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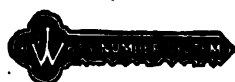
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KENNARD v. HATHAWAY.

(Supreme Judicial Court of Maine. Nov. 27, 1912.)

1. CHATTEL MORTGAGES (§ 159*)—RIGHT OF POSSESSION BY MORTGAGOR.

A buyer, executing a chattel mortgage to secure the price of goods bought, may, on rescinding the contract of sale on the ground of fraud of the seller inducing the sale, retain possession of the mortgaged chattel.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 272-281; Dec. Dig. § 159.*]

2. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence, rendered under instructions to which no exceptions are taken, will not be disturbed, in the absence of bias, misconduct, or prejudice of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

On Motion from Supreme Judicial Court, Arrostook County, at Law.

Action by Henry Kennard against Reuben Hathaway. Motion for new trial overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

William P. Allen, of Caribou, for plaintiff.
O. L. Keyes, of Caribou, for defendant

PER CURIAM. [1] This is an action of replevin, in which the plaintiff claimed the right of possession of a horse by virtue of a mortgage. The horse replevied was owned and mortgaged by the defendant, as security for notes given in part payment for a horse sold and delivered to the defendant by the plaintiff. The defendant claimed that the plaintiff fraudulently misrepresented the horse purchased by him, and returned the horse to the plaintiff, thereby undertaking to rescind the trade. If the defendant had a right to rescind the trade, then it is evident that he was entitled to retain the possession of the horse he had mortgaged to the plaintiff. Whether he was justified in his act of rescission depends entirely upon the issue of whether, in fact, such false and fraudulent misrepresentation were made by

the plaintiff, as to the character and qualities of the horse, and such reliance was placed upon them by the defendant, as warranted him in returning the horse and canceling the contract of sale.

[2] This issue was fully presented, under instructions to which no exceptions were taken. The jury, who saw and heard the parties and their witnesses, were peculiarly qualified to pass upon the credibility of the testimony and the effect of the evidence, and their verdict should not be disturbed, unless it clearly comes within the rule of law that requires the court to interfere. A careful reading of the testimony discloses no such error, bias, misconduct, or prejudice in the finding of the jury as to justify the court in setting it aside.

Motion overruled.

DYER v. COLLINS.

(Supreme Judicial Court of Maine. Nov. 30, 1912.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—QUESTIONS OF FACT.

In an action for negligently and willfully deserting plaintiff while on a fishing trip, the court on appeal could not substitute its judgment for the verdict of the jury for plaintiff although defendant's negligence was not very clearly established.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. NEGLIGENCE (§ 139*)—TRIAL—INSTRUCTIONS.

In an action for negligently deserting plaintiff while on a fishing trip, it was not error to refuse an instruction that, if plaintiff left the locality before defendant did, defendant was not negligent, and to charge that, if plaintiff left the fishing grounds before defendant did, the jury might consider that in determining whether defendant discharged his duty.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 371-377; Dec. Dig. § 139.*]

Motion and Exceptions from Superior Court, Cumberland County.

Action by Mark Dyer against William A. Collins. Verdict for plaintiff, and defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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excepts and moves for a new trial. Motion and exceptions overruled.

F. W. Hinckley, of Portland, for plaintiff. Benjamin Thompson and F. J. Laughlin, both of Portland, for defendant.

PER CURIAM. The plaintiff recovered a small verdict for injuries alleged to have been received and sufferings endured by reason of the defendant's failure of duty towards him on a fishing trip in which the parties were engaged on the 2d day of January last outside of Portland Harbor. The plaintiff claims that the defendant negligently and willfully deserted him on the fishing grounds in the darkness of the night, and that by reason of such desertion he was left alone in his dory, and was compelled to face a rough and choppy sea without food or water for about eight hours, before he reached the United States government lightship off Cape Elizabeth shore.

[1] The evidence is somewhat conflicting, and the defendant's negligence is not very clearly established. But after the defendant had finished his task and reached the power boat, there was only one dory on the ground requiring attention, and the jury evidently failed to discover a satisfactory explanation of the defendant's failure to find the plaintiff, since he had passed him in hauling his trawl to leeward only a short time before, and ought to have known where he could be found.

It may also have seemed to the jury improbable and incredible, if the defendant's power boat was only half a mile distant from the plaintiff, that the lights of the power boat should not have been discovered by the plaintiff.

While the evidence would not justify the conclusion that there was any willful desertion of the plaintiff, the jury evidently reached the conclusion that the defendant did not exercise that diligence and promptitude in searching for him that due care required under the circumstances of danger surrounding him. It is accordingly the opinion of the court that they would not be justified in substituting their own judgment for that of the jury, who saw and heard the witnesses.

[2] But the defendant took exceptions to the refusal of the presiding justice to give the following instruction, namely: "If the jury find that Dyer had started for the lightship before Capt. Collins left the locality, then the jury must find that Capt. Collins exercised such care as a prudent man would have done under the circumstances." The presiding justice declined to give this instruction, but did instruct the jury as follows: "I instruct you that if you find from the evidence that if Dyer left the fishing ground before Capt. Collins did, that you may consider that. I am not going to in-

struct you that it must be so, but you may consider that in determining whether or not Capt. Collins had discharged his duty in the premises." There is obviously no error in such instruction or refusal to instruct.

The negligence of the defendant in the management of the power boat after he came aboard may have been such as to justify the plaintiff in leaving the locality before the defendant did, but the time of the plaintiff's leaving was a fact proper for the jury to consider.

Motion and exceptions overruled.

SAYLES v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine. Dec. 2, 1912.)

CARRIERS (§ 318*)—INJURIES TO PASSENGER—EVIDENCE—NEGLIGENCE.

In an action by a passenger, injured by falling from the platform of a car while alighting, evidence held to show that the injury was the result of a purely accidental occurrence in catching her heel on the upper step and sliding down to the ground.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1340; Dec. Dig. § 318.*]

On Motion from Supreme Judicial Court, Cumberland County, at Law.

Action by Frances S. Sayles against the Maine Central Railroad Company. There was a verdict for plaintiff, and defendant moved to set aside the verdict as against the evidence. Sustained, verdict set aside, and new trial granted.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Edwin Stone, of Biddleford, and Ford White, of Buffalo, N. Y., for plaintiff. N. & H. B. Cleaves and Stephen C. Perry, all of Portland, and White & Carter, of Lewiston, for defendant.

PER CURIAM. The plaintiff recovered a verdict of \$3,500 for personal injuries received by falling on the steps of one of the defendant's cars, from which she was alighting, on the 4th day of September, 1909. The case comes to this court on a motion to set aside the verdict as against the evidence.

It is alleged in the declaration that the conductor of the train "with great force and violence seized hold of the dress suit case then in the plaintiff's hand, and with so much force and violence pulled and jerked upon the same that the plaintiff was thrown down upon the platform of the passenger car, and from the platform down and upon and over each and all of the steps of the car, and thence onto the ground."

The plaintiff, a woman 39 years of age and said to be in good health at the time of the accident, testified in substance as follows: "I stood on the platform, with my right

foot in the air, ready to descend to the next step, when the conductor reached and took my suit case, which I was holding in my hand at the side, and he snatched it, and the next I remember was being on the ground."

"I didn't have time to realize what he was doing. I was drawn down before I realized that he was taking it out of my hand."

"Q. What caused you to go down? A. Well, the conductor taking the suit case."

"I must have fallen and struck the steps, from the condition of my back. I should say I went down on my back. I don't remember anything after the feeling that I was in mid-air."

"There was a piece of my boot heel picked up there after the accident. It was scraped off when I was sliding down the stairs."

This version of the accident is corroborated by the testimony of the plaintiff's niece, 11 years of age, who states that the conductor reached up and got hold of her satchel and pulled her down.

In defense, the conductor, who had been in the employment of the defendant company in that capacity for 18 years, explains the plaintiff's accident as follows:

"I mentioned to all the passengers as they alighted that there was plenty of time, and not to hurry. I made that announcement two or three times. I looked up, and there was a lady stood on the top step with a dress suit case in her hand. I thought she was waiting for assistance, so I reached and took her dress suit case from her hand, and turned round and placed it on the ground, then turned back to assist her, and she was sliding down the steps; that is, feet foremost. She gave me the dress suit case; that is, passed it towards me."

"After I set the dress suit case down, I turned back to her. She was just starting from the top step coming down from the platform. I got hold of her as quick as I could, and did the best I could to stop her. I think that all that touched the ground was just her feet. I assisted her to get on her feet."

"I picked up part of the heel there near the top step, and asked her if it was hers, and she says, 'I guess so.'"

"Her father turned round and said, 'Daughter, what is the matter?' She says, 'I slipped and fell.'"

This testimony is corroborated by four other witnesses called by the defendant.

Mrs. Emery, another passenger, who alighted at the same station, says:

"Mrs. Sayles had a suit case in her hand, and I saw the conductor take it and set it on the ground, and then, as he was setting the case on the ground, Mrs. Sayles tipped right back and slid right down the step, feet first. I heard the conductor say, 'Take your time; don't hurry; there is plenty of time.'"

"Q. You say you saw the conductor take

the suit case. Did he pull it? A. Well, it didn't look that way to me."

"The other conductor came back and asked the cause of her falling, and she says, 'I lost my balance.'"

Ella F. Emery, daughter of the preceding witness, says:

"I saw the conductor take the dress suit case and set it on the ground. Then he turned round to the rest of the passengers, and Mrs. Sayles was then coming down from the steps—sliding down. She didn't pitch forward. I heard her say she lost her balance."

Two stage drivers, Westgate and Chick, who were present at the station, gave testimony substantially to the same effect.

In view of the physical improbability that the plaintiff could have been thrown upon her back in the manner stated by her by the act of the conductor in pulling forward and downward on the dress suit case, and the positive testimony of five witnesses to the contrary, the conclusion is irresistible that there was no failure of duty on the part of the defendant towards the plaintiff, but that the plaintiff's fall backwards upon the steps was the result of a purely accidental occurrence in catching her heel upon the upper step and sliding down to the ground.

The verdict was manifestly rendered under the influence of sympathy for an injured woman, and was not the legitimate effect of the evidence in the case relating to the cause of the accident. The certificate must accordingly be:

Motion sustained; verdict set aside; new trial granted.

ALLEN v. ALDEN et al.

(Supreme Judicial Court of Maine. Dec., 1912.)

1. SUBROGATION (§§ 17, 31*)—REDEMPTION BY JUNIOR MORTGAGEE—ASSIGNMENT.

A junior mortgagee, who redeems a senior mortgage, is entitled by operation of law to be subrogated to the rights of the senior mortgagee, so as to hold the senior mortgage as quasi assignee to obtain reimbursement for the amount paid to protect his interests as junior mortgagee in the event of the redemption of his own mortgage, and in case the redeeming party occupies the position of surety for the mortgage debt, he may be entitled to a written assignment of the mortgage.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 44-48, 58, 70-91; Dec. Dig. §§ 17, 31.*]

2. VENDOR AND PURCHASER (§ 89*) — CONTRACTS—CONSTRUCTION—ASSIGNMENT.

A contract for the conveyance of real estate and the assignment to the purchaser by the vendor of two \$5,000 mortgages, the first mortgage being held by a third person and the second by the vendor, provided that, in the event of the inability of the vendor to obtain an assignment of the first mortgage, so as to assign it to the purchaser, the agreement should be void, and the partial payment made should be returned to the purchaser. Before the execution of the contract the vendor had been ad-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

vised that he could not compel the senior mortgagee to make a regular assignment, but that a second mortgagee could pay and take up a senior mortgage. The vendor insisted on the insertion of the provision. *Held*, that the assignment in the provision was a voluntary legal assignment only, and where the third person refused to assign the mortgage the vendor could declare the contract void and tender a return of the partial price paid.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 148, 149, 151, 156; Dec. Dig. § 89.*]

Report from Supreme Judicial Court, Knox County, at Law.

Action by George E. Allen against Georgianna Alden and another. Cause reported. Judgment for defendants.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Reuel Robinson, of Camden, Heath & Andrews, of Augusta, and Alan L. Bird, of Rockland, for plaintiff. A. S. Littlefield, of Rockland, for defendant.

WHITEHOUSE, C. J. This is an action to recover damages for the breach of a contract for the conveyance to the plaintiff of certain real estate in Rockland known as the Hiram G. Berry Block, and the assignment to him of two \$5,000 mortgages on the Kimball Block adjoining; the first mortgage being held by the Rockland Savings Bank, and the second by the defendant Georgianna Alden. The consideration of the sale was \$29,000, of which the sum of \$500 was paid at the time of the execution of the contract.

The provision in the contract directly involved in the decision of the question presented is found in the following clause:

"In the event of my being unable to get an assignment of said mortgage to said Rockland Savings Bank, so as to assign it to said Allen as aforesaid, * * * then this agreement shall be void, and said \$500 shall be returned to said Allen."

The defendants seasonably applied to the Rockland Savings Bank to secure the purchase and legal assignment of the first mortgage on the Kimball Block, but the bank refused to sell or part with its mortgage, and the defendant Georgianna Alden never sought to exercise her legal right, as second mortgagee, to pay the prior mortgage, and thereby obtain an equitable assignment of it.

The plaintiff made seasonable tender of \$28,500 as the balance of the purchase price, and the defendants made seasonable tender of the return of the \$500 received at the date of the contract.

One of the counsel for the plaintiff who drew the contract states in his testimony that before the contract was made, and while they were discussing the possibility that the Savings Bank might not be willing to make an assignment of its mortgage to the de-

fendant, he advised them in that event "he could not compel them to make a regular assignment of the mortgage, but that, being a junior mortgagee, holding a second mortgage, he would have a right to pay the first mortgage to the bank, take it up, and by so doing he would be subrogated to the rights of the bank, and that in legal effect would be, so far as he was concerned, an assignment of the mortgage." It is a fair inference from all of his testimony that the first or "tentative" draft of the contract was not entirely satisfactory, and that the defendant, Mr. Alden, wished to have a clause inserted expressly declaring the contract void in the event that the defendants were unable to obtain an assignment from the Savings Bank of the first mortgage on the Kimball Block, and that a second draft was made in the form in which the contract now appears, with the clause in question duly inserted. It does not appear, however, to have been expressly stated by the plaintiff, or any one acting in his behalf, either before or after the contract was signed, that the plaintiff would be willing to accept the fact of the payment of the Savings Bank mortgage as a satisfactory performance of the contract; and it is admitted that after the signing of the contract there was never any conversation whatever between the parties in relation to the Savings Bank mortgage.

The case comes to the law court on report.

It is admitted that, if the agreement contemplates only a voluntary legal assignment of the mortgage obtained from the Savings Bank by purchase, the defendants are entitled to judgment. But it is contended that the plaintiff or his assigns would have been compelled to accept an assignment of the second mortgage upon proof that the defendants had paid the first mortgage, even if not accompanied by a legal assignment of it from the Savings Bank, and that such assignment of the second mortgage by the defendants, after payment of the first mortgage, would have operated as a legal performance of the contract for the sale to the plaintiff.

[1] It is undoubtedly well-settled law that a junior mortgagee of property who redeems a prior mortgage is entitled by operation of law to be subrogated to the rights of the first mortgagee, so as to hold the first mortgage as quasi assignee for the purpose of obtaining reimbursement for the amount paid by him to protect his interests as second mortgagee in the event of the redemption of his own mortgage. *Frisbee v. Frisbee*, 86 Me. 444, 29 Atl. 1115. And in case the redeeming party occupies the position of surety for the mortgage debt, he may be entitled to have a written assignment of the mortgage. *Lumsden v. Manson*, 96 Me. 357, 52 Atl. 783; *Ellsworth v. Lockwood*, 42 N. Y. 89. But in the last-named case it was held that the plaintiff was not in the position of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

a surety, and was not entitled to an assignment. In the opinion the court said:

"Upon the whole, I do not think it can be said to be the law of this state that the right to redeem a mortgage—that is, the right to compel the holder of it to accept or receive payment of it, after it is due and payable—carries with it the right, upon such redemption, to an assignment of the mortgage, unless the redeeming party has the position of surety." In Jones on Mortgages, § 792, the author says: "A mortgagee cannot be compelled in equity to assign his mortgage, on receiving payment, in order that subsequent parties in interest may adjust their rights. He is entitled to be paid, or to proceed to foreclosure, without being obliged to investigate titles arising after his own. He may release his interest on receiving payment, and leave after claimants to the preferences which their respective titles give them when his mortgage is discharged."

"The mere fact that one has a right to redeem a mortgage does not enable him to compel an assignment of it to himself. There may be some equitable reason for it, as that the redeeming party is in the position of a surety, and is entitled to be subrogated to the position of the holder of the mortgage. * * * It has been erroneously assumed in some cases that the right to compel an assignment of a prior mortgage, and the debt, flows from the right of redemption."

[2] But it is unnecessary to determine whether under the circumstances of this case the junior mortgagee could have compelled an assignment of the prior mortgage or not, and reference has only been made to the state of the law upon this subject, for the purpose of suggesting that it strengthens the probability that a voluntary assignment from the Savings Bank, and no other, must have been contemplated by the parties when the clause in question was inserted in the contract. They were advised by counsel, before the final draft of the contract was made, that they could not compel the bank to "make a regular assignment," but that the second mortgagee had the right to pay and "take up" the bank mortgage, and that the practical result would be an equitable assignment of the mortgage. But the defendants were evidently unwilling to be placed under obligation to raise \$5,000 to pay the first mortgage, or to exhaust legal remedies in the effort to obtain a written assignment. In order to avoid all such burdens and vexations, they insisted upon having the clause in question inserted in the contract. If only an equitable assignment resulting by operation of law from the payment of the prior mortgage had been in contemplation, the insertion of this clause in the contract was wholly superfluous. They all knew that such an equitable assignment could be obtained. There was no uncertain-

ty in relation to that. But there was an uncertainty in regard to the attitude of the prior mortgagee. The bank might be unwilling to make an assignment of the mortgage. This was obviously the contingency against which the defendants wished to provide, and it is the opinion of the court that the "assignment" mentioned in that clause of the contract under consideration must be held to signify a voluntary legal assignment, and no other.

Judgment for the defendants.

LAFOUNTAIN & STAPLES v. WILDER & NICHOLS.

(Supreme Court of Vermont. Windsor. Nov. 16, 1912.)

1. APPEAL AND ERROR (§ 370*)—CONDITION OF APPEAL—PAYMENT OF FEE—DOCKETING CASE.

That the "entry fee" required by P. S. 6208, to be paid to the clerk of court before entry of the case in the Supreme Court, was not paid until after adjournment of the term of that court held next after the motion for appeal was filed, was not ground for refusing to docket the appeal; the adjournment of the court before payment of the fee not remanding the case to the chancery court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1999; Dec. Dig. § 370.*]

2. APPEAL AND ERROR (§ 455*)—EFFECT OF MOTION FOR APPEAL.

The filing of a motion for appeal by the clerk of the court of chancery instantly transferred the cause to the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2214; Dec. Dig. § 455.*]

Appeal in Chancery, Windsor County; Fred M. Butler, Chancellor.

Action by Lafountain & Staples against Wilder & Nichols. Case ordered entered on Supreme Court docket.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Dunnett & Slack, of St. Johnsbury, for orators. John G. Sargent, of Ludlow, and Gilbert A. Davis, of Windsor, for defendants.

PER CURIAM. This was a suit in chancery pending in Windsor county, wherein such proceedings were had that a decree was rendered for the defendants. Thereupon the orators prepared and forwarded to the clerk a motion for an appeal. This was received and filed by the clerk within the time limited therefor. But no so-called "entry fee" was paid by the orators until after the adjournment of the term of the Supreme Court held next after this motion was filed.

[1] The claim of the defendants is that such a fee was called for by P. S. 6208, and that this attempted appeal was unavailing, since the prepayment of this fee is required by the statute referred to. It was said by Ross, C. J., in *Smith v. Burton*, 67 Vt. 514,

32 Atl. 467, in speaking of chancery appeals, that "if the decree was one from which an appeal could be taken, the motion brought the case before this court." The defendants do not overlook this, but say that the statute did not then require the prepayment of the entry fee. But the statute which provides for the appeal (P. S. 1239, 1307) is, so far as here involved, the same now as it was then (V. S. 981). The defendants say, further, that the statement in *Smith v. Burton* is a mere dictum, and only entitled to respect as such. However this may be, it is a correct interpretation of the statute, and has become the established doctrine of this court; for, in *Hyde Park v. St. J. & L. C. R. R. Co.*, 83 Vt. 562, 77 Atl. 913, we said that in appeals from orders of the Public Service Commission it was the motion which brought the case to this court, and that this was so because it was so in chancery appeals, citing *Smith v. Burton*.

[2] When the motion was filed by the clerk of the court of chancery, the case was instantly transferred to the Supreme Court for the county of Windsor, of which he was also clerk. *Tucker v. Eden*, 68 Vt. 168, 34 Atl. 698. To be sure, the next term of that court adjourned before the fee was paid, but that did not remand the case to the court of chancery. It remained in the Supreme Court, though it was omitted from the docket of that court. When the motion was filed it became the duty of the clerk of the court of chancery to transfer the cause and papers agreeably to the provisions of P. S. 1309. Not having done so then, he should do so now. Whether an "entry fee" was required on such an appeal, and what the situation would be if the fee had not been paid at all, are questions which are not involved nor considered. Let the case be entered on the docket.

In re BIDGOOD'S ESTATE.

(Supreme Court of Vermont. Washington.
Nov. 14, 1912.)

CURTESY (§ 12*)—SALE OF REALTY—RIGHTS OF WIFE'S CREDITORS.

The one-third interest to which a husband is, by P. S. 2934 (Acts 1896, No. 44, § 15), entitled in his deceased wife's real estate whereof they were seised in her right in fee simple at the time of her death, having been given in lieu of curtesy, can be sold under a license of the probate court for the payment of her debts and expenses of administration, just as curtesy could have been.

[Ed. Note.—For other cases, see *Curtsey*, Cent. Dig. §§ 43-64; Dec. Dig. § 12.*]

Appeal from Washington County Court; E. L. Waterman, Judge.

In the matter of *Adelpha Bidgood's Estate*. From an order of the probate court, granting a license to the administrator to sell all intestate's realty for the purpose of paying debts and expenses of such estate, John Bidgood, the surviving husband, appeals. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

E. A. Heath, of Moretown, and R. M. Harvey, of Montpelier, for appellant. Fred L. Laird, of Montpelier, for the estate.

ROWELL, C. J. Appeal from probate. The only question is whether the one-third interest that the husband is entitled to by P. S. 2934, in his deceased wife's real estate whereof they are seised in her right in fee simple at the time of her death, can be sold under a license from the probate court for the payment of her debts and the expenses of administration. It is clear that it can be. It is given in lieu of curtesy, as shown by the statute creating the right—No. 44, § 15, Acts of 1896—and curtesy was subject to be defeated by such a sale. *Bennett v. Camp*, 54 Vt. 36. And there is nothing in the statute to indicate that this interest stands any better in this respect than curtesy stood.

Affirmed. Let a certificate go down.

THORWORTH v. BLANCHARD.

(Supreme Court of Vermont. Washington.
Nov. 15, 1912.)

1. PLEADING (§ 125*)—PLEA OR ANSWER—TRAVERSES—INDUCEMENT.

Matter of inducement is not traversable, unless essential to make out the case.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 259, 260; Dec. Dig. § 125.*]

2. PLEADING (§ 58*)—DECLARATIONS—MATTER OF INDUCEMENT.

Only traversable facts need be laid with time and place; and in an action for breach of a contract to pay an assessment upon property, a former assessment, which defendant undertook to pay, but which was vacated, and for which he was never liable, is matter of inducement, not traversable, and hence not required to be laid with time and place.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 123; Dec. Dig. § 58.*]

3. PLEADING (§ 58*)—DECLARATIONS—SUFFICIENCY—MATTER OF INDUCEMENT.

A declaration for breach of a contract to pay an assessment, alleging that the assessment was made in a proceeding for the condemnation of land, and for assessments for benefits to land, sufficiently alleges the nature of the proceeding, that being mere matter of inducement.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 123; Dec. Dig. § 58.*]

4. VENDOR AND PURCHASER (§ 349*)—ACTION FOR BREACH—PROMISE.

A declaration in an action for breach of a contract to pay an assessment on land purchased by defendant alleging that, as part of the contract of purchase, defendant agreed to pay any assessment growing out of a pending proceeding that the court should sustain, and that it sustained an assessment, alleges a sufficient promise.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1039-1042; Dec. Dig. § 349.*]

5. APPEAL AND ERROR (§ 231*)—OBJECTIONS—SUFFICIENCY.

An objection that a certain allegation is not certain, but is indefinite and uncertain and insufficient, without saying wherein, is too general for consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.*]

6. PLEADING (§ 18*)—CERTAINTY.

A declaration in an action for breach of a contract to pay an assessment on land, growing out of a pending proceeding for condemnation and the assessment of benefits, "provided that it was sustained by the court," when read in connection with the words preceding, was not objectionable for uncertainty.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 89; Dec. Dig. § 18.*]

7. PLEADING (§ 35*)—FORM AND ALLEGATIONS—SURPLUSAGE.

In an action for breach of a contract to pay an assessment growing out of a pending proceeding for the assessment of benefits when sustained by the court, an allegation that such assessment, after being sustained, was entered on the tax records, and thereby became a lien on the land, was wholly dehors the contract, and hence superfluous, and could be rejected as immaterial, since it did not show that the plaintiff had no cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 76-80; Dec. Dig. § 35.*]

8. PLEADING (§ 34*)—CONSTRUCTION AGAINST PLEADER.

An allegation, in an action for breach of a contract to pay an assessment on lands purchased by defendant, provided it was sustained by the court, that the assessment was sustained on May 6, 1907, and was payable to the taxing authorities "on or about" July 6, 1907, is uncertain, as leaving it in doubt whether defendant was to pay "when" the assessment was sustained, or when it became payable to the district; and, such time being a traversible allegation, and, in view of the doubt, the pleading being construed to refer to the date last mentioned, and that date not being stated with certainty, the declaration was insufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66-75; Dec. Dig. § 34.*]

9. VENDOR AND PURCHASER (§ 349*)—ACTION FOR BREACH—DECLARATION—CERTAINTY.

In such action, an allegation as to the time when the assessment was payable by defendant is traversable, and hence the time should be stated with certainty.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1039-1042; Dec. Dig. § 349.*]

10. VENDOR AND PURCHASER (§ 349*)—ACTION FOR BREACH—DECLARATIONS—NOTICE.

In such action it was not necessary to allege that defendant had notice that the assessment had been sustained by the court, since he could find that out as well as the plaintiff.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1039-1042; Dec. Dig. § 349.*]

Exceptions from Washington County Court; E. L. Waterman, Judge.

Special assumpsit by Marion B. Thorworth against A. N. Blanchard. Special demurrer sustained, and declaration adjudged insufficient. Cause passed to the Supreme

Court, before trial on the merits or final judgment, on plaintiff's exceptions. Affirmed and remanded.

This is special assumpsit for the breach of a contract of bargain and sale of a certain piece of land in the city of Washington, D. C. Heard on demurrer to the declaration at the March term of Washington county court; Waterman, superior judge, presiding. Demurrer sustained, declaration adjudged insufficient, and cause passed to the Supreme Court before final judgment on plaintiff's exceptions.

The declaration alleges that at the time of said bargain and sale there was pending in the Supreme Court of said district a proceeding under the laws of Congress for the condemnation of land and for assessments against land for the extension of Eleventh Street N. W., in said city, and that said court had jurisdiction thereof; that before and at said time said piece of land had been assessed, in said proceeding for benefits, the sum of \$812, payable to said district, and that the validity of said assessment was the subject of litigation in said proceeding; that, as a part consideration for said purchase at and for the price of \$6,000, the defendant then and there agreed to pay the amount of said assessment or any other assessment growing out of the same matter or the same suit, provided said assessment or assessments were sustained by said court; that in consideration of said agreement by the defendant to pay as aforesaid, the plaintiff purchased said land of the defendant and took a deed thereof from him at the time aforesaid.

The declaration further alleges that said assessment was on the 4th of March, 1904, vacated by said court in said proceeding, and that on the 6th day of June, 1906, another assessment of \$650 for benefits in the extension of said street was made and levied by the court in said proceeding, and that the defendant then and there, again confirming his previous agreement, agreed to pay the same, provided it was sustained by the court, and that afterwards, to wit, on the 6th day of May, 1907, it was sustained by the court, and thereafter entered on the tax records of said district, thereby making the same a lien on said land for the amount thereof with interest and penalties, the same being payable to said district "on or about" July 6, 1907, and that at divers times the plaintiff notified the defendant that said assessment had been sustained and was a valid lien upon said lot, and requested him to pay the same, with interest and penalties, which he neglects and refuses to do, and that the same is still a charge and lien upon said land.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

H. C. Shurtleff, of Montpelier, for plaintiff. T. J. Deavitt and E. M. Harvey, both of Montpelier, for defendant.

ROWELL, C. J. The declaration is demurred to for want of certainty and sufficiency in divers respects specifically stated.

[1, 2] It is objected that there is no sufficient allegation of when and where said first-mentioned assessment was due and payable. But it is only traversable facts that need to be laid with time and place, and matter of inducement is not traversable, unless essential to make out the case. Steph. Pl. 243. Here the allegation objected to is mere matter of inducement, as said assessment never became due and payable, but was vacated and set aside by the court, and so it is not involved in the special charge against the defendant, which is the nonpayment of the subsequent assessment, which was sustained by the court.

[3] It is further objected that there is no sufficient allegation as to the nature of the proceeding pending in said court, nor by whom the assessment was made. But the proceeding is alleged to have been for the condemnation of land and for assessments for benefits to land for the extension of a certain street in said district, and that is a sufficient allegation of its nature. As to who made the assessment, its making being matter of inducement not essential to make out the case, it is enough to allege that it was made, without saying by whom. Thus, speaking of matter of inducement, Mr. Chitty says that, in declaring upon a promise to pay money in consideration of the forbearance of an antecedent debt, it is not necessary to state the particular cause or subject-matter of the debt, nor the time when nor the place where it was contracted. 1 Chit. Pl. 291.

It is further objected that there is no sufficient allegation of the "other assessment growing out of the same matter or suit," nor what the same was, nor by whom made, and that the same is not alleged with sufficient certainty. The argument in support of this objection is that here the allegation changes form, and the "proceeding" becomes a "matter" or "suit," but that the allegation of "some matter" may or may not be coextensive with the "proceeding," and that the language of the pleader is too uncertain and general to define a legal liability. But we think that the language of the allegation can fairly be taken only in a natural sense, and that, thus taken, it has the requisite degree of certainty.

As to the objection that there is no sufficient allegation of what court should sustain the assessment, and that the court is not alleged with sufficient certainty, it is plain that the Supreme Court of the district is meant.

Nor is the objection good that there is

no allegation sufficiently describing the "proceeding" in which assessment was or should be made, for it is clear that the proceeding then pending in the Supreme Court is the one meant. The declaration clearly discloses one proceeding and two assessments therein.

It is objected that there is no sufficient allegation of the assessment made June 6, 1906, for that it is not alleged for what purpose it was made and by whom. But this objection is groundless, for the declaration expressly alleges that said assessment was by said court in said proceeding for benefits to plaintiff's land by the extension of said street.

[4] As to no sufficient promise being alleged to pay said assessment, the declaration alleges in effect that as part of the contract of purchase the defendant agreed to pay any assessment growing out of said suit that the court should sustain, and that it sustained said assessment. This alleges a sufficient promise.

[5] The objection that the allegation of the proceeding is not certain, but is indefinite, uncertain, and insufficient, without saying wherein, is too general for consideration.

[6] The objection that the allegation, "provided it was sustained by the court," is uncertain, indefinite, and not alleged with certainty, is without merit; for, when read in connection with the words preceding them, their meaning is perfectly clear.

[7] The allegation that said assessment was entered on the tax records of the district, and thereby became a lien on the land, is wholly dehors the promise as alleged, and therefore is superfluous, and may be rejected as immaterial, since it does not show that the plaintiff has no cause of action.

[8, 9] As to the objection that the allegation that the assessment was payable "on or about" July 6, 1907, is not sufficient as to time, and is uncertain in that respect, the plaintiff says that the allegation is surplusage; for that according to the declaration the defendant agreed to pay the assessment provided it was sustained by the court, regardless of when its payment became a legal obligation upon the owner of the land, and so a good cause of action would be stated if this time was omitted altogether, for then it would sufficiently appear that the cause of action accrued before suit brought, as the declaration shows that the assessment was sustained May 6, 1907. But as the declaration does not allege that the defendant promised to pay *when* the assessment was sustained, but only provided it *was* sustained, and then goes on to allege that it was payable to the district "on or about" July 6, 1907, which was two months after it was sustained, it is not clear according to reasonable intendment and construction whether the pleader intended to state the time of payment by the defendant as being when the assessment was sustained, or when it in

fact became payable to the district. But the latter seems to be the time intended, for otherwise it is not seen why he should have alleged it at all. There being this obscurity, the latter is taken to be the time intended, and, the allegation being traversable, its time should have been stated with certainty, and not uncertainty.

[10] But it was not necessary to allege that the defendant had notice that the assessment was sustained, for he could find that out as well as the plaintiff. *Lamphere v. Cowen*, 42 Vt. 175; *Drew v. Goodhue*, 74 Vt. 438, 52 Atl. 971.

It is further objected that no cause of action is shown, nor damage sustained. But it is manifest that a cause of action is shown, and nominal damages at least.

Affirmed and remanded.

KEILY et al. v. SAUNDERS.

(Supreme Court of Pennsylvania. May 22, 1912.)

1. VENDOR AND PURCHASER (§ 303*)—REMEDIES OF VENDOR—ACTION FOR PRICE.

Assumpsit for purchase money for real estate is a substitute for a bill in equity to enforce specific performance, and plaintiff, invoking the equitable powers of the court, must be ready and willing to convey the land purchased by defendant.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 851-861; Dec. Dig. § 303.*]

2. EXECUTORS AND ADMINISTRATORS (§ 372*)—MANAGEMENT OF PROPERTY—SALE OF REAL ESTATE—PERFORMANCE OF CONTRACT.

Where a decedent had received by conveyance two adjoining city lots fronting on the same street, and there had been built on the large lot a stable and on the smaller one a house which encroached three feet on the stable lot, and the decedent's executors advertised the stable lot for sale at public auction, giving a description of the lot by its distance from a cross street and its width and debt by conforming to the deed to decedent, a purchaser cannot be compelled to take a deed for a lot three feet less in width than that advertised and three feet more in distance from the cross street than were mentioned in the advertisement.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1518, 1527; Dec. Dig. § 372.*]

3. EXECUTORS AND ADMINISTRATORS (§ 388*)—MANAGEMENT OF PROPERTY—SALE OF REAL ESTATE—PERFORMANCE OF CONTRACT.

That a purchaser at an executors' sale of a lot saw the premises and the condition of the grounds does not prevent him from demanding a conveyance of the lot of the full width advertised, where the decedent had owned the lot sold and the adjoining lot, and the executors had full power to sell all the real estate, subject to a certain condition as to the adjoining lot, and where a simple inspection would not have disclosed to the purchaser a discrepancy in the frontage of the lot sold.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1573-1582; Dec. Dig. § 388.*]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by James P. Kelly and another against Harry T. Saunders to recover the balance of purchase money of real estate. From an order making an absolute rule for judgment for want of sufficient affidavit of defense, defendant appeals. Reversed, with a procedendo.

The facts are stated in the opinion of the Supreme Court.

The affidavit of defense was as follows:

"This lot I was desirous of purchasing, and I bid for the same the sum of \$9,600. I desired said premises for the purpose of an automobile garage. Its width as advertised of 50 feet was barely sufficient for said purpose, and, if I had known that the plaintiffs when advertising the lot they had to sell as 50 feet in front on Lancaster avenue intended to convey a lot of less frontage, I would not have bid for the same. After the property had been knocked down to me by the auctioneers at my bid of \$9,600, plaintiffs delivered to me the title deeds to the property, in order that I might have the deed I desired them to execute prepared. These title deeds described the property as situate on the northeasterly side of Lancaster avenue 200 feet southeasterly from Wyalusing street, and containing in front on Lancaster avenue 50 feet.

"In addition to the lot above described, plaintiffs were the owners of another lot adjoining the same on the west and described as beginning on the northeasterly side of Lancaster avenue at a distance of 183 feet southeastwardly from the southeasterly side of Wyalusing street, and containing in front on Lancaster avenue 16 feet 8 inches. Subsequently to the date when I bid for the property first above described, I learned that the dwelling house which was erected on the lot last above described extended nearly three feet eastwardly over the lot first above described, for which I had bid at the auction sale. If this fact had been known to me at the time of the sale, I would not have bid for the property. Since the date of said auction sale I have also learned that in the wall between the lot occupied by the dwelling house and the property first above described there are a number of windows and also a door opening into the yard of the dwelling house, and thus indicating the existence of some right by the owner of the property first above described over the lot adjoining the dwelling house.

"For the first time, after I had made the bid and paid in the \$500 called to be paid at the time of the sale, I learned that plaintiffs proposed to convey to me only a lot beginning at a point on the northeasterly side of Lancaster avenue 202 feet 11¼ inches southeastwardly from Wyalusing street, instead of 200 feet southeastwardly therefrom, and containing in front on said Lancaster avenue only 47 feet and ¾ of an inch, instead of 50 feet.

"As the plaintiffs are the owners of property of the full width described in the said advertisement and as the point at which their property as described in said advertisement commences is within the line of the properties owned by them, I caused to be prepared and tendered to the plaintiffs through their attorney, Thomas H. McCaffrey, at the same time that they, through said attorney, tendered to me the deed described in plaintiffs' statement, a deed for the premises which they had advertised for sale and which I purchased, described (as hereinbefore set forth) as commencing on the northeasterly side of Lancaster avenue at the distance of 200 feet southeastwardly from the southeasterly side of Wyalusing street and extending southeastwardly along said northeasterly side of said Lancaster avenue 50 feet to a point. The plaintiffs, through their attorney, declined to execute said deed. Through my attorney, therefore, I declined to accept the deed tendered by plaintiffs as in accordance with the agreement of sale, and demanded from the plaintiffs the repayment of the \$500 deposited by me in accordance with the terms of sale. The plaintiffs, through their attorney, refused to repay me said sum.

"I deny that the deed tendered by the plaintiffs to me is in accordance with the agreement of sale to which I was a party, or that I am in any way bound to accept a deed for the property described therein, or to pay the plaintiffs anything with respect thereto. I therefore owe the plaintiffs nothing at the present time. On the contrary, they are indebted to me in the sum of \$500, being the amount of the deposit which I made in accordance with the terms of sale. For this amount I shall ask a certificate at the trial of this cause.

"I make the foregoing affidavit in part of my own knowledge and in part upon information received from others. I believe all the facts herein set forth to be true and expect to be able to prove the same at the trial of this cause."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

John G. Johnson and James Wilson Bayard, both of Philadelphia, for appellant. Thomas H. McCaffrey, of Philadelphia, for appellees.

MESTREZAT, J. This is an appeal by the defendant from a judgment entered against him for want of a sufficient affidavit of defense. The action was assumpsit to recover the purchase money alleged by the plaintiffs, the executors of Margaret Donnelly, deceased, to be due for a city lot sold by them to the defendant. Margaret Donnelly died in September, 1909, seised of certain premises on the northeasterly side of Lancaster avenue, in the city of Philadelphia, described in the statement as follows: "Beginning at a point on the north-

eastern side of Lancaster avenue at the distance of 183 feet 4 inches southeastwardly from the southeasterly side of Wyalusing street, * * * thence extending southeastwardly 66 feet 8 inches to a point, thence along the line parallel with Wyalusing street 228 feet to a point in the southwesterly side of Merion avenue, * * * at the distance of 250 feet southeastwardly from Wyalusing street, thence extending northwestwardly along the southwesterly side of the said Merion avenue fifty feet to a point, thence extending southwestwardly along a line parallel with the said Wyalusing street 114 feet to a point, thence northwestwardly along a line parallel with the said Lancaster avenue 16 feet 8 inches to a point, thence extending southwestwardly along a line parallel with said Wyalusing street 114 feet to a point in the said northeasterly side of Lancaster avenue and place of beginning." Lancaster avenue and Merion avenue are 228 feet apart, and are at right angles with Wyalusing street, which is southwest of the premises described. On the northeasterly part of the premises is a large three-story brick stable, and on the other or southwesterly part of the lot is a brick dwelling house encroaching nearly three feet on the other part of the premises, both buildings fronting on Lancaster avenue. The stable has three street numbers, and the dwelling one street number, 4553. The premises were conveyed to the decedent in two parcels, the eastern part fronting or having a width of 50 feet on Lancaster avenue and extending the same width 228 feet to Merion avenue, and the western part fronting 16 feet 8 inches on Lancaster avenue and extending back the same width a distance of 114 feet.

The decedent by her will empowered her executors, at their discretion, to sell any or all of her real estate at the best prices which could be obtained for the same, providing, however, that the part of the premises numbered 4553 be not sold until her sister was provided with a home or she gave her consent to the sale. In pursuance of this authority, the executors offered for sale at public auction by the hands of an auctioneer and at his salesroom in the city a part of the premises above described. The sales catalogue of the auctioneer and the handbills described the premises to be sold as follows: "Valuable Three-Story Brick Stable 4545-4551 Lancaster Avenue. All that certain lot or piece of ground with the improvements thereon erected, situate on the northeasterly side of Lancaster avenue, at the distance of 200 feet southeastwardly from the southeasterly side of Wyalusing street, in the Forty-fourth ward of the city of Philadelphia; containing in front or breadth on the said Lancaster avenue 50 feet, more or less, and extending northeastwardly between lines parallel with Wyalusing street 228 feet, more or less, to Merion avenue." The advertisement then

describes the brick stable as the improvement on the premises to be sold. The terms provided that the sale should not be invalidated by errors or misdescription of the size of the parcel of land sold, or of the improvements which may be thereon. The defendant was present at the sale, purchased the property for \$9,600, and in compliance with the terms of sale paid \$500 on the purchase money. Shortly thereafter the plaintiffs tendered to the defendant a duly executed deed, and demanded payment of the balance of purchase money. Payment was refused because the deed did not convey to the defendant the premises which he had purchased at the sale. This action was then brought by the plaintiffs to enforce payment of the purchase money.

The deed tendered to the defendant contained a description of the premises according to a recent survey. Briefly stated, it describes a lot beginning at a point in the northeasterly side of Lancaster avenue 202 feet and $11\frac{1}{4}$ inches southeasterly from Wyalusing street, thence 47 feet and $\frac{3}{4}$ inches along the north side of Lancaster avenue, thence parallel with Wyalusing street 228 feet to Merion avenue, thence 50 feet along Merion avenue, then southwestwardly on a broken and an irregular line to Lancaster avenue, the place of beginning.

[1] The statement of facts relieves the solution of the question at issue from any difficulty. This is an action to recover purchase money, and hence is a substitute for a bill to enforce specific performance of the contract for the sale of the lot purchased by the vendee. If, therefore, the plaintiffs invoke the equitable powers of the court to compel the defendant to pay the purchase price, they must be ready and willing to convey the lot of ground which they sold him. Equity will not permit them to recover the price agreed to be paid unless they can and will convey to the vendee the lot he purchased.

[2] The contention of the plaintiffs is that the defendant bought a stable property regularly numbered according to the system of street notation established by the city, and that, therefore, he is required to pay for and accept the lot on which the stable is erected. That contention, in the light of the conceded facts, we do not regard as tenable. It can only be sustained by disregarding the description of the lot contained in the sales catalogue and handbills, and the other important facts disclosed by the pleadings. The decedent, as will be observed, owned at the time of her death two lots of ground, one fronting 50 feet, and the other 16 feet 8 inches, on Lancaster avenue, or a piece of ground aggregating a frontage on the avenue of 66 feet and 8 inches. The larger lot, 50 feet in width, was conveyed to her by a deed describing it as lying at a point 300 feet southeastwardly from Wyalusing

street, and extending the same width between lines parallel with Wyalusing street to Merion avenue. In purchasing the other lot, it was described as beginning at a point on the north side of Lancaster avenue 183 feet 4 inches southeastwardly from Wyalusing street. In advertising the 50-foot lot for sale, it will be observed that the plaintiffs described the lot in accordance with the description in the deed to their testatrix. The lot sold at auction was described as beginning at a distance of 200 feet from Wyalusing street on the north side of Lancaster avenue, containing in front or breadth, 50 feet, more or less, on the avenue, and extending between lines parallel with Wyalusing street 228 feet to Merion avenue. That is the lot that was purchased by the testatrix and was the lot sold to the vendee. Had the description in the handbills described the premises simply as "a valuable three-story brick stable 4545-4551 Lancaster avenue," there would be something in the plaintiffs' contention that it was "the brick stable property" which was advertised and which was sold to the vendee. If property is sold by a street number, the vendee takes what the number represents, and he cannot complain if there is a slight discrepancy in the frontage of the lot. But that is not this case. What we have quoted was simply the heading of the advertisement, and the description did not stop with it, but set forth specifically the size of the lot which was to be sold. To locate on the ground the lot described in the handbills it is absolutely necessary to begin at a point 200 feet distant from Wyalusing street. The lot sold at auction fronted on Lancaster avenue "50 feet, more or less"; and, there being no monuments on the ground referred to in the description in the handbills, it is obvious that the precise frontage on the avenue could not be definitely ascertained without commencing the survey on the avenue at the exact distance southeast of Wyalusing street named in the description. Had the description in the handbills described the property as beginning at a distance of 250 feet from Wyalusing street, and the frontage as "50 feet more or less" extending southeasterly from that point, the plaintiffs might have some ground for their contention. The vendee might then have been compelled to accept the stable lot notwithstanding it is about three feet less in width than the original lot purchased by the testatrix. The indefinite description of the frontage might then have been determined by locating it between the easterly line of the lot and the wall of the dwelling house erected principally on the other lot, which would have given the vendee about 3 feet less than the 50-foot frontage on Lancaster avenue. But there is no such description in the advertisement of the premises sold, and, unless that description is adhered to and the lot sold is lo-

cated by beginning at a point 200 feet distant from Wyalusing street, there can be no location of the lot on the ground.

It is urged on the part of the plaintiffs that the description in the handbills stated that the improvement was a three-story brick stable, and that, therefore, it necessarily follows that it was the lot occupied by the stable which was advertised and which was sold to the vendee. That contention, however, has no merit. The advertisement does not state the length of the stable, nor what part of the lot it occupied. It might have been 10 feet or it might have been 50 feet in length, and there is nothing whatever to indicate its real length. When improvements on the premises are referred to in the advertisement of sale, it does not necessarily follow that they cover the entire property to be sold. They are stated in the advertisement for the purpose of showing the value and not the size of the premises.

[3] The conditions on the ground and the fact that the vendee saw the premises are not sufficient to prevent the latter from demanding a conveyance of the 50-foot lot. The testatrix owned both lots and empowered her executors to sell all her real estate, coupled, however, with the condition that they should furnish her sister with a home, or not sell the other lot without the sister's permission. When the purchaser saw the advertisement, he had the right to presume that, in the exercise of the power conferred on the executors, they had provided a home for the sister and intended to sell the whole of the 50-foot lot. Nothing contrary to that presumption was announced at the sale. Again, a simple inspection would not have disclosed to the defendant a discrepancy of 3 feet in the frontage of the premises. Nothing short of an actual measurement on the ground would have told him that the lot to be sold was less than 50 feet frontage, or did not begin at a point 200 feet east of Wyalusing street. While the difference of 3 feet in the frontage of the lot on Lancaster avenue unquestionably would injuriously affect the value of the lot, it could not be detected without a close examination made for the special purpose of determining the exact frontage of the premises.

There was no error in the description in the sales catalogue. The plaintiffs owned the land therein described at the time of the sale. The deed tendered the defendant does not contain the description in the advertisement, but a description from a recent survey which was made by beginning at a point on the north side of Lancaster avenue, not 200 feet east of Wyalusing street, as set forth in the handbills, but at a point 202 feet 11¼ inches east of Wyalusing street. The deed conveys a lot, not containing a frontage on Lancaster avenue of 50 feet, more

or less, between a point 200 feet east of Wyalusing street and the easterly line of the plaintiffs' premises, and extending the same width to Merion avenue, but a lot having a frontage of only 47 feet and ¾ inches on Lancaster avenue, and not extending the like width to Merion avenue. The lot sold was necessarily a rectangular piece of ground fronting on Lancaster avenue, and extending back to Merion avenue, as it is described in the handbills as fronting on Lancaster avenue and extending between lines parallel with Wyalusing street to Merion avenue. The lot offered to be conveyed is not rectangular in shape, but 50 feet wide on Merion avenue, 47 feet and ¾ inches on Lancaster avenue; having a broken and irregular western line, and containing a less quantity of land than the lot sold. The plaintiffs, therefore, tendered a deed conveying to the defendant, not the premises described in the advertisement of the sale and sold to him, but a lot of ground described from a recent survey, and substantially different in description and value from the one purchased by the vendee.

The purchaser, through his counsel, states that he is willing to carry out his bargain and take the lot described in the advertisement and sold to him. So far as the record discloses, he has done nothing to estop him in any way from demanding of the plaintiffs a conveyance of the lot as described in the handbills. If the plaintiffs are unwilling or unable to give the vendee what he purchased, they have no standing in law or equity to demand that the contract of sale shall be modified to the extent of permitting them to convey a different lot and recover the price bid by the vendee for the lot advertised. It is the contract in its original and not in its modified form that the plaintiffs have the right to demand shall be specifically enforced. When they tender performance of the agreement on their part, equity will compel performance on the part of the vendee.

The learned court below committed reversible error in entering judgment against the defendant for want of a sufficient affidavit of defense, and the judgment is now reversed, with a procedendo.

FRIEND v. KRAMER.

(Supreme Court of Pennsylvania. May 22, 1912.)

PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—EVIDENCE.

In an action against a dentist to recover for physical injuries, plaintiff alleging that defendant in extracting a tooth had fractured her jaw, and introduced by unclean instruments poisonous germs, a nonsuit *held* properly entered.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-48; Dec. Dig. § 18.*]

Appeal from Court of Common Pleas, Fayette County.

Action by Mary E. Friend against Arthur Raymond Kramer. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

H. S. Dumbauld and Robinson & McKean, all of Uniontown, for appellant. R. P. Kennedy and George Patterson, both of Uniontown, for appellee.

MOSCHZISKER, J. The plaintiff sued in trespass to recover damages for physical injuries suffered by her through the alleged negligence of the defendant, a practicing dentist. She averred that the defendant "negligently and unskillfully" injected cocaine into her "gum or jaw," and applied to one of her teeth "a pair of powerful forceps which had not been properly cleansed, and extracted said root or tooth, or a part thereof, applying such force as to fracture the plaintiff's jawbone in so doing," and that "by the use of the unclean instruments aforesaid her jaw was affected by poisonous germs." The court below nonsuited the plaintiff, and the error assigned is the refusal to take off the nonsuit.

The plaintiff showed that, after her tooth had been extracted by the defendant, she had been taken ill and obliged to spend some time in a hospital, and that she had suffered great pain in the part of the jaw from which the tooth had been removed; but she did not prove that there had been negligence or unskillfulness in administering the cocaine, or that her jawbone had been fractured. While she claimed that she did not see the defendant cleanse or sterilize his instruments, it is exceedingly doubtful from the testimony whether she was in a position to know whether or not this had been done; but, assuming that there was sufficient to take that particular point to the jury, the weakness of the plaintiff's case lies in the fact that she did not show with any degree of certainty that the direful results attributed by her to the use of the alleged unclean instruments came from that cause. The hypothetical question propounded to the expert witnesses, the answers to which were depended upon by the plaintiff to make out her case, stated that she was "in a normal state of health, that her jaw was healthy and sound, and not affected or diseased at the time she visited the defendant's office."

Counsel for the defendant objected that the question assumed facts not shown, and in overruling the objection the trial judge stated that, unless more proof was produced later on, the testimony would not avail the

plaintiff. In the opinion filed by the court below it is said: "We allowed the witness to answer indicating at the time that we thought there was merit in the objection, and that the answer would not avail the plaintiff unless other and further proofs were submitted on some of the assumed propositions, having in mind particularly the assumption that plaintiff's 'jaw was healthy and sound and not infected or diseased, and that she was in a normal state of health.' * * * Therefore, instead of the proof in point inuring to the benefit of the plaintiff, it bore in the opposite direction. On cross-examination Dr. Allen says that if there were a dead root of a tooth in the mouth of the plaintiff, and that if some time before she went to the defendant she had a decayed tooth partly pulled, leaving the root of that tooth in the alveolar process that the teeth are imbedded in, you would expect that root to make trouble, and that the gum might become infected after it was lacerated by the pulling of the tooth just where it could not be dressed or properly treated. He says it could become infected from the air, from drinking water, or from food taken into the mouth, that it would be possible for other decayed teeth in the mouth to contribute a germ or help along the condition. He further says the defendant might have treated the plaintiff to the highest standard of professional dentistry, leaving a lacerated gum from pulling the root, and yet the jaw become infected with a germ or germs after he had done all he could for her." The testimony of the other experts was substantially the same as that given by Dr. Allen. The hypothetical question put to each of them was not a fair presentation of the actual facts concerning the plaintiff's state of health. It appears in the evidence that her vitality was much weakened from a recent attack of typhoid fever with complications and that her jaw was far from "healthy and sound," for she herself testified that at the time of the operation by the defendant her teeth were in such a state that she wanted to get false ones, and that the particular tooth extracted had been broken off by another dentist, "was decayed a little in the middle, * * * had grown over," and hurt her when she "was eating something and would bite on it." With the testimony in this condition the conclusion that the plaintiff's illness was properly ascribable to the alleged negligence of the defendant would have been a mere guess and not a finding based on evidence which, on the theory of reasonable probability, would lead the mind naturally to the conclusion contended for by the plaintiff. Under these circumstances, the court below committed no error in entering the nonsuit. The assignments are overruled, and the judgment is affirmed.

DRAKE v. FENTON.

(Supreme Court of Pennsylvania. July 2, 1912.)
**NEGLECT (§ 31*)—INJURIES TO FIREMAN
 —ELEVATOR GUARDS.**

A fireman entering a building in performance of his duty and injured by neglect of the occupant to keep elevator guards closed, as required by Act April 25, 1903 (P. L. 804), can recover damages from the occupant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 50; Dec. Dig. § 31.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Robert Drake against J. Monroe Fenton, trading as the Fenton Storage & Delivery Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

Horace M. Schell and Frank R. Shattuck, both of Philadelphia, for appellant. I. G. Gordon Forster and Rowland C. Evans, both of Philadelphia, for appellee.

FELL, C. J. The plaintiff was a fireman in the service of the city of Philadelphia, and in the performance of his duty he entered at night a storage warehouse, owned and occupied by the defendant, for the purpose of extinguishing a fire. While on the third floor, he fell through an elevator shaft and was injured. The defendant testified that at the close of business on the day of the fire a platform elevator loaded with furniture was left at the third floor in such a position that it closed the shaft, and that it fell, after the fire started, because of the burning of a rope that kept it in place. This testimony was uncontradicted, and its correctness was assumed by the court in submitting the case. The verdict rests on the finding by the jury that there was no guard or gate at the elevator shaft. The single assignment of error is to the refusal of the court to direct a verdict for the defendant.

In considering the case on the ground on which it was submitted, it must be assumed that the premises were safe at the close of the business day, and that they afterwards became unsafe because of an unforeseen occurrence; and since, at common law, the occupier of premises is not under a duty of active diligence to protect from harm a person who enters on the premises under a license from him, or under one given by the law, it follows that if there was any liability on the part of the defendant it was because of his failure to comply with the act of April 25, 1903 (P. L. 804).

The act is entitled "An act to further regulate the construction, maintenance and inspection of buildings and party walls in cities of the first class." Section 4 provides that "in any building now existing, in which there is an elevator, dumb-waiter, interior light or

vent shaft, hoistway, hatchway, chute, well-hole, or shaft of any description, not inclosed in walls constructed and arranged as required in this act, the openings thereof, through and upon each floor of said building, shall be provided with and protected by a substantial guard or vertical inclosure, and gate or gates, or with such good and sufficient trap doors, or both, as may be directed and approved by the bureau of building inspection. Such guards or inclosure gates shall be kept closed at all times when not in actual use, and trap doors shall be closed at the close of the business each day, by the occupant or occupants of the building having the use or control of the same."

The effect to be given to acts of Assembly of a like character, requiring the guarding of machinery for the protection of employes, has been considered in the recent cases of *Jones v. Caramel Co.*, 225 Pa. 644, 74 Atl. 613, *Valjago v. Steel Co.*, 226 Pa. 514, 75 Atl. 728, and *Bollinger v. Sand Co.*, 232 Pa. 636, 81 Atl. 712, and it has been held that the violation of the statute is at least evidence of negligence; and where its violation is the proximate cause of the injury nothing but the contributory negligence of the employe will relieve the employer from liability. The Supreme Court of Massachusetts, in *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450, held that under an act strikingly similar to our act of 1903, regulating the construction of buildings, a policeman, who entered a building at night and was injured by falling into an unguarded elevator shaft, could recover. In the opinion of the court it was said: "Where, therefore, in the construction or management of the building, the Legislature sees fit to direct by statute that certain precautions shall be taken or certain guards against danger provided, his unrestricted use of his property is rightfully controlled, and those who enter in the performance of a lawful duty, and are injured by the neglect of the party responsible, have just grounds of action against him. Were the case at bar that of a fireman who, for the purpose of saving property in the store, or for the preventing of fire to other buildings, lawfully entered, in the performance of his duty, and who was injured because there was no railing and trapdoors guarding the elevator, he would have just grounds for complaint that the protection which the statute had made it the duty of the owner or occupant to provide had not been afforded him."

The act of 1903 was passed under the police power of the state. It is not restricted to a specific class, but is general in its terms; and it is a reasonable construction to hold that it was passed for the benefit of all persons lawfully on the premises, and that as to them it creates a duty, the breach of which may be actionable negligence. The provision

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that guards and inclosure gates shall be kept closed at all times when not in actual use, and that trapdoors shall be closed at the close of each business day, indicates a purpose to afford protection to city officers, such as firemen and policemen, who at any time may be required to come on the premises.

The judgment is affirmed.

In re REED'S ESTATE.

(Supreme Court of Pennsylvania. May 22, 1912.)

WILLS (§ 729*)—CONSTRUCTION—ANNUITIES.

Where a will directs the payment to one son of testatrix, out of the net income of the residue of the estate, of \$8,000 per annum for life, and to a second son the same sum per annum if the income shall be sufficient therefor, and also directs that in any event the first son shall receive all the income up to \$8,000 per annum before the second shall receive any, the first son is entitled to be paid arrearages on his annuity out of subsequent income in excess of \$8,000 per annum before the second son receives anything.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1781-1784; Dec. Dig. § 729.*]

2 WILLS (§ 729*)—DEFICIENCY IN INCOME—ARREARAGES.

On the failure of income from which an annuity is to be paid in any year or years, the arrearages are to be paid out of the subsequent accumulations unless there is a plain intent expressed in the will to the contrary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1781-1784; Dec. Dig. § 729.*]

Appeal from Orphans' Court; Erie County.

In the matter of the estate of Harriet W. Reed, deceased. From a decree dismissing exceptions to an auditor's report, C. M. Reed appeals. Affirmed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Rossiter & Thompson, of Erie, for appellant. Frank Gunnison, Henry E. Fish, W. Pitts Gifford, and A. O. Chapin, all of Erie, for appellees.

STEWART, J. The testatrix, after making several bequests not here involved, gave the entire residue of her estate in trust, with the following direction as to the expenditure and appropriation of the income derived therefrom. "All the rest, residue and remainder of my estate, * * * I give, devise and bequeath unto my executors hereinafter named, and to the survivor of them, * * * in trust, * * * to pay over and distribute the net income of all the rest, residue and remainder of my estate, real, personal and mixed, as follows, to wit: To pay therefrom to my son Lloyd G. Reed, the sum of eight thousand (\$8,000.00) dollars per annum for and during the term of his natural life, and if said income shall be sufficient therefor, then to pay therefrom to my son Charles M. Reed, for and during the term of his natural life, the sum of eight thousand (\$8,000.00) dollars per annum; and if my

said net income from all the rest, residue and remainder shall exceed the sum of sixteen thousand (\$16,000.00) dollars per year then and in that case I direct that the amount of income in excess of said sixteen thousand (\$16,000.00) dollars shall be divided equally between my said sons Charles M. Reed and Lloyd G. Reed, during their natural lives, but in any event I direct that my said son Lloyd G. Reed shall receive all the income accruing from all the rest, residue and remainder of my estate until he shall have received the sum of eight thousand (\$8,000.00) dollars per annum, before the said Charles M. Reed shall receive any part thereof whatsoever. From and after the death of my said son Lloyd G. Reed, I direct the income to which he shall be entitled under this my will for his natural life, shall be paid by my said executors to his children in equal shares until such time as the youngest of them shall have reached the age of twenty-one years, then my said executors shall then assign and convey the portion of my estate to which the said Lloyd G. Reed shall be entitled to the use for his natural life, to his said children in equal shares absolutely. From and after the death of my son Charles M. Reed I direct that the income to which he shall be entitled under this my will for and during his natural life, to the extent of two thousand (\$2,000.00) dollars shall be paid over by my said trustees equally to my two grandsons, Harrison Reed and Carl M. Reed, for and during the term of their natural lives, and that all of said income to which the said Charles M. Reed shall be entitled for and during his life time, in excess of said two thousand (\$2,000.00) dollars shall be paid over to my grandson Carl M. Reed, for and during his natural life."

[1] We have given as much of the will as is necessary for an understanding of the question here raised. Testatrix died December 3, 1901. It was not until 1907 that the trust estate yielded any net income. In 1907 it yielded \$1,000; in 1908, \$5,500; in 1909, \$6,450; thereafter up to February 1, 1910, \$900—aggregating for this period the sum of \$13,850, all of which was paid to Lloyd G. Reed, Charles receiving nothing. Lloyd G. Reed died April 4, 1910. The income accruing since his death has not only been sufficient for the payment to Lloyd G.'s children of the income which their father would have received had he lived, but there remains a surplus of \$9,924. The proper distribution of this surplus was the matter in controversy before the court in adjudication proceedings on the sixth account of the trustees in which they had charged themselves with it. The entire fund was awarded to the estate of Lloyd G. on the theory that Lloyd G., by the terms of the will, was entitled to receive \$8,000 annually out of the income, and, failing to receive this in any year because of insufficiency of income dur-

ing the year, he was entitled to recover the difference out of any excess of income beyond his \$8,000 in any subsequent year or years. During the period between his mother's death and his own he had received but \$13,850. Under the view adopted by the auditor and the court, no part of the annual income thereafter accruing, no matter how much in excess of \$8,000 in any year, could be claimed by Charles until the difference between what Lloyd G. had received, and what he would have received had the income each year been as much as \$8,000, shall have been paid. From the decree of the court awarding the fund to Lloyd G.'s estate, Charles has taken this appeal.

The effect of the decree, if permitted to stand, will be to postpone indefinitely any participation of Charles M. in the income, and it may defeat his participation entirely. He can have no share in it until the arrearages due Lloyd G. have been paid thereout. When, if ever, accumulations of income shall be equal to this charge depends on the productiveness of the estate—a matter about which there can be nothing but speculation. At first blush this would seem inequitable, and the mind would be inclined to resist a conclusion that would work such results. It is to be remembered, however, that we are not making a will for this testatrix, but simply ascertaining from the will she has herself made what her intentions were in this respect. It may be inequitable; but, if she so designed it, it is not for us to give any different effect to it. What may seem inequitable to one unfamiliar with circumstances or conditions in which testatrix was placed may by another, with fuller knowledge of the facts, be clearly revealed as not only equitable, but generous, toward the party apparently discriminated against. It is impossible to read this will and not observe the radical distinction in the character of the gift to Lloyd G. and that to Charles M. The former is a gift absolute of the entire annual income of the estate within the limit of \$8,000. Whatever is yielded within this limit is to be his and his alone; whereas Charles M. becomes a beneficiary only in the event that there is an excess of income above \$8,000 in any year, and then he shares such excess with Lloyd G. A definite sum of \$8,000 a year is given to Lloyd G., and to the payment of this annual sum the testatrix subjects not only all income for the current year, but, having in contemplation a possible failure in some particular year or years, she provides as follows: "But in any event I direct that my said son Lloyd G. Reed shall receive all of the income accruing from all the rest, residue and remainder of my estate until he shall have received the sum of eight thousand dollars per annum." It will be observed that what it here subjected is not simply the income for the particular year, but all the income accruing from the

estate without a limitation as to time other than that which makes an end when Lloyd shall have received the sum of \$8,000 per annum. Never during any one year of his life did he receive as much as \$8,000. Had he received it one year and not in others, it could not be said that he was receiving \$8,000 per annum. That could be said only in case he received it uniformly as the years went by, and when testatrix ordered that he should receive this much per annum, and directed that the entire income should be subjected to this charge, and that it was to be paid before Charles M. was to receive anything therefrom, she could have intended nothing else than that any deficit of income in any year or years was to be made good out of income of succeeding years, should there be excess sufficient for it, or pro tanto.

[2] We take the general rule to be—it is at least one resting on our own and other authorities (Rudolph's App., 10 Pa. 34; Stewart v. Chambers, 2 Sandf. Ch. [N. Y.] 382)—that, where the income out of which an annuity is to be paid falls in any year or years, the arrearages on the annuity are to be paid out of subsequent accumulations, unless there is a plain intent expressed in the will to the contrary. In the first case above cited, the trust was to apply to rents and profits to one for life, and, in case he should leave a widow, to pay the widow an annuity of \$1,000 out of the net income or proceeds during widowhood, and the residue of the income to a third party. The first taker died leaving a widow. The clear income during certain years was insufficient to pay the widow her annuity. It was held that the widow was entitled to the arrearages out of income accruing during subsequent years.

But we do not need to rest the case on general rule, sufficient as it would be, since clearly no contrary intent can be gathered from this will. It speaks for itself in an unequivocal way, and a purpose to secure to Lloyd G. \$8,000 a year during his natural life by subjecting the income during the whole of that period to this liability is, we think, unmistakable.

The appeal is dismissed and the decree is affirmed.

In re REED'S ESTATE.

Appeal of HEMPHILL.

(Supreme Court of Pennsylvania. May 22, 1912.)

EXECUTORS AND ADMINISTRATORS (§ 47*)—ANNUITIES—ASSETS OF ESTATE.

Where a will directs that, out of the net income of the residue of the estate, there shall be paid to a son of testatrix \$8,000 per annum for life, and after his death the annuity is to be paid to his children in equal shares for a specified period, and arrearages of income in any one year are to be made up out of the income in subsequent years in excess of \$8,000

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

any excess after the son's death over \$8,000 per annum, applicable to the payment of arrearages, goes to the son's personal representatives, and not to his children to whom the annuity survives.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 298; Dec. Dig. § 47.*]

Appeal from Orphans' Court, Erie County.

In the matter of the estate of Harriet W. Reed, deceased. From a decree dismissing exceptions to the report of an auditor, Thomas M. Hemphill, guardian of Aaron Manning Reed, appeals. Affirmed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHISKER, JJ.

J. B. Haughney and C. F. Haughney, both of Erie, for appellants. Frank Gunnison, Henry E. Fish, W. Pitt Gifford, and A. O. Chapin, all of Erie, for appellees.

STEWART, J. It follows from what we have said in the appeal of Charles M. Reed (No. 161) 85 Atl. 15, January term, 1912, in the same estate, that the right in Lloyd G. Reed to \$8,000 out of the income from the trust fund was a vested right in him. The right to receive arrearages due on this annuity was no less vested. This right passed upon the death of Lloyd G. to his personal representatives. Now that the income from the trust estate has proved sufficient to pay the arrearages in part, the fund so applicable must be distributed to them, rather than to the children of Lloyd G., to whom the annuity survives.

There was no error in the court so ordering. The appeal is dismissed, and the decree is affirmed.

REED et al. v. BROAD TOP LUMBER CO.
(Supreme Court of Pennsylvania. May 22, 1912.)

TRESPASS (§ 46*)—ACTIONS—EVIDENCE—TITLE OF PLAINTIFF.

Where plaintiffs in an action for damages for cutting timber relied on a deed made in 1854 for title to two tracts, and the title to one tract failed because a survey made in 1787 on which the title was based was void, and the deed recited that the title of the grantors to the second tract was based on a certain improvement right, but plaintiffs disclaimed any right to recover on the improvement right, claiming title to the second tract based on the survey made in 1806, but produced no evidence to contradict the recital in the deed, they failed to establish title and cannot recover damages for the timber cut.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 123-127; Dec. Dig. § 46.*]

Appeal from Court of Common Pleas, Huntingdon County.

Trespass by William W. Reed and others against the Broad Top Lumber Company for damages for cutting of timber. From a judgment for defendant non obstante verdicto, plaintiffs appeal. Affirmed.

At the trial the jury returned a verdict for plaintiffs. Subsequently the court entered judgment for defendant n. o. v.; Woods, P. J., filing the following opinion:

"The plaintiff brought this action of trespass to recover damages alleged to have been sustained by reason of cutting timber from land which they claim. The statement as filed relied upon what was called during the trial the Benj. Penn survey, and upon what has been called the Arnold Houpt improvement, relying, in their chain of title, upon a deed of Arnold Houpt's heirs to Mickley & Cresswell dated May 5, 1854, in Deed Book M, No. 2, page 12. The case was submitted to a jury who found for the plaintiffs, and is now before us on a motion for judgment non obstante verdicto. This being the only question for our determination, we are confined to the facts as they appear in the evidence. Did the plaintiffs show such a title as would justify a verdict in their favor? During the progress of the trial the plaintiffs amended their statement so as to conform, as they allege, to what was called in the trial the Benj. Penn survey. The defendants claimed under the John Musser title; but, under the motion for judgment non obstante verdicto, the defendant's title need not be considered, the question being the sufficiency of the plaintiffs' claim to recover under the pleadings and evidence. Does the Benj. Penn survey relied upon conform to the deed of Arnold Houpt's heirs to Mickley & Cresswell? If it does, then the motion for judgment cannot prevail. If it does not, then our only conclusion would be to sustain the motion. During the trial of the case there appeared two surveys under the name of Benj. Penn, one containing 107 acres and 87 perches and allowance, and the other containing 101 acres and 142 perches and allowance. In the course of the trial the plaintiffs amended their statement and abstract, shifting their position from one survey to the other. The land was unimproved, and while the plaintiffs' claim to part of the land rested upon a so-called improvement, and designated Arnold Houpt's improvement, we determined that under the evidence, which does not meet the requirements upon which to sustain a recovery by reason of possession, there could be no recovery on that branch of the case, and, if an action could be sustained, it must be through their paper title. In the statement as originally filed, the plaintiffs rested their claim on what was called at the trial the first Benj. Penn, as described and referred to in the deed to Mickley & Cresswell; the recital in said deed being: 'Containing one hundred and seven acres, eighty-seven perches, and allowance of six per cent. surveyed the second day of October, 1787, in pursuance of a warrant to Benjamin Penn, dated July 9, 1787.' This description of the survey

and warrant does not tally with the second Benj. Penn on which the plaintiffs rely, as shown by their amended statement. In said deed both the description by courses and distances and the reference to the date of the warrant and survey conform to the first Benj. Penn, and in no place, either in the deed, pleadings, or abstract of title, is there any reliance by the plaintiff on the second Benj. Penn. In short, the proof as produced by the plaintiffs does not conform to the pleadings, as can be readily seen by examining the statement as amended, the deed to Mickley & Cresswell and the two Penn surveys. Under the evidence as produced, the plaintiffs have failed to show title to the locus in quo, and under this state of facts, as shown by the evidence, it becomes our duty to sustain the motion for judgment non obstante veredicto. Our answer, therefore, to the first point submitted to us by the defendant and reserved by us is answered in the affirmative; also we affirm the fourth point which we reserved. The fifth and sixth of defendant's points have reference to the defendant's title, and under the conclusion reached by us it is not necessary to determine these.

"And now, November 8, 1911, upon due consideration, it is ordered and directed that judgment be entered in favor of defendant non obstante veredicto. The motion of the plaintiffs to double the verdict is overruled and refused, to which decree the plaintiffs except and bill sealed."

Argued before FELL, C. J., and MESTREZAT, ELKIN, STEWART, and MOSCHZIS-KER, JJ.

Thos. F. Bailey, H. H. Waite, and Chas. C. Brewster, all of Huntingdon, for appellants. A. L. Cole, of Du Bois, and John D. Dorris, of Huntingdon, for appellee.

MESTREZAT, J. We have examined this record very carefully and are not convinced that the court below erred in entering judgment for the defendant notwithstanding the verdict. In his opinion the learned judge inadvertently says that the plaintiffs, in amending the statement, shifted their position. What he intended to say was that the plaintiffs' testimony did not sustain their title as set forth in the statement and abstract. The action was brought under the act of March 29, 1824 (P. L. 152) 4 Purdon's Dig. (13th Ed.) p. 4755, to recover damages which the plaintiffs allege they sustained by reason of the defendant having cut timber upon a certain tract of land in Carbon township, Huntingdon county. The cutting is admitted, but the defendant denies that the plaintiffs are the owners of the land. The statement describes the land by courses and distances, and concludes by stating that the tract contains "208 acres and 37 perches and allowance, being composed in part of a survey of 101 acres and 142 perches and allow-

ance, made the 19th day of April, 1805, in the name of Benjamin Penn, and by some additional lands cleared, cultivated, and held under an improvement by Arnold Houpt." The plaintiffs in their abstract of title set forth a deed from Arnold Houpt's heirs to Mickley & Cresswell, dated May 5, 1854, through which they claim and on which they rely to sustain their title. That deed purports to convey two tracts of land, one containing 107 acres and 87 perches, "surveyed the 2d day of October, 1787, in pursuance of a warrant to Benjamin Penn, dated July 9, 1787"; and the other, an adjoining tract, containing 101 acres and 142 perches and allowance, be the same more or less, "being the tract on which John Houpt, party hereto, lately resided as tenant at will of the other heirs and legal representatives of Arnold Houpt, deceased, and which tract was first improved by the said Arnold Houpt about the year A. D. 1804, and by improvement been ever since held by actual resident settlement and occupancy, title thereto having been completed."

It is conceded that the survey of October 2, 1787, was void for want of jurisdiction in the officer making it, and therefore the land contained in that survey is eliminated from the plaintiffs' title. The plaintiffs also now disclaim any right to recover on a title under the Houpt improvement right. Their claim is confined to the title under the Benjamin Penn warrant and the survey of April 19, 1805. If the claim is under the survey made in 1805, as set forth in the statement, the plaintiffs failed to sustain their title by evidence in the case. As we have already said, they rely upon the Mickley & Cresswell deed. They have been compelled to abandon the first tract conveyed by that deed and which was surveyed on the 2d of October, 1787, in pursuance of the warrant of July 9, 1787. The second tract was not held, so far as the evidence discloses, upon the survey made in 1805 in pursuance of the warrant of July 9, 1787, but was held under the Houpt improvement right. This is clearly and distinctly disclosed by the quotation from the deed which we have made. There is nothing in that deed to indicate, as set forth in the plaintiffs' statement, that the 101-acre tract was included in the survey made on April 19, 1805, under the Benjamin Penn warrant. On the contrary, the deed itself avers that the 101-acre tract conveyed by it was held under the Houpt improvement. The plaintiffs have therefore failed to show title to the land on which the timber was cut, and it follows that they cannot recover in this action.

We have examined the testimony in this case, and entirely agree with the learned court below that it was not sufficient to justify the jury in finding that Houpt had the survey of 1805 made under the Benjamin Penn warrant, or that the land on which

the cutting was done is held by the plaintiffs under that official survey. A discussion of the evidence bearing on the question is regarded as unnecessary. In the view we take of the case, the sufficiency of the defendant's title becomes immaterial, as the plaintiffs, not having a title to the premises, cannot complain of the alleged trespass. The question of the right of the plaintiffs to recover double damages, raised by the third assignment, becomes unimportant and need not be considered.

We are of the opinion that the learned court below committed no error in entering judgment for the defendant.

The judgment is affirmed.

VETTER v. CITY OF MEADVILLE.

(Supreme Court of Pennsylvania. May 22, 1912.)

1. ASSIGNMENTS (§ 58*) — PARTIAL ASSIGNMENT OF DEBT—VALIDITY.

A suit cannot be maintained on a partial assignment of a debt unless the debtor assented to the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 121-123; Dec. Dig. § 58.*]

2. MUNICIPAL CORPORATIONS (§ 1003*) — CLAIM AGAINST CITY — PARTIAL ASSIGNMENT.

An assignment by a city contractor of a portion of his claim against the city, with the assent of the city treasurer, cannot be enforced unless plaintiff shows authority of the city treasurer to assent.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2175; Dec. Dig. § 1003.*]

Appeal from Court of Common Pleas, Crawford County.

Action by George J. Vetter, for use of the Pittsburgh-Buffalo Company, against the City of Meadville. From a judgment sustaining demurrer to statement of claim, plaintiff appeals. Affirmed.

Plaintiff's statement, briefly summarized, set forth that George J. Vetter, the legal plaintiff, on or about the 13th day of May, 1907, was awarded the contract by the defendant to grade, curb, and pave a certain street in the city of Meadville, using Pittsburgh-Buffalo block paving brick. When the use plaintiff was notified by the legal plaintiff that he had secured said contract, it refused to furnish the brick to him until about the 2d day of May, 1907, when he signed an order, authorizing the city treasurer of Meadville to pay to it (the use plaintiff) moneys becoming due on account of said brick to be furnished and used. That said order was accepted by said city treasurer, and thereafter the use plaintiff furnished to the legal plaintiff the brick required under said contract to the amount of \$10,000 or upwards. That the brick so furnished were used in the completion of said contract; that the contract was completed on or about

the 7th day of January, 1908; that the final estimate of the engineer, showing a balance due the contractor of \$6,781.86, under date of January 8, 1908, was approved by the select and common councils of said city on the same date; that on the 15th day of January, 1908, the use plaintiff gave to the select and common councils of the city of Meadville notice of the aforesaid order, directed to its city treasurer, and duly accepted by him.

The said order and acceptance are as follows:

"Meadville, Pa., May 2, 1907.

"The City of Meadville, Meadville, Pa.: You are hereby authorized and directed to retain from money due or to become due me under my contract with the city of Meadville, Pa., dated March 27, 1907, for the grading, curbing and paving of Park avenue from Chestnut street south to the city limits, and pay to the order of the Pittsburgh & Buffalo Coal Company eighty-five per cent. of the amount due them, as shown by their statements of account rendered for Pittsburgh & Buffalo repressed block furnished on my order, for paving Park avenue, as above described. The balance to be paid when work is completed and final estimate is made by the city engineer, and this shall be your full and complete authority for such payments.

"[Signed] George J. Vetter, Contractor.

"I hereby accept the above as authority for retaining sufficient funds and paying same to the Pittsburgh & Buffalo Coal Company.

"Charles Schmidt, City Treasurer."

Plaintiff's statement also averred that statements had been rendered from time to time and payments made on account of its bill for said brick so furnished until its claim had been reduced to a balance of \$6,172.45, which had been duly demanded from the defendant company and payment refused.

To this statement of claim and demand the defendant demurred, assigning inter alia, the following reason: "(1) It is not shown in the statement of claim that the defendant, through Charles H. Schmidt, or through any person legally authorized or having the power so to do, ever undertook, agreed, or promised to pay the claim which plaintiff sets forth in his statement of claim."

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. A. Stone, of Pittsburg, and A. L. Bates and B. B. Pickett, both of Meadville, for appellant. James P. Colter and Frank J. Thomas, both of Meadville, for appellee.

STEWART, J. The plaintiff's statement of claim discloses no cause of action; it is lacking in an essential feature. The suit was brought for and on behalf of the use plaintiff to recover from the city of Meadville a portion of the contract price for which the legal plaintiff, Vetter, had undertaken to

grade, curb, and pave a portion of a certain street in the city, and which amount it was averred Vetter had assigned to the use plaintiff.

[1] The assignment declared on, it will be observed, was but a partial one. The right of recovery, therefore, other things being sufficient, depended on whether the city of Meadville had assented to it. *Jermyn v. Moffitt*, 75 Pa. 399; *Philadelphia's Appeals*, 86 Pa. 179; *Gelst's Appel*, 104 Pa. 351. The averment is that "on or about May 2, 1907, George J. Vetter made and signed an order upon the city of Meadville, or its city treasurer, Charles H. Schmidt, authorizing and directing him to retain money due said contractor, and pay the same to the Pittsburgh-Buffalo Company 85 per cent. as shown by its statement of account rendered; * * * that the said city treasurer accepted said order and agreed to retain the said money and pay the same to the said use plaintiff, the Pittsburgh-Buffalo Company as shown by the assignment, order, or acceptance, copy of which assignment, order, and acceptance is hereto attached."

[2] The assignment—more properly speaking the order—signed by Vetter was directed to the city treasurer, and it simply authorized and directed him to retain from money due or to become due under his contract, and pay same to the order of the Pittsburgh-Buffalo Company as set out in the averment for repressed block furnished on Vetter's order. The entry on the order by the city treasurer was as follows: "I hereby accept the above as authority for retaining sufficient funds and paying the same to Pittsburgh & Buffalo Coal Company"—signed, "Charles H. Schmidt, city treasurer." Whether this acceptance constituted a contract giving rise to duties and obligations we shall not discuss; for, assuming that it was such contract, it certainly could give rise to no duty or obligation upon the defendant municipality, except as it was shown that the city treasurer had authority to act for the municipality in making the contract. There was no averment that he had other authority than that implied from his office. Certainly something more was required, for the powers and functions of that official, defined by act of assembly, are limited to the receiving moneys payable to the city and paying all warrants duly countersigned by the controller. The exercise of any authority other than this, except as specially authorized, would be pure assumption on his part from which could arise no liability on the part of the city. In the case of *First National Bank v. Newcastle*, 224 Pa. 285, 73 Atl. 331, 132 Am. St. Rep. 779, where the act of a city treasurer was the basis of a suit, we said: "The duties of B. as city treasurer were limited to receiving the moneys of the city and paying them out on warrant. He had no authority

by virtue of his office to do anything else for it or in its name, and was powerless to make any promise on its behalf. An obligation signed by him as city treasurer could no more commit the city to its discharge than if signed by himself as an individual." The statement here avers that the use plaintiff notified the city council of Meadville and the mayor of "this order and assignment and its acceptance by the city treasurer, and his agreement to retain the money mentioned and pay it over to the Pittsburgh-Buffalo Company." But this of itself would not fasten liability on the city. Had it been an assignment of the entire sum due in the contract, notice to the city under the authority of *Philadelphia v. Lockhardt*, 73 Pa. 211, would have been sufficient to charge the city therewith; but, where the assignment is only of a part of the fund, more than notice is required. The assent of the city must be averred and shown.

The statement of claim lacking any averment of assent, and the acceptance by the treasurer being insufficient to impose liability on the city, the demurrer was properly sustained.

The assignments of error are overruled, and the judgment affirmed.

PITTSBURGH-BUFFALO CO. v. SCHMIDT et al.

(Supreme Court of Pennsylvania. May 22, 1912.)

1. MUNICIPAL CORPORATIONS (§ 173*)—CLAIMS AGAINST CITY—PARTIAL ASSIGNMENT—LIABILITY OF CITY TREASURER.

Neither a city treasurer nor his sureties are liable to an assignee of a part of a city contractor's claim because he assented to the assignment for the city without authority.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 399-409; Dec. Dig. § 173.*]

2. MUNICIPAL CORPORATIONS (§ 173*) — CITY TREASURER—LIABILITY OF SURETY.

The bond of a city treasurer imposes no liability on his surety for acts not done in connection with his official duty.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 399-409; Dec. Dig. § 173.*]

3. MUNICIPAL CORPORATIONS (§ 173*) — CONTRACTS—PERSONAL LIABILITY OF OFFICERS.

Where a man deals with a municipal officer, and the officer simply proposes to bind the city, but the contract is *ultra vires*, the officer is not personally liable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 399-409; Dec. Dig. § 173.*]

Appeal from Court of Common Pleas, Crawford County.

Action by the Pittsburgh-Buffalo Company against Charles H. Schmidt and the United States Fidelity & Guaranty Company. Judgment for defendants on demurrer to statement, and plaintiff appeals. Affirmed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKEB, JJ.

W. A. Stone, of Pittsburg, and Arthur L. Bates and B. B. Pickett, both of Meadville, for appellant. Frank J. Thomas, Manley O. Brown, and Fred C. Kiebert, all of Meadville, for appellees.

STEWART, J. In this action the effort was to charge the defendant, Charles H. Schmidt, with personal liability for his failure as treasurer of the city of Meadville to retain out of the money due from the city to George J. Vetter, on the latter's contract, the amount Vetter had assigned thereout to this plaintiff. The action was against the bonding company that had become surety for Schmidt as treasurer to the city as well. The facts appear in the case of Vetter, to Use, v. City of Meadville (No. 128) 85 Atl. 19, January term, 1912, just decided, and they need not be repeated here.

[1] The appeal is from a judgment sustaining a demurrer to plaintiff's statement. In the case referred to, we held that, in accepting the order or assignment as authority for retaining so much of the money as might become due to Vetter on his contract, and paying it to the plaintiff, the defendant, Schmidt was acting outside his duty, and that therefore his act imposed no liability on the city. The obligation of this bond was that Schmidt would well, faithfully, and truly discharge his official duties as treasurer.

[2] Such an obligation imposes no liability for acts not done as part of or in connection with official duty. It sometimes becomes a question whether the act complained of is a duty appurtenant to the office when, as was the case of *McCaraher v. Commonwealth*, 5 Watts & S. 21, 39 Am. Dec. 506, the character and bounds of the officer's duty are left to be determined by the nature of the office, the general principles of convenience, policy, and public security, by usage, and by such matters of express legislation as may be connected with the subject; but where, as in this case, the duties of the office are expressly defined by law, all such questions are avoided. Having decided that the act of Schmidt on which plaintiff rests its present action was not within the scope of his official duty, it follows that no cause of action was shown against the surety, the United States Fidelity & Guaranty Company, one of the defendants.

[3] There is like insufficiency in the statement of cause of action against Schmidt, the other defendant. The plaintiff must be held to knowledge of the fact that, in accepting the order from Vetter, Schmidt was acting without authority. "When a man deals with a corporation officer, and no representations are made by the latter, and he simply proposes to bind the corporation, but

as matter of fact the corporation is not bound because the contract is ultra vires, the officer is under no liability." This was said by Mr. Justice Brewer in *Holt v. Winfield Bank* (O. C.) 25 Fed. 812. The principle here asserted cannot be disputed.

The assignments are accordingly overruled, and the judgment is affirmed.

LEPSCH v. BARRETT.

(Supreme Court of Pennsylvania. May 22, 1912.)

EXECUTION (§ 18*)—PERSONS SUBJECT—FORM OF JUDGMENT.

Where a New York joint-stock association is sued under its association name, and, after verdict for plaintiff, the name of defendant is amended to make it that of an individual as president of the association, to comply with the New York law, and thereafter on the second trial a verdict and judgment is again rendered for plaintiff, execution may properly be issued against the property of the association.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 44, 45; Dec. Dig. § 18.*]

Appeal from Court of Common Pleas, Elk County.

Action by J. H. Lepsch against William M. Barrett, president of the Adams Express Company. From an order discharging rule to vacate judgment and stay writ of *fi. fa.*, defendant appeals. Dismissed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKEB, JJ.

A. L. Cole, of Du Bois, T. De Witt Cuyler, of Philadelphia, John G. Whitmore, of Ridgway, and John Lewis Evans, of Philadelphia, for appellant. Fred H. Ely, of Ridgway, and D. J. Driscoll, of St. Marys, for appellee.

MOSCHZISKEB, J. The plaintiff delivered diamonds to the defendant company for transportation from Ridgway to Philadelphia, and they were lost or stolen in transit. An action in assumpsit was brought against the defendant, describing it as Adams Express Company, and service was had on its local agent at Ridgway, to whom the diamonds had been delivered. The defendant entered a general appearance, and filed an affidavit of defense. The case was tried and defended on its merits, and a verdict was rendered in favor of the plaintiff for the value of the diamonds. Subsequently on application of the defendant the court granted a new trial. Pending the motion for a new trial, an amendment to the defendant's name was granted so that it was made to read, "William M. Barrett, President of Adams Express Company." The petition for the amendment averred "that the Adams Express Company * * * is a joint-stock association organized and existing under the laws of the state of New York; * * * that under the laws of the said state of New York a suit may be maintained against the president * * *

of such association; * * * that William M. Barrett, of the city of New York, is president of the Adams Express Company, defendant above named." This petition was sworn to and duly served. On the second trial counsel for the defendant withdrew from the case, stating: "We do not represent Mr. Barrett, president of the Adams Express Company, at all in this case, and we withdraw from any further participation in the case as the record now stands." A second verdict was rendered for the amount of the plaintiff's claim. After the entry of judgment, execution was issued and the property of the Adams Express Company in Elk county, Pa., was levied upon. Thereupon the express company served notice upon the sheriff of Elk county that the property levied upon belonged to it and not to William M. Barrett, president of Adams Express Company. The sheriff asked for an interpleader and William M. Barrett petitioned the court to vacate the judgment as to him. After hearing, both applications were refused.

In disposing of these matters the court below filed an opinion, in which it, *inter alia*, said: "The Adams Express Company is a joint-stock association organized under the laws of the state of New York. Such an association organized under our law could be sued by its corporate title and the Adams Express Company has always been sued by that title in this state. * * * The joint-stock association law of the state of New York (3 Con. Laws of New York, 1909, p. 1874, c. 84, § 4) provides that such association shall file yearly with the Secretary of State a certificate stating the names and places of residence of its officers, but there is no provision requiring the names of its stockholders to be filed. Our own laws provide that all foreign joint-stock associations shall file annually with the Auditor General a statement giving the name and address of its president and treasurer only. See Act May 8, 1901, § 2 (P. L. 150). There is no means, therefore, of knowing who are the individual stockholders of the Adams Express Company, and we doubt if any one does know, aside from its own officers. Under these circumstances we are satisfied that the title 'Adams Express Company' was a sufficient designation of the defendant company, and that there existed no necessity for amendment. Under the New York Code of Civil Procedure, however, it is provided in chapter 15, tit. 5, art. 1, § 1919, that in any case against such an association, in which the plaintiff might maintain an action against all the members of the association jointly or in common, an action may be maintained against the president or treasurer of such association, and section 1921 provides that in such case a judgment against an officer does not authorize either his arrest or an execution against his property, but only against the property of the association. It

was for this reason that the amendment in the name of the defendant in this case was made. * * * It is not denied that the goods levied upon were the goods of the Adams Express Company. The shipment in suit was made by the Adams Express Company, the goods were lost by it, suit was brought against it, and service was made upon its authorized agent. William M. Barrett, president of the Adams Express Company, was not sued in his individual capacity as president of this company. The amendment complained of works no change in the actual parties, but only a change in their corporate designation. * * * We are of the opinion that for the purposes of this suit the agents of the 'Adams Express Company' were also the agents of 'William M. Barrett, president of the Adams Express Company.' He is not hurt by these proceedings, as no property of his is or can be levied upon by virtue of this execution. The company that did the damage and against whom judgment is rendered is the company whose goods are to be sold, and this meets the demand of both law and equity. * * * We consider it immaterial whether the title of the defendant in this suit is the 'Adams Express Company' or 'William M. Barrett, president of the Adams Express Company.' The result is the same, but, if it would make any difference, we would permit the plaintiff now to amend, either by withdrawing his former amendment or by such other amendment as may be necessary, for whatever the proper title of the defendant in this case may be service has been regularly made on the authorized agent of such defendant. * * * Under the facts and circumstances of this case, we are satisfied that the claim is mala fides and collusive, and, as there are no facts in dispute, it would be idle to grant an issue. There is no dispute here between rival claimants. All parties admit that the goods levied upon are the goods of the Adams Express Company. The claim is that these goods are subject to execution under this judgment, and, as we concur in this view, we regard these proceedings as frivolous."

We agree with the learned court below that there is no merit in the contention of the appellant, and upon the record as presented we are not convinced of any reversible error. The petition of the plaintiff to amend the name of the defendant expressly averred the status of the Adams Express Company as a New York joint-stock association; that Barrett was its president, and that, under the laws of New York, actions were to be brought in the name of and against the president or treasurer of such an association; and upon the trial of the case the laws of New York were proved. It clearly appears from this petition that the purpose was not to sue Barrett personally but simply to name properly the defendant express company. While under our laws

joint-stock associations may "be sued in their association name" (Act May 1, 1876, § 3 [P. L. 89]), and service may be made on an agent (Act June 10, 1881, § 1 [P. L. 115]), which was the course pursued in this case, yet, since the amendment simply designated the defendant for the purpose of the suit as provided in the law of the state of its origin, we fail to see what harm was done to either the Adams Express Company or Barrett, its president.

In *Dinsmore*, President of Adams Express Co., v. Phila. & Reading R. R. Co., 2 Wkly. Notes Cas. 275, this very defendant brought an action in the United States Circuit Court for the Eastern District of Pennsylvania, wherein, for the purposes of the suit, it designated itself in the manner pursued by the plaintiff in the present case; and in *Edgeworth v. Wood*, 58 N. J. Law, 463, 33 Atl. 940, the Supreme Court of New Jersey held that an action might be maintained in New Jersey against the United States Express Company, a joint-stock association formed under the laws of New York, in the manner prescribed by the laws of the latter state, viz., in the name of its treasurer. *McConnell v. Apollo Savings Bank*, 146 Pa. 79, 23 Atl. 347, cited by the appellant, is readily distinguishable from the present case; there the action was brought against "the Apollo Savings Bank, a corporation," etc. An amendment was allowed striking out that part of the title which alleged the defendant to be a corporation, and there was nothing upon the record to show in what capacity the bank was sued; whereas in the case at bar the petition to amend plainly sets forth the fact that the Adams Express Company is a joint-stock association organized and existing under the laws of the state of New York.

Despite the fact that counsel for the defendant refused to participate in the trial, the cause seems to have been fairly and properly presented to the jury. The assignments of error are overruled, and the appeal is dismissed, at the cost of the appellant.

HADDOCK v. PLYMOUTH COAL CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. RECEIVERS (§ 196*)—COMPENSATION—CONTRACT FOR SERVICES.

Where an alleged agreement for the compensation of a receiver was either never consummated or was subsequently waived, it was proper for the court to allow reasonable compensation for the services notwithstanding the agreement.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 387, 389-391; Dec. Dig. § 196.*]

2. RECEIVERS (§ 101*)—MONEYS—DEPOSIT—INTEREST.

That a trust company, acting as receiver, deposited its funds in its own bank subject to check, did not justify a surcharge of the re-

ceiver's account for interest where the deposit was made in good faith with knowledge of the debtor and creditors; any duties accruing to the receiver in the premises being considered in making claims for compensation.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 189; Dec. Dig. § 101.*]

3. APPEAL AND ERROR (§ 589*)—SCOPE OF REVIEW—QUESTIONS NOT RAISED BY EXCEPTION.

On appeal from a decree dismissing exceptions to a receiver's account, objections not referred to in the statement of the claims involved, in appellant's paper book, or by an exception to the account and made the subject of an assignment of error would not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2690; Dec. Dig. § 589.*]

Appeal from Court of Common Pleas, Luzerne County.

Bill for the appointment of a receiver by J. C. Haddock against the Plymouth Coal Company. From a decree allowing the receiver's fourth and final account, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCH-ZISKER, JJ.

Wm. C. Price, of Wilkes-Barre, and Joseph Phillips, for appellant. B. R. Jones, and Thos. Atherton, both of Wilkes-Barre, for appellee.

BROWN, J. On March 14, 1902, the People's Bank of Wilkes-Barre authorized by its charter to execute trusts of all sorts, was appointed receiver of the Plymouth Coal Company. In consequence of the general strike of the anthracite miners then in progress, it was unable during the first six months of its receivership to do much in operating the mines of the company. During that period its efforts were chiefly directed to the conservation of the property, which involved an expenditure of nearly \$60,000 in excess of receipts. At the time of its appointment it was, and for several years prior thereto had been, the trustee for bondholders secured by a mortgage on the property of the coal company. The total indebtedness of that company at the time the receiver was appointed was \$681,000, in which was included unpaid bonded indebtedness secured by the mortgage, amounting to \$238,000. At the close of the miners' strike, it was deemed advisable that the corporate property should be transferred by the bank, as receiver, to itself as trustee under the mortgage, and that mining operations should be carried on by it as trustee until the bondholders were paid. Such a transfer was accordingly made October 28, 1902, and thereafter the bank, as trustee, conducted the mining operations of the company until April 1, 1905, when the last of the bonded indebtedness was paid off. On that day the bank resumed charge and control of the property as receiver, and continued mining operations until March 28, 1909, when the receivership

was terminated, and the Plymouth Coal Company again came into possession and control of its property. On June 2, 1909, the appellee filed its fourth and final account as receiver, and the exceptions to it, as disposed of by the court below, are the subjects of the assignments of error, upon which we are to pass on this appeal. But two exceptions were originally filed to the account, and they were as follows: "(1) To the item wherein the accountant claims credit for \$11,466.30 for receiver's commissions, same being 1 per cent. of \$1,146,623.05, as being excessive, exorbitant, and unearned. (2) To the item of \$1,500 for counsel fees for receiver's counsel, same being excessive, exorbitant, and unearned." Subsequently, by leave of court, the following third exception was filed: "Accountant has failed to charge itself with profits arising from the use in its banking business of trust funds received by it as receiver and trustee and mingled with its general banking funds, or to charge itself with interest for the use of such money." The second and third exceptions were dismissed and the first sustained to the extent of reducing the receiver's compensation from \$11,466.23 to \$9,975.62. As these were the only exceptions filed to the account and raised the only questions passed upon by the court below, counsel for appellant seem to misunderstand the scope of this appeal in insisting, in their printed brief, that the appellee ought to be largely surcharged because it had not been active, but remained neutral in certain litigation over a sales contract which the coal company had entered into with a sales agent. No such question having been raised in the court below, and no such question being raised by any one of the seventeen assignments of error, a discussion of it by counsel for appellant in their printed brief is entirely out of place.

[1] The first complaint of the appellant is over the allowance of \$9,975.62 as commissions or compensation to the appellee for its services as receiver during the period covered by its fourth and final account. During that period of one year and nearly four months it received the sum of \$1,146,623.05, upon which it charged 1 per centum. Appellant's contention is that the compensation ought to have been on the basis of only \$1,000 per year, in view of what it alleges was an agreement on the part of the appellee to serve for such compensation as receiver from April 1, 1905—the date upon which it relinquished control of the coal company's property as trustee in the mortgage. As evidence of such an agreement the appellant offered a letter, addressed to the attorneys for the creditors of the coal company by the counsel for the receiver, of which the following is a copy: "January 6, 1906. Messrs. W. S. McLean and S. J. Strauss. Gentlemen: The suggestion of the committee of the board of directors of the People's Bank made at the conference with you, had last Monday, to

the effect that the bank would probably be willing to serve as receiver of the Plymouth Coal Co., for an annual compensation of \$1,000 beginning April 1, 1906, has been ratified and approved by the board of directors, at their meeting held this morning, and I am now authorized to say that unless some extraordinary conditions or exigencies should arise, largely increasing the labors and responsibilities of the bank, none of which are now foreseen, the bank would be willing to accept in lieu of commissions, as receiver of the Plymouth Coal Co., the sum of \$1,000 annually, beginning April 1, 1906. Yours respectfully, Thomas H. Atherton, of counsel for the Receiver." The court below, however, found as follows: "We find nothing in the notes of testimony indicating that this proposition was accepted by Messrs. McLean and Strauss on behalf of the creditors they represented. Mr. Atherton testifies that his letter 'was written as a suggestion of compromise under a new arrangement'—that on July 9th he received a letter from Mr. Strauss and Mr. McLean, and that the suggestion 'was practically declined by them.' (The letter of July 9th appears to have been offered in evidence, but we are unable to find it among the papers submitted to the court, and no copy of it appears in the notes of testimony.)" We have not been convinced, after our own review of the testimony, that this finding was error, and it may, therefore, be regarded as disposing of the alleged agreement by the appellant to serve as receiver at an annual compensation of \$1,000; but, apart from this finding, there is an undisputed record fact in the case which shows conclusively that, even if there ever had been such an agreement, the appellant waived it on February 4, 1908, when, by its agreement, the first three accounts filed by the appellee as receiver were confirmed absolutely by the court. In the third account, which covered the period from June 1, 1907, to January 24, 1908—less than eight months—the receipts of the appellee as receiver amounted to \$521,988.22, and upon this sum it charged a commission of one per centum, amounting to \$5,219.88. This charge for compensation was made more than two years after the writing of the letter upon which the appellant relies as evidence of an agreement that the compensation of the receiver should be but \$1,000 a year, and the charge, as made in the account, was allowed by agreement of the appellant, through its president, in open court, as the records of the court show. In attempting to explain away this agreement by the appellant, which confronts the effort of its counsel to show that the letter of January 6, 1906, was an agreement that the compensation should be only \$1,000 a year, they refer to the testimony of J. C. Haddock, president of the coal company, in which he stated his reason for having agreed to the charge made for compensation in the third account. What may have induced Mr.

Haddock, as president of his company, to agree in open court that the appellee should be paid \$5,219.88 as compensation for its services during a period of less than eight months is not for our consideration on this appeal. We only know that the records show his agreement, which was followed by the absolute confirmation of the account in pursuance of it, and that account is conclusive of all things embraced within it. McLellan's Appeal, 76 Pa. 231; Appeals of Fross and Loomis, 105 Pa. 258.

With the letter of January 8, 1906, out of the case, the only question that remains is as to the alleged excessiveness of the compensation allowed to the appellant by the court below, whose duty it was to fix it, in the absence of an agreement as to what should be charged. During the seven years that the bank conducted the affairs of the appellant, as its receiver and trustee in its mortgage given to secure bondholders, the gross receipts of the business amounted to \$5,582,041. The indebtedness paid off by the appellee was \$974,980. For all its services during that period as trustee and receiver, rendered through the medium of a committee of its directors, composed of men of large experience in the successful administration of extensive coal mining operations in the anthracite field, its charges for commissions were \$44,311.34. In its three accounts, filed as trustee it charged as compensation eighty-seven one hundredths of one per centum upon its gross receipts, and these charges were not objected to in any instance, but each account was absolutely confirmed by agreement, in open court, of all parties in interest. The compensation charged by the appellee in its last account was reduced to the percentage which it had charged as trustee, and, in considering the responsibility assumed by it, the magnitude of its undertaking and its success in wiping out nearly a million dollars of indebtedness, the compensation allowed by the court below cannot be said to be excessive. On the contrary, it is the most moderate of which the writer has any knowledge. It was fixed by the court after hearing all the testimony in support of the exceptions to the account, and at a figure most reasonable, at least so far as the appellant was concerned. It was, therefore, hardly necessary for the appellee to invoke the rule as to interfering with the compensation of a receiver when fixed by the court. "When the court has fixed the compensation after the hearing of testimony and the allowance made is warranted by such testimony and appears to be reasonable, the exercise of the discretion of the court will not be interfered with on appeal." High on Receivers (4th Ed.) p. 922.

[2] Appellant's complaint of the failure of the court below to sustain its third exception to the receiver's account is sufficiently

answered by the three facts found in the opinion dismissing that exception. These facts were fully sustained by the testimony, and we need add nothing to them in dismissing the sixteenth assignment of error. They are as follows: "(1) The depositing of trust funds by the receiver in its own bank, in a business account, subject to check, was done in entire good faith and with the knowledge and acquiescence of the Plymouth Coal Company and its creditors, was justified by the nature of the receiver's duties, and such benefits if any, as accrued to the bank therefrom were considered in making the claims for compensation in the several accounts filed and confirmed by the court; and objections to the amounts so claimed were made by the president of the Plymouth Coal Company to the effect that they were excessive, partly at least, because of the fact that 'the bank had the use of the balances in favor of the receiver' on its books (testimony of Mr. McLean); but it does not appear that any objection was made to the fact of the use of such balances. (2) It has not been shown that any ascertainable profits were derived by the receiver from the use in its banking business of the trust funds so deposited. (3) In view of the hazardous nature of the business of secondary mining in which the receiver was engaged, the necessity for the retention of working capital to the extent of, say \$30,000, available for use at any time, the fluctuating nature of the daily balances, and the apparent acquiescence of parties in interest in such use of these balances in its banking business as it was able to make, together with the rules of its own and other institutions doing a savings bank business as to interest on deposits, we cannot say that the receiver was guilty of such negligence as would justify a surcharge in that regard."

[3] Appellant's statement of the questions involved on this appeal does not include the allowance of \$1,500 as counsel fees, which was the subject of the second exception to the account. The allowance was reasonable and moderate, and, as the formal objection to it does not seem to be seriously pressed, it is overruled.

All of the assignments of error are dismissed, and the decree is affirmed, at appellant's costs.

THORNE v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. CARRIERS (§ 347*)—INJURIES TO INTENDING PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Plaintiff approached a street car with the intention of boarding it, but, the car not having stopped long enough to enable her to do so, when it started forward again, she turned to

go farther from the track, and as she did so a pile of dirt on which she stood gave way, and carried her foot onto the track, where it was run over by the car wheel. In making repairs at the point defendant had excavated for a considerable distance along the line, and had cast the dirt along the street. *Held*, that plaintiff was not negligent as a matter of law.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1346-1397, 1402; Dec. Dig. § 347.*]

2. NEGLIGENCE (§ 136*)—STANDARD OF CARE—QUESTION FOR COURT OR JURY.

Where the standard of care is fixed and the standard of duty defined by law and is the same under all circumstances, failure to observe it may be declared negligence as a matter of law, but, when the standard shifts with the circumstances of the case, the question of negligence is for the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Anna B. Thorne against the Philadelphia Rapid Transit Company for personal injuries. The trial court, at the close of the trial, granted a nonsuit, which it subsequently refused to take off, and plaintiff appeals. Reversed, and a venire facias de novo awarded.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

Wm. A. Glasgow, Jr., of Pittsburg, for appellant. Layton M. Schoch, of Philadelphia, for appellee.

STEWART, J. According to the testimony adduced in support of plaintiff's claim, the accident which resulted in her injuries occurred under the following circumstances: The plaintiff, intending to take a south-bound car, stood on the northwest corner of an intersecting street, at a public crossing which was a flagging point. While there some three or four south-bound cars, with passengers occupying the front platform of each, passed without stopping. With a view to getting accommodation on the next car by approaching it at the rear, plaintiff moved northward along the pavement about the length of a car. When she saw a car coming which she thought was about to stop at the crossing, she advanced from the pavement toward the track, intending to enter upon the car at the rear. While waiting for the car to stop she stood upon a pile of dirt a foot or more in height, and very close to the track. The car stopped, but not long enough to permit the plaintiff to board it; and, when it again started, plaintiff turned to get further from the track. As she did so, the dirt pile on which she stood gave way, and carried her foot on the track where it was run over by the wheel of the car. In making repairs and alterations to its track at this point the defendant company had excavated for a considerable distance along its line, and had cast the dirt along the street. This street obstruction, says one of the wit-

nesses, continued along five squares, the dirt being piled to a height of from eighteen inches to two feet, leaving no place clear except at the public crossings. The learned trial judge was of opinion that the plaintiff in standing upon the ridge of dirt to await the car was guilty of contributory negligence as a matter of law. In this view of the case we cannot concur. The evidence does not disclose a disregard by the plaintiff of any fixed standard of duty or care. It may have been negligence on her part to occupy the position she did before she fell; but that was a question for the jury to determine from all the facts in the case. The car was of a pattern that invited passengers to enter at either end. It does not appear that the position the plaintiff occupied was too close to the tracks for safety under ordinary conditions; nor does it appear, apart from the accident itself, that any particular danger attended the standing upon a pile or ridge of dirt such as was this.

[1] The fact that plaintiff attempted a crossing to the car where she saw she must encounter this particular ridge of dirt, whereas she knew that she would have encountered none had she advanced from the street on the public crossing in the front of the car, is a circumstance calling for consideration, but whether it was negligence in her so to do depends on whether such accident as here befell her should reasonably have been anticipated; that is, the giving way or yielding of the dirt which was the immediate and proximate cause of plaintiff's fall and injury. Whether it be the negligence of a plaintiff or defendant that is the subject of inquiry, the same rule governs in either case.

[2] Where the standard of care is fixed, and the standard of duty is defined by law and is the same under all circumstances, the failure to observe it may be declared negligence by the court; but, when the standard shifts with the circumstances of the case, it must be submitted to the jury to determine what it is, and whether it has been observed. *West Chester & Phila. R. R. Co. v. McElwee*, 67 Pa. 311.

The appeal is from the refusal of the court to take off the nonsuit. The assignment of error is sustained, and the judgment is reversed, with a venire facias de novo.

COMMONWEALTH to Use of MORE v. MESSINGER et al.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. TRUSTS (§ 194*)—CONSTRUCTION—LIABILITY OF SURETY.

In an action against the personal representatives of a deceased surety on a bond to secure application of purchase money by a trustee appointed by the court to sell real estate, binding instructions for defendant are proper, where it appears that the principal obligor on the bond was testamentary trustee

of the lands so sold, that he, as trustee under the will, received the sum that as trustee for the sale he had received, and that the particular breach declared on was of duty as trustee under the will.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 249; Dec. Dig. § 194.*]

2. TRUSTS (§ 194*)—LIABILITY OF SURETY.

Surety on a bond of a trustee selling land under an order of sale by the court is not liable, where after such sale the beneficiaries under the will, of which the trustee making the sale was testamentary trustee, received from him interest on the moneys derived from the sale of the realty.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 249; Dec. Dig. § 194.*]

Appeal from Court of Common Pleas, Northampton County.

Action by the Commonwealth to the use of Victor V. More, Trustee of Emeline M. More, against George F. Messinger and others. Judgment for plaintiff, and defendants appeal. Reversed.

Argued before MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. S. Kirkpatrick, of Easton, for appellant. E. J. Fox, of Easton, and James T. Woodring, of South Bethlehem, for appellee.

STEWART, J. Michael Meyers by his last will devised to his son Oliver H. Meyers, whom he also appointed his executor, a certain farm, in trust, directing that the trustee should divide it in four purparts of equal value as nearly as might be, and allot to each of his four daughters named a purpart, giving them the right to select in a prescribed order. This further provision followed: "But my said son Oliver Horatio Meyers shall hold the titles to the four several lots in trust nevertheless for my four hereinbefore mentioned respective daughters, during their respective lifetime, and after the death of my respective daughters, the said respective devises as aforesaid shall go to and be vested in the children of my respective daughters, absolute as tenants in common, the child or children of each of my respective daughters shall take its or their parent's lot only. Should any one or more of my said daughters die without leaving a child or children; or such child or children should die before it or they should arrive at the age of twenty-one years and without leaving issue, then the lot or lots of which any of my said daughters should have been entitled to, shall go to and be vested in the others of my said daughters and be parted and divided by my said son Oliver Horatio Meyers, and the title shall be held by him in trust nevertheless for my said respective surviving daughters as aforesaid." Division of the farm followed, and the several allotments were made. We are here concerned only with that accepted by the daughter Emeline M. More. On March 18, 1871, Oliver H. Meyers, as

executor of and trustee under the last will and testament of Michael Meyers, deceased, presented to the orphans' court a petition praying for an order to sell the purpart allotted Mrs. More, setting forth therein such conditions with respect to the purpart and Mrs. More's circumstances in relation thereto as gave jurisdiction to the court. The order issued, bond was given with two sureties, the purpart was accordingly sold, and, return having been made, the sale was duly confirmed. Oliver H. Meyers died March 20, 1907, without having settled any account as trustee of Mrs. More, and, so far as we are informed, without having filed any account as trustee under the will of Michael Meyers. On March 2, 1908, Victor V. More was appointed by the orphans' court trustee of the estate of Emeline M. More, and at his instance a citation issued directed to the personal representative of Oliver H. Meyers, deceased, to file an account of her intestate as trustee as aforesaid. No account having been filed pursuant to the citation, an auditor was appointed to settle the account. Nothing entered into the account of the auditor except the money returned by the former trustee as the price realized for the purpart sold at judicial sale, and with that amount, \$3,750, he was charged, together with interest from 1884; it having been admitted that all prior interest had been paid by the former trustee to Mrs. More. The report having been confirmed and no appeal taken, demand for payment was made; but, the estate of the former trustee proving insolvent, the whole amount received thereout was \$188.36. Thereupon this action was begun by the present trustee of Mrs. More to recover on the bond given by the former trustee in connection with the order granted him to sell the real estate. Samuel S. Messinger was one of the sureties on the bond; but, having died, the suit was brought against his personal representatives. The trial resulted in a judgment for the full amount demanded, and we have now this appeal.

[1] Of the numerous assignments of error filed, we need consider but one—the refusal of the court to hold that, under all the evidence, the verdict should be for the defendant. The decree of the court fixing a devastavit on Oliver H. Meyers is based upon this express finding: "That these two amounts (making a total of \$3,750) were the amounts that came into the hands of Oliver H. Meyers, trustee of Emeline M. More, under the last will and testament of Michael Meyers, deceased, to be applied to the purposes of the trust, as set forth in the said last will and testament." The breach on part of Oliver H. Meyers, declared upon in plaintiff's statement, is as follows: "That the said Oliver H. Meyers did not faithfully execute the trust he accepted under the last will and testament of the said Michael Meyers, and did

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not properly apply all the moneys received by him as trustee as aforesaid to the said trust, but diverted the same to his own use, so that on the 8th day of February, A. D. 1909, the orphans' court of this county adjudged and decreed that he was indebted to the cestui que trusts in the sum of \$9,161.88." Neither as trustee under the will of Michael Meyers, nor as trustee of Emeline M. More, did Oliver H. Meyers ever give bond, nor was he under any duty to do so. The only bond he gave was a special one in connection with the order directed to him to sell. This order was not directed to him as trustee under the will of Michael Meyers, however, expressed, for the court could add nothing to his duties and powers as testamentary trustee, beyond what the will itself imposed and gave, but to him as representative of the court.

The condition of that bond, in which defendant's decedent joined as surety, was: "That if the said Oliver H. Meyers, trustee as aforesaid, shall faithfully execute said trust and shall properly apply all moneys to be received according to the trust and decree of the court, then this obligation to be void," etc. That Oliver H. Meyers committed a devistavit is settled conclusively by the decree of the court unappealed from; but in what capacity, and with respect to what fund? The finding of the auditor on which the decree was based was that it was with respect to funds that came into his hands as trustee of Emeline M. More, under the last will and testament of Michael Meyers, deceased, to be applied to the purposes of the trust as set forth in the last will and testament. These funds could only have come into his hands as such trustee from himself as trustee appointed by the court to make sale of the real estate. As we have seen, the declaration follows the language of the auditor's finding and charges that he did not faithfully execute the trust he accepted under the will, and did not properly apply the money received by him as such trustee. Admitting the breach as averred, did liability result to the sureties on the bond given to sell the real estate? This is the one question in the case. How, as trustee to sell, O. H. Meyers paid over to himself, as trustee under the will, the proceeds of sale is not for us to inquire. Neither the finding of the auditor nor the statement of the breach will admit of other construction than he did somehow or other pay it over to himself as trustee under the will. For the purpose of argument, suppose it was done in the most formal way that he actually received in cash as trustee under the will the full amount of the proceeds of sale from himself as trustee to sell, it certainly could not be questioned that he would be irrevocably fixed for such devistavit by this decree as trustee under the will. The unfortunate thing about it would be the want of security to answer the default; but the decree neverthe-

less would be final and conclusive against himself, and he could be held to answer to the utmost. Now, if the decree against him was as trustee under the will, it entailed no liability on the bond given for the special purpose of sale. It could not be a decree covering both relations. The obligation on the bond is to pay all moneys received according to the trust and the decree of the court. The trust here contemplated was that committed to him by the court, and not the trust committed to him by the will. Regularly an account of such special trust should have been filed, and a decree for payment obtained. Had such account been filed, the decree would have been, except as cause could be shown to the contrary, to pay over to the trustee under the will. However much Oliver H. Meyers was delinquent in this regard, since the fund was in fact paid over to the party who was entitled to receive it, and to whom he would have been ordered to pay it, such delinquency would not work a forfeiture of the bond as against the sureties. "When an executor or administrator also occupies some other character with regard to the estate, such as guardian or trustee, it will be presumed that the property in his hands is held in that capacity in which he ought to receive it, and, upon the termination of his duties in one capacity, the property is transferred by operation of law to his possession in the other so as to release the sureties on the bond in the former capacity from further liability. It is in some cases difficult to say when the transfer of possession from one capacity to another takes place, but it is well settled that, when property has been received in one capacity, the change, in order to shift the responsibility of the sureties, must be evidenced by some overt act or express election to hold the property in the other capacity." 18 Cyc. 1258; Seegar v. State, 6 Har. & J. (Md.) 162, 14 Am. Dec. 265; Newcomb v. Williams, 50 Mass. (9 Metc.) 525; Fish's App., 7 Atl. 222.

[2] We are relieved of all inquiry on this point by the clear admission in the pleadings and the finding of the auditor to the effect that Oliver H. Meyers, as trustee under the will, received the full sum that the trustee under appointment of the court received on the sale of the real estate. But even were it otherwise, and the question were to be resolved by the evidence in the case, the mere fact that, for a period of 12 years following the execution of the order of sale, Mrs. More, received regularly from Oliver H. Meyers the interest on the money derived from the sale of the real estate would be most persuasive of an understanding on the part of both that the money had passed out of the hands of the trustee to sell and into the custody of the trustee under the will, the only party to whom it could be paid. What, then, becomes of the decree fixing Oliver H. Meyers, trustee under

the will of Michael Meyers, with a devastavit? The answer is that it remains unaffected by what is done in this case, and stands, except as it may hereafter be reviewed, against the principal debtor. All we here decide is that no bond of Oliver H. Meyers, as trustee under the will of Michael Meyers, in which the appellant's decedent joined as surety, having been offered in evidence, there is nothing upon which the judgment in the case could rest.

The assignment of error is sustained, and the judgment is reversed.

MARTIN v. ATLANTIC TRANSPORT CO.
(Supreme Court of Pennsylvania. July 2, 1912.)

1. MASTER AND SERVANT (§ 150*)—INJURIES TO SERVANT—EXPLOSIVES—DUTY TO WARN.

Where a stevedore was unloading casks of explosives in ignorance of the contents thereof, and was injured thereby, he can recover from his employer if the latter had knowledge of such danger and failed to warn him and give proper instruction in regard thereto.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 287, 299-302, 305-307; Dec. Dig. § 150.*]

2. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—EXPLOSIVES—QUESTION FOR JURY.

Where a stevedore company had notice before the arrival of a ship that part of the cargo would be "knall korke," the German for "explosive corks," it is a question for the jury whether the company should have known of the dangerous nature of the explosives and warned an employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 265*)—DANGEROUS CHARACTER OF WORK—INJURY TO EMPLOYÉ.

What an employer ought reasonably to know to be dangerous to his employés, he is presumed to know.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Frank Martin against the Atlantic Transport Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

Alfred D. Wiler and Charles Biddle, both of Philadelphia, for appellant. Warren C. Graham of Philadelphia, for appellee.

BROWN, J. We cannot tell whether the probata followed the allegata in this case, as the statement of plaintiff's cause of action does not appear in appellant's paper book nor in the appendix to it, as required by rule 29. We must therefore assume that the averments and proofs correspond; and, with the latter before us, we cannot sustain

the contention of the appellant that the question of its negligence should not have been submitted to the jury.

[1, 2] At the time the appellee was injured he was employed as a stevedore by the defendant company, which was engaged in the business of loading and unloading ships of the Hamburg-American Line, plying between Hamburg, Germany, and Philadelphia. The freight which the company unloaded was shipped from Germany and was often marked in German. The cargo which the appellee was helping to unload included 14 cases of "knall korkes," marked "knall korkes, vorsicht." Knall korkes—dangerously explosive corks—are used in Germany as torpedoes and are well-known articles of commerce. Prof. Theodore Shumacher, a German professor in the University of Pennsylvania, testified that the words "knall korkes, vorsicht," are of common use and mean "explosive corks, should be handled with care." A meaning of the word "vorsicht," as given in Adler's German dictionary, a standard authority, is "caution." Five days before the arrival of the *Arcadia*, the ship upon which the explosion occurred, the defendant had received a manifest of its cargo and a plan showing where each article of freight was stored. This manifest showed the shipment of the 14 cases of knall korke, and the plan showed that they were stowed by themselves in hatch No. 3. If the defendant company had actually known that this consignment was dangerous to handle, the obvious duty would have rested upon it of notifying its employés of the danger incident to handling it and of the care to be exercised in moving the cases; and, if the appellant did not have actual knowledge of this danger, the question which the trial judge was called upon to submit to the jury was whether it, as the employer, by the exercise of reasonable diligence, should have known the danger, for constructive knowledge by an employer of danger to his employés imposes upon him, no less than actual knowledge, the duty of warning his employés of it and of giving them proper instructions as to how to avoid it.

[3] What an employer ought reasonably to know to be danger to his employés it is his duty to know, and he is therefore presumed to know it. *Tissue v. Baltimore & Ohio Railroad Co.*, 112 Pa. 91, 3 Atl. 687, 56 Am. Rep. 310; *Bier v. Standard Manufacturing Co.*, 130 Pa. 446, 18 Atl. 637; *McGuigan v. Beatty*, 186 Pa. 329, 40 Atl. 490. The stevedores, according to their testimony, were in utter ignorance of the dangerous articles they were handling when they undertook to unload the cases of knall korke. But with the information which the defendant company had five days before the arrival of the ship as to its cargo, in which were included the 14 cases of knall korke, it was for the jury to say whether it ought to have known the dangerous na-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ture of the explosives, and, if so, whether it was guilty of negligence in failing to notify its stevedores of the danger connected with handling the cases and of the care to be exercised in moving them.

The plaintiff did not rest merely upon the explosion, without testimony as to what caused it. The cases exploded as they were being handled. One had been placed on the top of another, and the stevedores were placing a third on top of the two. Just as they dropped one end of this third case into position it exploded. According to the testimony of William O. Robinson, the nature of the corks was such that a case of them might be exploded by the mere jar caused by setting it upon the ground. He testified that it was exceedingly dangerous to handle the cases without extreme care, and that it was very dangerous "to lift them up by any mechanical contrivance and deposit them in the hold of a vessel, or lift them out of the hold and deposit them on the wharf." A fair inference to be drawn by the jury from this testimony was that the handling of the cases caused the explosion; and, under all the testimony, another fair inference to be drawn was that, if the defendant company, which had at least constructive knowledge of the danger incident to the handling of the cases, had duly instructed and cautioned its employes, the handling would have been more careful, and the explosion would have been avoided.

The case was for the jury, and as nothing in the assignments of error calls for a retrial, the judgment upon the verdict is affirmed.

BRENNAN v. KINGSTON COAL CO. et al.
(Supreme Court of Pennsylvania. July 2, 1912.)

TRIAL (§ 140*)—INJURIES TO SERVANT—QUESTION FOR JURY.

In an action by a widow to recover for death of her son, under the age of 16 years, it was error to direct a verdict for defendants on the ground that the minor was guilty of fraud in presenting what purported to be a written certificate from his father that he was of lawful employment age, which certificate was admittedly forged, where the only evidence that the father's name was written on the certificate before delivery to the mine foreman was that of the foreman himself, one of the defendants.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by Catherine Brennan against the Kingston Coal Company and Richard Jones. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHIZIS-KER, JJ.

Edward A. Lynch, James H. Shea, and William H. Hines, all of Wilkes-Barre, for appellant. Henry A. Gordon, and Anthony L. Williams, both of Wilkes-Barre, for appellees.

STEWART, J. There is but one feature of this case that calls for consideration. The plaintiff's son, a minor under the age of 16 years, had been admitted to employment in the mine of the defendant company by Richard Jones, the other defendant, who was the company's foreman. While in this employment the minor met his death by accident in the mine, and the suit was brought by his mother for the recovery of damages by reason thereof. Binding instructions were given in favor of the defendant, not on the ground that the evidence failed to disclose negligence on part of the defendants to which the accident could be referred—a feature of the case into which we need not inquire, since it was not discussed on the argument—but solely on the ground that the minor had obtained his employment in the mine by presenting to the mine foreman what purported to be a written certificate from the minor's father to the effect that he was of lawful employment age, which certificate, as established by the evidence, had never been signed by the father. The following extract from the charge very clearly expresses the view taken of the case by the learned trial judge and the consideration which led him to give binding instructions: "Suppose that this boy had not been killed, but had been injured. He would have had a cause of action against this company. It would have been a personal action by representation of a next friend, and it would have been an action by his parents. If that case had come on to trial here, and the same facts had been presented here with reference to that certificate as were presented with reference to the certificate in this case, the court would not hesitate a moment to say that that was a fraud, and on the basis of that fraud there could be no recovery by this boy through the representation of his parents. The rule in that case must be the rule in this. No other conclusion can be reached." It will be time enough for an expression of view from us as to the correctness of the legal proposition here asserted, when the question shall have been raised by appropriate assignment, and shall have been made the subject of full consideration and discussion. It was a matter but briefly referred to in the argument on this appeal.

Assuming for present purpose its correctness, it is quite clear that it was not in itself a sufficient basis on which to rest the binding instructions which followed. That the certificate produced and offered on the trial by the defendant did not bear the genuine signature of the boy's father may be accepted as an established fact, since the plain-

tiff herself so declared in the course of her testimony, and it thus became an admission on her part. But there was no admission by her, nor was there anything in the evidence produced by her, which tended in the least to show that this certificate offered on the part of the defendant had been used by the minor to obtain employment with the defendant. The testimony of the magistrate, a witness called by plaintiff, and therefore to be accredited against her, who attached his certificate setting forth the acknowledgment of the father before him of the due execution of the paper, to the effect that the father had never in fact appeared before him, and that he had certified to the acknowledgment before the father's name had been written in, at the request of the minor, has a significance which, while it is not to be underestimated, cannot be allowed as controlling. Richard Jones, one of the defendants, called on his own behalf and on behalf of his codefendant, testified in an unqualified way that the minor had delivered to him the paper in the shape and condition it was in when offered on the trial, and that upon the strength of that certificate, purporting to be the certificate of the father, he had given the minor employment. The admitted fact that it was a forged signature, that the father's name had not been inserted when the minor secured the magistrate's certificate or attestation—for that is all that it was—together with Jones' testimony that the paper was delivered to him by the boy just as it now appears, might be to a jury strongly persuasive of the fact that the minor obtained employment by the practice of a fraud upon the defendants. But it could not be said to be conclusive; for, after all, the one fact in the case, as it then stood on the trial, was whether the father's name was written into the paper before the paper was delivered to the mine foreman. Except as it was, responsibility for the fraud would not attach to the minor. The latter, who is here charged with the forgery of the name, is dead, and his lips are closed. Jones, the foreman, testifying for himself and his codefendant, says that the certificate when handed in by the minor contained the father's name. He is the only witness for defendants who testifies to this point in the case. In view of his interest in the result of the trial, and in view of the death of the only other party to the transaction, and the person to whom the alleged fraud is attributed, we are of opinion that the jury should have been permitted to pass upon the credibility of the witness, and that it was error to give binding instructions for the defendants.

For this reason, and without attempting to pass upon the more serious questions of law suggested by the case, but not specifically assigned, we direct a reversal of the judgment, with a venire facias de novo.

BROBST v. CITY OF READING et al.
(Supreme Court of Pennsylvania. July 2, 1912.)

1. MUNICIPAL CORPORATIONS (§ 360*)—PUBLIC IMPROVEMENTS—SEWERS—SUBSTITUTED MATERIAL.

Where a contractor for the construction of a sewer substituted different pipe from that called for by the specifications resulting in leakages, he was not entitled to compensation for alleged extra work done to prevent such leakage, though the substitution was with the consent of the city engineer.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*]

2. MUNICIPAL CORPORATIONS (§ 360*)—CITY ENGINEER—POWERS.

Where a contract for the construction of a sewer provided for pipe of a particular character, the power of the city engineer was limited to an interpretation of the contract, and he had no authority to authorize the contractor to substitute a pipe of different material; and the contractor was bound to take notice of the engineer's lack of such authority.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*]

3. MUNICIPAL CORPORATIONS (§ 993*)—PUBLIC IMPROVEMENTS—EXTRA WORK—PAYMENT—INJUNCTION—TAXPAYER'S LIABILITY.

Where extra work by a sewer contractor was required to stop leakages by reason of a substitution of different pipe for that called for in the contract, a taxpayer was entitled to enjoin payment for such work by the city, even though the contractor acted in good faith.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2158-2161; Dec. Dig. § 993.*]

Appeal from Court of Common Pleas, Berks County.

Bill by Francis H. Brobst, a taxpayer, against Caleb Weldner, Clerk, Obadiah Doward, Controller, and Edward H. Filbert, Treasurer, of the City of Reading, and the City of Reading, to enjoin payment by the City to a contractor for alleged extra work required to prevent leakage of sewer pipes installed by the contractor. Decree for complainant, and defendants appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN and STEWART, JJ.

Isaac Hiester and Adam B. Rieser, both of Reading, for appellants. John B. Stevens, of Reading, for appellee.

BROWN, J. [1] No one of the 17 facts found by the learned court below has been assigned as error, and the case, as presented by them, is a very simple one, involving the single question to which there can be but one answer. In entering into the contract with the city of Reading for the construction of the sewer pressure pipe, the covenant of the appellant was that he would perform it "in strict and exact accordance with the terms, conditions, and specifications" attached to it. The specifications called for a re-enforced concrete pipe, built monolithic, and the express stipu-

lation was that, at the end of each day's work of construction, the concrete should be finished to a vertical joint, against which the next day's work should butt, the joint to be covered with a concrete ring or collar of designated width and thickness. The appellant, instead of intending to comply with that stipulation, entered into the contract with the deliberate intention of not doing so, but of substituting a pipe known as the Leet pipe, made up of short sections, manufactured outside of the trench. This pipe differed materially in the mode of re-enforcement from that required by the specifications, and was two-fifths thinner. The pipe was laid by the appellant in palpable disregard of the specifications and of his declaration in his proposal for the work that he had examined the form of the contract as approved by the city solicitor, and would contract, in the form so approved, to do all the work "in exact conformity with the terms, conditions, and covenants contained in said agreement and the specifications."

[2] As a consequence of the appellant's failure to construct the pipe as he had contracted, it leaked at most of its joints, and, when he stopped the leaks by widening the trench and building concrete rings around the joints, he did only what he ought originally to have done. In no sense can this last work be regarded as extra work, within the contemplation of the contract, and for which compensation ought to be allowed; for if the appellant had laid a pipe in accordance with the specifications, and there had been leaks, he was bound, by the seventy-eighth clause of the specifications, to stop them by tearing up, if necessary, the entire pipe line and relaying it at his own expense. The answer made to this is that the city's board of public works had assented to the use of the Leet pipe. Suppose it had. Leaks in the pipe to be laid were to be stopped "at the expense of the contractor." But, even if this were not so, the plea of the appellant to be paid is unavailing for another reason. His contract was with the city of Reading, and not with its engineers or board of public works. They were but its agents to act for it in the preliminaries leading up to the contract, to formulate the terms of the same, and to see that they were performed; and

the appellant was bound to take notice of the extent and limits of the powers of these agents. *Roland v. Reading School District*, 161 Pa. 102, 28 Atl. 995; *O'Malley v. Olyphant Borough*, 198 Pa. 525, 48 Atl. 483. What the city engineer and the board of public works permitted the appellant to do was not the city's permission. He had contracted, as just stated, not with them, but with it; and they were without authority to make a new contract with him to bind it. The powers of the engineer were to interpret the contract, not to change it; and yet this is what he undertook to do. No deviations from the approved plans and specifications were to be allowed, unless by the written consent of the city engineer, approved by the board of public works. For, what was more than a mere deviation by the appellant from his contract with the city, he did not even have the written consent of the engineer.

Nearly 50 years ago it was said by Mr. Justice Agnew, in *Hague v. Philadelphia*, 48 Pa. 527: "Now, more than ever, do we need a rigid enforcement of public contracts, and a stricter moral discipline, to defeat the varied plans by which money is taken from the treasury without authority. The older we grow as a people, the more systematized and difficult of detection do the schemes become for plundering the public; and, among them all, none are more prominent or successful than those which concern contracts and jobs." If this was true then, it is truer now; and the learned chancellor below well said that, unless contractors are held to specifications and calls for bids upon them, they will, instead of serving to guide bidders and protect the public, become, as to both, a sham and a snare.

[3] The appellant may have acted in entire good faith; but that is not the question before us. By his contract with the city, he and it are bound; and the appellee, a taxpayer, has the right to ask that both be held to their agreement, else moneys of the public will be unlawfully paid to the appellant.

The filing of this bill was not unduly delayed, and, as none of the assignments of error call for a reversal of the decree, it is affirmed at appellant's costs.

SWARTS v. SIVENY.

(Supreme Court of Rhode Island. Dec. 6, 1912.)

1. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT AUTHORITY—WHAT CONSTITUTES—"CHIROPRACTOR"—"CHIROPRACTICS."

One not a licensed physician, who held himself out as a "chiropractor" (that is, one versed in the science of "chiropractics," said to be a system of adjusting the cause of disease without drugs, based on a thorough knowledge of the nervous system), and who, by means of pamphlets, claimed to be able to cure all the ills to which the flesh is heir, is guilty of a violation of Gen. Laws 1909, c. 193, § 8, making it a misdemeanor for any person not lawfully authorized and registered to practice medicine or surgery; the practice of medicine or surgery in itself not requiring the administration of drugs.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

2. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT AUTHORITY—INFORMATION—SUFFICIENCY.

An information charging that accused held himself out as a practitioner of medicine, willing to practice the art of preventing, curing, and alleviating disease for reward, accused calling himself a chiropractor, instead of a physician or surgeon, is sufficiently definite.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

3. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT AUTHORITY—TRIAL—EVIDENCE.

In a prosecution for practicing medicine without a license, brought on the complaint of the secretary of the board of health, evidence as to the secretary's reason for making his complaint is inadmissible.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

4. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT A LICENSE—EVIDENCE.

In a prosecution for practicing medicine without a license, evidence as to the cures effected by accused is inadmissible, being immaterial.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

5. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT A LICENSE—EVIDENCE.

In a prosecution for practicing medicine without a license, where accused claimed to be a chiropractor, and referred to books and pamphlets as descriptive of his treatment, such works were properly admitted in evidence.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

6. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT A LICENSE—TRIAL—INSTRUCTIONS.

Where a chiropractor was prosecuted for practicing medicine without a license, the question for the jury is whether accused was guilty of practicing medicine or surgery without a license, and not whether the chiropractic science is the practice of medicine.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

Exceptions from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

On the complaint of Gardner T. Swarts, Frank Siveny was found guilty of practicing medicine without a license, and he excepts. Exceptions overruled, and case remitted for sentence.

Comstock & Canning and Patrick P. Curran, all of Providence, for the State. Cassius L. Kneeland and George A. Breden, both of Providence, for defendant.

VINCENT, J. The defendant was tried and found guilty in the district court of the Sixth judicial district, and in the superior court in Providence county, on the complaint of Gardner T. Swarts, secretary of the State Board of Health, which alleged that "in said county, on the 1st day of January, A. D. 1910, and from that day to the day of the date of this complaint, with force and arms Frank Siveny, alias John Doe, of said Providence, laborer, did open an office with intent to practice medicine, and did hold himself out to the public as a practitioner of medicine, by appending to his name the title of 'Chiropractor,' and by representing that he was versed in and willing to practice for compensation the art of preventing, curing, and alleviating disease and pain, and did attempt to and did practice medicine and surgery, after having received therefor, and with intent to receive therefor, directly and indirectly, a bonus, gift, and compensation; said defendant not being then and there legally authorized to practice medicine within this state, and not being then and there registered to practice medicine according to law."

The scope of the complaint is to charge the defendant with holding himself out as a practitioner of medicine, in violation of chapter 193, § 8, of the general laws of Rhode Island, without having a license from the State Board of Health. After a verdict of guilty in the superior court, the defendant filed his motion for a new trial, on the ground that such verdict was against the law and the evidence. This motion was denied by the justice presiding at the trial, whereupon the defendant filed his bill of exceptions. These exceptions cover the refusal of the court to quash the complaint and warrant, the denial of a motion to direct a verdict, the refusal to instruct the jury as requested, and the rulings of the court as to the admission and exclusion of testimony.

[1] The necessity for some legislation designed to regulate the practice of medicine and surgery has been very generally recognized. Legislatures in many of the states have enacted laws looking to the protection of the public from unscrupulous persons, or persons of insufficient education or acquirement, who might seek to treat disease and bodily ailments. Under the laws of this

state any person desiring to practice medicine therein must first observe certain regulations regarding registration, must present satisfactory evidence of fitness to practice and pass such examination as the State Board of Health may require. Then, if the State Board of Health is satisfied that the attainments of the applicant are such as would warrant it, a certificate will be issued by said board authorizing him to practice medicine. Without such certificate no one is authorized to practice medicine in this state.

Section 8, c. 193, Gen. Laws, is as follows: "Sec. 8. Any person who, not being then lawfully authorized to practice medicine within this state, and so registered according to law, shall practice medicine or surgery or attempt to practice medicine or surgery, or any of the branches of medicine or surgery, after having received therefor or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, or compensation, or who shall open an office with intent to practice medicine or shall hold himself out to the public as a practitioner of medicine, whether by appending to his name the title of doctor or any abbreviation thereof, or M. D., or any other title or designation implying a practitioner of medicine, or in any other way, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined fifty dollars, and upon each and every subsequent conviction shall be fined one hundred dollars and imprisoned thirty days, either or both, in the discretion of the court; and in no case when any provision of this chapter has been violated shall the person so violating such provision be entitled to receive compensation for services rendered." Upon this section of the statute the complaint against the defendant is founded, and under it he was convicted in the court below.

It appears from the testimony of the defendant that at the time of the trial he was 52 years of age; that in his boyhood he attended a grammar school, which he left at the age of 13 or 14 years, and he *thinks* that he attended for two terms some institute, the name or location of which he does not disclose; that after leaving the institute he carried on the business of a mason at Brainerd, Minn., later coming to Massachusetts, where he was employed as a bricklayer; that at the age of 44 he attended for 3 or 4 months a school of chiropractics at Brainerd, Minn., which was carried on by a Mrs. Lynch, and called the Lynch School. In describing this school the defendant says "there was no set term, no set time for anybody to practice at that time. There was no established school in the country, but I went there and stayed 3 or 4 months in it." After leaving the Lynch School the defendant returned to Massachusetts, where he opened an office and practiced as a chiropractor for

a year or more, removing from there to Providence, where he has since remained and continued the chiropractic treatment. In establishing himself in Providence, he rented two connected rooms in the Caesar Misch Building, upon the door of one of which he caused to be inscribed "Dr. Frank Siveny, Chiropractor," and upon a table in the room devoted to the reception of patients he exposed for distribution certain cards and pamphlets designed to convey information as to the great benefits to be derived from the chiropractic treatment, and specifying the time within which certain serious diseases and ailments could be cured thereby.

The word "chiropractic" or "chiropractor," according to the defendant, is coined from two Greek words, "chiro" and "practicas," signifying something done with the hands. The defendant in his testimony makes use of the words "cure" and "cured" two or three times, apparently in a moment of forgetfulness; but on the whole he seems to studiously avoid the use of these words, evidently under the impression that any attempt to cure disease would bring him within the practice of medicine. He further undertakes to exclude himself from the practice of medicine by showing that he does not take the pulse or ascertain the temperature of the patient, does not administer drugs, and does not otherwise employ the means usually resorted to by physicians in aid of their diagnosis. He claims that the chiropractic idea is not to cure the disease, but to remove the cause, and thus allow or bring about a recovery therefrom; a distinction which we find some difficulty in appreciating. The real design and scope of this treatment, as practiced by the defendant, is succinctly set forth in the card which he prepared or adopted and distributed. The card is as follows:

"Hours, 9 to 5. Sundays and evenings by appointment. Frank Siveny, D. C. 402 Westminster Street, Caesar Misch Building, Providence, R. I.

"**CHIROPRACTIC:** A new science of adjusting the causes of disease without drugs, based on a thorough knowledge of the nervous system. Nerves which control the various functions of the body emerge from small openings between the bony segments of the spinal column. A slight variation of these bones will cause pressure on a nerve and cut off the flow of mental impulses, the result of which is disease. The chiropractic method is to adjust the abnormality, remove the pressure, and thus permit the nerve to regain its normal size and duty, thereby removing the disease.

"Because it is new, don't say 'impossible.' That is what was said of Marconi. Do not condemn until you investigate. I am the only practitioner of this science in New England.

"If you have any of the following ailments, stop taking drugs. Let the chiroprac-

tor adjust the causes. He knows where to find the causes of your disease, and will prove it if you give him an opportunity. Abscesses, asthma, appendicitis, blindness, Bright's disease, brain fever, bladder troubles, bronchitis, cancer (any part of the body), constipation, cataract, cholera morbus, childbed fever, catarrh, colic, curvature, diabetes, diarrhoea, dysmenorrhoea, dropsy, dysentery, deafness, diphtheria, epilepsy, eczema, erysipelas, female diseases, fevers (all types), goitre, gall stones, gout, gastroynia, hernia, hysteria, hay fever, heart disease, hydrocele, impotency, indigestion, insanity, jaundice, kidney trouble, liver diseases, la grippe, locomotor ataxia, lumbago, lupus, mumps, measles, malarial fever, meningitis, neuralgia, nervous debility, pharyngitis, palsy, pleurisy, paralysis, pneumonia, peritonitis, piles, quinsy, rheumatism, sarcocele, sciatika, sight, spleen, scrofula, St. Vitus Dance, stuttering, spinal meningitis, spinal diseases, tumors (any part of the body) typhoid, ver-tigo, worms.

"Diseases marked with asterisk are special. This list is only a small portion of the diseases we adjust for. Common names are used, so that every one may understand. Don't be discouraged if your disease is not listed here, for space is limited."

The pamphlet by G. H. Patchen, M. D., entitled "The Chiropractic Idea," was also circulated by the defendant, and bears upon the back of it in large type, "Presented by Frank Siveny, Chiropractor, 402 Westminster St., Providence, R. I., Cæsar Misch Bldg."

This pamphlet contains, among other things, the following statement: "Abstractedly, the term [chiropractor] is a proper one to apply to any trade or profession in which the hands are the tools used in performing any specified work; but, applied to the study of the cause, nature, and elimination of disease, it means a science and philosophy which claims to be able, not only to analyze and locate, unerringly, the physical cause of disease, but also to provide an original, unique, and adequate means of adjusting or removing this cause more promptly, radically, and permanently than by any other method known at the present time." Further on, the pamphlet enumerates some 30 or more serious diseases, the causes of which can be removed and a recovery accomplished within certain specified periods by the employment of the chiropractic treatment.

In the case of *State v. Mylod*, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428, it was held that in the construction of penal statutes it was the well-established rule that words and phrases must be taken in their ordinary acceptance and popular meaning, unless a contrary intent appears; that the practice of medicine, as ordinarily or popularly understood, has relation to the art of preventing, curing, or alleviating disease, and consists in the discovery of the cause and nature of

disease, and the administration of remedies or the prescribing of treatment therefor. The practice of medicine does not wholly depend upon the administration of drugs. It is a matter of common knowledge that the use of drugs by doctors of medicine has materially decreased, especially during the last 20 years or more, and that not infrequently the medical practitioner limits his efforts to cure or alleviate disease to the regulation of diet and exercise, or to prescribing some change of scene, climate, or environment, reaching a conclusion as to the needs of his patient after learning his physical condition through a proper diagnosis, in which he is materially aided by his knowledge of disease, its origin, its anatomical and physiological features, and its causative relations.

The question now is: Has the defendant been guilty of practicing medicine within the terms of the statute, the phrase "practice medicine" to be taken in its ordinary acceptance and popular meaning? We think he has. He has undertaken by a certain system or method of treatment to cure or alleviate disease or pain. His intentions so to do are clearly evidenced by the testimony of witnesses and the literature which he has adopted and distributed in the advertisement of his business, and he has exacted a certain compensation for each treatment or group of treatments. To refer again to the Patchen circular, we find that the defendant boldly claims to be versed in that science and philosophy which enables him to analyze and unerringly locate the physical cause of disease, and to be capable of applying the proper remedy therefor. If it be assumed that the method or system practiced by the defendant is of any value, it must also be assumed that some knowledge of disease, its origin, its anatomical and physiological features, and its causative relations must be employed to locate and determine its nature, unless the defendant would have us believe that all the ills to which flesh is heir proceed from the impingement of nerves between the sectional vertebræ of the spine, and that whenever one or more displaced sections are brought into proper alignment the disease will disappear without the need of any determination on the part of the chiropractor as to the location of the affected part or the nature of the ailment. This view of the matter we are not prepared to accept.

[2] The defendant has taken an exception to the refusal of the court below to quash the complaint on the ground that the offense is not stated with a clearness and particularity sufficient to apprise him of the charge against him and enable him to prepare his defense. We do not see any merit in this exception. There is no difficulty in ascertaining from the perusal of the complaint that the defendant is charged with holding himself out as a practitioner of

medicine, versed in and willing to practice the art of preventing, curing, and alleviating disease and pain, for a reward or fee, without the authorization of the State Board of Health. The defendant sets up in his brief that he is charged, in the first place, with "opening an office with intent to practice medicine and surgery by appending to his name 'Chiropractor.'" This partial statement is, by itself, incorrect and misleading. The complaint charges that the defendant "did open an office with intent to practice medicine, and did hold himself out to the public as a practitioner of medicine by appending to his name the title of 'Chiropractor' and by representing that he was versed in and willing to practice for compensation the art of preventing, curing, and alleviating disease and pain." The attempt of the defendant to divide the charge in the complaint into a series of separate charges, and then to individualize them in his argument, does not seem to us to be warranted or to serve any useful purpose.

[3] The plaintiff's exceptions numbered 2, 3, 4, and 6 relate to the rulings of the court as to the admission and exclusion of evidence. The defendant asked Dr. Gardner T. Swarts, the complainant, if he issued the complaint on the strength, alone, of the word "Chiropractor." This was objected to, and we think properly excluded by the court. It was immaterial. The complaint speaks for itself, and the mental attitude of Dr. Swarts in making the complaint is in no way important.

[4] The defendant also interrogated some of the witnesses with a view to showing the benefits resulting to some of the parties who had been treated by the defendant, and that in some cases he had succeeded in alleviating their troubles after regular doctors of medicine had made the attempt and failed. These questions were objected to, and we think properly ruled out as immaterial. The result of defendant's treatment is of no consequence in the present inquiry. The purport of the complaint is that the defendant had been practicing medicine without authority. The result of such practice to the patient, if shown, could not have aided the jury in determining the question submitted to them.

[5] The defendant also objected to the introduction of certain books and pamphlets descriptive of the chiropractic treatment, and setting forth its advantages and beneficial results to those who might be suffering from either of the serious diseases and ailments enumerated therein. We do not find any error in the introduction of this evidence. These books, etc., related to chiropractic schools and methods, to which the defendant had referred with approval in his testimony.

[6] The defendant requested the court to charge the jury that, "If the jury find that a chiropractic is not a practitioner of medicine and surgery, then your verdict should be for the defendant." This request was rightly refused. The question for the jury was not thus limited. The real question was the broader one, as to whether the defendant, under all the evidence in the case, had been guilty of practicing medicine without authority.

The defendant's exceptions are overruled, and the case is remitted to the superior court for sentence.

DUFFY et al. v. McHALE.

(Supreme Court of Rhode Island. Dec. 6, 1912.)

1. LIMITATION OF ACTIONS (§ 25*)—JUDGMENTS—ACTION ON.

Decrees of the probate court, allowing accounts and balances in favor of a guardian, being ex parte and liable to be reopened for fraud or manifest mistake, do not constitute judgments in favor of the guardian, as against the ward, so as to make the statute of limitations concerning judgments applicable to claims allowed the guardian.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 118-131; Dec. Dig. § 25.*]

2. LIMITATION OF ACTIONS (§ 102*)—ACCRUAL OF ACTIONS—RUNNING OF STATUTE.

The statute of limitations does not begin to run on a claim of a guardian against his ward while the relation of guardian and ward continues; that relation precluding the institution of a suit by the guardian against his ward.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 494-505; Dec. Dig. § 102.* Guardian and Ward, Cent. Dig. § 483.]

3. GUARDIAN AND WARD (§ 68*)—ADVANCEMENTS—LIABILITY OF WARD.

Where a guardian advances money to preserve his ward's real estate, when the latter's income is insufficient to pay his debts and provide for his maintenance, such advances are proper and may be recovered.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 264-282, 497; Dec. Dig. § 68.*]

4. EXECUTORS AND ADMINISTRATORS (§ 91*)—GUARDIAN AND WARD (§ 37*)—POLICY OF LAW—IRREGULAR ACTS.

It is the policy of the courts to sustain, if possible, the acts of executors, administrators, or guardians, when their action has been in good faith and without detriment to the estates and interests intrusted to them, although irregular in some particulars.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 397, 398, 400-402; Dec. Dig. § 91.* Guardian and Ward, Cent. Dig. § 168; Dec. Dig. § 37.*]

5. GUARDIAN AND WARD (§ 153*)—ACCOUNTS—FINAL ACCOUNT—WHAT CONSTITUTES.

Annual partial accounts of a guardian, not containing all the disbursements and advancements, are not final accounts.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 508; Dec. Dig. § 153.*]

6. EXECUTORS AND ADMINISTRATORS (§ 224*)—FILING OF CLAIMS—STATUTES.

While Gen. Laws 1896, c. 215, § 2, allowing the presentation of claims against estates

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of deceased persons to the administrator, and not requiring such claims to be filed in the probate court, was still in force, it was not necessary for an administrator to file his claim in the probate court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 768-788; Dec. Dig. § 224.*]

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Proceeding by Thomas McHale, administrator, for settlement of his accounts. From a judgment allowing his accounts, Margaret Duffy and others appeal. Affirmed.

Cooney & Cahill, of Providence, for appellants. Doran & Flanagan, of Providence, for appellee.

SWEETLAND, J. This is an appeal from the allowance by the probate court of Central Falls of the final account of the appellee, Thomas J. McHale, as administrator of James McHale.

In 1891 the appellee was appointed and qualified as guardian of his nephew and niece, James McHale and Margaret McHale, minors. These wards were brother and sister, orphans, and had no other brothers or sisters. The said Margaret died in September, 1897, and the said James in 1905. No administration was taken on Margaret's estate. The appellee as guardian of the said minors, rendered four joint accounts relative to their estates in his hands, and the same were allowed by the probate court of Central Falls. These joint accounts treated every item of receipt and disbursement as the same for each ward, and the balances as equally in favor of or against each of them. The fourth and last of these joint accounts, rendered just after the death of said Margaret, included as disbursements all the debts arising from the last sickness, funeral, and burial of said Margaret; and in said account a balance due the guardian of \$783.45 was declared, and the said account was allowed by said probate court on December 22, 1897. Without approving this method of joint accounting, the court finds that during the period covered by said fourth joint account the estates of the two wards consisted exclusively of real estate, of which they were tenants in common, and the rents derived therefrom, in which each of the two wards had an equal interest, and that the said James was the sole heir of said Margaret, and took her interest in said real estate, subject to the payment of her debts and funeral expenses. Furthermore, the appellants have filed in the papers of this case a written withdrawal of their objection to the charging of said balance of \$783.45 due under said fourth account entirely against the estate of said James, which objection they formerly made on the ground that it was a joint debt, and should be charged one-half

against the estate of said Margaret and one-half against the estate of said James.

Said appellants, however, still urge upon other grounds their objection to the allowance of said balance as part of a claim in the administrator's account now under consideration. After said fourth joint account the appellee, as guardian of said James, rendered six accounts to said probate court, in none of which does he carry forward or charge said balance of \$783.45. The seventh of the accounts of the appellee as the guardian of said James, being the third after said joint accounts, was allowed by said probate court on December 10, 1902, and showed a balance of \$19.19 due to said guardian. This balance, also, was not carried forward and charged in the subsequent accounts. The last account of the appellee as guardian, rendered after the death of said James and allowed by said probate court, showed a balance of \$127.91 in the hands of said guardian. The appellee was appointed administrator of the estate of said James, and duly qualified. In his final account, as such administrator, now under consideration, the appellee has allowed as a debt against the estate, and states that "he has paid out," his claim "for balance due him on guardian's accounting \$674.73." This item alone of the account is disputed by the appellants. It is made up by adding together the balances of \$783.45 and \$19.19, due to the guardian upon the two accounts referred to, and deducting from that sum the balance of \$127.91 found in his hands upon his last guardian's account. The appellee's final account as administrator, including said item, was allowed by said probate court, and upon appeal it was allowed by the decision of the presiding justice of the superior court sitting without a jury. The matter is before us upon exception to said decision of the superior court.

In support of this exception, the appellants urge that the claim of the appellee, based upon said balances of \$783.45 and \$19.19, should not be allowed, because a right of action as to each of these balances accrued to the appellee at the time of the allowance of the account in which the balance is found, and therefore the claim is barred by the statute of limitations. Whatever may be said as to the balance of \$783.45, this objection of the appellants has no application to the balance of \$19.19, as that was allowed by the probate court on November 29, 1902. The said James McHale died in 1905. The appellee was appointed administrator upon the estate of said James, May 24, 1905, and as far as appears at once allowed said claim against the estate.

[1] To the contention of the appellants the appellee has replied that the decrees of the probate court allowing the accounts showing said balances have the force of judgments, and that the claim accruing upon each de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cree would not be barred by the statute of limitations until 20 years after the entry of said decree. We do not regard the decrees of a probate court, approving the annual accounts rendered by a guardian during the course of the guardianship, as final and conclusive upon the ward. These partial, periodical accounts, although notices of their pendency were given by publication in a public newspaper, and although they were allowed by the probate court, are, in effect, by reason of the disability of the ward, *ex parte* proceedings, and they may be reopened on the ground of fraud or manifest or gross mistake. Such decrees furnish *prima facie* evidence of the correctness of the accounts approved; but they do not constitute judgments in favor of the guardian against the ward.

[2] There is, however, an ample and conclusive answer to the claim and argument of the appellants. The statute of limitations is not applicable to the circumstances of the matter as urged by the appellants. The statute does not begin to run until there is a claimant capable of suing, and a person capable of being sued. The position of suitor and defendant is inconsistent with the relation existing between guardian and ward, which relation calls for the exercise, on the part of the guardian, of oversight, control, and defense of the ward's person and estate. We know of no authority to the contrary, and it is in accord with reason that the law will not permit the guardian to sue his ward while that relationship continues. Hence no right of action against his ward can be said to have accrued to this appellee at the time when either of said accounts, showing a balance in favor of the appellee, was allowed by the probate court. In the lifetime of the said James McHale the statute did not begin to run against any claim which the appellee had for advances made for the benefit of said James during the guardianship.

[3] Any such advances would create a valid claim against the estate of said James after his death, provided such advances were ones proper to be made by the guardian. The balances in question in favor of the guardian clearly arose by reason of advances made by the guardian to preserve the ward's real estate, when the ward's income was insufficient to pay the debts of the ward and to provide for his maintenance. The action of the probate court in approving such advances was proper.

If the guardian had been of greater experience in such matters he would have carried forward the balances in his favor into his subsequent accounts; and the amount that he now claims against the estate of his ward, which is the item under consideration, would have appeared as a balance in his favor in his last account rendered as guardian after the death of his ward.

[4] We would not commend the method of accounting adopted by the appellee, but it was employed honestly by him. From an inspection of the entire series of his accounts, approved by said probate court, we can find without difficulty the exact record of his dealings with his ward's estate and the true final balance of his account. From the nature of probate proceedings it frequently happens that persons without experience or training in such matters are called upon to act as executors, administrators, or guardians. They may be the persons most available, and notwithstanding their lack of experience they may be the persons most suitable for appointment. It is the policy of the courts to sustain, if possible, the acts of such executors, administrators, or guardians, when the court finds that their action has been in good faith, and without detriment to the estates and interests intrusted to them, although, perhaps, such action has been irregular in some particulars.

[5] According to the true intent of a final account, the appellee has never rendered his final account as guardian showing the condition of his account with his ward's estate at the termination of the guardianship. However, it would serve no good purpose, in connection with the matter that is before us now, to require the appellee to go back to the probate court and render his final account as guardian. The question before us can as well be determined from an examination of his annual partial accounts. Such question is: Did the appellee make the advances for his ward's benefit which are the basis of his claim, and did such advances, if made, remain unpaid at the time of the ward's death? An inspection of all said guardianship accounts approved by the probate court furnishes clear *prima facie* proof of the validity of the appellee's claim. No attempt has been made by the appellants to discredit these accounts. This state of the evidence warranted the finding of the probate court and of the superior court that the item under consideration constituted a valid claim against the intestate's estate.

[6] The appellants further object to the decision of the justice of the superior court on the ground that the appellee did not file his claim in the probate court within one year after his appointment as administrator. There is no force in this objection. At the time of the appellee's appointment as administrator the statute permitted the presentation of claims against estates of deceased persons to the administrator, and did not require such claims to be filed in the probate court. Gen. Laws 1896, c. 215, § 2.

The appellants' exception is overruled, and the case is remitted to the superior court for further proceedings in accordance with the decision of the superior court.

In re CARTER et al.

(Supreme Judicial Court of Maine. Dec. 4, 1912.)

1. WILLS (§ 365*)—PROBATE—APPEAL—PETITION—MOTION TO DISMISS.

Motion to dismiss a petition to be allowed to appeal from a decree admitting a will to probate, based on the petition not making certain allegations, is equivalent to a demurrer to the petition.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 830; Dec. Dig. § 365.*]

2. WILLS (§ 365*)—PROBATE—APPEAL—PETITION—JURISDICTIONAL AVERMENTS.

Under Rev. St. c. 65, § 30, providing that if a person entitled to appeal from a probate decree "from accident, mistake, defect of notice or otherwise without fault on his part, omits to claim or prosecute his appeal" as provided, the Supreme Court, "if justice requires a revision," may allow an appeal, the jurisdictional facts, which a petition for leave to appeal must aver, are accident, mistake, defect of notice, and want of fault on petitioner's part, and do not include the fact that "justice requires a revision"; this being a mere matter of proof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 830; Dec. Dig. § 365.*]

3. WILLS (§ 365*)—PROBATE—APPEAL—PETITION—MATTERS OF PROOF.

The petition for leave to appeal from a probate decree, because of petitioner, through accident, mistake or defect of notice, without fault on his part, having omitted to seasonably claim or prosecute his appeal, need not state with technical precision matters of proof of such excuses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 830; Dec. Dig. § 365.*]

Exceptions from Supreme Judicial Court, Knox County, at Law.

Petition by Emma Monroe Carter and others to enter appeal from a probate decree. Petition dismissed, and petitioners bring exceptions. Exceptions sustained.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, and KING, JJ.

Coggan & Coggan, of Boston, Mass., for petitioners. R. I. Thompson, of Rockland, for Inhabitants of South Thomaston.

SPEAR, J. This case comes up on exceptions by both the petitioner to enter an appeal from the decree of the judge of probate admitting to probate the will of Harriett A. Monroe, late of Rockland, deceased, and by one of the beneficiaries named in the will to the allowance of an amendment of the petition. The petition is as follows:

"Respectfully petitions and represents to this honorable court the undersigned:

"That Harriett A. Monroe, who last dwelt in Rockland, in said county, died on the 26th day of January, A. D. 1911.

"That your petitioners are heirs at law and next of kin of the deceased.

"That there was presented to the probate court for said county of Knox a petition asking for the probate of a certain instrument purporting to be the last will and testament of said Harriett A. Monroe, by

David V. Smith, the executor named therein.

"That upon said petition an order of notice issued out of said probate court, with order thereon, that the same be published for three weeks successively in the Rockland Opinion, a newspaper published at said Rockland, giving notice to all parties to appear at a probate court to be held at Rockland in and for said county on the 21st day of February, A. D. 1911.

"That on said 21st day of February, said petition being uncontested, no one appearing to oppose the granting of said petition, a decree was entered in said probate court proving and allowing said document as the last will and testament of the said deceased, Harriett A. Monroe.

"That your petitioners live in a remote part of the state, having had no previous knowledge of the sickness or death of the deceased, nor did any knowledge of the presentation of said instrument to said court come to their notice.

"That they were entirely ignorant of the death of the deceased, or of the existence of any instrument purporting to be the last will of the deceased, or that any steps had been taken in the settlement of her estate.

"That through accident, mistake, and defective notice, and without fault on your petitioners' part, they omitted to claim or prosecute their appeal, or to appear in said proceedings.

"And your petitioners set forth as the reasons of said appeal that said instrument filed and admitted to probate as the last will and testament of the said deceased, Harriett A. Monroe, was not the will of the said Harriett A. Monroe, and that the same was not duly executed, that the said deceased was not at the time of the alleged execution of said instrument of sound and disposing mind, but was of unsound mind, and that undue influence was exerted upon the said deceased, thereby rendering the execution of said instrument, if executed at all, null and void.

"Wherefore your petitioners pray that they may be allowed to enter an appeal from the decree of said court of probate to this honorable Supreme Court of Probate, and be allowed to prosecute their appeal as if it had been seasonably done, and that due notice to all parties adversely interested may be given."

The inhabitants of South Thomaston, beneficiaries under the will, moved to dismiss the petition for the following reasons:

"And now comes the inhabitants of the town of South Thomaston, beneficiaries named in the will of said Harriett A. Monroe, and upon whom a duly attested copy of said petition has been served, and moved that said petition be dismissed for the following reasons, namely:

"(1) Because said petition does not allege that justice required a revision.

"(2) Because said petition does not allege that any will of said Harriett A. Monroe was ever presented for probate in the probate court of Knox county. It alleges only a petition therefor.

"(3) Because said petition alleges that an order of notice on said will was 'issued out of said probate court,' but does not allege that said order was not complied with.

"(4) Because said petition does not allege in what part of the state said petitioners lived at the time of the sickness or death of said Harriett A. Monroe, or at the time of the presentation of her will for probate, or at the time of the probate thereof.

"(5) Because said petition does not allege that the petitioners named therein did not have knowledge of the presentation of said will for probate. It says only that they had no knowledge of notice.

"(6) Because there is nothing in said petition to show that the petitioners did not have such knowledge within 20 days after the probate of said will (February 21, 1911), so that they or either of them might have appealed to the Supreme Court of probate within that time if they or he had so desired."

[1-3] The justice sitting as the Supreme Court of probate dismissed the petition upon the first, fourth, and sixth ground alleged in the motion. To this ruling the petitioners took exceptions. The motion to dismiss was equivalent to a demurrer. In *Gurdy, Appellant*, 101 Me. 73, 63 Atl. 322, involving a motion to dismiss, the court held: "This is in effect a demurrer. In passing upon the issue thus raised all the allegations in the appeal and reasons of appeal must be taken as true." At the threshold, therefore, is raised the question whether this petition is sufficient, assuming every statement to be true, to give the Supreme Court of probate jurisdiction to hear the evidence for the purpose of determining the question of fact, whether justice required such revision of the decree, as would authorize the appeal to be entered and prosecuted. The language of the statute (R. S. c. 65, § 30), authorizing the appeal, is: "If any such person from accident, mistake, defect of notice, or otherwise without fault on his part, omits to claim or prosecute his appeal, as aforesaid, the Supreme Court, if justice requires a revision, may, upon reasonable terms, allow an appeal to be entered and prosecuted. * * *" But one of the objections to the validity of the petition is because it "does not allege that justice requires a revision." It is not necessary that it should. It is not

a jurisdictional fact. The jurisdictional averments of the statute are accident, mistake, defect of notice, and want of fault on the part of the petitioner. These requirements are conditions precedent to any further inquiry, and hence must be alleged. Upon failure to aver and establish them the case ends, irrespective of its merits. But upon proof of these prerequisites then the court may go further, and inquire whether "justice requires a revision; this being a matter of proof and not of jurisdiction." In *Danby v. Dawes*, 81 Me. 30, 16 Atl. 255, the court say: "Still it does not necessarily follow that the petition shall aver everything which may be proved to authorize jurisdiction. * * * We do not think that the technical rules of pleading should be stringently applied in a case of this kind." In *Gurdy, Appellant*, 103 Me. 356, 69 Atl. 546, where the question of jurisdiction was directly raised, the court say: "It is not denied that when an interested party, from accident, mistake, or otherwise without fault on his part, omits to claim an appeal, the Supreme Court of probate has authority to allow an appeal to be entered." In addition to these jurisdictional averments, it was held in *Gurdy, Appellant*, 101 Me. 73, 63 Atl. 322, supra, that, to justify an entry of an appeal, two things are indispensable: "Appeal must show what order, sentence, decree or denial of the judge of probate is appealed from; and taking all allegations in the appeal and the reason therefor to be true, it must appear that there was error." These are both found in the petition before us. The second reason for dismissal is obviated by the averment in another paragraph in the petition that the will was probated on the 21st day of February following the date of the petition. The other objections clearly go to matters of proof rather than averment. In *Gurdy, Appellant*, 101 Me. 73, 63 Atl. 322, supra, the rule governing this class of cases was stated as follows: "Technical precision of statement and pleading are not required in probate appeals to the same extent as in actions at law." *Danby v. Dawes*, 81 Me. 30, 16 Atl. 255; *Chase v. Bates*, 81 Me. 182, 16 Atl. 542.

Under this rule of liberal interpretation, it is the opinion of the court that the petition was sufficient to authorize the court to proceed to a hearing thereon. Upon this conclusion it becomes unnecessary to consider the exceptions to the allowance of the amendment.

Exceptions to the dismissal of the petition sustained.

RODICK v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine. Dec. 4, 1912.)

1. NEW TRIAL (§ 71*)—CONCLUSIVENESS OF VERDICT—CONFLICTING EVIDENCE.

In an action against a carrier for personal injuries, *held*, that a finding, on conflicting evidence, that plaintiff fell upon a part of defendant's wharf set apart for passenger travel was not so manifestly wrong as to require it to be set aside.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

2. CARRIERS (§ 286*)—CARRIER OF PASSENGERS—PERSONAL INJURIES—CONDITION AND USE OF PREMISES.

Where part of carrier's wharf was used by passengers on foot, and a walk led up the wharf to a part of it across which there was no barrier, and over which there were no warnings, so that a passenger could go directly to carriages allowed to wait on that part of the wharf, on the carrier's private property over which it had control, there was an invitation to a passenger to use that way; and the carrier was bound to use due care toward passengers upon it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.*]

3. CARRIERS (§ 286*)—CARRIER OF PASSENGERS—PERSONAL INJURIES—ACCUMULATION OF ICE.

Where a carrier, after a heavy snowfall, removed only a part of it from its wharf, and scraped the sidewalk in front of it, but allowed ice to remain in places on the walk and outside of it, without attempting to remove or sand it, a passenger's fall on the ice was due to a condition for which the carrier was responsible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1152; Dec. Dig. § 286.*]

4. CARRIERS (§ 286*)—CARRIER OF PASSENGERS—PERSONAL INJURIES—DUE CARE.

A passenger walking along a wharf in the usual way with other passengers from the same boat, although she did not look at the surface of the wharf to discover ice, and who, had she so looked, would not have seen it, because it was covered by snow, was in the exercise of due care, since she had a right to assume that the carrier had provided a reasonably safe walk.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1152; Dec. Dig. § 286.*]

5. EVIDENCE (§ 359*)—REVIEW—DISCRETION OF TRIAL COURT—ADMISSION OF EVIDENCE—PHOTOGRAPHS.

The admissibility of photographs in evidence, whether they are sufficiently verified, whether they appear to be fairly representative of the object portrayed, and whether they may be useful to the jury, lies largely within the discretion of the trial judge, whose discretion, unless shown by the facts to have been abused, is not the subject of exception; but where a photograph, in a passenger's action for injuries, instead of showing simply the conditions existing at the time, showed the plaintiff standing at the place where she claimed to have fallen, that place being a controverted point, it would have been a wiser exercise of discretion to have excluded the photograph, although its admission was not such an abuse of discretion as to justify a new trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 749-755; Dec. Dig. § 359.*]

6. EVIDENCE (§ 359*)—DOCUMENTARY EVIDENCE—PHOTOGRAPHS—CONDITION OF PREMISES.

Photographs, if admissible in evidence, should simply show the conditions existing at the time, to aid the jury in applying the oral evidence to the particular location. They should represent inanimate, not animate, objects, as otherwise they tend to unduly emphasize the claims or evidence of one of the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 749-755; Dec. Dig. § 359.*]

7. CARRIERS (§ 286*)—CARRIER OF PASSENGERS—PERSONAL INJURIES—CONDITION OF PREMISES.

It is the duty of a carrier to exercise all ordinary care to maintain its premises, given to the use of passengers, in such a reasonable and suitable condition that passengers, who are themselves in the exercise of ordinary care, may use them in safety.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.*]

8. DAMAGES (§ 132*)—MEASURE—EXCLUSIVE DAMAGES—PERMANENT INJURIES TO FOOT AND ANKLE.

A verdict of \$4,830, in an action against a carrier by a woman employed at \$1,400 a year, whose earning capacity had been reduced, whose injury to her foot and ankle was serious, with strong probability, if not absolute certainty, of being permanent, whose expenses had been large, and whose suffering had been severe, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

On Motion and Exceptions from Supreme Judicial Court, Hancock County, at Law.

Action by Elizabeth M. Rodick against the Maine Central Railroad Company. Judgment for plaintiff, and defendant brings the case up on motion and exceptions. Motion and exceptions overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Deasy & Lynam, of Bar Harbor, for plaintiff. Hale & Hamlin, of Ellsworth, and Forrest Goodwin, of Skowhegan, for defendant.

CORNISH, J. On the evening of February 8, 1911, the plaintiff, a passenger on a steamboat of the defendant company, landed at its wharf in Bar Harbor, and, while passing along and upon the wharf on her way to take a public conveyance, slipped upon ice, fell, and was seriously injured. She obtained a verdict of \$4,830, and the defendant has brought the case to this court on motion and exceptions.

Motion.

[1, 2] The wharf of the defendant company corresponded to the station grounds of a railroad for the arrival and departure of passengers. It covered considerable space; a portion being used for the passenger station, a portion for the freight station, and the rest for passengers on foot, or for conveyances, which were permitted to drive upon the wharf. The usual course of passen-

ger travel from an incoming steamer was up the slip beneath an awning toward the passenger station, and then around the corner of the station and along a walk 12 feet wide running beside the station, with a railing or guard on the outer side. This walk led off the wharf to the public highway; and outside this railing carriages, public and private, were allowed to drive upon the wharf to bring and carry away passengers. A space of about 4 or 5 feet in width, slightly raised, next the rail formed a buffer against which the rear wheels of the carriages rested. At the end of the railing, near the corner of the station, was an electric light pole. At various places there were openings in the railing to enable passengers to pass through and reach their carriages. Between the end of the railing at the electric light pole, near the northwest corner of the passenger station, across to the freight station, was no guard or railing to prevent a passenger going directly to a team; and teams were permitted to wait at that portion of the wharf. In the summer a barrier, in the form of a chain, was stretched across from the light pole to one of the posts supporting the awning to prevent such travel; but this was not used in the winter.

The plaintiff, on the evening in question, had reached a point near the light pole, when she suddenly slipped on ice and fell. The sharp issue of fact submitted to the jury in the charge was the precise spot where she fell; the case apparently having been tried upon the theory that if she was injured upon the passenger walk, or within that portion of the wharf set apart for passenger travel, the defendant company would be liable, while if she was injured at a point a few feet outside, where she may have gone to take a team, the company would be free from liability. A large number of witnesses on both sides testified as to the exact spot where she fell, and where she was found after the fall; and upon the issue submitted the jury must have found that the plaintiff's contention was correct. The evidence is conflicting; but we cannot say, after carefully studying and comparing it, that the finding on this point is so manifestly wrong as to be set aside. Were the question before the court without the verdict of a jury, we might conclude that the plaintiff, when she reached the pole, instead of turning to the left and following the sidewalk, took a step or two to the right to reach her team. But we are not prepared to say that even then the company would be free from blame. It knew the situation. It permitted teams to drive upon that portion of the wharf and wait for passengers; and it might naturally expect these passengers would be obliged to take a few steps beyond the sidewalk to reach the waiting teams. No rail or chain at that point suggested a barrier. No sign warned passengers not to proceed to the teams. On the contrary, the situation was

such as to imply an invitation. This was not a public highway in which the teams were waiting, and over which the defendant would have neither control nor responsibility. It was the defendant's private property, devoted to the use of the public; and it was bound, in law, to use due care toward passengers upon it. *Keefe v. B. & A. R. R. Co.*, 142 Mass. 251, 7 N. E. 874.

[3] The plaintiff's fall was due to a condition for which the defendant was responsible. A heavy snow had fallen on the preceding day. A portion of it had been removed from the wharf, and the sidewalk had been scraped. But the evidence leads to the conclusion that ice had been allowed to remain at points both on the walk and just outside it; and no attempt was made to remove or sand it until after the accident.

Upon this branch of the case—the want of due care on the part of the defendant—the verdict should not be disturbed.

[4] Nor are we able to discover any want of due care on the part of the plaintiff. Her conduct was that of the ordinarily prudent woman under similar circumstances. She was walking along in the usual way, as were the other passengers from the same steamer; and it was not incumbent upon her to keep her eyes fastened on the surface of the wharf to discover ice. She had a right to assume that the defendant had provided a reasonably safe place for her to pass over; and had she looked she would have discovered nothing, because the ice was concealed by a slight covering of snow, which made it still more treacherous.

The motion cannot be sustained.

Exceptions.

[5, 6] 1. The first exception lies to the admission of two photographs of the locus, introduced by the plaintiff against the defendant's objection. These were taken in the fall after the accident, and their admissibility is challenged because the plaintiff appears in the photographs as standing in the place in which she claims to have fallen; that spot being, as we have already said, a sharply controverted point.

This question of the admissibility of photographs in evidence has been several times considered by this court; and the rule of practice in this state has been firmly established. Their admission or rejection lies largely within the discretion of the presiding justice; and the exercise of that discretion, unless the court finds the facts such as to show an abuse of discretion, is not the subject of exception.

"Whether it is sufficiently verified, whether it appears to be fairly representative of the object portrayed, and whether it may be useful to the jury, are preliminary questions addressed to him and his determination thereon is not open to exceptions." *Jameson v. Weld*, 93 Me. 345, 45 Atl. 299. In the application of this rule, a wide latitude is left

to the presiding justice, and we find that no exceptions were sustained by the law court to the admission of photographs in *State v. Hersom*, 90 Me. 273, 38 Atl. 160, and *Jameson v. Weld*, 93 Me. 345, 45 Atl. 299, nor to their exclusion in *Stone v. Street Railway*, 99 Me. 243, 59 Atl. 56, and *Babb v. Paper Co.*, 99 Me. 298, 59 Atl. 290.

The same rule prevails in Massachusetts. *Blair v. Pelham*, 118 Mass. 420; *Verran v. Baird*, 150 Mass. 141, 22 N. E. 630; *Carey v. Hubbardston*, 172 Mass. 106, 51 N. E. 521; *Field v. Gowdy*, 199 Mass. 568, 85 N. E. 884, 19 L. R. A. (N. S.) 236; *Everson v. Casualty Co. of America*, 208 Mass. 214, 94 N. E. 459.

Photographs, however, should show simply the conditions existing at the time. They should aid the jury in better applying the oral evidence to the particular location. In a case like the one under consideration, they should represent inanimate, not animate, objects; and when they go further than this and represent the parties in various claimed positions they may more properly be excluded than admitted, on the ground that they have passed beyond their legitimate function and tend to emphasize unduly the claims or the evidence of one party or the other. It was on this ground that the photographs were excluded in *Babb v. Paper Co.*, *supra*, where the court say: "To be admissible, photographs should simply show conditions existing at the time in question. But photographs taken to show more than this, with men in various assumed positions, and things in various assumed situations, in order to illustrate the claims and contentions of the parties, should not be admitted. An examination of the excluded photographs shows that they fall within the latter class. They would serve merely to illustrate certain theories of the defendant as to how the accident happened. They were properly excluded as a matter of law."

So in *Stone v. Street Railway*, 99 Me. 243, 59 Atl. 56, the photograph showed a man in the position on the car in which some of the witnesses said the plaintiff was at the time of the accident; and it was held to have been properly excluded.

In the case at bar, therefore, it would have been a wiser use of discretion to have excluded the photographs; but we do not think their admission, in connection with all the facts in the case, was such an abuse of discretionary power as to warrant the sustaining of exceptions. It may have been error, but not such exceptionable error as would justify the ordering of a new trial.

We are aware that in other jurisdictions there is a conflict of authority on the admissibility of photographs showing persons or parties in certain assumed positions.

In *Fore v. State*, 75 Miss. 727, 23 South. 710, their admission was held exceptionable error, being in the nature of tableaux vi-

vants; while in *Shaw v. State*, 83 Ga. 92, 9 S. E. 768, *State v. O'Reilly*, 128 Mo. 597, 29 S. W. 577, *State v. Kelley*, 46 S. C. 55, 24 S. E. 60, *Harrison v. Green*, 157 Mich. 690, 122 N. W. 205, and *Bowling Green Gaslight Co. v. Dean* (1911) 142 Ky. 678, 134 S. W. 1115, their admission is approved.

After carefully considering all these cases, we adhere to and reaffirm the rule already established in this state and Massachusetts.

[7] 2. The second exception lies to the refusal of the presiding justice to charge the jury that at the time of the alleged injury the relation of common carrier and passenger did not exist between the plaintiff and the defendant in this case.

The request was properly refused. The presiding justice had already clearly and comprehensively charged the jury as to the exact legal relations existing between the parties at the time of the accident, giving in substance, if not in words, the rule laid down by this court in the recent case of *Maxfield v. Railroad Co.*, 100 Me. 79, 60 Atl. 710, that it was the duty of the railroad company "to exercise all ordinary care to maintain the platform in question in such a reasonably safe and suitable condition that passengers, who were themselves in the exercise of ordinary care, could walk over it in safety." To have given the requested instruction would have misled rather than have assisted the jury in their comprehension of the legal obligations of the parties.

This exception is also without merit.

Damages.

[8] The plaintiff had been employed as a clerk in the Bar Harbor Post Office for a period of 14 years, and was so employed, at a salary of \$1,400, at the time of the accident. Her earning power has been reduced. The injury to the ankle, foot, and leg was a serious one, with the strong probability, if not the absolute certainty, of being permanent. The expenses have necessarily been large. The suffering, as described by the physicians as well as the plaintiff, was severe.

After careful consideration of the entire case, we are unable to say that the damages are excessive.

Motion and exceptions overruled.

WILLIAMS v. WILLIAMS.

(Supreme Judicial Court of Maine. Dec. 4, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 52*)—BURDEN OF PROOF—PAYMENT.

In an action by an executrix for money due the testator from the sale of certain property and admitted to have been received by defendant as testator's agent, the burden was on the defendant to prove payment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1873; Dec. Dig. § 52.*]

2. EXECUTORS AND ADMINISTRATORS (§ 52*)—EVIDENCE OF PAYMENT—EXECUTRIX.

Evidence, in an action by an executrix for a share of the money received by defendant from the sale of certain property of an estate of which he and testator were owners in common, held to show nonpayment and that the testator's purported receipts to defendant for the amount of the principal debt were forgeries.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1873; Dec. Dig. § 52.*]

3. EXECUTORS AND ADMINISTRATORS (§ 52*)—DEBTS DUE DECEDENT—EVIDENCE—PAYMENT.

Where, in an action by an executrix against the testator's agent for money received, defendant claimed to have paid the testator large sums, testimony that testator had borrowed small sums from the witness should have been admitted as tending to show the testator's financial condition.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1873; Dec. Dig. § 52.*]

4. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of such evidence was harmless, however, where other evidence of the same financial condition was admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.*]

5. EVIDENCE (§ 271*)—SELF-SERVING ACTS.

In an action by an executrix against an agent of the testator for money received on the testator's behalf, and which the defendant claimed to have paid, the testimony of an attorney, employed by the testator after the alleged payments, as to what he did by virtue of that employment was properly excluded, where it was not contended that anything done by him was brought to the defendant's knowledge; it being at most evidence of a self-serving act.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

6. EVIDENCE (§§ 271, 474½*)—OPINION—DECLARATIONS OF DECEDENT.

In an action by an executrix against the testator's agent for money received, evidence which involved either the witness' opinion or some declaration of the testator was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104, 2220-2233; Dec. Dig. §§ 271, 474½.*]

7. EVIDENCE (§ 197*)—PROOF OF HANDWRITING—COMPARISON.

The genuineness of handwriting may be proved by comparison with other handwriting admitted or proved to be genuine.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 681, 681½; Dec. Dig. § 197.*]

8. EVIDENCE (§ 197*)—PROOF OF HANDWRITING BY COMPARISON—ADMISSIBILITY OF STANDARD.

A writing need not be relevant to the other issues of the case to be admissible as a standard for comparison in proof of handwriting.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 681, 681½; Dec. Dig. § 197.*]

9. APPEAL AND ERROR (§ 970*)—ADMISSION OF EVIDENCE—HANDWRITING—STANDARD OF COMPARISON.

The trial court's admission of a writing as a standard of comparison will not be disturbed

unless it clearly appears that there was some error of law, or that the evidence was admitted without proper proof of the qualifications requisite for its competency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.*]

10. EVIDENCE (§ 197*)—HANDWRITING—ADMISSIBILITY OF STANDARD—DISCRETION.

The admissibility of a writing as a standard of comparison in proof of handwriting is a preliminary question addressed to the sound, but not arbitrary, discretion of the trial court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 681, 681½; Dec. Dig. § 197.*]

11. EVIDENCE (§ 197*)—HANDWRITING—STANDARD OF COMPARISON—PROOF OF GENUINENESS.

The genuineness of a standard of comparison in proof of handwriting may be proved by any person who has knowledge of the party's handwriting from having seen him write, or from having corresponded with him, or from having seen handwriting acknowledged or proved to be his.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 681, 681½; Dec. Dig. § 197.*]

12. EVIDENCE (§ 511*)—EXPERT TESTIMONY—HANDWRITING—STANDARD OF COMPARISON—PROOF OF GENUINENESS.

Where the presiding justice, while deciding that the question of genuineness of standards to prove handwriting was for his determination alone, heard defendant's opinion thereon, it was error to exclude expert evidence to the contrary, although expert evidence may be insufficient alone to establish the genuineness of a standard.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2315; Dec. Dig. § 511.*]

13. EVIDENCE (§ 271*)—JURY—USE OF MICROSCOPE—EXAMINATION OF HANDWRITING.

It is largely a matter of discretion with the presiding justice whether he shall permit the jury to examine disputed handwriting with a microscope.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

14. TRIAL (§ 236*)—INSTRUCTIONS—TESTIMONY OF PARTY.

In an action for money received by an agent on behalf of his principal, it was error to instruct that defendant was a competent witness, and that his being an adverse party should not detract from the weight of his testimony; the effect of such instruction being to tell the jury to make no allowance for the fact that defendant had interests adverse to plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531-533; Dec. Dig. § 236.*]

On Motion and Exceptions from Supreme Judicial Court, Knox County, at Law.

Action of trover by Cora Williams, executrix, against Maynard S. Williams. A verdict was rendered for defendant, and the case is before the law court on motion and exceptions by plaintiff. Motion and exceptions sustained.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, and KING, JJ.

A. S. Littlefield, of Rockland, for plaintiff. L. M. Staples, of Washington, Me., for defendant.

CORNISH, J. This is an action of trover brought by the executrix of the last will and testament of Warren G. Williams to recover from the defendant the sum of \$18,750, with interest. A verdict having been rendered for the defendant, the case is before the law court on motion and exceptions by the plaintiff.

The following facts are practically conceded:

The testator, Warren G. Williams, the defendant, Maynard S. Williams, and Mrs. Mary J. Frohock were the children of Timothy Williams, and as his heirs at law were the owners in common of a certain lime quarry in Rockland which in March, 1900, was conveyed to the Rockland-Rockport Lime Company for the sum of \$56,250, one-third of which belonged to each of the three heirs.

The entire purchase price was paid to the defendant, who was the active agent in making the sale, and on March 19, 1900, was deposited by him in his own name with Kidder, Peabody & Co. of Boston, with the full consent of his brother and sister.

Warren G. Williams died testate in 1910, and this suit is brought by his wife, the executrix, who claims that the defendant never paid over to her husband the portion that was due him, and seeks to recover the same, with interest, while the defendant claims that he paid the testator in full, one-half, \$9,375, on September 10, 1901, and the remaining one-half \$9,375, on April 18, 1903. In support of his contention, he presents two receipts purporting to be signed by Warren G. Williams, bearing those dates and for those amounts. The plaintiff replies that these receipts are forgeries. Here is the issue.

Motion.

[1] The \$18,750 belonging to Warren G. Williams having been admittedly received by the defendant, the burden rested upon him to prove its payment to the owner.

[2] His story is this: That he deposited the entire \$56,250 with Kidder, Peabody & Co. in his own name by agreement with his brother and sister, and received interest thereon at rates varying from 2 to 4 per cent., the dividends being paid to him semi-annually, and then checks were sent by him to his brother and sister for their respective shares; that the first half of the principal, \$9,375, was paid by him to his brother on September 10, 1901, at his sister's home in Rockland, and in her presence, and was paid in money at Warren's request because, to use his own words, "he said he wanted it in cash, bills, or money, and not checks or bonds or anything of that nature," and the first receipt was given at that time.

His explanation of having so large an amount of bills on hand is that he had drawn about \$12,000 in cash in November, 1900, from Kidder, Peabody & Co., and had drawn

it partly with the idea of meeting this claim.

That subsequently Warren requested payment of the remaining \$9,375, and again they met at Mrs. Frohock's house on April 18, 1903, and again, at Warren's request, he paid him the full amount in bills of large denomination, and Warren put them in his pocket and went away. He accounts for the possession of so large an amount of cash on the second occasion by saying that he had purchased \$12,000 worth of bonds of Kidder, Peabody & Co. in January, 1903, and had turned over 8,000 or 9,000 or 10,000 of them to his sister, for which she had paid him in bills, and it was these same bills that he had kept on hand until April 18, 1903, when he made this final payment to his brother and took the second receipt.

That after that second payment Warren never mentioned the quarry matter to him nor informed him of what he had done with the money or how he had invested it.

The sister corroborates the defendant in a large part of his testimony, especially as to the cash payments made to Warren in her home; and this with the two receipts, the genuineness of which is seriously denied, makes up the defendant's explanation.

After a careful study of the entire testimony, we fail to find this explanation satisfactory or convincing; on the contrary, it lacks the elements of credibility.

The transactions, as related by the defendant, are possible, but they seem hardly probable. They are so at variance with the usual course of business as to be well-nigh inherently incredible. The drawing of \$12,000 in cash from the bankers in November, 1900, and keeping it on hand in order to pay Warren the \$9,375 10 months later, in September, 1901, and that, too, when, as the plaintiff testifies on cross-examination, Warren did not ask for the payment until two months before it was made, or about July, 1901, overtakes one's credulity. The idea of keeping that large amount of money in idle bills for so long a time to meet a claim that had not as yet been made, lacks reasonableness.

Then, too, every other payment during all the progress of this business had been made by the defendant in checks. He apparently knew their value as receipts, and, when the rent of the quarry had been received by the defendant prior to the sale, he had remitted to the plaintiff and his sister checks for their share. According to his own statement, after the sale and before the payment of the first half of the principal—that is, from March, 1900, to September, 1901—he had used checks with which to pay the plaintiff his share of the earned dividends, and between the payment of the first half and of the second—that is, between September 10, 1901, and April 18, 1903—he continued to pay the plaintiff his dividends on that remaining half in checks. They lived in the

same city and only a mile and a half apart, but these business transactions between them were conducted in the usual way. The defendant paid by check, and Warren apparently received the checks without objection.

Yet when it came to the payment of \$9,375 on two occasions, making a total of \$18,750, it was counted out in bills. From the standpoint of both the man who made the payment and the man who received it, checks would seem to have been not only the natural, but the necessary, form of payment.

The second payment is in the same category. The cash which he used in this payment he says he obtained from his sister as the price of certain bonds that he sold her; that she paid him in cash at her house; that he does not know where she obtained the bills, but that he took them and placed them in his safety deposit box at the Rockland Trust Company, and kept them there until he made the second payment in April, 1903. This involves two cash payments of \$9,000 or more; the one from the sister to the defendant, and the other from the defendant to Warren, and that, too, although he had not asked his sister to pay him in cash—a most unnatural transaction.

It may be that the defendant attempted to connect his alleged payments with two checks drawn by him on Kidder, Peabody & Co., the first on November 6, 1900, for \$12,418.58, and the second on January 19, 1903, for \$12,403.50, the only two large amounts drawn from that account prior to April, 1903; but the first of these shows that it was drawn to the order of J. R. Frohock, and has no connection with Warren. It may have been in part payment of Mrs. Frohock's share, while the second appears in the account merely as a draft. Outside of these two withdrawals, the other withdrawals from Kidder, Peabody & Co., excluding a purchase and sale of some United States bonds that appear on both sides of the account and do not affect it, aggregate only \$4,184.89 between the time of first deposit and the alleged final settlement.

The question naturally arises, therefore, From what source did the defendant obtain his money to make the payments?

Again these two receipts represent only the principal. What of the accrued interest? The defendant says he paid it as it accrued, but on April 18, 1903, there must have been interest due from January 1, 1903, and that did not enter into the settlement. Would it not have done so if a final settlement was then made? We have simply two naked receipts each for exactly one-half the principal. All these suggestions arise so naturally from the circumstances and probabilities that they cannot be ignored in attempting to reach the truth.

It is further in evidence that Warren was a day laborer all his life, industrious and frugal. There was never any outward sign

of his having received what to him would have been a fortune. His dealings with the traders disclose a man of very moderate means. He had about \$7,000 in bonds that apparently came from some other portion of his father's estate, but there is no evidence of any investment or deposit or use of the large amount in controversy which the defendant says he paid him. All this is significant.

On the other hand, however, it should be said that Warren was married in 1903 to the plaintiff, and that there is no evidence of any demand being made upon the defendant for payment until after Warren's decease in 1910. The relations of the two brothers apparently continued friendly.

This brings us to the two receipts, the genuineness of which is in dispute.

The plaintiff attacks them as forgeries, not free-hand imitations, but tracings from some genuine original.

An inspection of these two receipts themselves, without comparison with any other standards, arouses suspicion. The two blank forms used are identical, the same paper, the same printing. The written portions of the body are as nearly identical as the human hand could make them, with the exception of one or two words. The ink is apparently the same; the handwriting the same. In fact, the two receipts are so similar in form and substance that it seems impossible that one was written on September 10, 1901, and the other on April 18, 1903. Their appearance would indicate strongly that they were prepared at one sitting.

When we come to the signatures, "Warren G. Williams," these too, are practically identical. It must of course be remembered in this connection that Warren could not read and could write nothing except his name. He had learned to do this in a mechanical way, so that an unusual similarity in his signatures might be expected. But the similarity here is more marked than even that. There is some variety in the signatures introduced as standards of comparison especially when superimposed, but these two, when one is superimposed upon the other, correspond in practically every detail, a correspondence not to be expected when they were written more than a year and a half apart. Moreover, the experts for the plaintiff testified that the ink on the two receipts was identical in color and analysis; that it was of practically the same age; and, when compared with the same kind of ink in signatures nearly 10 years old and admittedly genuine, the latter had a dark, thoroughly rusted, burnished red appearance as they should have at that age, with an elimination of black or blue, while the ink on these two disputed receipts was of "a fairly bright methylene blue color, with no rusty appearance, only a dullness, the blue still prominent."

In other words, if these receipts had actually been written at their purported dates in 1901 and 1903, the ink should have the appearance of ink of that age, while in fact it had the appearance of being recently used.

This expert evidence is corroborated by the positive testimony of the judge of probate and the register of probate who noted the freshness of the ink when these receipts were first presented in the probate court, and the change from a blue black to a darker color, with a loss of the fresh appearance and a taking on of dullness, within a comparatively short time; changes that could not have taken place between the two inspections had the receipts actually been written about 10 years before.

It is true that the defense presented two experts, the same number offered by the plaintiff, who testified that in their opinion the signatures to the receipts were genuine; but their attention seems to have been directed more to the question of forgery by imitation than by tracing, so that the very similarities which would indicate genuineness from the former standpoint might tend to prove forgery from the latter. Nor did they make any analysis or test of the ink, or attempt to controvert the convincing testimony of the plaintiff's witnesses on that point.

Without going into further detail, it is sufficient to say that it is our opinion from the testimony, the exhibits, the circumstances, and the probabilities, that the verdict in this case was so clearly wrong as to indicate bias or prejudice on the part of the jury, or failure to appreciate the facts, and for that reason it cannot be allowed to stand.

Exceptions.

These should be briefly considered because the same questions may arise if this case is tried again.

[3, 4] 1. The exclusion of the testimony of Herbert L. Ulmer tending to show that Warren G. Williams borrowed small sums from him during the past 10 years. We think this testimony was legally admissible as having some tendency to show the financial condition of Warren; its weight being for the jury. But inasmuch as other witnesses, such as traders, were permitted to show the manner in which Warren carried small accounts at their stores and paid in installments, which was evidence tending to prove the same general condition, we do not think the exclusion of Ulmer's evidence constituted prejudicial error.

[5] 2. The exclusion of the testimony of Merritt A. Johnson, an attorney, who was employed by Warren after these alleged payments, and was asked what he did by virtue of that employment. It is not contended that anything done was brought to the attention or knowledge of the defendant. It would

be at the most a self-serving act, and the evidence was properly excluded.

[6] Johnson was further interrogated as to a trip with Warren to the Pan-American Exposition in October, 1901, after the first alleged payment, and stated that the trip was under consideration for two or three weeks, but Warren did not decide to go until the day before they started. Being asked, "What was the reason that it was not earlier decided?" and "Had you delayed your going for any reason on account of Mr. Williams?" the answers were excluded.

We think there is no error here. The evidence sought so necessarily involved either the opinion of the witness or some declaration of Warren that it was properly excluded.

[7-10] 3. The exclusion of expert testimony offered by the plaintiff to prove to the court that certain exhibits offered by the defendant as standards of the handwriting of Warren were not themselves genuine.

Whatever the rule may be in other jurisdictions, the general rule adopted in this state is that, when the genuineness of handwriting is in question, it may be proved by comparison with other handwriting of the party sought to be charged, admitted, or proved to be genuine; that such writing is admissible as a standard for the purpose of comparison, whether relevant to the issue or not; that, before it can be admitted as a standard, it must be proved or admitted to be genuine; that the question of its admissibility as a standard is to be determined by the presiding justice, and exceptions to its admission will not be sustained unless it clearly appears that there was some error in law, or that the evidence was admitted without proper proof of the qualifications requisite for its competency. *State v. Thompson*, 80 Me. 194, 13 Atl. 892, 6 Am. St. Rep. 172.

The Massachusetts court has adopted the same rule as in this state that exceptions will not lie to the findings of the presiding justice unless his decision is founded upon error in law or upon evidence which is, as a matter of law, insufficient to justify the findings. *Nunes v. Perry*, 113 Mass. 276; *Costello v. Crowell*, 139 Mass. 590, 2 N. E. 698, cited in *State v. Thompson*, supra.

In other words, the genuineness of the standard is a preliminary question of fact to be determined by the presiding justice, and its admissibility as a standard is a matter within his discretion. This does not mean, however, an arbitrary exercise of power, which is sometimes termed "an abuse of discretion." To illustrate: "Whether a witness called as an expert possesses the necessary qualifications to enable him to testify is a preliminary question to be decided by the court. That decision must be final and conclusive unless it is made clearly to appear from the evidence that it was not justified, or that it was based upon some error in law." *Mars-ton v. Dingley*, 88 Me. 546, 34 Atl. 414. So,

in cases of handwriting, "proper proof" of the qualifications requisite for the competency of the standard must be adduced to the court. Great consideration must necessarily be given to the decision of the presiding justice; but the question remains, What is "proper proof" or "evidence sufficient in law." and when can it be made to appear that "the ruling was not justified by the state of the evidence as presented to the judge at the time," all of which tests have been recognized by the courts of Massachusetts and Maine?

[11] The general rule is that "it may be proved by any person who has acquired a knowledge of the handwriting by having seen the party write, or from having carried on a correspondence with him, or, as decided in *Hammond's Case*, 2 Me. (2 Greenl.) 32, 11 Am. Dec. 39, from having seen handwriting acknowledged or proved to be his." *State v. Thompson*, *supra*.

[12] Applying these principles to the precise point at issue, we find the situation to be this: Several specimens of Warren's signature were introduced by both plaintiff and defendant, which were admitted to be true, and were therefore accepted as standards. The defendant offered certain other specimens, to the admission of which the plaintiff objected on the ground that they were not genuine. Thereupon the court put this question to the defendant:

"Q. The question is, examine those papers, Nos. 13 to 27, the signature of Warren G. Williams, and state whether, in your opinion, it is his genuine handwriting.

"A. I should say they were.

"The Court: I will admit them. Whether they are or not we will see afterwards."

Some discussion followed between court and counsel as to withdrawing these exhibits, but they were not withdrawn. The plaintiff then offered an expert in handwriting to state whether, in his opinion, the party who wrote the admitted standards wrote the signatures on these exhibits, Nos. 13 to 27, and whether he had any way of demonstrating the grounds of his belief. This evidence was excluded and exceptions reserved.

So that the presiding justice, while deciding that the question of the genuineness of the offered standards was a matter for his determination alone, heard the opinion of the defendant himself, but declined to hear expert evidence to the contrary.

It is the opinion of the court that this evidence should have been received. While mere expert evidence may not be sufficient alone to establish the genuineness of a standard, under the decision in *Commonwealth v. Tucker*, 189 Mass. 457-472, 76 N. E. 127, 7 L. R. A. (N. S.) 1056, yet it does not follow that it should not be heard by the presiding justice when offered to attack the genuineness (*Costello v. Crowell*, 133 Mass. 352), especially when the only evidence of that genuineness

is the opinion of the defendant himself, uncorroborated—the party who is claiming under the alleged forged receipts.

The source being somewhat open to suspicion, we think the other side should be allowed to offer any competent evidence, including expert, to meet the claim, and that "the ruling was not justified by the state of the evidence as presented to the judge at the time."

This exception should be sustained.

[13] 4. Refusal of the presiding justice to allow the jury to make examination with the microscope, used by one of the experts, who testified as to the results of his examination.

This is largely a matter of discretion with the presiding justice, and, while it is customary to permit the jury to use such an aid in the investigation of the facts, we are not prepared to say that the refusal to do so in this case was reversible error.

[14] 5. The court, after explaining the statute which prevents the defendant from testifying unless the plaintiff, as a representative party, had testified, used this language: "Therefore, in law, the defendant became a competent witness, and his testimony is entitled to as much weight as you find it entitled to, and you should not detract from it on account of his being an adverse party to the estate because the plaintiff has waived that rule." This may not have accurately expressed the meaning of the court; but, as it stands, it practically says to the jury that they are to make no allowance for the fact that the defendant is an interested party with interests adverse to the plaintiff. It was an incorrect statement of the rule by which the defendant's evidence was to be weighed, and its effect may have been harmful.

It is unnecessary to consider the other exceptions, many of which are of minor importance.

The conclusion of the court is that the entry should be:

Motion and exceptions sustained.

WILBUR v. FORGIONE & ROMANO CO. et al.

(Supreme Judicial Court of Maine. Dec. 4, 1912.)

1. MASTER AND SERVANT (§ 330*)—INJURIES TO THIRD PERSON—BURDEN OF PROOF—PROXIMATE CAUSE.

In an action for personal injuries by a third person against a master for alleged negligence of a servant, the burden of proving the proximate cause of the accident was on the plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.*]

2. MASTER AND SERVANT (§ 301*)—INJURIES TO THIRD PERSON—RELATION OF PARTIES—SERVANT LENT OR HIRED.

While a servant in the employ of one person may be lent or hired to another so as to

become the servant of the other for the time being and in a particular transaction, with all the legal consequences of the new relation, the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant; but, in the absence of a special contract to the contrary or of interference by such other person, he remains the servant of his original master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210-1216; Dec. Dig. § 301.*]

3. MASTER AND SERVANT (§ 301*)—INJURIES TO THIRD PERSON—RELATION OF PARTIES—DRIVER OF HIRED TEAM.

The driver of a coal company's team hired by the day to a contractor, and told by the coal company's manager to report to the contractor for work, after which he had nothing to say as to what the team should do, was, while so engaged, the servant of the coal company, and not of the contractor, notwithstanding the driver obeyed the orders of the contractor as to where the team should be loaded, and the signals or direction of the contractor's employes as to when the team should be started, such orders not applying to the handling of the team, and the contractor was not liable for injuries to a third person resulting from the negligence of the driver in handling the team.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210-1216; Dec. Dig. § 301.*]

Report from Supreme Judicial Court, Cumberland County, at Law.

Action by David J. Wilbur against the Forgione & Romano Company, the Tyson Construction Company, trustee. On report, with the stipulation that, if in the opinion of the law court there is sufficient evidence to establish the liability of the defendant, the case is to be remanded for assessment of damages by a commission of three to be appointed by the court. Judgment for defendant.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Symonds, Snow, Cook & Hutchinson, of Portland, for plaintiff. Arthur Chapman and Foster & Foster, all of Portland, for principal defendant. Eaton, Keene & Gardner, of Portland, for trustee.

CORNISH, J. On report, with the stipulation that, if in the opinion of the law court there is sufficient evidence to establish the liability of the defendant, the case is to be remanded for assessment of damages by a commission of three to be appointed by the court.

The conceded facts are these: In July, 1911, the Tyson Construction Company were the general contractors in erecting an addition to the store of Porteous, Mitchell & Braun Company on Congress street in the city of Portland and in extending the rear of the store to Free street. The work of making the necessary excavation was sublet to the defendant. The shoring of the adjacent buildings was sublet to the Isaac

Blair Company, and the plaintiff was one of the Blair Company employes.

On the day of the accident, the plaintiff, in the course of his employment, was working upon a ladder at a height of about 28 feet from the ground, the bottom of the ladder resting in the excavation on the Free street lot and the top against the wall or chimney of an adjoining house. A team consisting of a pair of horses and a dump cart, loaded with rock, on its way out from the excavation, came in contact with this ladder throwing the plaintiff to the ground. This team was owned by the Cash Fuel Company, and with its driver, Marston, had been left by the Cash Fuel Company to the defendant to assist in the removal of rock. It was one of several employed in the same work, one being owned by the defendant, two by the Cash Fuel Company, and the others by various other persons or concerns.

The Cash Fuel Company was engaged in the sale of coal and wood, but, as there was little for its teams to do at that season, it entered into an agreement with the defendant whereby the defendant was to pay it the sum of \$5 per day for the use of each team and driver as long as the defendant saw fit to employ them. The general manager of the Cash Fuel Company, a witness for the plaintiff, on being asked what arrangement he made with the defendant, replied: "To hire two teams to him with dump carts, two horses and a man. He was to pay for the use of them \$5 a day." On being asked what instructions he gave the drivers, he replied that he told them to report to Forgione, and to tell him whose teams they were, where they came from, but he had nothing to say as to what the teams should do after arrival. It was a typical case of letting a team with driver for special work. The Fuel Company selected, hired, and paid the drivers for its teams, and with that the defendant had nothing to do. If the defendant was not satisfied with a driver, it could doubtless have sent back the team and driver, but could not have substituted a driver of its own selection.

This being the state of facts, the plaintiff rests his contention upon one of two propositions. First, that the defendant was negligent in ordering the team in question to be loaded and driven in such close proximity to the ladder as to cause the accident; or, second, that Marston, the driver of the team, was at the time in the performance or the defendant's business as its servant, and his negligence was in law the defendant's negligence.

[1] The first step to be taken in the solution of this problem is to ascertain what was the proximate cause of the accident. That is a question of fact. It is undisputed that this team had been loading with rocks in the rear of the Free street excavation, with the horses' heads pointed toward Con-

gress street. On the way out it passed the ladder on which the plaintiff stood. The plaintiff claimed that the rear end of the cart was at an elevation of two or three feet while being loaded, the rear wheels being trigged; that, when the cart was full, the trig was removed, and the driver started on his way; that, as he was nearly abreast the ladder, the left forward wheel struck a solid projecting rock about the size of a derby hat, causing the pole and the yoke to swerve toward the left and strike the ladder. The burden was upon the plaintiff to establish this claim by a preponderance of the evidence. This we think he failed to do, but, on the contrary, the fair conclusion to be reached from all the evidence in the case is that no projecting rock caused the accident, but, when the cart was full, the driver in leaping upon the seat and gathering up the reins in some way, perhaps accidentally, pulled on the wrong rein, turned the horses toward the left, and thereby came in contact with the ladder. It would be profitless to discuss in detail the evidence leading to this conclusion. It is sufficient to state the conclusion itself. The direct and immediate cause, therefore, was the manner in which the team was handled by the driver, and not a condition of the ground in the excavated cellar.

It is not necessary to decide in this action whether, under all the circumstances of the case, the kind of work that was going on, and the rough place in which it was necessarily performed, the driver was or not in the exercise of due care, but, assuming that his act was a negligent one, was the defendant legally responsible for that act? That depends upon whether the driver was, at the moment of the injury to the plaintiff, and in the particular work he was then engaged upon, the servant of the defendant, the general contractor, or of the Cash Fuel Company, his immediate employer.

Under the long line of decisions both in this country and England the court is of the opinion that he was not at the time the servant of the defendant.

[2] It is true that a person admittedly in the general employment of one person may be lent or hired to another in such a way as to become the servant of the other for the time being and in a particular transaction, with all the legal consequences of the new relation. *Wyman v. Berry*, 106 Me. 43, 75 Atl. 123, 20 Ann. Cas. 439. But, as was stated by Chief Justice Holmes in *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922: "The mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant. More than that is necessary to take him out of the relation established by the only contract which he has made and to make him a voluntary subject of a new sovereign—as the master sometimes was called in the old books."

We must therefore determine whether in the particular act which caused the injury in this case, namely, the handling of the team, the driver was the servant of his original master, the Cash Fuel Company, or of the person to whom, with the team, he had been furnished, namely, the defendant, the general contractor.

[3] The authorities give but one answer to this question. They hold that, in the absence of a special contract to the contrary or of interference, he remains the servant of his original master. The reason for this is apparent. Take the case at bar. The Cash Fuel Company hired whom it pleased to care for, manage, and drive its teams. It paid them and discharged them. With their selection, payment, and discharge the defendant had nothing whatever to do, and it was no part of the duty of the defendant to determine upon the fitness or unfitness of such drivers. It took the teams as manned and furnished, and the responsibility for the proper handling of the teams in the absence of any contract to the contrary or of any express direction of the defendant still remained upon the owner of the team. It is doubtless true that if the defendant in the case at bar had given directions to Marston to drive against the plaintiff's ladder, and he had obeyed, the defendant would have been liable. In such case the defendant would have assumed to interfere with the general employment of the driver, and must therefore be responsible for the result of his own acts. But so long as the directions given by the defendant pertained to the general progress of the work, as the places from which the rock was to be taken and those to which it was to be carried and dumped, leaving the management of the team in doing that work still in the hands of the driver, that driver remained the servant of the party who hired, and paid him for that particular kind of labor presumably with the knowledge of his experience and skill. That was the situation here. It was the usual contract of hiring a team with driver, with no special limitations. So far as the evidence shows the defendant in a general way sent the teams to different parts of the excavation for their loads, and gave orders as to the places where the loads should be dumped, but the evidence fails to prove that the defendant controlled or directed the driver in the management and handling of the team at any point in the work. While driving out of the excavation, the driver remained the servant of the Cash Fuel Company, and that company was responsible for his acts the same as on Congress street on its way to or from the dumping ground.

In the absence of express contract, the law leaves the responsibility for the acts of the servant upon the person who was responsible for his selection and retention. "The health and safety of the horses, and the

protection of the whole team by careful management, are of so much importance to the owner that, in the absence of an express contract, he will not be presumed to have given up their management to the hirer when he has sent his own servant for the special purpose of retaining this management," is the language of Chief Justice Knowlton in *Shepard v. Jacobs*, 204 Mass. 110, 90 N. E. 392, 26 L. R. A. (N. S.) 442, 134 Am. St. Rep. 648.

Stress is laid upon the fact that the driver obeyed the orders of the defendant's boss as to where the team should be loaded and the signals or directions of the defendant's employes as to when the team should be started, but that is not sufficient to show there has been a change of masters so far as the handling of the team is concerned. The order did not apply to the handling of the team and the signals were more in the nature of information than of orders, and obedience to them showed co-operation in one extensive work rather than subordination to another employer. *Standard Oil Co. v. Anderson*, 212 U. S. 215-226, 29 Sup. Ct. 252, 53 L. Ed. 480. The authorities are abundant. Only a few need be referred to.

In *Jones v. Corporation of Liverpool*, L. R. 142 B Div. 890, the defendant contracted with one D to supply by the day a driver and horse to drive and draw a watering cart belonging to the defendant. The defendant's inspector gave general direction as to what streets should be watered. In an action to recover damages for injuries sustained by a third person through negligent conduct of the driver while in charge of the team, it was held that the hirer was not liable. This decision follows the leading English cases of *Laugher v. Pointer*, 5 Barn. & Cr. 560, *Smith v. Lawrence*, 2 Man. & Ry. 1, and *Quarman v. Burnett*, 6 Mees. & W. 497.

In *Higham v. Waterman Co.*, 32 R. I. 578, 80 Atl. 178, a truckman let his truck and driver to haul lumber at a certain price per hour. Held that the driver continued to be the servant of the truckman in all matters pertaining to the performance of the contract, unless by special arrangement he was placed directly under the control of the hirer or by the hirer's interference he makes the driver his servant as to the particular matter with which he interferes.

In *Morris v. Trudo*, 83 Vt. 44, 74 Atl. 387, 25 L. R. A. (N. S.) 33, the superintendent of streets of the city of Vergennes hired of the defendant a double team with driver. By the terms of the contract, the driver was to do with the team whatever work he was set to do by the superintendent, whether moving stones, or using a scraper, or hauling gravel. In the hauling of the gravel the superintendent directed where it should be taken from, where it should be unloaded, and how it should be placed. The plaintiff was assisting

the driver to unload, when the horses either started suddenly or were started by the driver, and the plaintiff, who was at the rear end of the wagon body, was thrown to the ground and injured. Suit was brought against the original employer, and the court in the course of the opinion said:

The precise question is whether or not, though the team and driver had been temporarily hired out by the defendant, the driver in the specific detail of managing or handling the team remained the servant of the defendant of whom the team was hired.

* * * One to whom the servant of another is temporarily lent or hired has for the time being the responsibility of a master in so far, and only in so far as he may exercise the authority of a master. The testimony tends to show that in respect to the driving of the team the defendant committed nothing to the city or its superintendent. * * * The doctrine of respondeat superior fastens liability upon the defendant, since the negligent wrongdoing inhered in a thing in respect to which the relation of master and servant between him and the driver had never been suspended. * * * If the contract had been such that Lavalley (the superintendent) might have put a driver of his own choosing in charge of the team, and have put the driver furnished at some other work, the defendant would be held to have relinquished the right of a master and to have been freed from responsibilities as such in all respects. Such a contract, however, the evidence does not show."

This language applies with equal force to the case at bar; the facts being essentially similar.

The Supreme Court of Massachusetts has affirmed and reaffirmed the same doctrine in the following cases among others:

In *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645, where a horse and wagon were let by the day by a contractor to the city of Boston to be used in the work of paving a street; in *Reagan v. Oasey*, 160 Mass. 374, 36 N. E. 58, where the owner let a double team and driver to the city of Boston for work upon a sewer extension, under the general supervision of the foreman who had the right to direct where the teams should back up for their load and the place where they should be unloaded; in *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922, where the team with driver was let to an electric lighting company to be employed in general construction work; in *Shepard v. Jacobs*, 204 Mass. 110, 90 N. E. 392, 26 L. R. A. (N. S.) 442, 134 Am. St. Rep. 648, which involved the letting of an automobile with chauffeur; and in *Hussey v. Franey*, 205 Mass. 413, 91 N. E. 391, 137 Am. St. Rep. 460, involving the letting of a hack with driver.

It is unnecessary to multiply the citation of authorities, which are numerous and uniform.

The very recent case in this State of *Ireland v. Clark*, 109 Me. 239, 83 Atl. 687, involved the question between the servant and master, and the rights of no third person were affected. But the principle now at issue was there under discussion, and many of the cases above referred to were cited with approval. That case is an authority in point. See, also, *Ames v. Jordan*, 71 Me. 540, 36 Am. Rep. 352.

The plaintiff seeks to escape the force of these decisions by distinguishing between livery stable keepers, truckmen, and persons carrying on a general livery of teaming business, and who, he claims, are therefore in a sense common carriers, and those persons or corporations who, like the Cash Fuel Company, are engaged in a different occupation, but in a single instance, or even occasionally, let their teams with drivers for the performance of certain work. This distinction, however, is not made in the cases, and we are unable to perceive the logical line of cleavage. In every case, no matter what the general business of the owner may be, the rights and liabilities of the parties depend upon the contract under which the teams are let. This and this alone is the test, and whether one of the parties makes the contract as a part of his regular occupation, or outside it and in a special instance, should make no difference. The question is, who was the master at the particular time and in the particular transaction, the owner or the contractor, not whether the owner is accustomed to make these contracts. Otherwise two teams might be working side by side, and under the same general arrangement between the parties, and the contractor be held liable for the negligent acts of one driver in the handling of his team, and not for those of the other under precisely the same circumstances. It would not seem that liability could shift on such artificial grounds. It rests upon contract, and not upon occupation.

Our conclusion, therefore, is that the injury in question was caused by the driver in the management of his team, and that in that phase of his work he was not the servant of the defendant.

The entry must therefore be:

Judgment for defendant.

L'UNION MUSICALE v. CHEVALIER et al.
(Supreme Judicial Court of Maine. Dec. 5, 1912.)

1. DAMAGES (§ 45*)—BREACH OF CONTRACT BY BUILDING CONTRACTOR—FAILURE TO FURNISH LABOR AND MATERIALS.

Where an owner paid a building contractor, who had agreed to furnish all labor and materials, for the labor and materials furnished according to the architect's certificates before the contractor's abandonment of the work, he was entitled to recover from the contractor out-

standing lien claims on the property for labor and materials which he was required to pay.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 92-98; Dec. Dig. § 45.*]

2. DAMAGES (§ 45*)—BREACH OF CONTRACT BY BUILDING CONTRACTOR—EXPENSES OF REPAIRING.

Where a building contractor failed to comply with the specifications of the contract and subsequently abandoned it, the owner's necessary expenditures in repairing and strengthening the part of the building constructed were recoverable from the contractor.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 92-98; Dec. Dig. § 45.*]

Report from Supreme Judicial Court, Androscoggin County, at Law.

Action by L'Union Musicale against Ovide Chevalier and another. On report. Judgment for plaintiff.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

McGillcuddy & Morey, of Lewiston, for plaintiff. J. G. Chabot, of Lewiston, and George C. Wing, of Auburn, for defendants.

WHITEHOUSE, C. J. This is an action to recover damages for the alleged breach of a bond given by the defendant, Chevalier, as principal, and the Fidelity & Deposit Company of Maryland, as surety, to secure the faithful performance of a contract with the plaintiff for the erection of a brick building at the corner of Cook and Second streets, in Auburn, to be used as a clubhouse. The contractor was to provide all the materials and perform all the labor required to construct the building according to the terms of the contract and of all the drawings, specifications, and stipulations which were made a part of the contract, for the agreed price of \$29,500. This contract bears date May 23, 1910, and the bond in suit, signed by the contractor, Chevalier, and the surety company is dated July 5, 1910. Work on the building was begun two or three weeks after the date of the contract and was continued under the supervision of Architect Desjardines until August 15th, when, as the defendants claim, a heavy fall of rain undermined the stone foundation at one corner of the building, and caused two of the partially constructed walls near that corner to settle and crack. The plaintiff contends that the settling and cracking of the walls were due to the failure of the contractor to lay the foundation and protect the work, according to the plans and specifications, and that it was known to the contractor that the foundation at that point was settling before the rainfall. On the 23d day of August the architect notified the contractor to tear down these "brick walls and stone foundations and rebuild them according to contract and specifications." On the same day the plaintiff by its attorneys caused the fol-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lowing notice to be delivered to the surety company:

"In accordance with the terms of the bond furnished to the L'Union Musicale of Auburn, Me. (a corporation), for the faithful performance of the contract for their building by the contractor, Ovide Chevalier, we hereby notify you that, through the neglect of the said Ovide Chevalier to properly protect his work, rain caused a damage (Monday the 15th) of twelve to fifteen hundred dollars."

And on the 27th day of the same month the plaintiff caused a second notice to be given to the surety company, as follows:

"You are hereby notified that the L'Union Musicale to whom Ovide Chevalier gave a bond as principal and yourself as surety hereby notify you of the following defects and failure to perform the contract on the part of Chevalier that has come to their notice, to wit:

"The depth of their block at the corner of Cook and Second streets in Auburn at a point six feet west from the northeast corner of the wall, that the depth is three feet and two inches and also at a point twenty-five feet from the same corner the depth is three feet and three inches; at a point twenty feet east from the northwest corner the depth is four feet and six inches and ten feet south of the northeast corner the depth is three feet and four inches and at the southeast corner the depth is four feet.

"You are hereby notified to at once cause said foundations to be put in according to the contract and pay the damages occasioned by the defective work."

It is not in controversy that, according to the specifications in the contract relating to the "height of stone work," the foundations in the sections comprising the corner where the walls settled and cracked were to be six feet in height, "the top of the wall being figured one foot from present grade." The third paragraph of the contract provides that "no alterations shall be made in the work except upon written order of the architect." In the stipulations in regard to "general conditions" is the following provision:

"And the contractor is to amend and make good at his own cost any defects, injuries, shrinkage, settlements or other faults in his work arising from defective or improper materials and workmanship which may appear within one year after the completion of the building, is to clear away from time to time the dirt and rubbish resulting from his operations and cover and protect his work and materials from all damage during the progress of the building, and deliver the whole in a clean and perfect condition."

It appears from the evidence that the statements made by the plaintiff in the notification to the surety company of August 27th, respecting the depth of the stone founda-

tions were entirely correct, and that instead of being six feet in depth, as required by the specifications, the foundation actually laid by the contractor varied from three feet two inches to four feet six inches; and it is admitted by the contractor that no written order was ever given by the architect authorizing such a change to be made in the depth of the foundation.

It is also satisfactorily shown by the testimony that the contractor, who was required by the terms of the contract to protect his work against all damage during the building, negligently allowed the ditch, which should have carried off the water, to become obstructed so that at the time of the heavy rain the water flowed into the cellar and undermined the wall which at this point was built upon the sand. It appears, however, that the foundation had settled and the wall cracked somewhat before the rain, and that the cracks had been "jointed" by the contractor; and that after the rain the foundations settled still more and the cracks in the walls were reopened.

On the 12th day of September the architect, Desjardines, in the discharge of his duty under the provisions of the contract, signed a certificate stating that the contractor, Chevalier, had "refused and neglected to supply a sufficiency of properly skilled workmen or of materials of the proper quality, and has failed to prosecute the work * * * with diligence, and has failed in the performance of the agreements contained in such contract." He further certified that such neglect, refusal, and failure on the part of the contractor were sufficient cause for the plaintiff "to terminate the employment of the contractor under said contract, and is also sufficient ground for the said Union to enter upon the premises and take possession for the purpose of completing the work, * * * and to employ any other person or persons to finish the work and to provide the materials therefor."

The next day, September 13th, the plaintiff gave the contractor a written notice that this certificate had been received from the architect, and that at the expiration of three days from the service of that notice upon Chevalier the owner would be at liberty to terminate the employment of the contractor and employ any other person or persons to finish the work, in pursuance of the provisions of the contract.

After the contractor had received from the architect the notification of August 23d, and this had been reinforced by a like notice from the plaintiff demanding that he tear down the brick walls and stone foundations in question and rebuild them according to the contract, he accepted the inevitable result, and surrendered the contract. He had manifestly become convinced prior to August 15th that the building could not be erected in a

workmanlike manner, according to the plans and specifications, for the contract price of \$29,500; but, after the discovery of the defective foundations and the demand by the owner for a rebuilding of the walls, he realized that compliance with this demand and a full performance of the contract would involve a heavy loss to him.

The surety company thereupon formally waived the privilege to assume the contract.

The situation which then confronted the plaintiff was not free from practical difficulty. It had paid the contractor \$6,000, and become liable to pay valid lien claims for \$1,286 more. As a result of the contractor's failure to perform his work according to the contract, the foundations were not sufficiently substantial and secure to sustain a building of the height called for by the original plan. After expending all of its cash on hand upon Chevalier's rejected work, it was not practicable to raise sufficient funds to tear down his work, and, commencing anew, construct the building according to the original plan. The society therefore adopted the only course remaining. It procured the services of another architect, redrafted and altered the plans, and proceeded to erect a building one story lower and otherwise materially different from that originally planned. Chevalier's foundation and walls, as strengthened and repaired, were deemed sufficient to support a building erected according to the modified plan, and they were accordingly allowed to stand, and were utilized in the building finally erected. Thus the amount of the damage caused by the contractor's failure to perform his contract according to the specifications, for which the defendants would be legally responsible, was reduced to the lowest practicable figure.

[1] The plaintiff claims to recover only the damages resulting from the contractor's breach of the contract before it was surrendered. It has paid him for the labor and materials furnished according to the certificates of the architect, but subsequently discovered outstanding lien claims on the property to the amount of \$1,286.17 which it was compelled to pay. The plaintiff was damaged to that extent by reason of Chevalier's failure to furnish the labor and materials according to the contract.

[2] The amount actually expended by the plaintiff in repairing and strengthening the foundation and walls is also a legitimate element of damage. The items of labor for these repairs are not definitely separated by the testimony from the other work on the building; but, upon the estimates made by the contractor himself and other witnesses, it is considered by the court that the sum of \$300 would be a reasonable allowance for this item. The certificate must accordingly be:

Judgment for the plaintiff for \$1,586.17, with interest from the date of the writ.

AVERY v. AVERY.

(Supreme Judicial Court of Maine. Dec. 6, 1912.)

BILLS AND NOTES (§ 103*)—CONSIDERATION—LEGALITY.

A note given by a party after his settlement of several of his notes on the payee's false statement, recklessly made without knowing it to be true, that the law required him to pay the fees or commissions of the payee's attorney for collecting the other notes, was without legal consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 233-240; Dec. Dig. § 103.*]

On motion from Supreme Judicial Court, Lincoln County, at Law.

Action by Newell E. Avery against Albert J. Avery. Judgment for plaintiff, and defendant moves to set aside the verdict as against the evidence. Motion sustained, and verdict set aside.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

R. S. Patridge, for plaintiff. W. H. Hilton, of New Castle, for defendant.

PER CURIAM. In this action the plaintiff recovered a verdict for \$39.72 on a promissory note bearing date November 7, 1905, for the sum of \$29.25. The case comes to this court on motion to set aside the verdict as against the evidence.

The motion must be sustained. The verdict is clearly wrong, and should be set aside. There is no legal consideration for the note upon which the verdict was rendered.

At the October term of court in Lincoln county for 1905 the plaintiff had an action pending against the defendant on four promissory notes for \$25, \$200, \$40, and \$80, respectively. Upon the note for \$40 there was an indorsement of \$35, and upon the note for \$80 there was an indorsement of \$75.

It appears that both parties had computed the interest on the notes, and that the results were slightly different. Thereupon Mr. Richards, the register of deeds at Wiscasset, at the request of the parties, made another computation, and the result reported by him was accepted; and the defendant testifies that he paid the full amount due on the notes according to the computation of Mr. Richards, "two hundred and ninety odd dollars, and the costs, eleven dollars and something."

But the plaintiff then claimed that the defendant should pay the fees or commissions which he, the plaintiff, must pay his attorney for collecting the notes. The defendant expressed the opinion that it "didn't belong to him" to pay the plaintiff's lawyer, but the plaintiff insisted that the law required him to do so, and stated that the amount of the commission was \$29.25.

The defendant did not have money enough

left, after paying the notes, to pay this claim for commission, but was induced by the plaintiff to give his note for the amount.

The plaintiff denies that this note had any reference whatever to attorney's fees or attorney's commissions; and testified that the defendant did not have money enough to pay the amount due on the notes and taxable costs, and gave this note to supply the deficiency.

But unfortunately for the plaintiff the original notes themselves, with the payments indorsed upon them, are in evidence, and a computation of the interest to the time of the settlement in question shows the amount due to be \$292.59, and the taxable costs of \$11 would increase the amount to \$303.59. This is in exact accordance with the testimony of the defendant, and at variance with that of the plaintiff. It is highly significant also that the commission of 10 per cent. upon \$292.50 would be \$29.25, precisely the amount for which the note in suit was given.

The defendant was entirely without experience or knowledge in relation to questions of that character. The parties were cousins, and the plaintiff well understood that the defendant would accept his statement in regard to his liability for commissions, and the defendant was induced to believe that he was liable for attorney's commissions precisely the same as for taxable costs.

If the plaintiff knew that his statement to the defendant was false, he intended to deceive and defraud him. He did not know it to be correct, but recklessly stated as a fact what he did not know to be true.

Under such circumstances, it must be held that there was no legal consideration for the note.

Motion sustained; verdict set aside.

SULLIVAN v. ROCKLAND, T. & C. ST. RY.
(Supreme Judicial Court of Maine. Dec. 6, 1912.)

MASTER AND SERVANT (§ 177*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

The injury to a servant being due to one working in the crew as a member thereof, a fellow servant, giving an order to hoist before other fellow servants had properly readjusted clamps, thereby allowing the load to be thrown on a part of the hoisting apparatus not intended to carry it, the master is not liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 307, 352, 353; Dec. Dig. § 177.*]

Exceptions from Supreme Judicial Court, Knox County, at Law.

Action by Thomas H. Sullivan, administrator, against the Rockland, Thomaston & Camden Street Railway. Nonsuit was ordered, and plaintiff brings exceptions. Exceptions overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, and KING, JJ.

Philip Howard, of Rockland, for plaintiff.
A. S. Littlefield, of Rockland, for defendant.

PER CURIAM. This is an action for personal injuries resulting in the death of Sortir Theodos, the plaintiff's intestate. At the conclusion of the plaintiff's testimony, the presiding judge ordered a nonsuit.

Sortir was one of a crew of men who, on the 23d day of December, 1910, under the charge of William Walker as foreman, went to work for the defendant corporation discharging a cargo of coal in the defendant's cars at its wharf at Glencove in the town of Rockport, Me. The declaration is not before us. We are therefore unable to determine precisely what the allegations in the writ covered, but evidence was offered tending to prove both the improper use of the tackle and the decayed condition of the piling to which one end was attached. The hoisting apparatus is briefly described as follows: A guy wire was used to support a pair of shears extended over the hole of the vessel for the purpose of discharging coal by the use of tubs, weighing, when filled, from 700 to 800 pounds. It was necessary, in unloading vessels of different widths, to adjust the shears by letting them up so that the cable attached to the tubs would come directly over the hole of the vessel.

The guy wire was accordingly securely fastened to the top of the shears and then run back to the end of a narrow projection of the wharf, and there passed around several piling driven near together, was then brought back upon itself and clamped to the guy by iron clamps—some witnesses say two, others three. About one-fourth of the distance up the guy from its lower end, one end of the tackle was secured to the guy, the other end fastened to a piling about 10 feet in from and somewhat to one side of the bunch of piling just mentioned. The object of this tackle was to raise and lower the shears for the purpose of adjusting them to the width of the vessel being discharged. The lower end of the guy wire was securely fastened by the clamps to prevent the end of the wire which was clamped upon itself from slipping and letting the shears fall. There is no complaint of any defect in this part of the apparatus. The office of the tackle was to hold the guy wire from slipping, letting the shears fall, while the clamps were being removed, or partially removed, for the purpose of lengthening or shortening the guy wires, as the case might require, in order to adjust the tubs to the hole of the vessel. There is no contention that this tackle was ever calculated for holding the shears with a load upon them; but, on the contrary, the plaintiff's testimony

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

clearly shows that it was not intended for that purpose. Just before the accident it was discovered that the tub was coming in contact with the end of the platform so that some of the coal tipped out, and the stevedore stopped the operation of hoisting for the purpose of letting out the guy wire and obviating the difficulty discovered. The tackle was used as it was intended to be; the clamps were loosened, the tackle let out, and the guy wire lengthened. But before the clamps were again tightened so as to hold the wire from slipping, the stevedore directed the hoisting to proceed for the purpose of seeing whether the shears were properly adjusted. The attempt to lift the loaded tub from the hole pulled the tackle from the piling to which it was attached and secured by a long spike of round iron. When this happened, the clamps, not being fast upon the guy wire, allowed it to slip, the shears to fall, and the tub to descend, striking the plaintiff's intestate, who was instantly killed. A witness testified that the capsl was rotten where the iron entered it.

A careful reading of the testimony, which it will serve no purpose to analyze, clearly shows that the accident which caused the death of the plaintiff's intestate was due to, or contributed to by, a fellow servant. There is no claim in this case that the stevedore was a superintendent of the defendant. He says, in answer to a question, that he "was working in the crew as one of the crew." The only conclusion which can be fairly drawn from the testimony is that this tackle was intended for the sole purpose of lengthening the guy for the adjustment of the shears, and never contemplated for use in hoisting loaded buckets from the hole of the vessel. It is also evident that the attempt to lift the loaded buckets was the proximate cause of the accident. The order to hoist was directed by a fellow servant before his other fellow servants had properly readjusted the clamps upon the guy wires after they were loosened, thereby allowing the wire to slip and throw the load upon that part of the apparatus not calculated to carry it. It is the opinion of the court that a nonsuit was properly ordered.

Exceptions overruled.

MURPHY v. PATTEN et al.

(Supreme Court of New Jersey. Oct. 29, 1912.)

1. PLEADING (§ 341*)—MODE OF MAKING OBJECTIONS TO PLEADINGS.

Practice Act (P. L. 1912, p. 377) schedule A, rule 26, provides that pleadings may be struck out on motion where they disclose no cause of action. Rule 27 authorizes objections to pleadings other than those provided for in rule 26 to be made by motion. *Held*, that a motion on the ground of misjoinder of parties and causes may be treated as an objection covered by rule 27, although designated

by the moving party as a motion to strike out the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1046, 1047; Dec. Dig. § 341.*]

2. ACTION (§ 47*)—JOINDER OF CAUSES—WRONGFUL DISTRESS AND BREACH OF COVENANT.

Under Practice Act (P. L. 1912, p. 377) § 11, providing that the plaintiff may join any causes of action, causes of action against a landlord for wrongful distress and for breach of covenant may be joined.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 469-489; Dec. Dig. § 47.*]

3. ACTION (§ 50*)—JOINDER OF CAUSES—PARTIES AND INTERESTS INVOLVED.

Under Practice Act (P. L. 1912, p. 377) § 11, authorizing a plaintiff to join any causes of action, and section 6, providing that separate causes of action against several defendants may be joined if the causes have a common question of law or fact and arise out of the same transaction or series of transactions, causes of action against a landlord for breach of the covenants of the lease and causes against the landlord and a third person for wrongful distress in the collection of rent under the same lease may be joined, the legality of the distress being dependent upon the obligation to pay rent, which may be controverted by a recoupment of damages from breach of covenant, especially in view of schedule A, rule 13, of that act, providing that the transactions referred to in section 6 include any transactions growing out of the subject-matter in regard to which the controversy arises.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

4. PLEADING (§ 34*)—CONSTRUCTION—CONSTRUING AGAINST PLEADER.

The rule for construing pleadings that, when there are two intents, the one must be taken which is most against the pleader, is not expressly or impliedly abolished by the Practice Act (P. L. 1912, p. 377), especially in view of schedule A, rule 25, providing that unnecessary repetition, etc., and other violations of the rules of pleading, are objectionable, which impliedly continues all rules of pleading except those so purely technical that they are contrary to the spirit of the act.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66-75; Dec. Dig. § 34.*]

5. PLEADING (§ 362*)—MISJOINDER OF CAUSES—DETERMINATION OF OBJECTION.

Under the Practice Act (P. L. 1912, p. 377) schedule A, rule 14, subd. "f," authorizing the court to strike out causes of action which cannot be conveniently tried with other causes joined in the same suit, and rule 15, providing that objections for misjoinder are waived unless made on motion before answer or reply, an objection to a complaint for misjoinder must be determined solely on the allegations of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147-1155; Dec. Dig. § 362.*]

6. PLEADING (§ 369*)—DEFECTS—ELECTION TO AMEND OR DISCONTINUE.

Where causes of action against a landlord for breach of covenant and causes against the landlord and another for wrongful distress are joined without allegations that the distress was in the collection of rent under the lease containing the broken covenants necessary to justify such joinder, plaintiff will be permitted to elect whether he will amend by alleging such facts, or will discontinue as to the third person.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Joseph F. Murphy against Thomas G. Patten and others. On motion to strike out complaint. Motion granted in part.

The complaint was as follows:

"Plaintiff, residing in the city of Long Branch, county of Monmouth, and state of New Jersey, says:

"First Count.

"(1) Heretofore, to wit, on the 31st day of August, 1912, to wit, at the city of Long Branch, in the county of Monmouth, the said defendants unlawfully seized, took, and distrained certain goods and chattels, to wit, 10 barrels of Budweiser beer, 1 barrel of whisky, 2 barrels of sherry, 1 barrel of port, 4 cases of Pommery Sec. wine, 34 bottles of Cluquot wine, 24 bottles of whisky, 9 bags of potatoes, and 7 barrels of bottled beer, of great value, to wit, of the value of \$2,000, and unlawfully kept and detained the same for a long space of time, to wit, for the space of three days, then next following, whereby plaintiff for and during all that time lost and was deprived of the use, benefit, and advantage of said goods and chattels and the profits to be derived by him from the sale thereof, and the same thereby became and were greatly damaged, lessened in value, and spoiled.

"Second Count.

"Said plaintiff further says:

"(1) The said above-named defendants afterwards, to wit, on the 31st day of August, 1912, to wit, in the city of Long Branch, in said county of Monmouth, unlawfully seized, took, and carried away certain goods and chattels of the said plaintiff of the like number, quantity, quality, description, and value of the said goods and chattels in the said first count of this complaint mentioned, then and there found and being, and unlawfully converted and disposed of the same to their own use, thus depriving the plaintiff of the use, benefit, and advantage of the same, and causing him the loss of profits, which would inure to him through the sale thereof in his business.

"(2) Plaintiff demands as damages on the foregoing counts from said defendants, Thomas G. Patten, Walter R. Patten, and Charles W. Seller, \$3,000.

"Third Count.

"The said plaintiff further says: .

"(1) That the said defendants Thomas G. Patten and Walter R. Patten, to wit, on or about the 1st day of April, 1912, let and rented to the plaintiff a certain hotel, and premises with the appurtenances, situate in the city of Long Branch, in said county of Monmouth, and undertook and agreed that the said hotel and premises, with the appurtenances and its surroundings, were fit and suitable for hotel purposes, free from nuisance of every kind, and would at all times during the continuance of the lease whereby the same was let and rented be suitable and

fit for the purposes aforesaid, and that they, the said defendants, would at their own cost and charges support, uphold, maintain, and keep the said hotel and premises, with its appurtenances and surroundings, in good and tenantable state, order, and condition, so that plaintiff might peaceably and quietly have, hold, use, and enjoy the demised premises, without detriment or damage to plaintiff, his family, and guests.

"(2) The said defendants Thomas G. Patten and Walter R. Patten failed in the performance of their said undertaking and agreement, in that they suffered and permitted to exist and maintained on other lands owned and controlled by said defendants by them devoted to public uses, and adjacent to said hotel and premises, so as aforesaid demised to plaintiff, a public privy, or water-closet, the stenches arising from which jeopardized the health of plaintiff, his family, and guests to such extent that many of the plaintiff's guests refused to stay at said hotel, and left the same, thus depriving plaintiff of the large profits which would have inured to him had his said guests remained.

"Fourth Count.

"The said plaintiff further says:

"(1) That at the time of the letting of said hotel premises and appurtenances, and thereafter, the said defendants Thomas G. Patten and Walter R. Patten undertook and agreed with plaintiff to cover with asbestos or some other proper nonconducting heat device a certain boiler and furnace and the pipes connected therewith in the cellar of said hotel and one of the appurtenances thereof, in order to insure protection from spoil or damage to the wines, ales, beers, and other liquors, the meats, fish, and other food stuffs belonging to plaintiff, to be kept in said cellar, by reason of the heat which would arise from the said boiler and furnace and the pipes incident thereto and connected therewith.

"(2) The said defendants Thomas G. Patten and Walter R. Patten wholly failed in the performance of this undertaking and agreement.

"(3) As a result of this failure in performance on the part of the said defendants, plaintiff was obliged to expend unnecessary moneys in the purchase of larger quantities of ice than should have been required, notwithstanding which the wines, ales, beers, and other liquors, the meats, fish, and other food stuffs intended to be and necessarily kept in said cellar of said hotel, to be used and employed by him in his business, were damaged, spoiled, destroyed, and rendered valueless.

"Fifth Count.

"Said plaintiff further says:

"(1) That at the time of the letting of said hotel and premises and appurtenances, and thereafter, the said defendants Thomas G. Patten and Walter R. Patten undertook and agreed

with plaintiff that they would, at their own costs and charges, put the cesspools, sewers, toilets, services, and plumbing in the said hotel, and appurtenant thereto in sanitary condition and good and tenantable order and repair, and would uphold, maintain, and keep the same in such condition and repair.

"(2) The said defendants Thomas G. Patten and Walter R. Patten failed in the performance of this last-mentioned undertaking and agreement, and suffered and permitted the said cesspools, sewers, toilets, services, and plumbing to be and remain in such unsanitary state and in such condition of disorder and disrepair that the cellar of said hotel became flooded with sewage, from which noxious odors arose, whereby the health of plaintiff, his family, and guests was impaired and the food stuffs aforesaid of plaintiff spoiled and rendered unfit for use.

"(3) By reason of the premises, guests intending to remain at the said hotel of plaintiff refused so to do, and left said hotel, thereby depriving plaintiff of large profits.

"Sixth Count.

"The said plaintiff further says:

"(1) That at the time of the letting of the said hotel, the premises, and appurtenances, and thereafter, the said defendants Thomas G. Patten and Walter R. Patten undertook and agreed to supply certain lights for use in said hotel and upon the said premises, and to properly equip and maintain the same; and further undertook and agreed to finish and paint the stairways, toilets, and bath-rooms in said hotel.

"(2) The said defendants failed to do so.

"Plaintiff, under the third, fourth, fifth, and sixth counts, above set forth, demands from the said defendants Thomas G. Patten and Walter R. Patten as damages \$10,000."

Motion is to strike out the complaint upon the specified grounds that: "First. Because by the said complaint there appears to be a misjoinder of parties defendant. Second. Because by the said complaint there appears to be a misjoinder of causes of action. Third. Because the said complaint is in divers other respects illegal and improper."

Argued before VOORHEES, J., at Chambers.

George W. C. McCarter and McCarter & English, all of Newark, for the motion. Joseph Reilly, of Red Bank, opposed.

VOORHEES, J. In the consideration of this motion, which arises under the Practice Act of 1912 (P. L. 1912, p. 377), we must keep in mind the liberal construction enjoined by its first section, in order that substantial rights may be speedily and finally determined, and the fact that it abrogates the rule of strict construction, which, before its

passage, prevailed concerning statutes in derogation of the common law.

We must likewise be mindful of the structure of this legislation. It consists of a statute short and general in its character, conferring upon the court power to prescribe rules. Section 32. These rules are of such a nature that they supersede both statutory and common law when in conflict therewith. I take it, however, that the rules provided for may not supersede the statute which confers the power for their enactment. The rules which were enacted with the statute become the first rules promulgated. This motion is, in terms, as shown by the notice, "for an order striking out the complaint." Under rule 26, therefore, it takes the place of a demurrer, and may prevail if the pleading "discloses no cause of action." It is quite evident that a strict construction of the rule, treating the notice according to its terms as simply to strike out, will lead to a denial of the motion, for the whole complaint does set out a cause or causes of action, as well as each count thereof.

[1] Because the object of the motion is clearly stated in the notice, it may be treated as an objection to a pleading (rule 27) other than those objections provided for in rule 26, made by motion, the practice being laid down by rules 27, 28, and 29. We may assume this latitude according to the spirit of liberality enjoined by the statute, although at the risk of encountering the provisions of rule 29, for in thus moulding the notice it becomes one simply alleging misjoinder, and does not "specify the grounds thereof." The motion, therefore, considered in this aspect, presents the questions of misjoinder of parties and misjoinder of causes of action. The provisions of the statute regulating joinder of causes of action and of parties defendant (sections 6, 11) are very liberal. As to the latter, any defendant may be joined "who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or any part thereof, adverse to the plaintiff, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein." As to the former, there may be joined "separate causes of action against several defendants if the causes of action have a common question of law or fact, and arose out of the same transaction, or series of transactions," and (section 11) "the plaintiff may join any causes of action."

It might be argued that the power to join is practically unlimited as applied to parties defendant, but that separate causes of action against several defendants, to be capable of being joined, must possess a common question of law or fact, arising out of the same transaction, as prescribed by section 6. The statutory leave to join parties defendant, under the same section, is given expressly "subject to rules." The rules regulating this subject pertinent to this case

are 7 and 8, and they do not materially restrict the joinder of parties defendant. If the objection to the joinder of causes of action is groundless, then it would appear that the parties defendant, not being several, cannot be objected to.

Six counts are contained in the declaration, and they form two groups. The first two counts constitute the first group, and the remainder of the counts the second group. The first group embraces actions of tort arising from unlawful distraint of chattels, and the second group comprises actions brought against two only of the three defendants, for breaches of covenant in a lease.

[2] In view of the general right given by section 11 to "join any causes of action" limited only by rules (see rules 14 and 15), it will be conceded that, if the defendant Seller had not been brought in, there could be no objection urged against the two groups of actions being litigated in the same suit against the same defendants. The restriction contained in section 6 concerns "separate causes of action against several defendants." Seller is in this case the only several defendant. With regard, then, to this several defendant, have these two groups a common question of law or fact, and do they arise out of the same series of transactions? That must be the test.

[3] It must be apparent that if the distress was made in order to collect rent, under the demise referred to in the second group, then there might be a common question of fact or law arising out of the same series of transactions; for, although formerly in an action for rent due on a lease under seal the tenant was not allowed to recoup his damages for a breach of covenant in such lease (*Hunter v. Riley*, 43 N. J. Law, 480), yet, under Practice Act 1903, § 105, the law was changed so as to permit the defendant to recoup even against a sealed instrument. This section was repealed by the Practice Act of 1912, yet, in place of the abrogated section, by the 1912 Act, § 12, a defendant may "counterclaim or set off any cause of action."

The legality of the distress is, in one aspect, dependent upon the obligation of the tenant to pay rent, and that may be controverted by a recoupment of damages arising from a breach of a covenant in that very lease. So that as a result it would seem that if the complaint had alleged that the distress, which is claimed to be unlawful, was made in the enforcement of a claim for rent accruing under the same demise referred to in the second group of counts, there would appear upon the face of the pleading the necessary recitals to warrant a joinder of these causes of action.

This is the more apparent from rule 13, where it is said that transactions include those "which grew out of the same subject-matter in regard to which the controversy has arisen," and from the illustration con-

tained in that rule, to make its meaning more complete.

[4, 5] The mover of the motion, however, insists that the fundamental and familiar rule of pleading—that, when there are two intendments, that one must be taken which is most against the party pleading—must be considered to be in full force; that there is nothing in the Practice Act of 1912 which expressly or impliedly abolishes this rule of pleading; that rule 25 impliedly continues all rules of pleading except such which are purely of so technical a nature that they may be said to be contrary to the spirit of the act; and that in the case in hand an argument in favor of the upholding in the present case of this principle is irresistibly to be drawn from the following sections of the act. The reasoning is this: Subdivision "f" of rule 14 authorizes the court to "strike out causes of action which cannot be conveniently tried with other causes of action joined in the same suit," and rule 15 obliges the defendant to move regarding objections for misjoinder of causes of action before he answers the complaint. The insistence, therefore, is that such motion of necessity must be based solely upon the complaint, and that the allegations of the complaint furnish a complete statement, upon such application, of the test set out in section 6 of the statute. This reasoning is satisfactory. But the fault complained of would be remedied either by the elimination of Seller as a party defendant, for then there would not exist a separate cause of action against a "several defendant," or by incorporating in the complaint allegations of the general import of those above suggested.

[6] It would seem to be going too far to turn this proceeding into a motion to strike out one or the other of these causes of action on the ground that they cannot be conveniently tried together under rule 14f. The first group may be tried together, and the second group may be tried together. Which group shall be stricken out? It would of necessity result in putting the plaintiff to his election which of the two groups he would try.

The better result will be reached by granting the motion by declaring that upon the face of the pleading there appears to be a misjoinder of causes of action, because the court cannot say by reading the complaint that there is any connection between the two groups of causes alleged therein, which authorizes the bringing in of the "several defendant," but that the plaintiff may be permitted to amend his complaint, as before suggested, under the power given by the Practice Act of 1912, so as to make certain to the court that the transactions do arise out of the same subject-matter, and that there is a common question of law or fact thus presented, or by discontinuing against Seller.

An order will, therefore, be made that the motion shall prevail to the extent aforesaid,

and that the plaintiff make such amendments as he may be advised within 20 days after the date of the order to be entered herein, and shall file and serve upon the defendant's attorney within that time his amended complaint, or, if he so elect, his order of discontinuance against the defendant Seller. Costs will be allowed upon this motion to the defendants.

**EQUITABLE GUARANTEE & TRUST
CO. v. HUKILL et al.**

(Court of Chancery of Delaware. Dec. 9, 1912.)

**FIXTURES (§ 18*)—BETWEEN MORTGAGEE AND
LESSEE OF MORTGAGOR.**

A lease of land, made after mortgage of it, having authorized the lessee to erect on the premises a building for trade purpose and remove it during the term, the lessee may, as against the mortgagee, during the term, the mortgage not having been foreclosed, remove it; it not being shown the original security will be thus impaired.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 32-46; Dec. Dig. § 18.*]

Suit for injunction by the Equitable Guarantee & Trust Company, trustee, against Margaret W. Hukill, administratrix, and another. Bill dismissed.

Injunction bill. On November 10, 1875, Letitia L. Green purchased from Joshua B. Fennimore certain land situate in the town of Middletown and gave to him a bond and mortgage for the full amount of the purchase price thereof. Through sundry assignments the said bond and mortgage were assigned to the trustees under the will of Victor Green, and are now held by the Equitable Guarantee & Trust Company, the present trustee under said will by appointment of the Chancellor.

Subsequent to the purchase of said premises the said Letitia L. Green leased a portion of said lands, from year to year from January 1st, to Gideon E. Hukill for the purpose of conducting a lumber yard and for the sale of general building material. On March 29, 1881, the said Letitia L. Green entered into an agreement with the said Gideon E. Hukill, who at that time was a holding over tenant from year to year, whereby he was granted "the privilege of erecting at his individual expense on the said lumber yard a frame building suitable for the storage of moldings, sash, doors and other millwork, together with other cumbrous or heavy articles of merchandise in connection with his business. Also to build at his expense such shedding as he may require to protect his lumber from rain and storms, and that he may at any time when he may so desire, remove without objection or hindrance from the land of the said party of the first part [the lessor] any, or all, of the buildings or shedding that he may have erected thereon at his in-

dividual expense under this agreement." On December 8, 1881, a further agreement was entered into by the lessor and lessee, whereby the lessee was granted the privilege of erecting on said premises a frame building to be used for a stable and carriage house, with the privilege of removing it at any time.

Subsequent to the execution of said agreements the said lessee erected, at his own expense, a large warehouse, sheds for storing lumber and a stable and carriage house. The bill alleged that all of said buildings are well and substantially built, have shingle roofs, and are annexed to the soil by brick or stone piers or foundations let into the ground about 1½ feet; that said buildings were appraised by the appraisers of the personal estate of the said Gideon E. Hukill, who died October 27, 1911, at the sum of \$450, but have a much greater value if permitted to remain attached to the freehold.

After the death of the said Gideon E. Hukill, his administratrix, Margaret W. Hukill, who is in possession of said premises for a term ending January 1, 1913, offered said buildings and sheds for sale, under protest of the complainant, as part of the personal estate of the said Gideon E. Hukill, and were purchased by Short & Walls Lumber Company.

The bill also alleged that one or more children of Victor Green, who are the beneficiaries in remainder under said will, are now living; that said buildings are fixtures, and when erected became subject to the lien of said mortgage and still remain subject to the lien thereof, notwithstanding said agreements of the mortgagor with said lessee; that the property covered by said mortgage, including the lands described in the bill, is not of sufficient value to pay said mortgage, and the removal of said buildings would subject the complainant to great and irreparable injury; and that the said Margaret W. Hukill, administratrix as aforesaid, and Short & Walls Lumber Company threaten to remove said buildings unless restrained.

The prayers of the bill, other than those for answer, subpoena and other relief, are:

"That the Chancellor may make and enter a decree finding that the said buildings are fixtures and, when erected, became subject to the lien of said mortgage, and still remain subject to the lien thereof.

"That the said defendants, and each of them, may be perpetually enjoined and restrained by the injunction of this honorable court from removing, or attempting to remove, said buildings, or any of them, from the premises hereinbefore described, or otherwise interfering therewith."

The answer averred that said buildings were necessary for carrying on the business and trade for which said premises were demised to the said Gideon E. Hukill, and were erected thereon and used for no other

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

purpose than that of trade fixtures; that said buildings are not attached to the freehold any further than by their own weight resting upon stone or brick piers; and are capable of being removed without any damage to the freehold.

Upon motion of the solicitors for the complainant, the cause was heard on bill and answer.

Saulsbury & Morris, of Wilmington, for complainant. Martin B. Burris, of Middletown, for defendants.

THE CHANCELLOR. The point involved is whether a mortgagee can enjoin the removal of buildings erected for a trade or business purpose upon the mortgaged premises by authority of the lessor, who was also the mortgagor, given to the lessee under a lease made subsequent to the mortgage and by the terms of which the lessee had a right to sever and remove the buildings during the term, which has not yet expired but is still continuing and unsundered.

It does not appear whether the value of the security for the mortgage debt will be depreciated by the removal below that which existed when the mortgage was made. By the bill it is alleged that the mortgaged premises are not sufficient security, meaning thereby probably that it is insufficient if the buildings be removed; and it is further alleged that the removal would cause great and irreparable injury to the complainant. From the answer it appears that the buildings can be removed without damage to the freehold. Whether, or not, the complainant had notice or knowledge of the lease and the erection of the buildings is not alleged or denied by either party. Nor is it, of course, alleged that the mortgagee consented to the annexation, or assented to the lease in any way. It is unnecessary to consider whether there was, in legal effect, an annexation, for it appears that there was an actual physical annexation to the land of the buildings in question. The first consideration is whether by the decisions of our own courts the case can be decided and a review of them is necessary.

The case of *Rice v. Adams*, 4 Har. 332 (1845), is an early decision that real fixtures such as steam engines, boilers, cupola and other equipment for a foundry erected by the owner and by him attached to the land, not for a temporary purpose, but as a fixed establishment, acquired the character of real property, and as such subject to the lien of a judgment against such owner. Prior to the entry of the judgment the owner made a parcel sale of the equipment to a new firm, of which he became a member. Subsequently a second judgment creditor of the owner of the land levied on the equipment as personal property. But it was held that being realty the equipment was not subject to be so seized as personalty.

This case does not control the case under consideration, in which the tenant by authority of a written agreement with his lessor attached improvements for trade purposes, with an express right to remove them.

The case of *Watertown, etc., Co. v. Davis*, 5 Houst. 192 (1877), would seem at first to be conclusive of the question in this case. There the plaintiff agreed with Holmes, who had previously mortgaged his land to Davis, to erect on the mortgaged premises a saw mill and equipment, including an engine and boiler, which equipment it was agreed should continue to be the property of the vendor until paid for and in case of default in the payment of the purchase price the vendor could, by the agreement, enter and remove the property sold. Subsequently the mortgage was foreclosed and the mortgagee, Davis, became the purchaser. The vendor, the plaintiff, demanded redelivery of the equipment because of default of payment by its vendee and on refusal brought an action of trover for the value thereof. The court did not find fault with, but upheld the form of the action. It sustained the contract of sale as valid. It was held, however, that if the vendee, who had no title to the equipment as against his vendor, annexed the equipment to the mortgaged land in such way as to make it a part of the realty in legal contemplation, the rights of the prior mortgagee would attach, not only as against the mortgagor, but also as against the vendor of the mortgagor. It would seem to follow that if a mortgagor has no power to make an agreement with a third person, such as a vendor of a chattel, by which the chattel annexed shall remain the property of the vendor as against the mortgagee, then the mortgagor could not, by lease made subsequent to the mortgage, grant to the lessee the right to remove trade fixtures as against the mortgagee. *Tiffany on Landlord and Tenant*, p. 1619. But the two cases are distinguishable. Clearly the theory on which the court in *Watertown, etc., Co. v. Davis*, reached its conclusion was that established in *Rice v. Adams*. After referring to that case, the court, alluding to fixtures such as machinery, fixed by the owner to his land, said:

"When these are attached to the land by the owner in a permanent manner, and not for a mere transitory purpose, with such circumstances as indicate a purpose or intention on his part to connect them permanently with the soil or buildings upon it in order to the pursuit of a permanent employment or occupation, they cease to have the character of chattels or movable goods, and become part and parcel of the land, just as much as the doors or window-shutters upon the house are, which, though removable in most cases, by simply lifting them from their hinges, are yet as much part of the land itself as a tree growing upon it or a rock under its surface."

And again it was said later:

"And in the case of machinery set upon the premises by the owner, as in this case, the question rather is, are the things affixed, set or erected or fastened to the freehold for a temporary or permanent purpose? and if the purpose is shown to be permanent, as to carry on an employment or business, or if it be an improvement to the property enhancing its value, it should be treated, especially if the adaptation of the means to the end is shown to be appropriate and fit, as being indicative of a design to incorporate the machinery with the freehold and make it part of it, and as such you should regard it. When the attachment of the chattels is thus complete, so that they become part and parcel of the freehold, like the buildings, the fences, and other improvements of a permanent character, the owner of the land himself cannot detach or remove them and change their character back into personalty to the prejudice of a creditor who has a mortgage upon the premises; for to do so, if the value of the lien of the mortgage should be seriously impaired thereby, would be an act of waste, to prevent the commission of which the mortgagee could obtain relief in equity by injunction or by writ out of the Superior Court."

From this it will be seen that from the facts in such cases the court makes a legal inference of an intention to annex the structure, equipment or improvement and so make it a part of the land. Such facts, as the court said, indicate a design to incorporate into the freehold the thing placed on it. As between the mortgagor and mortgagee this would be held to be the legal intention, whatever the mortgagor might declare, unless the mortgagee assent thereto in some binding way other than by having notice of such declaration.

But it is clear that an intention to make fixtures a part of the land is necessarily absent where the mortgagor gives to his lessee a right to attach an equipment for carrying on a trade on the mortgaged premises with a right of removal thereof by the tenant. The necessary legal implication would be that the attachment was for a temporary, and not a permanent purpose, and that the thing affixed would be separated and removed by the tenant from the premises at the termination of the demise. It would be implied that the use was for the tenant during the term and not for landlord, or those to claim under him.

In *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209, Agnew, J., said that the character of the physical connection of a chattel to real estate did not constitute the criterion of annexation, but the intention to annex.

"The same want of intention to connect is implied to a tenant who attaches to the land fixtures for the use of his business, the law presuming in favor of trade that he meant

to remove them before the end of his term; and it is only on leaving without removal the intention to make a gift of them to the landlord is imputed to him."

Inasmuch as the theory on which the case of *Watertown, etc., Co. v. Davis* was decided does not apply to the case at bar, this court is free to reach a conclusion without being controlled by the cited case as a precedent, though a court should not fritter away established rules of law by refining distinction. It is better to disregard or disapprove decisions of other courts than to unnecessarily and unwisely differentiate them, unless one finds a clear and controlling element of difference.

In the case of *Equitable Guarantee & Trust Co. v. Knowles*, 8 Del. Ch. 106, 67 Atl. 961, and also in the case of *Atkinson v. Patterson*, heard by Judge Spruance while at the bar, as referee, and reported in 8 Del. Ch. 539, as an appendix thereto, the question as to fixtures arose between a mortgagee of a mill and creditors of the mortgagor who had levied on articles in the mill as personal property subject to seizure and sale on a *fi. fa.* writ. Judge Spruance said that the mortgagee takes all the fixtures which would pass to the heir, and, as between the heir at law and the executor of the owner of the fee, the inheritance is favored. His opinion largely relates to applications of general principles as to the mode of attachment of articles of which the mill was composed, and has little of instruction for this case.

Chancellor Nicholson, in the other case, adopted for a like purpose the guides adopted by Judge Spruance and applied them to the circumstances before him as to the particular mill. He quoted, however, with approval from the opinion of Judge Knowlton in *Hopewell Mills v. Taunton*, 150 Mass. 519, 521, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235, as to the intention of the owner in the annexation and method of ascertaining such intention. The character of the property, as real or personal, may be fixed by contract with the owner of the real estate when the article is put in position. In the absence of a contract the intent is to be found, not in the undisclosed purpose of the owner, but that implied and manifested by his act. In neither of these cases was the point under consideration here touched on in any such way as to show the mind of the court. In neither case does the court announce any principle which would deny the right of a mortgagor after making the mortgage to so lease the mortgaged premises as that the lessee could attach a building fitted and intended and appropriate for a trade purpose, and have a right as against the mortgagee to remove it, provided the value of the security, as it was when the mortgage was made, was not impaired by the removal. Nor is either case an authority where there is such a lease. The giving of the right to remove did indi-

cate unmistakably the intention of the parties thereto, both the mortgagor lessor and the lessee, that there should be no permanent annexation such as would constitute the building a part of the real estate.

There are no other cases in Delaware having an important bearing. In *Ott v. Specht*, 8 *Houst.* 61 (1887), the vendor of machinery under a conditional sale, with right to remove for non-payment of the price, maintained against the vendee of the chattels an action of replevin for the chattels sold, though they were annexed to the buildings in a permanent manner.

The case of *Taylor v. Plunkett*, 4 *Pennewill*, 467, 56 *Atl.* 384 (1903), concerned the right of a grantee of real estate, on which there was a bakery, to such articles as were actually affixed or fastened to the freehold, as against an execution creditor of the grantor, the annexation having been made by the grantor for his own use while owner.

Viewing the particular questions raised in this case as without controlling precedent in this state, though there are illuminating decisions here, it will be found that in the courts elsewhere there is an irreconcilable conflict. On the one hand, some courts hold that the mortgagor cannot grant to another a greater right than he himself has, and, therefore, as he cannot, as against the mortgagee, or any claiming under the mortgagee, remove things attached to the land, even for trade purposes, he cannot, as against the mortgagee, grant such right to his lessee, and the lessee can be restrained from removing chattels after an annexation thereof, even though the original value of the security of the mortgage be not impaired. This rule does not seem to be equitable, or to be based on sound reason and good policy. It may seem logical, and is clearly defined and easily applied. It is also true that in this country the lessee takes his lease and makes his improvements with constructive notice of the mortgage and other record liens and erects improvements for trade purposes at his peril. Courts of high standing take this view.

In Massachusetts the courts have consistently held that as against the mortgagee the mortgagor cannot, subsequent to the mortgage, give to a third person a right greater than the mortgagor had. *Clary v. Owen*, 15 *Gray*, 522; *Lynde v. Rowe*, 12 *Allen*, 100 (where the court said that a mortgagor cannot create a tenancy after making the mortgage which will be valid against the mortgagee); *Butler v. Page*, 48 *Mass.* (6 *Metc.*) 40, 39 *Am. Dec.* 757; *Meagher v. Hayes*, 152 *Mass.* 228, 25 *N. E.* 105, 23 *Am. St. Rep.* 819. Indeed the rule against the lessee has been called the Massachusetts rule. In the minds of some it may be deemed important that in Massachusetts the mortgagee takes the legal title and not a lien only.

The courts of Maine follow those in Massachusetts. *Wight v. Gray*, 73 *Me.* 297; *Ek-*

strom v. Hall, 90 *Me.* 186, 38 *Atl.* 106; *Young v. Chandler*, 102 *Me.* 251, 66 *Atl.* 539. But in none of these cases did the question arise as to a lessee.

On the other hand, other courts have held that if the original value of the security for the payment of the mortgage debt is not affected by the removal of the fixture during the term of the lease, then the mortgagee has no just ground of complaint against such removal. This latter view meets the approval of this court as being based on the better reason and supported by the weight of authority. If the mortgagee is not injured by the removal during the term, his standing to prevent the removal is without merit. To allow such power is to unreasonably limit the use which a mortgagor may make of the mortgaged premises, and would tend to prevent the development and improvement of land for commercial and trade purposes.

This is the view of the courts of New Jersey. In *Campbell v. Roddy*, 44 *N. J. Eq.* 244, 14 *Atl.* 279, 6 *Am. St. Rep.* 889 (1888), the Court of Errors and Appeals held that a mortgagee of chattels, afterwards annexed by the mortgagor to his land, did not lose his lien on the chattels after annexation, as against a mortgagee of the land, made prior to the chattel mortgage, where the security of the real estate mortgage was not diminished. The principle on which the court based its ruling was thus stated by it:

"Any property belonging to the mortgagor which he chooses to annex to the mortgaged premises, becomes realty. But it is difficult to perceive any equitable ground upon which the property of another, which the mortgagor annexes to the mortgaged premises, should inure to the benefit of the prior mortgagee of the realty. * * * So long therefore as he is secured the full amount of the indemnity which he took, he has no ground for complaint."

This reason applies with even more force in the case at bar than in the case cited. This case has been followed by later cases in New Jersey. *Palmtree v. Robinson*, 60 *N. J. Law*, 433, 38 *Atl.* 957, and *Oil City, etc., Works v. N. J., etc., Co.*, 81 *N. J. Law*, 491, 79 *Atl.* 451 (1911), both cases in the Court of Errors and Appeals, and *Falaenau v. Reliance Steel Co.* (1908) 74 *N. J. Eq.* 325, 69 *Atl.* 1098.

In Indiana, in *Binkley v. Forkner*, 117 *Ind.* 176, 19 *N. E.* 753, 3 *L. R. A.* 33, a chattel mortgage on property annexed to land preserved the character of a chattel as against a mortgage on the real estate made prior to the chattel mortgage and to the annexation of the chattel if it could be removed without impairing the original value of the real estate. Whether the security of the prior mortgage on the real estate would be impaired, or not, was deemed to be controlling.

"Whether the chattel mortgage shall be postponed, notwithstanding the agreement

between the owner of the land and the mortgagee, must depend upon the inquiry whether or not the preservation of the rights of the holder of the chattel mortgage will impair or diminish the security of the real estate mortgage, as it was when he took it. If it will not, then it would be inequitable that the latter should defeat or destroy the security of the former. If it will, then it was the folly or misfortune of the holder of the chattel mortgage that he permitted the property to be annexed to a freehold from which it cannot be removed without diminishing or impairing the existing mortgage thereon."

In *Belvin v. Raleigh Paper Co.*, 123 N. C. 139, 31 S. E. 655 (1898), it was held that the lessee of mortgaged premises who put improvements, including a building and machinery for a paper mill, can hold them free of the mortgage, though the mortgagee did not join in the lease, or consent. This was based not only on the law of fixtures, but because the lease provided that the property should remain that of the lessee and be removable by him. The court based their conclusion on the principle that property annexed did not become the property of the mortgagor, who was also the lessor, and, therefore, the mortgagee could not acquire greater rights. By the agreement between the lessor and the lessee the things did not become a part of the land. One judge dissented. It did not appear whether the original value of the security for the mortgage was impaired, or not.

In *Alabama*, in *Broaddus v. Smith*, 121 Ala. 335, 26 South. 34, 77 Am. St. Rep. 61, the court said:

"The following propositions seem to be supported by the weight of authorities in well-considered cases: (1) Where the owner of real estate contracts or agrees with a tenant that the tenant may erect or affix anything on the realty, and that the thing so affixed shall remain the property of the tenant, and be removed by him, such article never becomes a fixture, but remains personal property, and the property of the tenant, and may be removed by him, just as any other article of personal property left by him on the land unattached to the realty. * * * (4) A prior mortgagee of the real estate acquires no interest in the chattel attached, subject, however, to the limitations that the mortgagor and tenant may not, by their acts, do anything to impair the mortgagee's security."

In *New York* the decisions seem to be conflicting. In *Sprague, etc.*, *Bank v. Erie, etc., Co.*, 22 App. Div. 526, 48 N. Y. Supp. 65, and in *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. Supp. 93, affirmed without an opinion in 175 N. Y. 472, 67 N. E. 1080, the tenant of the mortgagor could remove, while in *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446, the

right of the prior mortgagee of the land prevailed against the person who had annexed fixtures by authority of the mortgagor.

Other cases give to a vendor of chattels annexed to the land by the owner a right to the chattels, based on the contract of sale, as against the prior mortgagee, where the original security for the mortgage is not impaired. These cases, even if they be treated as opposed to the case of *Watertown, etc., Co. v. Davis*, supra, yet sustain the view taken herein. *Ellis v. Glover*, [1908] 1 K. B. 388, 13 Ann. Cas. 666, a decision of the Court of Appeals, based on *Gough v. Wood*, [1894] 1 Q. B. 713, which latter case was one where a tenant of a mortgagor was a conditional vendee of chattels annexed after the mortgage. It should be observed, however, that there is more reason for so holding in England than here, because there the mortgages are not recorded and the lessee has not, therefore, the same opportunity for receiving notice of the mortgage. See, also, *Cochran v. Flint*, 57 N. H. 514; *Pioneer, etc., Bank v. Fuller*, 57 Minn. 60, 58 N. W. 831; *Paine v. McDowell*, 71 Vt. 28, 41 Atl. 1042.

In *Tiffany on Landlord and Tenant*, p. 1618, the matter is thus stated:

"In case the lease was made after the mortgage, the question whether the tenant annexing an article should be allowed to remove it as against the mortgagee might, it seems, depend to some extent on the legal character of a mortgage in that jurisdiction. If the mortgage constitutes merely a lien, the mortgagor, retaining the legal title, has the right to make a lease, which is valid as against the mortgagee, in so far as it does not affect his security, and a tenant holding under the lease would have the same right to annex and remove fixtures as if no mortgage had been given, provided only that their removal does not render the premises less valuable as a security than they were at the date of the mortgage. But this view, that if the mortgage creates merely a lien the mortgagor's tenant has the right of removal, is not in accord with a number of decisions, rendered in states where such is the effect of a mortgage, that a mortgagor cannot remove articles annexed by himself, since, it would seem, the mortgagor's tenant can have no greater rights as to removal than the mortgagor."

This view, that the legal character of the interest of the mortgagee in the mortgaged premises has a bearing, does not seem to be sound. It would seem to be unimportant whether the interest of the mortgagee, prior to default of the mortgagor, be that of a lien holder only, or whether the mortgage operates as a conveyance of the legal estate to the mortgagee. In the latter case it is a qualified interest and in both cases the mortgagee is treated in equity and at law as the real owner.

It is settled in Delaware that the interest of the mortgagee in the mortgaged premises is only that of a lien holder and that he does not take the legal title. *Fox v. Wharton*, 5 Del. Ch. 200.

Questions similar to those in this case have arisen where the chattel is annexed by an owner who has previously given a chattel mortgage on the property annexed, and also where a vendee of land, put in possession under a contract of sale, makes improvements, and in such cases the courts differ as to the rights of a prior mortgagee relating to the removal of such fixtures after the annexation thereof. But it seems that in both cases the intention with which the annexations were made might reasonably be considered controlling.

No opinion is here expressed as to the effect upon the rights of a lessee in case of a foreclosure of the mortgage and a sale of the mortgaged premises during the term, for in the case under consideration the term is pending and the mortgage has not been foreclosed.

There is, then, in this case a legal intention of both lessor and lessee not to make the trade fixtures, or improvements, a part of the land, and as between these persons the buildings remained chattels, removable during the term, and the complainant, the mortgagee, has no equitable ground of complaint, because it is not alleged, or shown, that the value of the security which he had when the mortgage was made, and on which he relied, is impaired by the annexation and removal of the buildings by the tenant during the term and prior to a foreclosure of the mortgage. The bill should, therefore, be dismissed.

Let a decree be entered accordingly.

IN RE GOETZ'S ESTATE.

Appeal of FERDINAND GOETZ SONS CO.
(Supreme Court of Pennsylvania. July 2, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 507*) — ACCOUNTING — JURISDICTION — CORPORATIONS.

Where executors with the consent of the beneficiaries organized a corporation to continue testator's business, and transferred to the corporation the property of the estate, the orphans' court, in auditing the executors' accounts, had no jurisdiction to ascertain and distribute the profits made by the corporation, nor to allow compensation to one of the executors of the estate for his services to the corporation.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2004, 2006, 2178-2191; Dec. Dig. § 507.*]

2. CORPORATIONS (§ 182*) — INTEREST OF SHAREHOLDER.

A shareholder in a corporation has no distinct and individual title to the property of the corporation nor any actual control over it; the shares being distinct from the corporate property, under the rule that the fact that a

person owns all the stock of a corporation does not make him the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 686-693; Dec. Dig. § 182.*]

3. CORPORATIONS (§ 152*) — PROFITS — DISTRIBUTION.

Where a corporation was organized to continue testator's business and his property was transferred to it, its profits could only be distributed by its directors, and not by the orphans' court.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 621-628; Dec. Dig. § 152.*]

4. CORPORATIONS (§ 151*) — PROFITS — DIVIDENDS.

Until a dividend of the profits of a corporation has been declared by its board of directors a stockholder has no legal title to any interest in them, his shares only representing a right to participate in the profits and enforceable only after a dividend has been declared by the directors.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 614-620; Dec. Dig. § 151.*]

5. CORPORATIONS (§ 308*) — OFFICERS — COMPENSATION FOR SERVICES.

Where a corporation was organized to take over and continue testator's business and one of the executors acted as business manager, compensation for his services as such could only be provided by the corporation's board of directors or trustees under Act April 29, 1874 (P. L. 73), providing that a corporation shall be managed and conducted by a president and a board of directors or trustees.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1257, 1258, 1263, 1263½; Dec. Dig. § 308.*]

Appeal from Orphans' Court, Berks County.

Judicial account by Fred. W. Goetz, executor of the estate of Ferdinand Goetz, deceased. From a decree dismissing exceptions to the adjudication, the Ferdinand Goetz Sons Company appeals. Reversed.

See, also, 85 Atl. 67.

Ferdinand Goetz, a member of the firm of Winter & Goetz, tanners, died leaving a will wherein he gave to his widow for life the entire income of his estate. He named his son, Fred. W. Goetz, and his son-in-law, William C. Billman, executors. He left six children, two of whom were minors. The executors, with the consent of the widow and adult children, purchased the interest of the surviving partner in the tanning business for \$80,500, and organized a corporation under the laws of Pennsylvania, "The Ferdinand Goetz Sons' Company," with a capital of \$75,000, divided into 1,500 shares of the par value of \$50 each.

In the application for a charter the said shares were set forth thus:

"Fred. W. Goetz.....	747 shares.
"W. C. Billman.....	747 shares.
"Charles E. Miller.....	2 "
"Karl Goetz.....	2 "
"George Rumer.....	2 " "

Fred. W. Goetz and Wm. C. Billman were the executors as aforesaid, and Karl Goetz

was a son of the testator, while Charles E. Miller and George Rumer were workmen in the tannery.

None of the said parties paid any money for their shares; the capital being paid in full by a transfer of the tanning business which had for many years been prosperous and then belonged entirely to the testator's estate. Fred. W. Goetz was made president and Wm. C. Billman treasurer of the corporation. In June, 1910, Mr. Billman, claiming to own in his own right the 747 shares standing in his name, took the certificates therefor from the corporation's safe. George Z. Goetz, a son of the testator, a minor, having for his guardian the Reading Trust Company, compelled the filing of an inventory and account. Mr. Billman filed the account, refusing to charge himself with the 747 shares of stock. Fred. W. Goetz, his coexecutor, joined in the account with a protest that not only the 747 shares, but all the shares, should be embraced as part of the assets of the estate. George Z. Goetz, by his guardian, filed an exception to the account based on the omission of the shares of stock. The controversy was as to the 747 shares claimed by Mr. Billman. Testimony was submitted, Mr. Billman claiming the stock under an alleged arrangement with the widow, and the widow testified that she understood that the stock was to belong to the estate. The court below found the transaction a fraud upon the widow and children, and adjudged the shares of stock to belong to the estate. The court further proceeded to ascertain the profits which the corporation had made from the 12th day of November, 1904, to January 1, 1910, the amount thereof being \$171,144.02. To this the court added the balance of the income account, \$790.11, making a grand total of \$171,934.13. The court then deducted the \$80,500 paid for Mr. Winter's interest, leaving a balance of \$91,434.13, which the court distributed to the widow. In a subsequent distribution the court distributed \$18,428.80 of the said sum to Mr. Billman as compensation for services rendered to the corporation. Fred. W. Goetz, executor, filed exceptions to the adjudication.

The exceptions were dismissed. Both the Ferdinand Goetz Sons Company and Fred. W. Goetz, executor, appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Cyrus G. Derr, of Reading, for appellants. Jefferson Snyder, of Snyder & Zieher, of Reading, for William C. Billman, appellee.

BROWN, J. These two appeals will be disposed of together. The same questions are raised by each and the assignments of error are identical. It is not necessary that we decide whether the Ferdinand Goetz Sons' Company has any standing as an appellant,

as the appeal of Frederick W. Goetz, executor, must be sustained.

[1] What the court had before it in adjudicating the account of the executors of Ferdinand Goetz, deceased, was his estate, and the parties before it were his executors, his widow, and children; but in awarding to the widow what it found to be the net income of the estate of the testator it undertook to find what the net profits of the Ferdinand Goetz Sons' Company, a corporation, had amounted to from November 12, 1904, to January 1, 1910, and, after fixing the compensation to be paid out of them to the business manager of that corporation, awarded the balance to the widow. In other words, without having before it the Ferdinand Goetz Sons' Company, the court below found that the balance of its net profits during the period stated, after paying the purchase price of the interest of Ferdinand Winter in the partnership, amounted to \$90,644.02, and decreed that of this sum W. C. Billman, the business manager of the corporation, should receive \$18,428.80 as the balance due him for services to the corporation, and that the remainder of the said net profits should be paid to the widow. This anomalous adjudication was made because the court found that the estate of the testator was the owner of 1,494 of the 1,500 shares of the capital stock of the Ferdinand Goetz Sons' Company, or 6 shares less than the entire stock issue. Suppose the estate was the owner of all the stock, what the court below did would be none the less anomalous. The estate, as a holder of all the stock, would not be the owner of the corporation, but only of the shares of its capital stock, which constitute a species of property entirely distinct from the corporate property.

[2] A shareholder has no distinct and individual title to the moneys or property of the corporation, nor any actual control over it. *Bidwell v. Pittsburgh, Oakland & East Liberty Passenger Railway Co.*, 114 Pa. 535, 6 Atl. 729. "We have been referred to no authority, and we know of none, that asserts the doctrine that the purchaser of all the shares of the capital stock of a corporation thereby becomes the owner of its property. On the contrary, the principle is well established that the shares of the capital stock of a corporation are essentially distinct and different from the corporate property, and that the owner of all the stock of a corporation does not own the corporate property or become entitled to manage or control it. 'A corporation,' says Mr. Cook in his work on Corporations (section 6) 'is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all of the stock does not make him and the corporation one and the same person.' In *Morawetz on Private Corporations*, § 1009, it is said that 'it is well settled that all the shares in a corporation may be held by a single person, and yet the corporation con-

tinues to exist; and, if the charter or by-laws should require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his shares to other persons, so as to conform to the letter of the rule.' In *Bidwell v. Pittsburgh, etc., Pass. Railway Company*, 114 Pa. 535 [6 Atl. 729], Mr. Justice Clark, delivering the opinion of the court, says: 'The shares in a corporation constitute a species of property entirely distinct from the corporate property. A shareholder has no distinct and individual title to the moneys or property of the corporation, nor any actual control over it. The shares represent a right to participate in profits only.'" Mr. Justice Mestrezat, in *Monongahela Bridge Co. v. Pittsburgh & Birmingham Traction Co.*, 196 Pa. 25, 46 Atl. 99, 79 Am. St. Rep. 685.

[3] How are corporate profits to be ascertained and by whom are they to be distributed? Surely not by an orphans' court, to which no living manufacturing company is ever answerable for the management of its affairs, and whose jurisdiction and supervisory powers do not extend to representatives of such a dead corporation. The affairs of a corporation are managed by a board of directors, who, in the first instance, are to determine whether profits have been earned and whether, in their discretion, they ought to be divided among the shareholders; and, if such discretion is abused, the remedy for its correction is not to be found in an orphans' court.

[4] Until a dividend of the profits of a corporation has been declared by its board of directors, a stockholder has no legal title to any interest in them. The shares of stock which he holds represent only a right to participate in the profits, and that right is to be enforced ordinarily only after a dividend of the profits has been declared. *Corgan v. Lee Coal Co.*, 218 Pa. 386, 67 Atl. 655, 120 Am. St. Rep. 891, 11 Am. Cas. 838; *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449; *Goodwin v. Hardy*, 57 Me. 143, 99 Am. Dec. 758; *Phelps v. Farmers' & Mechanics' Bank*, 26 Conn. 269; *Cook on Stock and Stockholders and Corporation Law*, § 4. As just stated, the *Ferdinand Goetz Sons' Company* was not even before the court at the adjudication, and yet it assumed to ascertain its profits, and, in effect, to make a cash distribution of them, though they were not represented by money in the treasury, but existed only in the form of materials on hand, manufactured goods, accounts receivable, etc.

[5] And even more than this was done, for the court assumed to fix the compensation of *William C. Billman*, the business manager of the corporation, for his services, and ordered that out of the profits he should be paid the sum of \$18,428.80, in addition to what he had already received. All this was *coram non iudice*. The common law was ignored, as

were the express words of the act of May 14, 1891 (P. L. 61), which declare that the business of every corporation created under the general corporation act of April 29, 1874 (P. L. 73), shall be managed and conducted by a president and a board of directors or trustees.

If profits have been earned by the *Ferdinand Goetz Sons' Company*, to which the widow of the testator is entitled through dividends paid, or to be paid, to his executors, she will receive them; and, if *William C. Billman* is entitled to compensation for his services as business manager of the corporation, he has his remedy to compel it to pay him. Neither he nor Mrs. Goetz will be prejudiced by reversing the decree which the court below was powerless to make.

The first, second, thirteenth, and fourteenth assignments of error filed in the appeal of *Frederick W. Goetz* are sustained, and the decree of the court below, in surcharging the accountants with profits of the *Ferdinand Goetz Sons' Company*, and in directing that *William C. Billman* be paid out of the same, as compensation for his services as business manager, is reversed, the costs on these two appeals to be paid out of the funds of the estate.

IN RE GOETZ'S ESTATE.

(Supreme Court of Pennsylvania. July 2, 1912.)

Appeal from Orphans' Court, Berks County. In the matter of the estate of *Ferdinand Goetz*, deceased. From a decree dismissing exceptions to adjudication, *George A. Goetz* and *Anna K. Goetz* appeal separately. Reversed. See, also, 85 Atl. 65.

Argued before *FELL, C. J.*, and *BROWN, MESTREZAT, ELKIN*, and *STEWART, JJ.*

Cyrus G. Derr, of Reading, for appellant *George Z. Goetz*. *Henry P. Keiser*, of Reading, for appellant *Anna K. Goetz*. *Jefferson Snyder*, of Reading, for appellee *William C. Billman*.

BROWN, J. The assignments of error filed in these two appeals are sustained, so far as they complain of the decree of the court below directing that, out of the profits of the *Ferdinand Goetz Sons' Company*, *William C. Billman* be paid the sum of \$18,428.80 as the balance due him for compensation as the business manager of the corporation, the costs on each appeal to be paid by the estate.

IN RE GOETZ'S ESTATE.

Appeal of *BILLMAN*.

(Supreme Court of Pennsylvania. July 2, 1912.)

APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS OF FACT.

Findings of fact by the orphans' court that executors held stock in a corporation carrying on the business of the decedent as trustees for the estate will not be reversed when based on sufficient evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8979-8982; Dec. Dig. § 1010.*]

Appeal from Orphans' Court, Berks County. In the matter of the adjudication of the estate of Ferdinand Goetz, deceased. From a decree dismissing exceptions of William C. Billman, he appeals. Reversed.

See, also, 85 Atl. 65, 67.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Jefferson Snyder, of Snyder & Zeiber, of Reading, for appellant. Henry P. Keiser and Cyrus G. Derr, both of Reading, for Anna K. Goetz et al., appellees.

BROWN, J. In view of the admitted and undisputed facts in this case—to say nothing of those correctly found by the court below—not a word is needed from us in vindication of its surcharge of the executors with 1,494 shares of the capital stock of the Ferdinand Goetz Sons' Company. From the time the inventory was filed Frederick W. Goetz, one of the executors, with a due sense of fidelity to his father's estate, insisted that these shares belonged to it, and not to them, and it is almost inconceivable that his coexecutor, the appellant, should claim to be the individual owner of one-half of them. From the day the 1,494 shares were issued they formed part of the estate of the testator, and were held in trust for it by his son and son-in-law. To enter upon any discussion to show that this is so would be a work of supererogation. The facts speak for themselves, and, without saying more, appellant's complaint of the surcharge is dismissed.

For the reasons stated in sustaining the appeal of Frederick W. Goetz, Executor, 85 Atl. 67, filed herewith, appellant's fifth and seventh assignments are sustained. The first, second, third, fourth, sixth, and eighth are dismissed, the costs on this appeal to be paid by the estate.

FOUST et al. v. DREUTLEIN.

(Supreme Court of Pennsylvania. July 2, 1912.)

EMINENT DOMAIN (§ 317*) — SUBMERGED LANDS — TITLE ACQUIRED BY COMMONWEALTH.

Where canal commissioners, under Acts Feb. 25, 1826 (P. L. 55) and April 9, 1827 (P. L. 192), took lands for the erection of a dam for the purpose of storing water for the Pennsylvania Canal, the title in fee to the land was vested in the commonwealth in perpetuity.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 834-840; Dec. Dig. § 317.*]

Appeal from Court of Common Pleas, Crawford County.

Action by Andrew Foust and another against Henry Dreutlein. Judgment for defendant, and plaintiffs appeal. Affirmed.

In 1833 Cornelius Foust and William Power were adjoining riparian owners on the shore of Conneaut Lake. They each held

under patents, the dividing line between which was a north and south line which touched the shore of the lake at an acute angle. In 1833 the canal commissioners of Pennsylvania dammed the outlet of Conneaut Lake, by this means raising the water about 12 feet and causing an overflow of the lands of both Power and Foust. The land of Foust, which was thus submerged, amounted to about nine acres. The flowage covered all the property which is now in dispute. The water thus stored was a reservoir for the supply of the Erie division of the Pennsylvania Canal. This was the purpose of its construction, and this use was the reason of the construction of the dam.

In course of time the state sold the canal to a corporation, and the property of the corporation was sold at judicial sale to a private purchaser, and the use of the canal as a highway or means of transportation was abandoned. In 1872 the dam across the outlet was broken down, and the water receded to what had practically been the former level.

In 1873 Foust and Power established a consentable line, which bisected the patent or division line between their properties, as above described, in a direction at right angles to the lake. By this arrangement Foust ceded to Power his title, whatever it was, to a wedge-shaped piece of land lying back from the lake, and Power, in like manner, ceded to Foust a wedge-shaped piece of land abutting on the lake. As a result, each tract preserved the same acreage; but the division line ran at right angles, instead of obliquely, to the lake. There was no dispute as to the consentable line thus established. By various conveyances, not necessary to refer to, such title as the commonwealth acquired to the lands in dispute passed to Henry Dreutlein, the petitioner in this proceeding, who became the defendant under the issue framed by the court, and the title of Cornelius Foust passed to the respondents, Andrew Foust and Alva Foust, who were made plaintiffs in the issue.

The plaintiffs in the issue framed claimed title in two ways: In the first place, they claimed that the state had not taken a fee in the strip, but only an easement or right of support to the water so long as it might be there. In the second place, the plaintiffs contended that they and their predecessors in title had been in adverse possession of the land in dispute from 1873, when the waters receded.

Upon the first question thus raised the court charged the jury that the state took a fee in the lands in question, and that this fee had passed to the defendant. Upon the second question the court first charged the jury that, while no one of the acts or series of acts shown by the plaintiff was sufficient to establish title by adverse possession, yet the jury, taking all the acts together, might

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

find that such possession had been established. The jury having remained out for several hours, the court sent for them and gave binding instructions for the defendant. The plaintiffs appealed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Patterson, Sterrett & Acheson, of Pittsburgh, and Manley O. Brown, of Meadville, for appellants. Frank J. Thomas, of Meadville, for appellee.

BROWN, J. In 1833 the canal commissioners of the commonwealth dammed the outlet of Conneaut Lake for the purpose of storing a supply of water for the Erie division of the Pennsylvania Canal. In thus raising the waters of the lake, the land which is the subject of this issue was submerged. Subsequently the state sold the canal, and its use as a highway or means of transportation was abandoned. In 1872 the dam across the outlet of the lake was removed, and the waters receded to their former level. Whatever title the commonwealth acquired in the submerged land involved in this controversy has passed, by various conveyances, to Henry Dreutlein, the appellee.

The first contention of the appellants is that the state did not take the submerged land for permanent and continuous use in connection with the operation of the canal, and did not, therefore, acquire title to it in perpetuity. If it be true that the occupation of the land by the commonwealth was not permanent and continuing, but only of temporary or limited duration, it reverted, upon the abandonment of the canal, to the original riparian owner, under whom the appellants claim. On the other hand, if the canal commissioners, by submerging the land, took it from the owner for the purpose of permanently increasing the water supply to be stored in the lake for the permanent use of the canal, the commonwealth took a fee in the land, just as it did in the bed of the canal itself. This is to be regarded as settled by an unbroken line of cases, among which are *Haldeman v. Penna. Central R. R. Co.*, 50 Pa. 425; *Craig v. Allegheny*, 53 Pa. 477; *Robinson v. West Penna. R. R. Co.*, 72 Pa. 316; *Wyoming Coal & Trans. Co. v. Price*, 81 Pa. 156. In *Robinson v. West Penna. Railroad Company* the question was whether the commonwealth had acquired a fee in a certain track of land or a mere easement in it, to be used as a basin in connection with the canal, which, upon the abandonment of the canal, reverted to the original owners; and, in holding that it did not so revert, this court said: "Why should the commonwealth consent to take and hold a less estate or interest in the basin than in the bed of the canal or towing path? The basin was as necessary a part of the improvement as either, and its use was intended to be as permanent. There was, then,

the same reason for taking an absolute estate in one as the other. * * * There can be no doubt of the right of the commonwealth, under the acts of February 25, 1826 (P. L. 55) and of April 9, 1827 (P. L. 192), to take the land for the purpose of constructing the basin, nor of the owner's right to have the damages which he sustained by reason thereof assessed under the provision of the latter act. But the right of the commonwealth to the land so taken was an absolute estate in perpetuity (*Commonwealth v. McAllister*, 2 Watts, 190; *Haldeman v. Penna. Central R. R. Co.*, 50 Pa. 425), and could not be defeated or impaired by the owner's neglect or refusal to make application for the assessment of his damages within the time limited by the act." All of this applies to the present case. Another case in which it was held that the commonwealth had taken an estate in perpetuity in a piece of land, which it had appropriated for the purpose of constructing a reservoir to furnish a supply of water to a canal, is *Delosier et al. v. Pennsylvania Canal Company*, 11 Atl. 400. It was there contended that an estate in perpetuity had not been taken by the commonwealth; that it was the owner only of that portion of the land which formed the bed of the canal proper; that the statute expressly stipulated that nothing but an easement could be acquired to any other land taken, and, as the reservoir formed no part of the bed of the canal, on its abandonment the land reverted to the former owners. This contention was not sustained by our late Brother Dean, who presided at the trial of the case in the court below, and, in affirming the judgment upon a verdict directed by him, we said: "The boundaries of the land seized for the use of the state were sufficiently defined; and that the fee thereto vested in the commonwealth is a matter now so well settled by previous decisions that discussion concerning it is unnecessary."

When it was discovered by the canal commissioners that the waters of Conneaut Lake, in its natural state, would be insufficient for the purpose of supplying the canal, the dam was erected. This necessarily caused an overflow on the strip of land surrounding the lake, which included the part here in dispute. When it was submerged, it was taken from the then owner by the commonwealth for permanent use, and therefore in perpetuity, just as the land for the bed of the canal had been taken. The land taken for that bed would have been permanently useless, unless water permanently flowed through it; and, that water might so flow through it, the canal commissioners took, not temporarily, but permanently, the strip of land surrounding the lake. The three acres claimed by the appellants are part of that land, and were included in the strip of which we said, in *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 74 Atl. 648: "When the

commonwealth enlarged the lake and raised its level, it overflowed a strip of ground all around the lake. After the abandonment of the canal and the return of the waters to the former level, the question of the ownership of the strip of land thus uncovered arose; and it seems to have been decided that the fee to this land had become vested in the commonwealth."

A second contention of the appellants is that, even if the commonwealth did acquire an absolute title to the land, in dispute, they now have a title to it, as against the appellee, by adverse possession. In charging the jury, the learned trial judge below submitted to them the question of the sufficiency of the evidence to establish such title, but subsequently, upon being informed that they could not agree upon a verdict, he instructed them that the evidence was insufficient to establish title by adverse possession, and they were directed to find for the defendant. It would serve no useful purpose to review in detail the evidence upon which the appellants rely to establish title by adverse possession. It is sufficient to say that, tested by the well-known rules as to the proof required to establish such a title, the ultimate conclusion of the learned trial judge was correct that the appellants had failed to show such adverse, hostile, exclusive, continuous, and notorious possession as had ripened into a title in them.

The assignments of error are overruled, and the judgment is affirmed.

GREEN v. GREEN.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. DESCENT AND DISTRIBUTION (§ 130*) — LIENS AGAINST ESTATE—ESTABLISHMENT.

Where, in proceedings under Act June 14, 1901, to continue a lien against a decedent's estate, there is a failure to conform to the statutory requirements, the court can strike the instrument, filed with a view to create the lien, from the record.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 472, 478-487; Dec. Dig. § 130.*]

2. LIENS (§ 8*)—VACATION—EVIDENCE.

Whether an instrument, filed for record to create a statutory lien, is defective must be determined solely by what appears of record.

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 2; Dec. Dig. § 8.*]

3. DESCENT AND DISTRIBUTION (§ 130*) — LIEN OF CREDITOR—RECORD—SELF-SUSTAINING COVENANT.

Decedent's wife in her lifetime entered into a covenant with plaintiff, wherein she agreed that, in the event of the sale of certain real estate, in which both parties were interested, for \$30,000 or more, plaintiff should first be paid \$13,000, less any sum that might be received by the obligor for releases of a certain mortgage held by her against her husband. On the same day the obligor and certain others granted to the husband an option for six months to sell the land, which agreement also provided that plaintiff should receive \$13,000, less, etc.,

in accordance with the covenant with plaintiff. Held, that the latter covenant was self-sustaining without the former, in that the filing thereof constituted a valid lien, under Act June 14, 1901 (P. L. 562), providing that, in order to prolong the lien of a general debt, there should be filed with the prothonotary of the proper county and indexed in the judgment index, within two years after the decedent's death, a copy or particular written statement of any bond, covenant, deed, or demand, when the same is not payable within two years.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 472, 478-487; Dec. Dig. § 130.*]

4. QUIETING TITLE (§ 7*)—CLOUDED TITLE—INVALIDITY.

Where invalidity of a disputed title appears on the face of the conveyance, or in proof which the claimant is required to produce in order to maintain an action to establish it, no suit in equity can be maintained to set it aside, under the rule that a title obviously void does not constitute a cloud.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.*]

5. HUSBAND AND WIFE (§ 152*)—MARRIED WOMAN—CAPACITY—COVENANT.

Coverture of a covenantor in an instrument filed to continue a lien on real property was not ground for striking the covenant from the record.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 596-602; Dec. Dig. § 152.*]

Appeal from Court of Common Pleas, Huntingdon County.

Action on a covenant by Hannah E. Green, as executrix, etc., against Dr. Edward H. Green, as executor of the will of Eliza H. Green, deceased, on rule to show cause why a copy of the covenant should not be stricken from the record. From a decree granting such relief, plaintiff appeals. Reversed.

On the 29th of December, 1903, Eliza H. Green, wife of Edward A. Green, entered into a covenant with appellant, wherein she agreed that, in the event of a sale of certain lands, in which both parties were interested, being made for the sum of \$30,000 or more, the appellant should first be paid the sum of \$13,000, less any sum that might be received by her for releases of a certain mortgage that she held against Edward A. Green. On the same day of the execution of the foregoing covenant, an agreement was entered into between appellant, Eliza H. Green, and Edward A. Green, her husband, J. Miles Green, and F. Potts Green, executors of Joseph Green's estate, and J. Miles Green, individually, granting to Dr. Edward H. Green an option for the period of six months to sell the same lands mentioned in the covenant between Eliza H. Green and appellant, which agreement also contained a provision that appellant should receive \$13,000, less any moneys received for releases of a certain mortgage, in the event of a sale of said lands being made for \$30,000 or more. Eliza H. Green died on or about August 15, 1908, and, in order that appellant might obtain a lien on her real estate, a copy of her covenant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

with appellant, dated December 29, 1908, was filed in the court of common pleas of Huntingdon county on January 18, 1910, in accordance with the act of June 14, 1901 (P. L. 562). The copy of covenant filed by appellant made reference to the agreement granting an option to Dr. Edward H. Green.

The appellee, on September 19, 1910, presented his petition, praying that the copy of covenant filed by appellant be set aside and annulled and the record thereof marked satisfied; whereupon a rule to show cause was granted. After hearing the court below filed a decree which set aside and annulled the covenant filed by appellant, and directed the record to be marked satisfied.

Argued before FELL, C. J., and MESTREZAT, ELKIN, STEWART, and MOSCHZISKEB, JJ.

R. A. Orbison and T. F. Bailey, both of Huntingdon, for appellant. James S. Woods and J. R. & W. B. Simpson, all of Huntingdon, for appellee.

STEWART, J. [1] It is not to be questioned that, where a plain statutory requirement, upon which rests the right to acquire or continue a lien, has been disregarded, it is in the power of the court to declare void the instrument which has been filed with a view to create the lien, and strike it from the record. This power has time and again been asserted, most frequently in connection with mechanics' liens. The fact that in this case the original proceeding was not to acquire a statutory lien after the manner of a mechanic's lien, but to continue a common-law lien already existing against the estate of a decedent, denotes a distinction, but a distinction which suggests no difference, or any reason for difference, so far as concerns the power of the court over its records. The right in either case is purely statutory; and if, because the instrument by which a mechanic's lien is sought does not conform to statutory requirements, the court may strike it down, it follows that where like want of conformity appears in a proceeding to continue a lien against a decedent's estate, under the act of June 14, 1901 (P. L. 562), the same power inheres in the court. The power of the court is neither greater nor less in one case than in the other, and its exercise must be regulated by like rules.

[2] An established rule, too familiar to require citation of authority, is that, in determining whether any proceeding of this character is defective by reason of failure to comply with statutory requirements, regard must be had solely to what appears on the record; by what there appears its sufficiency is to be adjudged, and by that alone. This rule the court below plainly disregarded. The appellant, within two years after the death of Mrs. Eliza H. Green, filed in the office of the prothonotary a copy of a covenant entered into by Mrs. Green, with di-

rections to the prothonotary to index the same in the judgment docket. The paper was filed January 18, 1910, and was properly indexed. Thereupon, September 19th following, on petition of Dr. Edward Green, executor of Eliza H. Green, in which it was averred that the paper so filed "is not the entire agreement or covenant, but that it shows upon its face that there is another agreement to which this agreement is a supplement, and that said original agreement is not filed of record," and in addition thereto, that the covenant set out "was signed by Eliza H. Green during the lifetime of her husband, and, as the same relates to real estate, would not be binding on her or her estate," a rule issued to show cause why the copy of the covenant should not be annulled and stricken from the record. The answer averred that the paper filed "is an entire and separate covenant, and that one of the considerations passing, as appears in the said paper, was different and distinct from the consideration named in the other agreement." The evidence submitted included nothing more than a prior agreement between the parties, referred to both in the paper filed and the petition to annul, and was here introduced by deposition. The learned court, in the opinion filed in the case, nowhere finds that the covenant set out in the paper filed is not self-sustaining, but holds that to discover the intention of the parties thereto it is necessary to consider both instruments. This was simply using evidence dehors the record to discover a supposed irregularity or defect. The fact that the record makes reference to an earlier agreement does not bring such agreement upon the record, except so much of it as is recited; nor does it open up inquiry with respect to such other agreement. "We see no reason," is the deliverance of the court in a per curiam in *France v. Ruddiman*, 126 Pa. 257, 17 Atl. 611, "for departing from our numerous, well-considered decisions to the effect that a judgment cannot be stricken off for irregularity, unless it appear upon the record; and the depositions taken in the court below upon a rule to open a judgment cannot be considered here."

[3] But, even though it were warranted to go outside the record to solve doubt and uncertainty as to the intention of the parties as expressed in the paper, there could have been no excuse for so doing in this case. That the covenant filed is self-sustaining admits of no question. It recited so much of the earlier agreement as was necessary, in connection with the covenant itself, to inform fully all interested, whether heirs or creditors, of the nature, extent, and character of the demand; and, as a statement in an action brought for breach, the paper filed with the prothonotary would have answered every legal requirement. And

so it does here. The act of June 14, 1901, simply requires in such case, in order to prolong the lien of a general debt, that there be filed with the prothonotary of the proper county and indexed in the judgment index, within two years after the death of the decedent, "a copy or particular written statement of any bond, covenant, debt or demand, when the same is not payable within the said period of two years." Every requirement was here fully met. It comes to nothing that the object in declaring void the instrument filed, and ordering it to be stricken from the record, was, as stated in the opinion filed, to remove a cloud from the petitioner's title. Relief of this kind is never given where the instrument or proceeding complained against is void on its face; nor where the instrument can be supported only as supplemented by proofs. It was because the instrument here filed was, in the judgment of the court, incomplete, and could not be made enforceable as a lien, except as supported by something outside the record, that the present order appealed from was made.

[4] As we have said, we cannot agree to this view; but, even were it correct, it would not warrant the relief prayed for. "Where invalidity of the disputed title appears upon the face of the conveyance, or in proof which the claimant is required to produce in order to maintain an action to establish it, no suit can be maintained in equity to set it aside, because, as it is said, a title obviously void does not constitute a cloud upon the title of the true owner." Beach's Modern Equity, § 509.

[5] If the fact that the covenantor was a married woman contributed to the court's conclusion, it is only necessary, to show how immaterial the fact was in this connection, to refer to the case of *Adams v. Grey*, 154 Pa. 258, 26 Atl. 423, where an allegation of coverture was held insufficient to warrant the striking down of a record.

We decide nothing with respect to this case, except that the paper filed shows no defect on its face. It follows that it was error in the court to enter the decree appealed from. The assignment of error is sustained and the decree reversed.

SEIGFRIED v. BOYD et al.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. BOUNDARIES (§ 40*)—TREES—LOCATION—QUESTION FOR JURY.

In ejectment to determine a disputed boundary line, whether certain trees, claimed to be on the boundary, corresponded with the official survey, whether they were original or otherwise, their boxing, number, date, and location, were for the jury.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 186-204; Dec. Dig. § 40.*]

2. APPEAL AND ERROR (§ 204*)—EVIDENCE—NECESSITY OF OBJECTIONS.

Evidence of declarations of a third person, when not the owner of premises in dispute, which was merely corroborative and admitted without objection, was not ground for reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

3. JUDGMENT (§ 584*)—"RES JUDICATA"—REQUISITES.

In order that a judgment may be "res judicata," there must be identity in the thing sued for, in the cause of action, in the parties, and in the quality in the persons for or against whom the claim is made.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1063-1065, 1067, 1079, 1081, 1083; Dec. Dig. § 584.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6126-6130; vol. 8, pp. 7786, 7787.]

4. JUDGMENT (§ 707*)—RES JUDICATA—IDENTITY OF PARTIES.

A judgment, in an action for trespass on land, is not res judicata of a subsequent action in ejectment to recover possession of the same land, brought by one who was not a party to the action in trespass.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1230; Dec. Dig. § 707.*]

5. JUDGMENT (§ 675*)—RES JUDICATA—ACTION—PARTIES.

One who has been summoned as a witness is not, by reason of that fact alone, concluded by a judgment rendered in the action, unless he was in fact directly connected with the litigation.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1190, 1191, 1194; Dec. Dig. § 675.*]

6. JUDGMENT (§ 743*)—RES JUDICATA—NATURE OF ACTION.

While a judgment in trespass is conclusive in a second action of trespass, wherein a freehold of the same class is attempted to be put in controversy, such judgment is not conclusive of the title in a subsequent ejectment suit for the same land.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1253, 1275-1277; Dec. Dig. § 743.*]

Appeal from Court of Common Pleas, Luzerne County.

Ejectment by Susan Seigfried against J. A. Boyd and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZIS-KER, JJ.

D. O. Coughlin, of Wilkes-Barre, and J. Q. Creveling, of Plymouth, for appellants. Arthur H. James and James L. Lenahan, both of Wilkes-Barre, for appellee.

BROWN, J. [1] The single question of fact in this ejectment is the location of the northerly line of what was known on the trial as the Mary Custard tract. The plaintiff claims title to a portion of it, for the whole of which a warrant was issued to Mary Custard on August 17, 1792, and a survey of the same was made for her on June 27, 1793. The dispute between the ap-

pellee and appellants is solely as to the location of the northerly line of this tract; the contention of the appellants being that it is about 30 rods south of where the appellee claims it was originally run. If the appellants are right, the land in controversy is embraced in what is known as the McNeal tract, adjoining the Mary Custard tract on the north. A warrant was issued to James McNeal, under whom the appellants claim, for what is known as the McNeal tract on August 6, 1793, and the same was surveyed for him on August 12, 1794, a little more than a year after the survey of the Mary Custard tract.

The location of the northerly line of the Mary Custard tract was admittedly a pure question of fact for the jury; but the main contention of the appellants is that, in view of all the testimony in the case, the court should have directed a verdict in their favor. In a case like this it is neither necessary nor proper that we recite the voluminous testimony on the disputed question of fact. Our duty is to review such testimony; and if, after having done so, our judgment is that it called for a submission of the question to the jury, it is sufficient that we merely say so, without more. While the jury might very fairly have found for the defendants, the court could not, under all the evidence, have directed them to do so. If they believed the northerly line of the Mary Custard tract was what the court referred to in its charge as the "Crockett line," run by Crockett, the surveyor called by the plaintiff, she was entitled to a verdict; while, on the other hand, if what was known as the "Cook line" was the true southerly line of the McNeal tract, the verdict ought to have been for the defendants. Nothing more need be said in answer to appellants' complaint of the refusal of the trial judge to affirm their eighth point, and to direct a verdict in their favor, than the following from the opinion of the court, refusing them judgment non obstante veredicto and discharging the rule for a new trial: "The question of trees, whether original or otherwise, their boxing, their date, their location, the number of such trees, whether they correspond with the official survey, were all questions of fact for the jury. While they could have found, under the testimony, a verdict in favor of the defendants which could be sustained by the court, we cannot say that the verdict in this case was perverse, and should be set aside." The affirmance of defendants' eighth point would have been practically a direction to the jury to ignore the "Crockett line" and to find that the "Cook line" was the true one.

[2] No reversible error appears in the seventh assignment. While Crockett may have testified to declarations of Aaron Boyd, when the latter was not the owner of the premises, he did so without objection, and

Smith's testimony was merely corroborative. We cannot see that it substantially harmed the defendants.

In 1901 Aaron Boyd, the father of defendants, under whom they claim title, brought an action of trespass in the court below against H. E. Mayby and Aaron Seigfried. Boyd having died after the institution of the suit, Susan Boyd, his administratrix, was substituted as plaintiff, and, on the trial of the cause, Susan Seigfried, this appellee, was called as a witness by the defendants to prove that the land upon which the alleged trespass had been committed was part of the Mary Custard tract and belonged to her. The matter in dispute in that action seems to have been the same as the one in controversy here; but Susan Seigfried was not allowed to testify, for the reason that Aaron Boyd's death made her an incompetent witness against his estate, in whose favor a verdict was returned. On the trial of the present case the record in that case was offered in evidence, for the purpose of showing that, as to the appellee, the northerly line of the Mary Custard tract is *res adjudicata*, because she had attempted to testify, in the action of trespass, that the true line between the tracts was the one which she now claims, and the jury found that it was not. The record in the action of trespass was admitted under plaintiff's objection, the learned trial judge reserving the question to the effect of it; and, by the seventh assignment, error is alleged to have been committed by the court in refusing judgment for the defendants non obstante veredicto, "because the question at issue, namely, the line of the Mary Custard survey and the title to George B. Stackhouse, through whom the plaintiff now claims title, was fully adjudicated by trial, verdict, and judgment in the case of Aaron Boyd v. H. E. Mayby and Aaron Seigfried, No. 66, February term, 1901, on which trial, according to the record, Susan Seigfried was sworn and offered her title in justification of the trespass, deducing that title through George B. Stackhouse, through whom she now deduces her title."

[3-5] In order to make a matter *res adjudicata*, there must be a concurrence of the four following conditions: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and of parties to the action; (4) identity of the quality in the persons for or against whom the claim is made. *Vide* cases cited in 2 Bouvier (Rawle's Edition) 898. There is no identity of any one of these four conditions in the two actions. The one between Boyd and Mayby and Seigfried was trespass for the recovery of damages, while the case at bar is ejectment to recover possession of land, brought by a plaintiff who was no party to the former action. She was not even allowed to testify; but, even if she had testified, her testimony would not estop her

from setting up her title in this action. "I know of no case where one who has been summoned as a witness is, by reason of that fact alone, concluded by the judgment or decree rendered in the case. There must be other circumstances shown connecting him directly with the litigation, as in fact a party to it, before he can be held bound by the result." Williams, J., in *Miller's Estate*, 159 Pa. 562, 28 Atl. 441.

[6] But, even if the appellee had been an actual party to the action of trespass brought by Boyd, the judgment recovered by his administratrix would not be conclusive against her in this proceeding. While a judgment in trespass is conclusive in a second action of trespass, wherein a freehold of the same class is attempted to be put in controversy, such judgment is not conclusive of the title in a subsequent ejectment for the same land. *McKnight v. Bell*, 135 Pa. 358, 19 Atl. 1036.

No error is discoverable in those portions of the charge which are the subjects of the fifth and sixth assignments; for nothing is to be found in them which improperly commented upon the testimony of any witness, or upon any admitted or disputed fact in the case.

The assignments are all overruled, and the judgment is affirmed.

WEISENBERG v. LACKAWANNA & W. V. R. CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

CARRIERS (§ 333*)—OPERATION—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

A passenger, who, after alighting from a car to the east platform of a double-track railroad, attempts to cross to the west platform on a plank crossing provided for the public use, and is struck by a train on the west track, where he had an unobstructed view for 1,200 feet, is conclusively presumed negligent.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1385-1397; Dec. Dig. § 333.*]

Appeal from Court of Common Pleas, Luzerne County.

Trespass for personal injuries by Tony Weisenberg against the Lackawanna & Wyoming Valley Railroad Company. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCH-ZISKER, JJ.

Frank A. McGuigan, B. R. Jones, and Evan O. Jones, all of Wilkes-Barre, for appellant. John T. Lenahan and Richard B. Sheridan, both of Wilkes-Barre, for appellee.

FELL, C. J. At Midvale station, on the line of the defendant's double-track electric railroad, there is a platform on either side of the tracks, raised a few inches above them.

A plank walk 7 feet wide and 22 feet long, level with the tracks, extends from one platform to the other. Between the tracks there is a picket fence 250 feet in length, with an opening at the plank walk. The town of Midvale is west of the railroad, and persons going from it to the east platform, or to it from that platform, are required to use the plank walk in crossing the tracks. The plaintiff's husband got off the rear end of a car on the east platform, between 2 and 3 o'clock p. m., walked back 6 or 7 feet, stepped down to the plank walk, went back of the car that had not moved from the station, through the opening in the fence, and stepped directly in front of a train on the west track. At the opening there was a clear view of the track for 1,200 feet. He did not look or exercise any care whatever. The question on which the case turns is whether, under the circumstances, he was relieved from the duty of care.

The duty of a person about to cross a railroad track to stop, look, and listen for an approaching train is not always applicable to a passenger at a station going to or from his train. If the way provided to pass between the station and the train is across a track, or the place to alight is between tracks, he may rely on the place being kept safe while he is in the act of passing or alighting. *Flanagan v. Railroad Co.*, 131 Pa. 237, 37 Atl. 341; *Betts v. Railroad Co.*, 191 Pa. 575, 43 Atl. 362, 45 L. R. A. 261; *Harper v. Railroad Co.*, 219 Pa. 368, 68 Atl. 831; *Besecker v. Railroad Co.*, 220 Pa. 507, 69 Atl. 1039, 123 Am. St. Rep. 714, 14 Ann. Cas. 21; *Keifner v. Railway Co.*, 223 Pa. 50, 72 Atl. 253; *Struble v. Penna. Co.*, 226 Pa. 118, 75 Atl. 17. The reason of the rule is that a carrier is required to provide a safe place to receive and discharge passengers; and hence passengers may assume that the place provided will be kept safe from trains on intervening tracks. *Besecker v. Railroad Co.*, supra. The rule does not apply to the approaches to a station from a street, unless the approaches are of such a character that they may be considered a part of the station. In this case the plank walk was not intended for any one to stand on in getting on or off a train. It was a way provided for the convenience of passengers going to or from the east platform.

It may be that the situation was dangerous, and that some other means should have been provided by the defendant, but with its negligence we are not concerned; it may be conceded. The single question is whether the deceased was relieved from all duty of care; for he exercised none. In *Yersack v. Railroad Co.*, 221 Pa. 493, 70 Atl. 837, 18 L. R. A. (N. S.) 519, 128 Am. St. Rep. 746, a judgment for the plaintiff, who was injured at the same station and under circumstances differing but slightly from those in this

case, was reversed because of his negligence in not observing an approaching train, or in taking the chance of crossing in front of it. It was said in the opinion: "That the passageway over the tracks was provided by the defendant company for the use of persons going to or from the east platform was a fact to be considered in determining the plaintiff's negligence; but it did not relieve him from the exercise of reasonable care. It was not a place where passengers alighted, nor a way leading from the place where they alighted to the station to which they were going, which they might assume would be kept clear of trains and be safe at the time. It led from the platform on the east to the street; and, while its use was a convenience and, it may be, a necessity, it was not a place where passengers stood in getting on or off cars. The care required in its use was not the ordinary care required of a passenger who must cross a track between his train and the station, but the greater care of a person at a crossing over which he knows trains constantly pass." These cases cannot be distinguished from each other. In the recent case of *Goller v. Railroad Co.*, 229 Pa. 412, 78 Atl. 929, it was held the rule of *Carroll v. Railroad Co.*, 12 Wkly. Notes Cas. 348, and the numerous cases that have followed it, that a person who steps in front of a moving train that he saw or would have seen, if he had taken the care which the law and common prudence require, will be conclusively presumed to have been negligent, applies to a passenger who attempts to cross a double-track railroad, at a station, on a plank crossing, and had an unobstructed view of the train by which he was struck.

The judgment is affirmed.

IN RE PATTERSON'S ESTATE.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. APPEAL AND ERROR (§§ 1008, 1011*)—REVIEW—QUESTIONS OF FACT—CONFLICTING EVIDENCE.

Where the testimony is conflicting, or the credibility of witnesses involved, a finding that a marriage, claimed to exist, did not exist will not be set aside, unless manifest error is shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969, 3983-3989; Dec. Dig. §§ 1008, 1011.*]

2. MARRIAGE (§ 50*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence held to sustain a finding that a woman had not sustained her claim to be the common-law wife of decedent, notwithstanding evidence of cohabitation.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-89; Dec. Dig. § 50.*]

3. MARRIAGE (§ 40*)—EVIDENCE—PRESUMPTIONS—COHABITATION AND REPUTATION.

In order to give rise to a presumption of marriage, cohabitation must be such as is con-

sistent with and would naturally result from the marriage relation, and reputation of marriage must be general.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 58-69, 79; Dec. Dig. § 40.*]

4. MARRIAGE (§ 40*)—EVIDENCE—PRESUMPTIONS—COHABITATION AND REPUTATION.

Where the relation between parties was illicit in its inception, a marriage will not be presumed, because of cohabitation and reputation, without proof of a change of the relation.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 58-69, 79; Dec. Dig. § 40.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of William E. Patterson. From a decree dismissing exceptions to adjudication, Jennie E. Patterson appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Charles L. Smyth and Russell Duane, both of Philadelphia, for appellant. Ruby R. Vale, of Philadelphia, for appellee.

FELL, C. J. [1] The learned auditing judge found that the appellant had not sustained her claim, as the widow of the decedent, to share in the distribution of his estate; and this finding was sustained by the court in banc. Such a finding of fact from conflicting testimony, or when the credibility of witnesses is involved, will not be set aside by an appellate court, unless manifest error is shown. *Moore's Estate*, 211 Pa. 338, 60 Atl. 987; *Furbush's Estate*, 220 Pa. 166, 69 Atl. 592. Our examination of the testimony has not convinced us of error, or even raised a doubt as to the correctness of the conclusion reached.

[2] There was no proof of the marriage of the decedent and the appellant. Her case rested entirely on the presumption of marriage arising from cohabitation and reputation. The voluminous testimony may be summarized by the statement that the decedent was a man of dissipated habits, who frequently went on drinking sprees that lasted for weeks, and at times for months. During these periods he lived in various parts of the city and avoided meeting the members of his family. He was supported by a weekly allowance from his father's estate; and all his life he had a home at the house of his mother, where a room was set apart for him. To this home he went shortly before his death, and from it he was buried.

Before the appellant met the decedent, she had lived in a number of towns in different parts of the state, and had been divorced at the suit of her husband. She came to Philadelphia in 1901, and during the following three years lived under different names at different houses, the character of which she declined to disclose, on the ground that her

answers would incriminate and disgrace her. She had been once convicted and sentenced in Philadelphia for keeping a bawdyhouse. She first met the decedent on his visit to a house of ill fame that she conducted; and they subsequently lived together at times in houses where she conducted the business of letting apartments. While living together, she was known to persons who furnished supplies to the house and to the servants as Mrs. Patterson; and to them and to some others the decedent spoke of her and introduced her as his wife. When they stopped at hotels in other cities, they were registered as man and wife. Some two years before his death he made a will, in which he mentioned her as "my intended wife." But during the whole of this time he was known to his kindred and friends as a single man, and she as his mistress. In their relations to each other while occupying rooms in houses rented or owned by her, there was nothing to indicate that they regarded their cohabitation as matrimonial. During this time she purchased and sold real estate in her maiden name, describing herself as a single woman, kept her bank account in the name of the man from whom she was divorced, and loaned money to the decedent, and received for collateral securities received from him to secure the loan, in her maiden name.

[3,4] Cohabitation and reputation are circumstances which, when conjoined, may give rise to a presumption of marriage; but the cohabitation must be such as is consistent with and would naturally result from the marriage relation, and the reputation must be general. An irregular or inconstant cohabitation and a partial or divided reputation will not sustain a presumption of marriage. Moreover, when, as in this case, the relation between the parties was illicit in its inception, a marriage will not be presumed, because of cohabitation and reputation, without proof of a change of the relation. *Yardley's Estate*, 75 Pa. 207; *Hunt's Appeal*, 86 Pa. 294; *Grimm's Estate*, 131 Pa. 199, 18 Atl. 1061, 6 L. R. A. 717, 17 Am. St. Rep. 796.

The decree is affirmed at the cost of the appellant.

IN re SMITH'S ESTATE.

Appeal of ALWARD.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. GIFTS (§ 49*)—EVIDENCE.

Where an administrator, a grandson of the decedent, claims a balance of money which came into his possession as attorney in fact of his decedent before her death as a gift from her, the claim will be disallowed, and the administrator surcharged with the amount, where one-half the sum received by him was paid over to decedent by check, and the only evidence to establish the gift of the balance was a writing of the decedent not under seal, with-

out consideration, by which she did "agree to give" the accountant one-half of the sum received by him for her, and the acceptance by the decedent of the check for one-half.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 95-100; Dec. Dig. § 49.*]

2. GIFTS (§ 47*)—INTER VIVOS—EVIDENCE—BURDEN OF PROOF.

One who, after death of an alleged donor, claims money as a gift has the burden of showing an executed gift by clear and convincing evidence, consisting either of the declarations or admissions of the alleged donor or his acts accompanied by other indicia of a gift, especially where the claimant stood in a fiduciary relation to the donor.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 81-86; Dec. Dig. § 47.*]

Appeal from Orphans' Court, Erie County.

In the matter of the estate of Maria Smith. From a decree dismissing an exception to an adjudication of the final account of Forest J. Alward, administrator, he appeals. Affirmed.

The auditor filed a report of distribution showing a surcharge against the accountant of \$2,345.75, which report was confirmed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

E. L. Whittelsey, of Erie, and James R. Andrews, of Meadville, for appellant. H. C. Yard and T. A. Lamb, both of Erie, for appellees.

STEWART, J. In the adjudication of his final account as administrator of the estate of Maria Smith, deceased, appellant was surcharged with the sum of \$2,345.75 for money which, as the court found, belonged to the estate of his decedent, and which was unaccounted for. The appeal is from this decree of surcharge, and its correctness is the only matter for our consideration. The appellant was a grandson of Maria Smith, and for nearly a year before the latter's death he had held a written power of attorney as her attorney in fact. It does not appear what duties he discharged, or what service he rendered as such attorney, but since Maria Smith was absolutely without property, except as she was entitled to share in the estate of a deceased son, then in process of settlement, it may be assumed that whatever he did was in connection with the settlement of that estate. The money with which he is here surcharged was derived by Maria Smith from that estate. Upon her death in February, 1908, letters of administration upon her estate were granted to the appellant. The account which was before the court for adjudication was his second and final account. The contention which resulted in the surcharge arose on the following facts: On January 13, 1908, a month preceding the death of Mrs. Smith, the attorney who represented her in the settlement of her son's estate, James R. Andrews, Esq., received as her share in the estate a check from the Erie

Trust Company for \$4,571.50, payable to his order as "attorney for Maria Smith." Mr. Andrews indorsed the check as follows: "Pay to the order of Maria Smith, James R. Andrews, attorney for Maria Smith," and delivered it to Mrs. Smith. The same day Mrs. Smith indorsed the check, "Pay to the order of F. J. Alward, attorney in fact, Maria Smith," and delivered it to appellant, who indorsed the check "F. J. Alward, attorney in fact," and deposited the full amount to his own credit in the Trust Company. Appellant then drew his individual check in favor of Mrs. Smith for \$2,225.75, part of the \$4,571.50 which he had received as her attorney in fact. All this occurred on the same date, January 13, 1908. Appellant's check in favor of Mrs. Smith was deposited to her credit in the Trust Company seven days thereafter, three weeks prior to the death of Mrs. Smith. That the difference between the amount received by the appellant in this transaction as attorney in fact and the amount paid thereout to Mrs. Smith does not enter into the account as filed by him is not disputed. So far as his account shows, he did not consider this difference as any part of the decedent's estate, but regarded it as his own property. And this was the claim asserted by him when the surcharge against him was demanded.

[1] In support of this claim, he produced a paper signed by Mrs. Smith, of which the following is a copy: "Edinboro, Pa. 4/8/07. I, Maria Smith, party of the first part, do by these presents hereby agree to give, transfer and set over to Forest Jerome Alward, party of the second part, fifty per cent. or one-half of whatever I receive from the estate of my deceased son E. C. Gibson." Relying upon the sufficiency of this paper to invest him with the ownership of one-half the fund he received as attorney in fact, appellant made no return of it. The insufficiency of the paper for such purpose is too manifest to call for discussion. The paper does not by its terms purport to be a present, gift or investiture. The language is: "I * * * do hereby agree to give, transfer and set over," etc. Interpreted by its own terms, it is but an expression of a purpose to make a gift in the future. It expresses no consideration, is unsealed, and was therefore revocable at the pleasure of the party signing it. The actual giving and transferring necessary to make it a gift remained *in fieri*; and, without actual delivery of the subject of the proposed gift, it was *nudum pactum*. The one question in the case is, Was the paper followed by an actual delivery? If it was, then appellant stood on solid ground in declining to account for anything derived by Mrs. Smith from the estate of her deceased son. The one-half of the distributive share awarded her from her son's estate, and which came into his hands as her attorney in fact, had been paid over to her in her lifetime. So much of the fund

therefore in its specific character was not to be accounted for.

[2] The residue was to be accounted for, except as the accountant could show an executed gift of it to himself; and the burden of so showing was upon him. First as to the measure of proof required in such cases. We have said in *Fross's App.*, 105 Pa. 258, that the evidence of a gift *inter vivos* must, after the death of the alleged donor, be clear and satisfactory; and in *Wise's Estate*, 182 Pa. 168, 37 Atl. 936, that it is required to be clear and convincing. Numerous other cases might be cited to show that a mere preponderance of evidence will not suffice to sustain a gift where the question arises after the death of the alleged donor. The execution of the purpose to give—that is, by delivery—may be shown either by declarations or admissions of the alleged donor, or it may be gathered from his acts when accompanied by other indicia of a gift; but whether in one way or the other, or both, the evidence must disclose a clear and unmistakable intention on the part of the donor at the time to withdraw or surrender his dominion over the subject of the gift. Except as such intention is shown to accompany the act relied on, the delivery is incomplete. In the present case, no verbal expressions of the testatrix in connection with the alleged delivery were shown, and appellant's whole case rested upon a single undisputed circumstance—the acceptance by Mrs. Smith of appellant's check for the one-half the sum received by him as her attorney in fact—a circumstance which would be entirely without significance as evidence except for its correspondence with her earlier promise in writing to give the appellant the one-half of the total sum she might receive from her son's estate. Thus associated, the most that can be urged for the combined effect would be that, if Mrs. Smith intended by the acceptance of the check to indicate her relinquishment of all claims to what remained of the fund in the hands of her attorney in fact, the method adopted was adequate to the end. Such may have been her intention; but with no degree of certainty could we derive the fact of intention from this mere circumstance standing alone, not reinforced by any verbal expressions from her, or other corroborating facts. The question at once arises in the mind, if this was intended as an act of delivery, why did the donor adopt any such vague and equivocal method of asserting it when so many more direct, unqualified, and equally convenient methods were open to her? To invest the ordinary purchaser of personal property with right of ownership as against third parties, the law requires that the vendor shall have done everything in his power to effect a delivery to his vendee. Shall we say that any less stringent rule is required for the protection of

dead men's estates against claims resting upon alleged gift? It is quite true that the acceptance of the appellant's check for the one-half the fund is entirely consistent with his present claim; but the question is, What does it prove? It is not enough that it be consistent with the claim made; the act, to be effective, must show unequivocally an intention thereby to invest the donee with the right of disposition beyond the recall of the donor. And herein the appellant's case fails. The rules we have asserted are to be applied with increased strictness when the claimant stands in such relation to the alleged donor as here existed between Mrs. Smith and the appellant. Not only so; but a much heavier burden with respect to the sufficiency of evidence rests upon the claimant because of the relation. The burden is on him to show that the gift was executed fairly, advisedly, and that no advantage was taken of the donor in its procurement. Upon this feature of the case, we need not enlarge, since, without regard to it, the evidence in support of the gift was clearly insufficient.

The contention that the matter of the surcharge was res adjudicata because a like effort had been made in connection with adjudication of appellant's first account and failed is without merit. The record discloses the fact that the question was not then passed upon, but was expressly reserved for consideration with the final account.

The assignments of error are overruled, and the decree is affirmed at the cost of appellant.

WESTINGHOUSE AIR BRAKE CO. v. HARRIS.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. SALES (§ 209*) — CONSTRUCTION OF CONTRACT—TRANSFER OF TITLE.

Where 5,200 ton of pig iron constituted part of a larger amount owned by a furnace company and pledged to its selling agent and stored on a lot of ground owned by the furnace company, but leased to the selling agent, and under the contract the selling company sold the pig iron in question, received the price, and issued certificates of ownership, but before any separation from the bulk had been made the furnace company passed into the hands of a receiver, after which some one interested in the sale, without the receiver's authority, separated the 5,200 ton and marked them with the purchaser's initials, title vested in the purchaser as against the furnace company.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 562-566; Dec. Dig. § 209.*]

2. REPLEVIN (§ 8*) — RIGHT OF ACTION — PLAINTIFF'S RIGHT OF POSSESSION.

Where plaintiff has the right of possession of personalty in the possession of another, replevin lies even if the plaintiff never had possession.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 45-68; Dec. Dig. § 8.*]

3. DAMAGES (§ 197*)—ASSESSMENT — WRIT OF INQUIRY.

A judgment for want of a sufficient affidavit of defense in replevin authorized by act April 19, 1901 (P. L. 89) § 5, merely determines the title to the property in dispute, and plaintiff must resort to a writ of inquiry for the assessment of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 518, 519; Dec. Dig. § 197.*]

Appeal from Court of Common Pleas, Fayette County.

Action by the Westinghouse Air Brake Company against Walter C. Harris, receiver of the Dunbar Furnace Company. From an order making absolute a rule for judgment for want of sufficient affidavit of defense, defendant appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Abraham M. Beitler, of Philadelphia, and Johnson & Rush, of Uniontown, for appellant. H. S. Dumbauld, of Uniontown, and John A. Emery, of Pittsburg, for appellee.

ELKIN, J. [1] This is an appeal from an order making absolute a rule for judgment for want of a sufficient affidavit of defense. It is an action of replevin; the property replevied being 5,200 tons of pig iron. The Air Brake Company purchased this pig iron and paid \$74,050 in cash for it. It was stored on a lot of ground owned by the Furnace Company, but leased to and in the possession of the Wister Company. The Wister Company was the selling agent of the Furnace Company, and from time to time advanced moneys to that company as working capital, taking title to the pig iron as a pledge of security for the loans thus made. The Wister Company took possession of the pledged pig iron by storing it upon the leased premises over which it exercised absolute control and supervision. Under its contract with the Furnace Company, the Wister Company took title to the pig iron, held possession and made sale of the same, giving proper credits as sales were made from time to time after deducting commissions. The right of the Wister Company to sell the pig iron and make title to the purchaser is not questioned, and this is what was done in the present case. At the time of the sale of the pig iron, 52 certificates of ownership, each certificate calling for 100 tons of pig iron, were issued to the Air Brake Company. When the certificates were issued and the purchase price paid in full, the transaction between the parties was closed in all respects except as to delivery. It is contended for appellant that, at the time of the sale in question, there were stored on the Wister lot 30,000 tons of pig iron, and that the 5,200 tons were a part of the total mass, not marked, nor separated, nor identified for the purpose of delivery so as to pass title. In support of this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

contention, the rule is urged that goods sold must be ascertained, designated, and separated from the stock or quantity with which they are mixed before there is a completed transfer of the title; and, until this is done, the title remains in the vendor and the property does not pass to the vendee. It must be conceded that this is a correct statement of a general rule of law established in this state and recognized in most jurisdictions. Its application must necessarily depend to a considerable extent upon the nature of the transaction, the course of dealing relating to the subject-matter of the sale, and the facts of each particular case. When so viewed, we have reached the conclusion that the appellant is not in position to assert the general rule relied on so as to defeat the right of the appellee to claim and recover the property which it bought and paid for prior to the appointment of the receiver.

We think it sufficiently appears from the pleadings that title to the pledged pig iron stored on the Wister lot, including the 5,200 tons sold to appellee, passed from the Furnace Company to the Wister Company under the agreement entered into between these parties. It is true that the Wister Company was the general selling agent of the Furnace Company; but, as to the pledged pig iron stored on the Wister lot, it is equally true that it held title and possession, with the right to sell at such prices and upon such terms as it might choose to make. The legal status of the Wister Company and the Furnace Company was fixed by their own agreement prior to the institution of receivership proceedings, and the appointment of a receiver did not change that status at least as to acts consummated and as to title to property which had passed prior to that time. Neither the Furnace Company nor the receiver could have maintained an action of replevin against the Wister Company for the pig iron stored on the Wister lot, the title to which had passed under the agreement between these two companies, because the latter company held both title and possession. When, therefore, the Wister Company sold the iron in dispute to the Air Brake Company, neither the Furnace Company in the first instance, nor the receiver subsequently, was in position to interfere with the sale and delivery to the Air Brake Company. In this view of the case, the Wister Company alone was the only party in position to raise the question that the pig iron was not so marked and identified as to pass title to the Air Brake Company. It is important to keep this fact in mind in considering what the sheriff did in executing the writ of replevin. The sheriff was commanded to replevy and deliver to the Air Brake Company the 5,200 tons of pig iron in dispute. He made return that he had taken possession of the goods, and chattels as commanded by writ of replevin, and that he

found the pig iron marked "A. B." piled in separate lots upon the premises where stored. He attached to his return the number of each separate lot of pig iron so marked. Here, then, is the official return of a sworn officer to the effect that, in the execution of the writ, he went upon the ground, found the pig iron in dispute piled in separate lots, each lot numbered and marked "A. B.," and that he seized and took possession of the same. It is apparent that the letters "A. B." stood for Air Brake Company. If these facts be true, it would seem to necessarily follow that there was a sufficient identification and marking of the property to pass title even under the general rule relied on by appellant. It is argued, however, and it is so averred in the affidavit of defense, that the separation and marking of the pig iron was done after the appointment and without the authority of the receiver. This point would have much force if the receiver had the authority either to mark or prevent the marking of the pledged pig iron stored on the Wister lot; but, as hereinbefore indicated, the title to this pig iron was in the Wister Company, which company sold it to the Air Brake Company with full authority not only to sell but to make delivery, and therefore it is of no avail for the receiver to say that he did not assent to the marking for the purpose of delivery. He had nothing to do with the sale and delivery of this pig iron, and no one else questioned it. The pig iron was initialed and set apart by some one, presumably by parties interested in the sale and purchase; and, when the sheriff went upon the premises, he found the pig iron called for by his writ of replevin set apart in separate lots and properly marked. Under these circumstances, the Air Brake Company made out a prima facie case of title and right of possession which the averments of the affidavit of defense were not sufficient to overcome.

[2] In this state, the action of replevin lies for property of one person in the possession of another, even if the claimant never had possession, provided he has the right of possession. *Ferguson v. Lauterstein*, 160 Pa. 427, 28 Atl. 852. In the present case, the Air Brake Company, having purchased and paid for the pig iron, had the right of possession and can properly maintain the action. Appellant strongly urges that there were stored upon the Wister lot, in addition to that pledged to the Wister Company, several hundred tons, perhaps a few thousand, of pig iron, over which the Wister Company did not have dominion, and that this, being a part of the general mass, gave the receiver the right to assert title to and take possession of all the unpledged pig iron, even if stored upon the Wister lot. This may be true; but that would be a question between the Wister Company and the receiver, or perhaps other claimants. It is certainly true that the receiver had the right of pos-

session to all the pig iron not pledged, and of all other pig iron, the title to which remained in the Furnace Company at the time of his appointment as receiver. But this does not affect the rights of the Air Brake Company in the present action. It is conceded that the 5,200 tons in dispute here were a part of the pig iron held in pledge by the Wister Company; that it was in the possession of the Wister Company on the leased premises; that it was sold to the Air Brake Company by the Wister Company as part of the iron pledged to it; and that the Wister Company had the right to sell and make delivery. Under these facts, it is immaterial, in determining the question of ownership and right of possession in the Air Brake Company, that the Furnace Company may have had other pig iron stored on the Wiser lot.

[3] It is suggested by the learned counsel for appellant that the order making absolute the rule for judgment for want of a sufficient affidavit of defense is irregular under the pleadings, and that it not only settled the question of title, but had the effect of entering judgment for the amount of damages claimed. If the judgment had this effect, we would feel called upon to reverse it in order that the damages, if there be any, could be properly assessed. But we quite agree with the learned counsel for appellee as to the effect of judgment for want of a sufficient affidavit of defense under section 5 of the act of April 19, 1901 (P. L. 88), the form and effect of which are regulated by this section of the replevin act. It seems perfectly clear that a rule absolute for want of a sufficient affidavit of defense under the provisions of this section does nothing more than determine the title to the property in dispute. The plaintiff must resort to a writ of inquiry for the assessment of damages. *Painter v. Snyder*, 22 Pa. Super. Ct. 603. In the present case the plaintiff did not attempt to assess damages, and, making the rule absolute, did not include damages. There is therefore no necessity to strike off the assessment of damages, or to reverse the judgment on this ground. If the plaintiff claims damages, it must resort to a writ of inquiry to have them assessed. Judgment affirmed.

IN RE LEISENRING'S ESTATE. APPEAL OF DODSON.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. WILLS (§ 728*)—CONSTRUCTION—ACCUMULATIONS.

A will provided for annuities payable out of the income of the estate, and that any balance of income should be divided between the children of M., if any, and that on her death, the principal subject to the annuities should be divided between the children of M. then liv-

ing, with remainder over if she left no children. When the will took effect, M. was unmarried, but three years later became married, and two years later had one son. The same year there was a fund for distribution consisting of a balance of surplus income, which arose in part prior to the birth of the son and in part subsequent thereto. *Held*, that the son took both the part accruing after his birth and that accruing before it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1759-1780; Dec. Dig. § 728.*]

2. WILLS (§ 733*)—CONSTRUCTION—ACCUMULATIONS.

The gift of the surplus income was immediate, not being built upon the determination of any prior estate, but given directly to the beneficiaries who were made primary legatees, and it is of no consequence that the testatrix knew of the nonexistence of the beneficiaries when she wrote the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1819-1846; Dec. Dig. § 733.*]

3. WILLS (§ 587*)—CONSTRUCTION—RESIDUARY BEQUEST—ACCUMULATIONS.

A general residuary bequest, contingent in terms, carries the intermediate income which is not disposed of, but accumulates, and, if the will contains no direction as to accumulation, the law will supply the intention and permit the accumulation within the statutory period.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1279, 1281-1291; Dec. Dig. § 587.*]

4. PERPETUITIES (§ 9*)—ACCUMULATIONS—EXCESS ABOVE LIMITATION.

While a limitation violating the rule against perpetuities is wholly void, a provision for accumulation contrary to the statute is void only for the excess.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 67-73; Dec. Dig. § 9.*]

Appeal from Court of Common Pleas, Luzerne County.

In the matter of the estate of Mary S. Leisenring. From a decree dismissing exceptions to an adjudication, Truman M. Dodson, father and next friend of Charles M. Dodson, Jr., a minor, appeals. Reversed.

Argued before FELL, C. J., and MESTREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.

Wesley K. Woodbury, of Pottsville, and William W. Porter, of Philadelphia, and Andrew H. McClintock, of Wilkes-Barre, for appellant. Laird H. Barber, of Mauch Chunk, and William S. McLean, of Wilkes-Barre, for appellee.

STEWART, J. The testatrix, a widow, died September 25, 1904, childless. Her last will was executed December 9, 1903. By this will she placed the larger part of her estate in trust, and provided for certain annuities for life out of the income therefrom. To her mother, Mrs. Matilda Shippen, she gave an annuity of \$1,500, in quarterly payments; to her sister, Mrs. Isabel Esser, an annuity of \$1,200, in quarterly payments; to her niece, Mary S. Esser, an annuity of \$2,500, in quarterly payments, to be increased to the sum of \$10,000 in case she should marry. This further provision follows: "Subject to

the foregoing annuities, any balance of income shall be divided between the children of Mary S. Esser, if any, and upon her death the principal of said estate, subject to the payment of the aforesaid annuities, shall be divided between the children of Mary S. Esser then living. If upon the death of Mary S. Esser there be no living children of the said Mary S. Esser, then the principal of said estate, subject to the annuities aforesaid, shall go to Keith Esser, and if he be dead the same shall be divided between the children then living of her brother Keith Esser, if there be any, and if there should be no children of Keith Esser then living, then the principal of the said estate shall be divided among the heirs at law of the said Mary S. Leisenring." It is this provision which gives rise to the present controversy. When the will became operative, the niece, Mary S. Esser, was 18 years of age and unmarried. Three years thereafter she married Truman M. Dodson, and as the fruit of this marriage one son, Charles M. Dodson, was born August 2, 1909. On December 17, 1909, the Fidelity Trust Company, trustee under the will, filed its first account charging itself therein with a balance of \$7,403.17 of income remaining after the payment of the specific annuities. Of this sum \$5,798.83 represents surplus income derived after the birth of the son to Mrs. Dodson. By the adjudication this entire balance was awarded the legal representative of the deceased mother of testatrix, Matilda Simpson, who was next of kin, on the ground that the gift of the balance of income of the trust fund, after payment of the annuities, to the children of Mary S. Esser transgresses the act of April 18, 1853 (P. L. 503), which forbids accumulations of income beyond statutory period, and is therefore void. The appeal from this decree is on behalf of the infant son of Mary S. Esser, now Dodson, by his father and next friend.

[1,2] We cannot adopt the view taken of this case in the court below. By a process of reasoning not warranted by settled rules of construction, the learned judge of the orphans' court reached the conclusion that the testatrix did not intend an immediate gift of the surplus income to the children of Mary S. Esser, and from this conclusion he derives the inference that testatrix intended an accumulation of income for their benefit. Clearly there was no occasion here to look beyond the letter of the bequest to determine its character. That the gift was immediate admits of no dispute. Language could not have made it plainer. No prior estate or interest in the surplus income is created, and, had child or children of Mary S. Esser been in existence at the death of testatrix, such child or children would have at once taken. The fact that testatrix knew of their non-existence when she wrote her will is a matter of no consequence so far as regards this particular inquiry. It is enough to know

that the gift is not limited upon the determination of any prior estate, but is direct and immediate to the beneficiaries indicated, who are made primary legatees. Whether a gift to a primary legatee is absolute or qualified becomes a question of intention on the part of the testator only where the first expressions are ambiguous. Where the intention is expressed, nothing that afterwards follows can affect the construction of the positive gift. Gifts such as that we are here considering—that is to say, to objects not in existence—may be unusual, but they are quite as strictly legal as any other, and their incidents and legal consequences are as clearly defined. For instance, it is well settled that where there is an immediate gift to children, and there is no object in esse at the death of the testator, the gift will embrace all the children who may subsequently come into existence by way of executory bequests. 2 Jarman on Wills, 721; Hawkins on Wills, 70; Williams on Executors, 1175. The disposition the law will make of intermediate income accruing before the takers come into existence, where the will is silent on the subject, is quite as well settled. In *Harris v. Lloyd, Turner & Russell*, Ch. Rep. 310, a leading authority on the subject, the legacy was in trust for the children of A. A. had no children at the death of the testator. It was held by Lord Eldon that after-born children would take, and that the interest until the birth of a child fell into the residue. This latter rule has a double significance in the present case, since it settles as well the controversy we have here with respect to so much of the fund for distribution as accrued before the birth of Mary S. Esser's child. As to that part of the fund which accrued after the birth—except as the gift is void for the reasons stated by the learned judge of the orphans' court—the appellant's right to it is not open to controversy. No more is that part which accrued prior to his birth under the authority of the case above cited. The subject of the gift was the income of the trust estate. After directing that certain specific legacies in the shape of annuities, and therefore not variable, should be paid thereout, testatrix ordered that, "subject to the foregoing annuities, any balance of income shall be divided between the children of Mary S. Esser if any." Here we have a general residuary bequest, contingent in terms.

[3] The rule in such cases, as stated by Mr. Hawkins in his work on Wills, p. 43, is as follows: "A general residuary bequest, contingent in terms, carries the intermediate income, which is not undisposed of, but accumulates." Thus, he says, in supporting the rule: "If the testator bequeathed the residue of his personal estate to such son of A. as shall first attain 21, and A. has no son at testator's death, the income of the residue does not go to the next of kin, but accumu-

lates in trust for a son of A. who may come into existence. The same rule seems to have been extended in *Bullock v. Stones*, 2 Vesey, Sen. 521, to a bequest of 'all my personal estate at A.' But with respect to specific bequests generally the rule appears to be that the intermediate income does not pass to the legatee until the period of vesting." The rule and distinction here indicated between specific and residuary bequests is generally recognized. Mr. Jarman states the rule quite as explicitly. We quote from the text appearing on page 246, vol. 2: "A residuary bequest of personalty, it is well known, does (though contingent on its terms) carry the prior income;" and for this he cites a number of cases.

[4] Now, it is wholly immaterial to inquire whether the testatrix contemplated an accumulation of income between the period of her death and the birth of a child to Mary S. Esser. If the will is silent on the subject, the law will supply such intention, and allow the accumulation within statutory period. Should the construction of the will carry the accumulation beyond the statutory period within which accumulations are permissible, the law will stop the accumulations at this point, and thenceforth give the income to the next of kin. It will not declare the gift void because of such transgression, but will avoid so much of it as does transgress the restrictions of the act of 1853. *Brown v. Williamson*, 36 Pa. 338; *Conrow's Appeal*, 3 Penny. 356. It was therefore error to hold that the gift in this instance was void because of the act of 1853 forbidding accumulations, no matter what the purpose of the testatrix was in this respect, an error which resulted from failure to distinguish between the rule governing perpetuities and the rule governing accumulations. "A limitation which transgresses the rule against perpetuities is void altogether, differing in this respect from a provision for accumulation contrary to the statute, which is void only for the excess." *Hillyard v. Miller*, 10 Pa. 326; *Brown v. Williamson*, supra; *Rhodes' Estate*, 147 Pa. 227, 23 Atl. 553.

We need only repeat that, notwithstanding the object of the gift here was not in existence at the death of the testatrix, the gift was a perfectly valid and legal one; and that, though the period of enjoyment was necessarily delayed to await the coming into existence of the beneficiary, yet, being a gift of a residuary fund, whatever intermediate accumulations accrued passed with the gift to the beneficiary. Here the beneficiary came into existence within five years from the death of the testatrix, and there is therefore no excess in accumulation to be avoided. Other reasons might readily be given for excluding from all consideration in this case the statute against accumulations were it necessary. We have limited the discussion to the features urged upon our attention as

supporting the decree entered. For the reasons stated, the decree is reversed, and distribution of the fund is ordered to be made in accordance with the views here expressed.

ERBECK v. MEADVILLE & CONNEAUT LAKE TRACTION CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

CONTRACTS (§ 352*) — ACTIONS — EVIDENCE — NONSUIT.

In an action for work and materials furnished in the construction of a railway under a contract providing that the contractors should be entitled to payment in full 10 days after the completion of the work and its acceptance by the railway company's engineer and certificate thereto in writing, the statement, though not demurred to, did not allege that the work had been accepted by the engineer or the certificate given or waived. The plaintiff offered in evidence a paper furnished by the president of the defendant company, containing a list of the moneys paid out by defendant for plaintiff and to plaintiff on his contract, and a statement of intention to recheck so as to make sure that all the figures were correct. The object of this offer was to show an estimate by defendant's engineer in favor of plaintiff in a given sum. Neither the paper nor the letters transmitting it warranted an inference that the construction of the road had been completed according to the contract or accepted by the engineer in charge. *Held*, that the paper was properly excluded and a nonsuit properly entered.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1200, 1824-1828; *Dec. Dig.* § 352.*]

Appeal from Court of Common Pleas, Crawford County.

Assumpsit by Frank J. Erbeck against the Meadville & Conneaut Lake Traction Company on a construction contract. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before BROWN, POTTER, ELKIN, STEWART and MOSCHISKER, JJ.

John S. Ferguson, of Pittsburg, John O. McClintock, of Meadville, and Ralph C. Davis, of Pittsburg, for appellant. G. K. Wright and McKee, Mitchell & Alter, all of Pittsburg, and George F. Davenport, of Meadville, for appellee.

STEWART, J. A compulsory nonsuit in this case followed logically and inevitably upon the rejection of plaintiff's offer of a certain paper to show compliance on his part with the terms of the written contract on which his action was based, and thereby to establish his right of action. The suit was for the recovery for work and labor done and materials furnished in the construction of a railway under a written contract which provided, among other things, that "in ten days after the work shall have been finished and completed the contractor shall be entitled to be paid in full, including the balance due on the aggregate of all amounts reserved, provided said work shall be accepted by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

said engineer, and he shall certify thereto in writing." The engineer here referred to was the engineer of the defendant company under whose supervision, by the terms of the contract, the road was to be constructed. The declaration in the case contained no averment that the work done by the plaintiff had been accepted by the engineer, or that any certificate from him had ever been requested, or that this provision of the contract had been waived. The defendant's promise to pay was conditioned on an acceptance of the work by the engineer certified in writing. Except as the declaration averred such acceptance, or a waiver, or other facts sufficient in law to dispense with this particular requirement of the contract, it disclosed no cause of action. It was not demurred to, however, and on the trial plaintiff offered a paper furnished at the request of plaintiff by the president of the defendant company, which, as explained by the letter accompanying was a "list of moneys paid out for you (the plaintiff) and to you on your contract," with this statement following: "It is my intention to recheck the entire matter so as to make sure that all figures are correct." The purpose of the offer as stated was to show "an estimate by defendant's engineer in favor of the plaintiff amounting to \$160,305.51 rendered in pursuance of plaintiff's final estimate furnished to plaintiff in pursuance to his request as such estimate." It was objected to for the reason "that the so-called estimate does not purport to be in accordance with the provision of the contract, which is in this language: 'Provided said work shall be accepted by said engineer, and he shall certify thereto in writing.'" The objection was sustained, and the evidence excluded.

It was not proposed in the offer to follow it up by evidence supplementing it in any way; we have therefore the ruling of the court on the naked offer as it stood to consider. In the first place, the paper does not purport to be an estimate made by the engineer, but one furnished by the president of the company, from what data does not appear. In the second place, it does not purport to be a final estimate. And again nothing in the paper itself or in the letters transmitting it, would warrant an inference that the construction of the road had been completed under the contract, or that it had been accepted by the engineer in charge. If the purpose of the offer was to derive from this evidence an inference that the road had been in fact accepted by the engineer, and that showing a certificate in writing from him was therefore unessential, or that the company had substituted its own acceptance for that of the engineer, it should have been so stated. The court ruled on the offer as it was made, and correctly, because of the manifest want of correspondence between the paper and the offer. But even allowing a wi-

der purpose in the offer than that stated, and assuming that it was intended to derive therefrom the inference above suggested, neither the paper itself nor the correspondence in connection therewith would support any such finding. Together they do not tend to show a completion of the road pursuant to the terms of the contract, any acceptance of it by the company as a completed construction, or any abandonment or relinquishment on its part of the requirement as to the certificate of the engineer in writing. The paper itself would be competent as an admission by the defendant of the amount of work done and material provided by plaintiff and the moneys paid him; but, before it could have been introduced for such purpose, the way must have been prepared by evidence showing compliance by the plaintiff with the terms of the contract, or a waiver by defendant of the omitted requirements. We see no error in the ruling of the court excluding the offer, and this assignment is overruled. Since the rejection of the evidence left the plaintiff without right of action, the other assignments need not be considered.

The judgment is affirmed.

KUREL v. BOROUGH OF SHAMOKIN.

(Supreme Court of Pennsylvania. July 2, 1912.)

MUNICIPAL CORPORATIONS (§ 803*) — ACTION FOR PERSONAL INJURIES — CONTRIBUTORY NEGLIGENCE.

In an action against a borough for personal injuries, plaintiff cannot recover where the accident was caused by plaintiff stopping his wagon so near the tracks of a steam railroad on a borough street that it was struck by a train, though there was ample room to stand on the street at a safe distance from the tracks.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1673, 1682; Dec. Dig. § 803.*]

Appeal from Court of Common Pleas, Northumberland County.

Action by Frank Kurel against the Borough of Shamokin. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Argued before FELL, C. J., and MES-
TREZAT, POTTER, ELKIN, and MOSCH-
ZISKER, JJ.

Charles C. Lark, of Shamokin, and George B. Reimensnyder, of Sunbury, for appellant. J. W. Gillespie and J. Mal. Gillespie, both of Shamokin, for appellee.

PER CURIAM. On the side of the borough street on which the plaintiff was injured, there were the tracks of a steam railroad, and at the place of the accident there was on the other side a guy pole, the outer surface of which was in line with the outer edge of the footwalk. There was a clear space between the railroad tracks and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

footwalk of more than 11 feet. The plaintiff was selling farm produce and stopped his wagon so near the tracks that it was struck by a train and pushed against the pole. There was ample room for his wagon to stand on the street at a safe distance from the tracks, and it is too evident to admit of doubt that his injuries resulted entirely from his own negligence.

The judgment of nonsuit is affirmed.

REID v. REID et al. (No. 1).

(Supreme Court of Pennsylvania. July 2, 1912.)

TRIAL (§ 392*)—FINDINGS OF FACTS AND CONCLUSIONS OF LAW—PRACTICE—ANSWER TO REQUESTS.

Where a court of equity replies to requests for findings of fact or conclusions of law with an answer that they are "refused to the extent that they are inconsistent with" the findings of fact and conclusions of law filed by the court of its own motion, it is reversible error, under equity rule No. 62.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 916-919; Dec. Dig. § 392.*]

Appeal from Court of Common Pleas, Fayette County.

Action by J. M. Reid against E. H. Reid and others. From a decree awarding distribution, plaintiff appeals. Reversed.

See, also, Reid v. Reid (No. 2) 85 Atl. 85, and Reid v. Reid (No. 3) 85 Atl. 87.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

E. O. Higbee, of Uniontown, for appellant. James S. Moorhead, of Greensburg, John Duggan, Jr., of Uniontown, and Robert W. Smith, of Hollidaysburg, for appellee Reid.

MOSCHZISKER, J. The Connellsville & Ursina Coal & Coke Company and the Ursina & Norfolk Railway were joint enterprises, the capital stock of which was owned as follows: E. H. Reid, eighteen-fortieths; J. M. Reid, ten-fortieths; B. F. Boyts, nine-fortieths; and the Scull estate, three-fortieths—for which certificates were never actually issued. On January 27, 1900, J. M. Reid, by a writing, formally transferred his interest in this stock, and all claims and accounts that he might have against the two companies, to E. H. Reid, and the latter signed an agreement acknowledging that he had received from the former "a transfer of his stock, * * * for which I will pay him four months from date the sum of \$22,695.88, or if not paid will return this transfer." The consideration was not paid within the four months, and J. M. Reid claims that all rights under the assignment were forfeited, as though it had never been executed. On the other hand, E. H. Reid contends that his rights were not impaired by the nonpayment of the consideration within the four months,

since J. M. Reid had waived the time limit, and had thereafter recognized the validity of the assignment.

A fund was realized from a sale of the property of the two companies, as more particularly set forth in the opinion this day filed in Reid v. Reid et al. (No. 2) 85 Atl. 85, and after the payment of certain obligations there remained a considerable balance for distribution to the stockholders. This was in the hands of the Somerset Trust Company, which declared its purpose to recognize E. H. Reid to the exclusion of J. M. Reid in making division thereof; whereupon the latter commenced these proceedings to restrain the proposed distribution, and to secure a division of the fund by a decree of court. In his bill the plaintiff claimed that he owned the stock in question; and the defendant E. H. Reid answered, denying this claim of ownership and averring that the stock, etc., had passed to him by virtue of the aforesaid assignment. At hearing the court below found in favor of E. H. Reid and made the award accordingly. J. M. Reid appealed. He states but two questions involved, which we will take up in order:

First, "Is it error for the court not to answer requests for findings of fact and conclusions of law?" The trial judge wrote an adjudication in which he made his own findings and conclusions, and he subsequently filed an order placing the plaintiff's formal requests upon the record, stating, "These requests have been delivered to the prothonotary by the trial judge with his own findings and conclusions," and adding: "It is ordered that they be marked as filed as of the date of the filing of the said findings of fact and conclusions; * * * and it is further ordered that, to the extent that they are inconsistent with such findings of fact and conclusions of law, they be and are hereby refused." This was the only direct answer made to the plaintiff's requests. We have read all the findings of the court below, and also the unanswered requests, and we do not find anything in the former which specifically covers the facts asserted in certain of the latter. For instance, the plaintiff asked the court to say that E. H. Reid had not claimed ownership of the appellant's interest in these corporations until a short time prior to November 4, 1909, and that after the expiration of the four months E. H. Reid had repeatedly assured the appellant that he would get his full share of the proceeds from the sale of the property of the two companies. Although these facts asserted by the plaintiff may appear inconsistent with certain of his actions in connection with the stock in question, whereby he apparently admitted the ownership of E. H. Reid, yet his explanation is that these so-called acknowledgments of ownership out of himself were only for the purpose of protecting the trust

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Indexes

company, which was holding the stock, and which had issued a declaration of trust recognizing E. H. Reid as the owner of the part now claimed by the appellant, and that they were made upon the express assurance of E. H. Reid that in the final distribution by the trust company the appellant should receive his full share of the fund. In this connection the plaintiff requested the court below to find "that no act had been done or performed by any of the parties mentioned in said deed of trust on the strength thereof;" no doubt in order to shut off an assertion of estoppel against him.

The appellant was entitled to specific answers to his requests; and, if the facts asserted in those to which we have particularly called attention were found as therein stated, the court should have dealt with the legal effect of such facts in its conclusions of law, and should have given us the benefit of a discussion thereof in its opinion. In fact, the court should have answered all the requests made by the appellant, either by affirming or denying them, or, if its own findings sufficiently covered any of them, then, in every such instance, by an express reference designating such findings. Equity rule 62 provides: "The counsel for the respective parties may present * * * requests for findings both of facts and law. * * * The judge may adopt or affirm these requests, or any of them, qualify or deny them, or state his findings of fact or of law in his own language." There can be no dispute at the present day over the meaning of this rule; for we have more than once construed it in plain language. In *Lehigh Valley Coal Co. v. Everhart*, 206 Pa. 118, 55 Atl. 864, we determined: "The language of the rule applies to each request; and it is the duty of the judge to make a separate and distinct answer to each request, as directed by the rule." Again, in *Hoyt v. Kingston Coal Co.*, 203 Pa. 509, 53 Atl. 348, we said: "Each request should be formally disposed of; and, if the judge feels that in the findings in his own language he has answered it, he should say so by indicating, in connection with the request itself, what he regards as his answer, to be found in his own independent findings. The letter and the spirit of the rule require this. With answers and requests brought up on appeal, it is not for us, after reading each, to turn to the independent findings of the judge to discover whether he has considered it, and then to determine what he wishes to be considered as his answer."

If the court below thought the requests bad in form, or that the facts asserted therein were immaterial, the chancellor should have so stated, and on review the only questions would be as to their form or materiality. *Hoyt v. Kingston Coal Co.*, 203 Pa. 509, 53 Atl. 348. But, in view of the fact that the chancellor seems to have based his conclu-

sion largely upon the apparent admissions of the appellant to the effect that the stock in question belonged to E. H. Reid, it is essential, on review, to have findings concerning the real understanding between the parties when these declarations were made; for if, as the appellant contends, the so-called admissions were merely for the purpose of reassuring the trust company, without prejudice to any one, and upon an understanding that, as between E. H. Reid and J. M. Reid, the rights of the latter were acknowledged by the former, then the facts in the appellant's requests might have a distinct bearing, and should have been found one way or the other. The only safe course for a chancellor to pursue in writing an adjudication is to follow the equity rules as they have been construed by this court.

The second question stated as involved in this appeal goes directly to the merits of the case; hence it cannot be considered until the appellant's requests have been dealt with by the learned court below. The decree is vacated and set aside, and the record is remitted, with directions that the requests for findings of fact and conclusions of law presented by J. M. Reid be answered, as required by the equity rules and as indicated in this opinion; and that, after the requests have been answered and made part of the record, a decree be entered. The costs of this appeal to be paid by E. H. Reid, appellee.

REID v. REID et al. (No. 2).

(Supreme Court of Pennsylvania. July 2, 1912.)

1. CORPORATIONS (§ 629*)—DISTRIBUTION OF CORPORATE ASSETS—OUTLAWED CLAIM OF STOCKHOLDER.

In proceedings for distribution of proceeds of sale of property of a corporation under a scheme of distribution arranged by the parties, the claim of a stockholder, outlawed when asserted, was properly disallowed.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2478-2481; Dec. Dig. § 629.*]

2. TRUSTS (§ 219*)—TRUST COMPANY—INTEREST ON TRUST FUNDS.

Where a trust company mingles funds held by it in trust for certain uses with its general deposits, it should pay the same interest thereon as it would pay to a third party carrying a deposit of like character.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 314-317; Dec. Dig. § 219.*]

Appeal from Court of Common Pleas, Fayette County.

Action by J. M. Reid against E. H. Reid and others. From a decree directing distribution, Cella M. R. Boyts, executrix of B. F. Boyts, deceased, appeals. Modified.

The facts appear by the opinion of the Supreme Court.

See, also, *Reid v. Reid* (No. 1) 85 Atl. 84, and *Reid v. Reid* (No. 3) 85 Atl. 87.

The fifth conclusion of law reached by the trial court was as follows: "V. The Somerset Trust Company, trustee, having accepted the trust for the mere purpose of converting the property into money and distributing it among those entitled thereto, and for the collection of the mortgage against Wilfred Johnson, and having been ready and willing at all times to pay over the money when thereunto required, and having made repeated efforts from the time it received the trust fund into its custody to get the parties to agree upon a proper distribution, and the delay having been occasioned by the acts and disagreements of the cestuis que trust, without fault or dereliction of any kind on the part of the trustee, therefore, under all the evidence, the trustee is not liable for the payment of any interest of said fund."

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

D. W. McDonald and Reppert, Sturgis & Morrow, for appellant. Ed. B. Scull, of Pittsburgh, John Duggan, Jr., of Uniontown, and Chas. F. Uhl, Jr., of Somerset, for appellee Somerset Trust Co. James S. Moorhead, of Greensburg, John Duggan, Jr., of Uniontown, and Robert W. Smith, of Hollidaysburg, for appellee E. L. Reid.

MOSCHZISKER, J. E. H. Reid, B. F. Boyts, and the estate of Edward Scull, deceased, held control of the entire capital stock of the two corporations named and more particularly described in the opinion filed this day in *Reid v. Reid et al.* (No. 1) 85 Atl. 84. By an amicable arrangement, all the property of both of these corporations was sold to one Johnson, and a mortgage was taken in part payment of the purchase money in the name of the Somerset Trust Company, as trustee, which company, on April 6, 1903, executed a deed of trust, wherein it declared that this mortgage was held for the three stockholders before named. Subsequently the trust company collected the mortgage, with accrued interest, and made certain payments, not in controversy, out of the fund. In December, 1905, the three cestuis que trust met and agreed upon a scheme of distribution for the balance held by the trust company; but afterwards B. F. Boyts declined to abide by this arrangement. Later, in December, 1905, Celia M. R. Boyts, the wife of B. F. Boyts, notified the trust company that she had a claim on the fund, which she would bring a suit to establish, and that it should not pay out any of the money in its hands. Mrs. Boyts instituted the suit; but when the case was called for trial in 1909 she failed to maintain her action, and the judgment went against her. On March 5, 1910, the trust company notified the three cestuis que trust, and also J. M. Reid, who likewise had given notice that he had an interest in the

fund, that it would pay out the money in accordance with the scheme of distribution agreed upon in December, 1905, unless restrained from so doing; whereupon, on March 18, 1910, J. M. Reid filed the bill which gave rise to the adjudication from which this and the two other appeals in the present case were taken. The purpose of the bill was to restrain the trust company from making the proposed distribution, and to have the court control the division of the fund. In his answer filed May 2, 1910, the defendant B. F. Boyts, who subsequently died and was succeeded upon the record by his executrix, the present appellant, asserted a claim against the fund for \$7,726.53, which he sought to maintain at hearing. But the learned court below disallowed the claim and made the awards in accordance with the scheme of distribution previously arranged between the parties; and in so doing it failed to charge the Somerset Trust Company with any interest on the fund, saying, in this connection: "The Somerset Trust Company, trustee, having accepted the trust for the mere purpose of converting the property into money and distributing it among those entitled thereto, and for the collection of the mortgage against Wilfred Johnson, and having been ready and willing at all times to pay over the money when thereunto required, and having made repeated efforts from the time it received the trust fund into its custody to get the parties to agree upon a proper distribution, and the delay having been occasioned by the acts and disagreements of the cestuis que trust, without fault or dereliction of any kind on the part of the trustee, therefore, under all the evidence, the trustee is not liable for the payment of any interest on said fund." Celia M. R. Boyts, executrix, has appealed, and states two questions involved: (a) Did the arrangement for distribution, agreed upon in December, 1905, constitute a contract binding upon the parties thereto? (b) Should the trust company have been charged with interest?

[1] In the absence of specific answers to the requests for findings made by J. M. Reid, the filing of which is directed by this court in the before-mentioned opinion disposing of his appeal, we cannot pass final judgment upon the distribution ordered by the court below. But, without considering or in any manner adjudicating the question of the interest of the said J. M. Reid, we may say that the distribution appears to be in accord with what was the desire of all the parties who held control of the stock of the two corporations in December, 1905, including the appellant's decedent; and, even though their agreement that the fund should be so divided may not have constituted a binding contract, yet we would not set aside the distribution, unless satisfied that it worked a wrong or injustice to some one entitled to complain. Therefore, in this connection,

the point to be first determined is: Was error committed in disregarding the claim asserted by B. F. Boyts? For if no error was committed in that regard, the appellant is not in a position to complain of the distribution. The claim under consideration was "for moneys advanced to the two companies prior to the sale of their properties," and the last item in each of the three several statements of the account upon which it rests, as set forth in the answer filed by Boyts, is dated July 7, 1903, July 25, 1904, and January 26, 1900, respectively. These dates show that the claim was stale and outlawed when asserted in 1910; hence we cannot say that the learned court below committed error in disregarding it. See our opinion in *Reid v. Reid et al.* (No. 3) *infra*, filed this day. Under these circumstances it is unnecessary to rule the first question stated by the appellant.

[2] The court below found "that the Somerset Company, trustee, did not keep the moneys arising from this fund in the trust department of the said corporation, but commingled the funds with the general deposits in the said institution, in the form of a general checking account; and that all of the said trust funds, from the time they were received until portions were actually paid out, has constituted a portion of the assets of the said corporation, and has been used either as a reserve, or as money loaned out, being included either in the cash on hand, balance with reserve agents, balance due from banks, loans, and discounts, notes or mortgages, held by the said company." As we understand the case from the above findings and the testimony upon the subject, the defendant trust company treated the fund in question as though deposited with it by a third party in a general checking account. The moneys of the two corporations were kept in a separate account, designated in the books of the trust company as the account of "Somerset Trust Company, Trustee, for E. H. Reid, B. F. Boyts, and Edward Scull Estate." Whether or not a trustee should be made to pay interest depends largely upon the circumstances in each case, and no general rule can be laid down upon the subject. In the present instance, while we cannot say that the defendant trust company was bound to invest the funds, or that it was chargeable with negligence for not so doing, yet we feel that it should pay the same interest thereon that it would pay to a third party who carried with it a deposit of a like character; that is, an account subject to check. The court below should ascertain the rate of interest paid on such accounts and the relevant facts in connection with this particular deposit, and charge the defendant trust company accordingly.

We have already, in the appeal of *J. M. Reid*, entered an order vacating the decree

in this case and remitting the record, so that certain requests for findings may be answered before a final decree is entered. When that is done, it is ordered that the court below charge the defendant trust company with interest, in accordance with its findings in regard thereto and with the views herein expressed; said company to pay the costs of this appeal.

REID v. REID et al. (No. 8).

(Supreme Court of Pennsylvania. July 2, 1912.)

CORPORATIONS (§ 565*)—INSOLVENCY—CLAIMS BARRED BY LIMITATIONS.

A fund arising from the sale of property of certain corporations was held in trust to be applied to the liquidation of the debts of a corporation, payable to persons not stockholders. *Held*, that a creditor under a claim based on a book account barred by limitations was not entitled to share in the fund.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

Appeal from Court of Common Pleas, Fayette County.

Suit by J. M. Reid against E. H. Reid and others. Judgment for defendants, and plaintiff appeals. Dismissed.

See, also, *Reid v. Reid* (No. 1) 85 Atl. 84, and *Reid v. Reid* (No. 2) 85 Atl. 85.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

E. C. Higbee, of Uniontown, for appellant. Jas. S. Moorhead, of Greensburg, John Duggan, Jr., of Uniontown, and Robert W. Smith, of Hollidaysburg, for appellee Reid. Ed. B. Scull, of Pittsburgh, John Duggan, Jr., of Uniontown, and Chas. F. Uhl, Jr., of Somerset, for appellee Scull.

MOSCHZISKER, J. The Somerset Trust Company had in its hands a sum of money arising from the sale of the property of the two corporations named and more particularly described in the opinion filed this day in *Reid v. Reid et al.* (No. 1) 85 Atl. 84. The fund came to the defendant trust company under an arrangement entered into in January or February, 1901, by the several persons who had control of the entire capital stock of these two companies, and, it was to be applied, first, to the liquidation of the debts of the corporations "payable to persons not stockholders." A proceeding was instituted looking to the proper distribution of the fund, and the appellant, J. M. Reid, as surviving partner of the firm of Boyts, Porter & Co., put in a claim for alleged indebtedness to his said firm arising out of two accounts against these corporations.

The property of the two companies was sold in April, 1901. A declaration by the defendant trust company, setting forth for

whom it held such property, was made April 6, 1903, and the bill instituting the present proceedings for the proper distribution of the proceeds thereof was filed March 18, 1910, as more specifically detailed in the opinion this day filed in *Reid v. Reid et al.* (No. 2) 85 Atl. 85. The two book accounts which form the basis of the appellant's claim began, the first of them, November 22, 1887, and ended August 22, 1894, and the second August 16, 1888, and ended March 25, 1901. No effort was made to collect either of these accounts until the year 1910, when the appellant filed a petition averring that Boyts, Porter & Co. were creditors of the two corporations whose funds were about to be divided, and praying leave to intervene in the distribution proceedings. To this petition two of the stockholders of these corporations, representing more than half of their capital stock, filed answers, averring, *inter alia*, the bar of the statute of limitations; and at hearing the court below disallowed the appellant's claim. But one question is stated as involved in this appeal, *i. e.*: Under the circumstances of the present case, was it proper to apply the bar of the statute to the claim?

The declaration by the defendant company, and all of the surrounding facts, show that the trust was intended for the benefit of the stockholders of the two corporations whose property had been sold, and that its real purpose was to secure a proper distribution to them of the net assets arising therefrom; but, of course, the trust could not have been sustained in law, had it failed to give priority to all creditors holding enforceable claims against these corporations. There is, however, no evidence that the trust was ever intended to apply so as to revive stale, unenforceable claims, or to have the effect of keeping alive claims that otherwise would have become outlawed; and we cannot agree with the appellant's contention that it should be so viewed. Certainly, so far as creditors are concerned, it cannot be maintained that the defendant company held the funds upon a technical trust falling exclusively within the jurisdiction of equity, as to which the statute of limitations would have no application. It was a trust primarily for the stockholders of the two corporations, and incidentally for the benefit of creditors who had enforceable claims against these corporations; and all such claims could have been enforced by actions at law, as well as in equity. Cases of this character are "not without the operation of the statute of limitations under the notion of a trust, although they are cases of express and direct trusts." *Lyon v. Marclay*, 1 Watts, 271, 275. Also see *Zacharias v. Zacharias*, 23 Pa. 452; *Barton v. Dickens*, 48 Pa. 518; *York's Appeal*, 110 Pa. 69, 1 Atl. 162, 2 Atl. 65; *Hostetter v. Hollinger*, 117 Pa. 606, 12 Atl. 741; *Miller*

v. Fulton, 206 Pa. 595, 56 Atl. 74; and *Dorance v. Ryon*, 35 Pa. Super. Ct. 180.

The corporations whose funds were in course of distribution might well have pleaded the statute against the appellant's claim; and, had this been a statutory proceeding for the dissolution of these concerns and the division of their assets, we must assume from the findings and conclusions of the learned court below that such a plea would have been allowed. But instead of dissolving the corporations and dividing the assets in accordance with the statutory method, those who had control of the capital stock undertook, in good faith, to secure a proper division of such assets by the course here pursued; and the legality or justice of this has not been questioned by any of the appellants. In fact, the present appellant, in his petition to intervene, expressly states "that your petitioner is willing that the said fund be distributed, and desires that the suit already instituted for the purpose may be maintained." Under the peculiar circumstances of this case, since the statute of limitations was formally pleaded by parties to the record in a proceeding in which the appellant asked leave to intervene and expressed his desire to maintain, we cannot rule that the court below committed error in sustaining the pleas and disallowing the claim presented by him.

This appeal is dismissed at the cost of the appellant.

In re MARTIN et al.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. ATTORNEY AND CLIENT (§ 153*)—COMPENSATION—FORFEITURE.

Anything showing lack of good faith of an attorney, such as receipt of money without giving notice to client within a reasonable time, or the refusal or neglect to pay over promptly on demand, requires a forfeiture of all claim to compensation.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 299, 300; Dec. Dig. § 153.*]

2. ATTORNEY AND CLIENT (§ 153*)—COMPENSATION—FORFEITURE.

Where attorneys brought suits at law for foreigners having poor command of the English language, which the attorneys settled without trial, and during the negotiations they did not disclose to their clients the amount of money expected in settlement nor, after receiving a considerable amount, the amount so received, an award of \$2,459 out of a collection of \$8,125, of which only \$1,156 had been turned over, will be set aside, and the attorneys will not be allowed any compensation.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 299, 300; Dec. Dig. § 153.*]

Appeal from Court of Common Pleas, Fayette County.

Petition by Frank Martin and others for rule on Lee B. Brownfield and others to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

show cause why the respondent should not pay over certain moneys to the petitioner. Rule made absolute, and money paid into court. From a decree distributing the fund, the petitioners appeal. Reversed, with directions.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZIS-KER, JJ.

E. D. Fulton and Wm. W. Parshall, both of Uniontown, for appellants. W. C. McKean and A. F. Cooper, both of Uniontown, for appellees.

POTTER, J. [1] Without going into details, it is sufficient to say that we are all of opinion that the record in this case discloses conduct upon the part of the appellees which is not in accord with the recognized standard of duty to which attorneys must conform in dealing with clients. That relation is so confidential in its nature that it calls for the exercise of the most perfect good faith. In transactions between counsel and client, no shadow of anything like deception or unfair dealing upon the part of an attorney can be countenanced. In every case in which complaint is made, the courts will scrutinize the transaction with jealous care to see that there is no relaxation of the rule. Owing to the confidence bestowed upon him, the attorney is presumed to be able to strongly influence his client, "hence the law often declares transactions between them void, which between other persons would be unobjectionable. Unless the transaction is fair and conscionable, it is deemed a constructive fraud." *Shoemaker v. Stiles*, 102 Pa. 549. Anything which savors of lack of good faith upon the part of an attorney, such as the receipt of money without giving notice to the client within a reasonable time, or the refusal or neglect to pay over promptly upon demand, calls for forfeiture of all claim to compensation. *Balsbaugh v. Frazer*, 19 Pa. 95.

[2] In the present case it appears that the appellees brought certain suits at law to recover damages on behalf of their clients, who were foreigners with poor command of the English language, which suits were afterwards settled by the attorneys without proceeding to trial. The answer of respondents shows that at no time during the negotiations did the attorneys disclose to their clients the amount of money they expected to receive in settlement of the cases, nor did they, after having secured the sum of \$8,000 and costs in the settlement, disclose the amount of money so received to any of their clients. The only reason suggested as an excuse for so doing was that the clients did not inquire as to the amount received in settlement of the cases. The court below in its opinion said that it could not indorse the course of counsel in their conduct of these cases, in the manner in which they were compromised, in their failure to advise and consult frankly,

freely, and fully with their clients in that regard, whether it was favorable or not, in never advising them of the amount received, and in settling four cases varying materially in amounts for a lump sum, when they felt and knew that they would have trouble with the clients in making distribution and in settling with them. If it be taken for granted that counsel were authorized to make a settlement of the cases, the least that they should have done in the proper discharge of their duty to their clients would have been to have promptly notified them of the full amount of money received by them in settlement, and which was then in their hands for division, and to have moved promptly towards a distribution of that amount to and among their clients. Admittedly this was not done.

It appears from the testimony that meetings were held and schedules of distribution among the various parties in interest were prepared and discussed without any apparent reference to the total sum on hand which was to be divided, and without any apparent knowledge upon the part of the clients of the amount of that sum. Naturally that would have been the first item of information which, at that stage of the proceeding, the clients were entitled to receive. The aggregate of the amounts named in the schedules that were submitted as being for distribution was only \$1,156 out of \$8,125 which had been collected. This left a balance of \$8,969 to be accounted for by counsel to their clients.

Various matters appear in the opinion of the court below, which have been discussed by counsel, which we do not deem necessary to consider at this time. Without regard to anything but the admitted dereliction of counsel, as shown in their answer, and as pointed out in the opinion of the court below, we are all agreed that it was of such a character as to justify forfeit all claim to compensation upon their part. We find nothing in the record to warrant the criticism which is expressed in the opinion of the court below upon the conduct of counsel for the petitioners in this case. They were not upon trial in any way. It was the conduct of the respondents which was under scrutiny. Doubtless the duty of bringing such matters to the attention of the court was unpleasant. But the courageous discharge of duty in an effort to uphold correct standards of professional conduct calls for commendation rather than censure.

We sustain the fifth assignment, which alleges error in awarding any part of the fund for distribution to counsel. The tenth assignment, which specifies error in the final order of the court below, is also sustained; and it is further ordered that the sum of \$2,450.23, which was awarded as counsel fees, be added to the sum remaining for distribution among the parties entitled thereto. The costs of this appeal to be borne by the appellees.

In re LONG'S ESTATE.

(Supreme Court of Pennsylvania. July 2, 1912.)

WILLS (§ 316*)—TESTAMENTARY CAPACITY—ISSUE DEVISAVIT VEL NON.

An issue devisavit vel non for lack of testamentary capacity is properly refused where the will was executed eight months before the death of testator, and differed slightly from three prior wills made by him when there was no question of his testamentary capacity, and witnesses testified that at its execution he was in full possession of his faculties, though during the last three months of his life his mind was impaired by a progressive disease.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 742-749; Dec. Dig. § 316.*]

Appeal from Orphans' Court, Fayette County.

In the matter of the estate of Samuel M. Long, deceased. From a decree refusing issue devisavit vel non, George R. Long and others appeal. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

D. W. MacDonald, John M. Core, and James R. Cray, all of Uniontown, for appellants. E. C. Higbee, P. S. Newmyer, and D. M. Hertzog, all of Uniontown, for appellees.

PER CURIAM. This appeal is from the refusal of an issue devisavit vel non asked for on the ground of want of testamentary capacity. The testator died at the age of 86 years, leaving to survive him a widow, 5 children, and 17 grandchildren. By his will he gave his wife one-third of his estate in money, to each of his children small bequests varying in amount, and gave the remainder of his estate in equal parts to 14 of his grandchildren. There was a dispute as to the date of the execution of the will, but the court found on sufficient evidence that it was executed on the day of its date, nearly eight months before the death of the testator. This will differed but slightly from three prior wills made by the testator at times when there could be no question as to his testamentary capacity, and it expressed the testator's deliberately formed, long continued, and oft expressed purpose in disposing of his estate. The last will made no change in the amount of bequests to the contestants. The only change made was to enlarge the gift to his widow and to appoint one, instead of two executors.

During the last three or four months of the testator's life his mind was impaired by a progressive disease, but it was shown by witnesses who were in close relation to him and had the fullest opportunity to observe him that at the date of the execution of the will he was in full possession of his faculties, and attended to his business affairs. Among these witnesses were his dentist, his pastor, his physicians, the collector to whom

he paid his taxes, business men with whom he had dealings, the cashier of the bank where he kept his account and with whom he consulted in relation to his investments and the counsel who drew and witnessed his will. The testimony in support of the petition for an issue was to the effect that the testator's memory was impaired, that he was irritable and petulant, and that he was under a delusion in relation to the conduct of his wife towards him. This delusion certainly had no influence on the testator in making his will, since the gift to his wife was larger than the gifts made in prior wills and the other facts shown were trivial and unimportant in determining testamentary capacity.

Applying to all the testimony the authoritative test whether a verdict against the proponents of the will should be allowed to stand, we are of opinion that the order refusing an issue should be affirmed.

Order affirmed.

WEAVERLING v. THROPP.

(Supreme Court of Pennsylvania. July 2, 1912.)

MASTER AND SERVANT (§ 276*)—INJURY TO SERVANT—UNGUARDED MACHINERY.

Where plaintiff was an all around laborer at defendant's furnace, and while going to the furnace building to eat he was asked by a fellow servant to hand him a hose, and stepped into an unguarded section of a metal trunk, in which a screw-shaped shaft revolved, and which was hidden from view by steam, and was injured, a verdict for plaintiff was justified.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

Appeal from Court of Common Pleas, Bedford County.

Action by Harold Weaverling, by his grandfather and next friend, George Smith, against Joseph E. Thropp. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Alvin L. Little, of Bedford, for appellant. J. H. Longenecker, of Bedford, for appellee.

PER CURIAM. The plaintiff was employed as a laborer at the defendant's furnace, to do whatever kind of work might be assigned to him. On the night he was injured he had been digging down ore in the stockhouse, and, having finished his work there, he went to the furnace building, where he and other workmen kept their dinner buckets, to get something to eat. In this building there was a screw-shaped shaft, that revolved in a metal trunk in the floor, and removed waste from the dust flue to the outside of the building. A section of this trunk, at the side of a walk,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was uncovered and unguarded. As the plaintiff was passing this section, he was asked by a fellow workman to hand him a hose, and while doing this he stepped into the trunk and was injured.

The negligence alleged was in not guarding the machinery in the furnace building as required by the act of assembly. The main grounds of defense were: (1) Contributory negligence; (2) that the plaintiff was at a place where he was not employed to be, and was doing something out of the scope of his employment. Under the plaintiff's testimony, the trunk was hid from view by steam and dust, and the danger was unseen, and he was in the furnace building for a proper purpose, and did what it was customary for one workman to do at the request of another. This testimony necessarily carried the case to the jury. While some parts of the charge are open to criticism, considering it as a whole, we find no error that calls for reversal.

The judgment is affirmed.

SAX & ABBOTT CONST. CO. v. SCHOOL DIST. OF CITY OF WILKES-BARRE.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. STATUTES (§ 94*)—SPECIAL LAWS—MUNICIPAL CORPORATIONS.

Act May 6, 1909 (P. L. 441), providing a method for securing and recovering moneys due subcontractors for labor and materials furnished for the construction of municipal work or public improvements, is violative of Const. art. 3, § 7, prohibiting the passage of any local or special law authorizing the creation, extension, or impairment of liens, or regulating the affairs of counties, cities, or townships, or providing or changing methods for the collection of debts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 103, 104; Dec. Dig. § 94.*]

2. STATUTES (§ 94*)—SPECIAL LAWS—COLLECTION OF DEBTS.

Act May 6, 1909 (P. L. 441), providing for securing moneys due subcontractors for labor and materials for municipal work or public improvements, provides a new method by which a special class of creditors may collect a special class of debts, and so is clearly divergent from and an advance on the law as it existed prior to Const. 1874, and is void.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 103, 104; Dec. Dig. § 94.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 86*)—CONTRACTS—STATUTORY PROVISIONS.

A school district is not authorized to withhold payment of a balance due a contractor for labor and materials furnished in the erection of a school building on account of a notice of lien by a subcontractor under Act May 6, 1909 (P. L. 441), providing for the securing of moneys due subcontractors for labor and materials for municipal work or public improvements.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 203-205; Dec. Dig. § 86.*]

Appeal from Court of Common Pleas, Luzerne County.

Action of assumpsit by the Sax & Abbott Construction Company against the School District of the City of Wilkes-Barre. From a judgment for plaintiff on case stated, defendant appeals. Affirmed.

Before Fuller, J. Hon. George S. Ferris, as referee, found for the plaintiff on the case stated, and the court subsequently overruled defendant's exceptions to his report and directed that judgment be entered in accordance therewith. The case turned upon the constitutionality of the act of May 6, 1909 (P. L. 441).

Argued before FELL, C. J., and MES-TREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.

John H. Dando, of Wilkes-Barre, for appellant. Ira J. Williams, of Philadelphia, and Evan C. Jones and George R. Bedford, both of Wilkes-Barre, for appellee.

FELL, C. J. [1, 3] The defendant was admittedly indebted to the plaintiff in the sum of \$30,990.47, the balance due on a contract for the erection of a school building. The only reason for withholding payment was that a notice of a lien in conformity with the provisions of the act of May 6, 1909 (P. L. 441), had been served upon its treasurer by a subcontractor under the plaintiff. The case turned on the effect of this notice. The learned referee reported that the notice was inoperative and without legal effect because the act of May 6, 1909, under which it was given, is unconstitutional. His report was confirmed by the court, and judgment was entered in accordance therewith.

The act of 1909 is in direct violation of section 7 of article 3 of the Constitution, which provides, among other things, that the General Assembly shall not pass any local or special law "authorizing the creation, extension or impairment of liens," "regulating the affairs of counties, cities, townships, etc., * * * or providing or changing methods for the collection of debts." The act is entitled: "An act providing a method whereby moneys due subcontractors for labor and materials furnished for and in the construction of municipal work or public improvements may be secured and recovered." Section 1 provides inter alia: "That when labor or materials are furnished for, and in the construction of, any municipal work or public improvement, any subcontractor who has furnished labor or materials therefor may, at any time before the construction of such work or improvement is completed, and accepted by the municipality, file a written notice of a lien, duly sworn to by the subcontractor, or by one of his or its agents or officers, with the head of the department or bureau, if any having charge of such construction, and with the controller or financial officer of the municipality, or other person or officer charged with the custody and dis-

bursement of the municipal funds applicable to the contract under which the claim is made." Section 2 provides: "Such claim, so filed, shall be a lien for the principal and interest of the value or agreed price of such labor or materials, and unpaid, upon the moneys of the city, borough, or other municipal or quasi municipal corporation, applicable to the construction of such improvement." Section 3 provides: "Such a lien shall not continue for a longer period than sixty days from the time of the filing of the aforesaid notice, unless an action in assumption to recover the amount so claimed is commenced within that time by the claimant or claimants, against the contractor, and written notice of the pendency of such action, is filed with the financial officer of the municipality, with whom the notice of the claim is, by this act, required to be filed." Section 4 provides for the discharge of the lien, and section 5 relates to the subject of priority.

[2] By its express terms this is a special law passed for the benefit of a special class; it authorizes the creation of a lien for the price of labor and material upon moneys of municipal and quasi municipal corporations applicable to the construction of public improvements; it provides a new method by which a special class of creditors may collect a special class of debts. The act was apparently intended as an extension of the Mechanics' Lien Act of June 4, 1901 (P. L. 431). A number of the sections of that act have been declared unconstitutional for the reason that, since the adoption of the Constitution of 1874, any statute which extends the law as it then stood by providing new methods for the collection of debts due a special class of creditors is void. *Vulcanite Portland Cement Co. v. Allison*, 220 Pa. 382, 69 Atl. 855, *Vulcanite Paving Co. v. Rapid Transit Co.*, 220 Pa. 603, 69 Atl. 1117, 17 L. R. A. (N. S.) 884; *Taylor Lumber Co. v. Carnegie Institute*, 225 Pa. 486, 74 Atl. 357; *Sterling Bronze Co. v. Improvement Co.*, 226 Pa. 475, 75 Atl. 668; *Page v. Carr*, 232 Pa. 371, 81 Atl. 430. In the case last cited it was said that any provision of the act of 1901 which is clearly divergent from, and an advance upon, the law as it stood prior to the Constitution of 1874 is invalid.

The judgment is affirmed.

SHEETS v. SUNBURY & NORTHUMBERLAND ELECTRIC RY. CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

CARRIERS (§ 320*)—INJURY TO PASSENGER—EVIDENCE.

In an action against a street railway company to recover for injuries to a passenger by the fall of a limb of an oak tree, which was discovered to be decayed, binding instructions for defendant were proper, where on the day after a severe storm defendant's employes examined

the particular tree, and there was nothing to indicate that it was not in sound condition.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

Appeal from Court of Common Pleas, Northumberland County.

Action by Philip Sheets against the Sunbury & Northumberland Electric Railway Company. From a judgment notwithstanding the verdict, plaintiff appeals. Affirmed.

The following opinion was filed by Auten, J., in the court of common pleas, granting judgment for the defendant non obstante veredicto:

"On the evening of July 14, 1908, the plaintiff boarded one of defendant's cars in the borough of Sunbury and became a passenger for hire to Island Park, then, and for some time prior thereto, in the possession of the defendant as lessee. At this time the park was a place of public resort, and a large electric sign, located in Sunbury, announced 'Big Show at Island Park.' While at this park, later in the evening, a limb of a large oak tree, under which plaintiff was standing, fell, striking and seriously injuring him.

"The only material question now requiring our consideration is whether the injury sustained was caused by the negligence of the defendant company.

"Witnesses for the plaintiff, who saw the fallen limb lying on the ground the morning after the accident, testify it had broken into several pieces, and that it was spongy and decayed, except a small portion of the heart. Witnesses for the defendant, however, declare that the portions of the limb were alive, and that it had green twigs and leaves on it. Two days before the accident the neighborhood was visited by a severe electric storm, accompanied by high winds.

"It appears from the uncontradicted evidence that on July 13th, the day intervening between the date of the storm and that of the accident, several employes of the company made an inspection of the park for the purpose of discovering and removing dangerous conditions, if any, and that in this course of their work they made an examination from the ground of this particular tree, and of the limb which, on the evening of the following day, fell and caused the injury to the plaintiff. These witnesses state positively that as they observed the tree from the ground, there was nothing whatever to indicate that it was not in a perfectly sound and healthy condition, though it was noticed that an outer portion of it had previously broken off and disappeared. It is further testified on behalf of the defendant, and not denied by the plaintiff, that the opening of the park season, about the 15th of May, 1908, the defendant had several men engaged for a period of about two weeks in cleaning up

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

the park, cutting down decayed trees, and taking off limbs that were in bad condition; and that other and later inspections were made, from time to time, before the accident. The portion of the limb which caused the injury was from 7 to 9 feet in length and 8 or 9 inches in diameter, and fell from a height variously estimated at from 40 to 70 feet.

"In *Glase v. Philadelphia*, 169 Pa. 488, 32 Atl. 600, it appeared that a number of adjoining buildings on the Schuylkill river, known as Fairmount Waterworks, were erected and owned by the city of Philadelphia. The large roof surface was used by the public, upon the invitation of the city, as a place of rest and pleasure. Plaintiff was injured by a fall caused by stepping upon a loose plate covering a manhole in this roof. The Supreme Court say: 'It [the city] was not compelled to provide any such place of rest and pleasure; but when it did so, and invited the public to go upon it, clearly, according to all the cases, it owed to the public the duty of, at least, ordinary care.'

"In 1 Thomp. Neg. § 996, the rule applicable to cases such as the one we are now considering is thus stated: 'The duty assumed by the owners of places to which the public thus resort in large numbers is manifestly analogous to that which the law imposes on carriers of passengers. Nevertheless it has been measured by the standard of ordinary care. Doubtless the true theory is that such persons assume the obligation of exercising reasonable care, and that what will be reasonable care will be a degree of care proportioned to the danger incurred and the number of persons who will be subjected to that danger. A good expression of the rule of liability, applicable to such cases, is found in the English case to the effect that the proprietor of such structure is not a warrantor or insurer that it is absolutely safe, but that he impliedly warrants that it is safe for the purpose intended, save only as to those defects which are unseen, unknown, and undiscoverable—not only unknown to himself, but undiscoverable by the exercise of any reasonable skill and diligence, or by any ordinary and reasonable means of inquiry and examination. Such being the nature of the obligation, it is obvious that the proprietor of such a building is under a continuing duty of inspection, to the end of seeing that it is reasonably safe for the protection of those whom he invites to come into it; and that if he neglects his duty in this respect, so that it becomes unsafe, the question of his knowledge or ignorance of the defects which render it unsafe is immaterial.'

"Under the foregoing authorities, defendant was not obliged to warrant or insure the absolute safety of Island Park. It did, however, impliedly warrant that the park was safe for the purpose for which the resort was used, save as to those defects which

were undiscoverable by the exercise of reasonable skill and diligence, or by ordinary and reasonable means by inquiry and examination. The defendant was also under the obligation of a continuing duty of inspection, so that the park would be reasonably safe for the protection of those to whom the invitation to visit it was given.

"Did the defendant comply with these requirements? Was there absence of the care required by the circumstances?

"At the request of counsel for the defendant, the jury were asked to find specifically whether the decay was open and obvious, or concealed and latent, and whether the inspections and examinations were the ordinary and reasonable inspections and examinations in common use. They found that the decay was open and obvious, and that the inspections were not the ordinary and reasonable ones in common use. The questions propounded to the jury, to which they were requested to make special findings, did not indicate whether the observable condition of decay mentioned related to a time before or after the fall; and there is nothing in any of the answers to indicate that the jury found that the defect in the limb was open and obvious while it remained on the tree. Of course, the decayed condition was obvious after it had fallen, but there is not a scintilla of testimony tending to show that such condition was observable while it was attached to the tree; nor is there any evidence from which such inference could have been drawn. The question of the defendant's negligence in that regard is to be determined, not by what was discovered in the limb after the fall, but by what it did, or omitted to do, before the accident; and the uncontradicted testimony of several witnesses establishes the fact that upon an examination made by them from the ground the day before the accident there was no observable appearance of unsoundness in the limb; that it, in fact, then had a sound and healthy appearance. Likewise, the special finding as to the method of inspection employed was absolutely without evidence to support it. And what other or different method should the defendant have adopted? The only other we can conceive of would have been by climbing the tree for the purpose of examination. But why require that the tree be mounted for such purpose, when the limb appeared to be healthy and strong? If it were defendant's duty to employ such method of examination for this particular limb, then, in order to protect itself from the charge of negligence, it would be obliged to climb every tree and inspect every limb thereon, it matters not how healthy or strong might be its appearance upon inspection from the ground. This, in our judgment, would be an unreasonable requirement, and would impose upon the defendant a greater degree of care, under the circumstances, than it was required to observe.

"The jury evidently found from the testimony that the limb was decayed, and therefore dangerous. As the only evidence showing a condition of decay was that which related to its appearance after the accident, they must have inferred that by a proper method of inspection the danger was observable before the fall. If, as we have already indicated, the method of inspection was all that was reasonably required, the jury must have further inferred that the dangerous defect in the limb was observable by that inspection. Such inference, however, is but a presumption, with nothing but another presumption to support it; and this is never allowed. It is a matter of common knowledge that the limbs sometimes do decay, while attached to the tree, without any external evidence of such condition. The jury might, with at least equal reason, have inferred that, when inspected the day prior to the accident, the limb had the appearance of being perfectly sound.

"After a careful consideration of this case, we are of the opinion that we should have directed a verdict for the defendant, and that our failure to do so was error. It is therefore now directed that judgment be entered for the defendant non obstante veredicto."

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

George B. Reimensnyder, of Sunbury, for appellant. J. Fred Schaffer, of Sunbury, for appellee.

PER CURIAM. The judgment is affirmed for the reasons stated in the opinion of the learned judge of the common pleas.

SCHAEFFER v. HERMAN et al.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. PARTIES (§ 40*) — INTERVENTION — ASSIGNEES.

Where one who has exercised an option to purchase land sues for specific performance, his assignees may be permitted to intervene as parties plaintiff.

[Ed. Note.—For other cases see Parties, Cent. Dig. §§ 60-67; Dec. Dig. § 40.*]

2. SPECIFIC PERFORMANCE (§ 106*) — PROCEEDINGS—PARTIES DEFENDANT.

A bill for specific performance against the vendor in an option to purchase land should not include as defendants parties who claim no right or title under the contract, but assert rights springing out of a subsequent option representing a different transaction; the only question involved between such parties and the plaintiffs being the title to the land, as to which equity has no jurisdiction.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 342-351; Dec. Dig. § 106.*]

3. SPECIFIC PERFORMANCE (§ 106*)—PROCEEDINGS—PARTIES PLAINTIFF.

Where one of two joint holders of an option to purchase land repudiates the contract, and in connection with other adverse parties secures another option for the same land, the other optionee, upon tender of the entire purchase price within the period of the option, is entitled to sue for specific performance without joining the first optionee as plaintiff.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 342-351; Dec. Dig. § 106.*]

4. SPECIFIC PERFORMANCE (§ 57*)—CONTRACTS ENFORCEABLE—CONSIDERATION.

An option under seal in the nature of a unilateral nudum pactum becomes binding between the parties on acceptance, and subject to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 178; Dec. Dig. § 57.*]

5. TENDER (§ 14*)—REQUISITES—CONDITIONS.

That a tender is coupled with a condition on which the debtor has a right to insist, and to which the creditor cannot reasonably object, does not invalidate it.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 33-38; Dec. Dig. § 14.*]

6. SPECIFIC PERFORMANCE (§ 126*)—PROCEEDINGS—RELIEF.

Where one of two joint optionees to purchase land repudiates the contract, and the other sues for specific performance after tendering the entire purchase price, it is within the power of the court to direct a conveyance directly to the plaintiff's assignees, who have intervened as parties plaintiff.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 401-405; Dec. Dig. § 126.*]

Appeal from Court of Common Pleas, Centre County.

Bill in equity by Lewis A. Schaeffer, now for use of Rembrandt Peale and another, against John H. Herman and others for specific performance. From a decree for plaintiff, defendant American Lime & Stone Company appeals. Modified.

Argued before FELL, C. J., and MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

Stevens & Pascoe, of Tyrone, and T. C. Hipple, of Lock Haven, for appellant. John Blanchard, of Bellefonte, Edmund Blanchard, of Bellefonte, and C. La Rue Munson, of Williamsport, for appellee.

ELKIN, J. The consideration of this case has been approached from so many angles that it is difficult to blaze a correct line through the underbrush of legal technicalities to the material points necessary to a proper solution of the questions here involved. It will be impossible, within anything like the proper limits of an opinion, to discuss consecutively and separately each of the 34 assignments of error, and it is not necessary to do so in order to determine the rights of the parties. The original bill was filed by Schaeffer, plaintiff, against John H. Herman, Alice E. Herman, and Samuel Sheffer, defendants. The primary purpose of

the bill was to compel specific performance of an agreement in writing for the sale of land. The Hermans and Sheffer each filed a demurrer to the bill, which was overruled. After the filing of the original bill, Peale and Shoemaker presented a petition asking leave to intervene as parties plaintiff, and were permitted to do so. Subsequently the bill was further amended by including Warfield, Harris, and the American Lime & Stone Company as parties defendant, and, as against the defendants thus included, certain additional relief was prayed for. Warfield, Harris, and the American Lime & Stone Company filed a separate demurrer, which was also overruled. The case then went to a hearing with all of the parties included, either as plaintiffs or defendants. At the outset it is necessary to determine whether the learned court below committed error in overruling the demurrers, or any of them. Without going into an elaborate discussion, we think the demurrers filed by Herman and his wife, and by Sheffer, were properly overruled. They were all parties to the original optional agreement, which it was sought to have specifically enforced. They were all interested in, or at least had a connection with, the same transaction. The matters complained of in the bill related to the optional agreement with which all of these parties were either directly or incidentally connected. If the plaintiff was entitled to relief at all, and this depended upon the facts, he certainly had the right to proceed against all of the defendants named in the original bill. If the facts warranted the relief sought, Schaeffer clearly was within his legal rights in asking the relief prayed for.

[1] It is equally clear that Peale and Shoemaker were entitled to intervene as parties plaintiff. They were the assignees of whatever rights Schaeffer had under the agreement. If Schaeffer's title was good, so was theirs, and their intervention in no way affected the rights of the defendants, who could as well defend against all of the plaintiffs thus joined as against the original complainant. Under the facts, their rights were no greater and no less than those of Schaeffer. As assignees they were interested in the transaction growing out of the original agreement, and as such had a right, with the permission of the court, to be heard. There was therefore no error in permitting them to intervene.

[2] As to Warfield, Harris, and the American Lime & Stone Company, a very different question arises. These parties did not claim any rights under the original agreement, and were not asserting any title depending upon that agreement. Whatever claim of title they had, or thought they had, grew out of a different transaction and a subsequent option. If for any reason the original optional agreement should be declared invalid, their option no doubt would have been good; but

this all depended upon a transaction with which they had no connection. The rights of the parties under the original agreement, on the other hand, did not depend in the remotest degree upon what was done by these parties in securing rights under a subsequent option. Each agreement represented a separate transaction, and, while title to the same land was involved, the rights of the parties grew out of independent contracts. As between these parties, the only question involved was title to the land in dispute, and equity does not have jurisdiction to determine questions of disputed title. This has been decided over and over again in Pennsylvania. As between the plaintiffs and Warfield, Harris, and the American Lime & Stone Company, we cannot regard this as anything but an ejectment bill involving the question of disputed title, which must be tried, if at all, on the law side of the court. *Chambersburg Boro. School District v. School District*, 228 Pa. 119, 77 Atl. 414. Of course, if it now be determined in this proceeding that the original optional agreement was properly exercised within the time specified, a good title passed to the optionee, who could assign it to others, and it would necessarily follow that no title passed under the subsequent option, but this question cannot be raised by a bill in equity to specifically enforce the original contract. The bill should have been dismissed as to Warfield, Harris, and the American Lime & Stone Company, and we think the learned court below erred in overruling their demurrer. This does not affect the proceeding as to the other parties, because the dismissal of the bill as to these defendants leaves a distinct cause of action, growing out of a single transaction, to be determined between the parties to that transaction, or those having the right to legally represent them, and, over the subject-matter of this controversy, equity has jurisdiction to give relief.

[3] The important question of fact in the case is whether the original option was properly exercised within the time specified in the agreement for the sale of the land in dispute. The agreement, dated December 30, 1904, was in writing and under seal. It was signed by Herman and his wife, who agreed to convey, and by Schaeffer, who had the option to purchase. The conveyance, in the event of the option being exercised, was to be made to Schaeffer and Sheffer, their heirs and assigns. The purchase price was to be paid on or before January 1, 1908, and the agreement was to be deemed null and void if the consideration was not paid within the time specified. Time was of the essence of the contract; it being necessary, in order to exercise the option, to make or tender payment in accordance with the terms of the agreement. This means that the optionees had until the 1st day of January, 1908, to make or tender payment. The contract was

binding upon the Hermans from the date of its execution, and became a contract inter partes, binding on all concerned, if properly exercised on or before January 1, 1908. *Barnes v. Rea*, 219 Pa. 279, 68 Atl. 836; *Barnes v. Rea*, 219 Pa. 287, 68 Atl. 839. On this branch of the case, the only question that can arise is whether the option was properly exercised. The facts have all been found in favor of Schaeffer, and the evidence fully warrants the findings; but, with the facts so found, there still remains a mixed question of law and fact to be determined. The name of Sheffer, by direction of Schaeffer, was inserted as an optionee in the agreement, and in that sense he became a party to the contract, although he did not sign it. Differences arose between Schaeffer and Sheffer respecting the option and their rights under it; and, these differences remaining unadjusted, Sheffer on August 17, 1905, declared that he had no further interest in the option and refused to take any steps looking to an exercise of it, or to assist Schaeffer in so doing. After his disagreement with Schaeffer, Sheffer, in connection with other adverse parties, began negotiations with the Hermans for a new option on the same land, and finally succeeded in obtaining it. He had full knowledge of the former option, and knew that Schaeffer insisted upon his right to exercise it; but, notwithstanding, he and those associated with him persisted in their efforts to secure another option. In so doing they took their chances, and cannot plead want of knowledge in extenuation of their conduct. The learned court below found as a fact that Sheffer in taking the new option, and Herman in giving it, acted in bad faith and in willful disregard of the rights of Schaeffer under the original agreement. Under this state of facts, it is perfectly clear that the rights of Schaeffer under the original agreement should be protected, provided he was in position to assert them without the co-operation of Sheffer. It is contended for appellants that, when a contract for the purchase of real estate recites that the conveyance shall be made to two persons, a bill cannot be maintained by one to compel the vendor to convey the entire title to that one. This would certainly be true if both vendees were asserting rights under the contract, and if neither vendee was in position to demand the conveyance of the entire title to him. On the other hand, it would be most unconscionable to permit a vendor, for purposes of his own, to enter into an arrangement with one of two vendees, by which the right to a conveyance was not to be demanded, and thus defeat the right of the other vendee to have his contract enforced. In cases of this kind, much depends upon the facts. Acts of one in relation to the common estate, so far as beneficial thereto, will be presumed to inure to the benefit of all who may be interested therein. 17 Am. & Eng. Ency. of Law (2d Ed.) 668. In our own state it has been held

that, where a joint purchaser's share of the purchase money under a contract for the sale of land is paid by his associates, and he fails to pay his share of the purchase money, the other joint purchasers acquire an equitable title, and neither he nor those claiming under him can recover in ejectment against the joint purchasers who do pay, without paying or tendering before suit brought, his share of the purchase money. *Deitzler v. Mishler*, 37 Pa. 82.

Even if Schaeffer be considered nothing more than a joint purchaser with Sheffer, he had the right to pay, or tender payment of, the entire purchase price, and, when he did so, the most Sheffer could insist upon was that, as to his share, Schaeffer held an equitable title, which could not be asserted without Sheffer either paid or tendered his share of the purchase money, and this he failed to do. There is a fiduciary relation existing between joint tenants, joint vendees, and joint optionees, which gives to one the right to perform acts beneficial to the common estate. Surely Schaeffer, one of the optionees, had the right to pay, or tender payment of, the entire purchase price, and when he did so, as the court below found he did, the optionors were not in position to say, "We will not comply with our covenant to convey because both of the optionees did not join in making the tender." Either one of the optionees could tender the entire purchase price and thus exercise the option. The only question that could then arise is as to whom the conveyance should be made; but, when either one of the optionees tendered the purchase price within the time specified in the agreement, there was an election to purchase, and the contract became binding inter partes. We agree that if Sheffer had any rights under the original agreement, or if he had done nothing to forfeit his rights thereunder, or if he had not joined with Herman in executing a new option for the purpose of avoiding a conveyance under the original option, he might be in position to ask equitable relief or perhaps to demand that his rights be recognized in the conveyance. But the court below has found that Sheffer and Herman ignored the original agreement, and that Sheffer not only declared that he did not claim any rights under it, but by his acts forfeited whatever rights he might otherwise have asserted. Certainly Sheffer and Herman by thus acting could not defeat the right of Schaeffer to insist upon a performance of the contract when he had complied with its terms. We therefore conclude, under the facts as found, that Schaeffer was in position to compel specific performance of the contract.

[4] It is also urged that the original agreement was a unilateral nudum pactum, without any consideration to support it, and therefore not specifically enforceable. We cannot accept this position as sound. We agree that there is a sharp conflict of author-

ity as to the effect to be given an option under seal when the courts are asked to decree specific performance of such a contract. On one side it is held that the seal renders the option irrevocable, and on the other that the courts, looking to the substance and not the form, should disregard the seal, and treat the option as revocable until accepted. But even in this conflict of authority, both sides agree that, when the option is accepted—that is, when it is exercised according to its terms—it becomes a valid binding contract, and necessarily the subject of specific performance. The conflict of authority as to the effect of the seal is limited to the rights of the parties during the option period, and before there has been an acceptance. After acceptance, the contract, then being inter partes, is to be treated like any other contract made between contracting parties, and subject to the same rules of law. In the case at bar the court has found as a fact that there was an acceptance, and therefore what was in the first instance a unilateral agreement because an absolute contract binding upon both parties according to its terms.

[5] Nor can we agree with the contention of appellants that the tender made by Schaeffer to Herman was accompanied with such conditions as to make it invalid. The general rule no doubt is that a tender must be absolute and without condition; but in this broad sense the rule must necessarily be subject to some qualifications as applied to the facts of a particular case. It is more accurate to say that a tender, to be good, must not be accompanied by any condition to which the creditor has a right to object, and is not invalidated if coupled with a condition upon which the debtor has a right to insist, and to which the creditor cannot reasonably object. 28 Am. & Eng. Ency. of Law (2d Ed.) pp. 31 and 32, and notes. It is proper to accompany the tender with an explanation of the transaction. In the present case, Herman had the right to insist upon the payment of the purchase price, and it was necessary for the optionees, or one of them, to tender the entire amount, and this was done. It is true that the tender was accompanied by an explanation that Sheffer had forfeited his rights under the contract, and that it was being exercised by Schaeffer alone. If this explanation were true in point of fact, and Herman knew that Sheffer had relinquished his rights under the original agreement, he would not be warranted in refusing to convey to Schaeffer, if the latter was in position to insist on performance. This is especially true in view of the findings of the court that Herman and Sheffer had joined hands in an attempt to render the first agreement null and void in order to secure a better price under the new option. The learned court below found all the facts relating to the

validity of the tender in favor of Schaeffer; and, upon the facts as found, we conclude there was a sufficient tender to meet the requirements of the contract and to preserve the rights of the parties under it.

[6] Again it is urged with much force that, even if the tender be held good, the contract can only be specifically enforced in favor of both optionees, and that the court erred in decreeing a conveyance to Peale and Shoemaker, their heirs and assigns. This objection is more apparent than real. The original agreement required a conveyance to the optionees, their heirs and assigns. No one will doubt that, if both optionees had assigned their interest in the contract to other parties, those parties, by complying with the terms of the agreement, could demand performance; or if one of the optionees had formally relinquished his rights under the agreement in favor of the other, and the remaining optionee had then assigned all rights resulting to him to third parties, they would be in position to insist upon specific performance. This, in substance, is what the learned court below found the parties did. Sheffer forfeited all his rights under the contract, and this left Schaeffer in position to carry out the contract, to tender the entire purchase price, and to demand performance. Schaeffer was therefore in position to assign his interest to Peale and Shoemaker, and they, as his assignees, could assert whatever rights he had under the contract. Equity regards that as done which should have been done. When all the parties were before the court, and their rights determined under the facts, it was within the power of the court to decree a conveyance direct to Peale and Shoemaker, the real owners of the title, without resorting to the circumlocution of directing a conveyance to the different parties representing the various steps in the transaction. This is what the court did, and, under the facts, we see no error in the course taken.

Many other questions have been raised and discussed; but we do not consider them vital in the consideration of the case. The facts fully warranted the findings, and the conclusion reached, respecting the original parties to the transaction, was equitable and just. We sustain those assignments which relate to the order of the court below refusing to sustain the demurrer filed by Warfield, Harris, and the American Lime & Stone Company. As to these defendants, the bill is dismissed with costs. The plaintiffs, having improperly included these defendants in the bill, should pay these costs.

Decree modified so as to exclude clauses 3, 4, and 5 from its requirements, and, as modified, it is affirmed. The costs of Warfield, Harris, and the American Lime & Stone Company to be paid by appellees, and all other costs by appellants.

SCHAEFFER v. COLDREN et al.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. SPECIFIC PERFORMANCE (§ 97*)—PERFORMANCE BY PLAINTIFF—SUFFICIENCY OF TENDER.

Where the purchaser of land on the last day for exercising his option made an effort to comply with the terms of the agreement, leaving a certified check with the seller's wife in the absence of the seller, and returning at night to make the tender, but being unable to gain admission, though the seller was at home, and at the earliest opportunity the purchaser informed the seller of what he had done and tendered a certified check for the balance, which was refused without objection to the form of the tender, and without any offer to return the check left with the seller's wife, there was a sufficient tender to warrant a decree for specific performance of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 97.*]

2. ESTOPPEL (§ 78*)—EQUITABLE ESTOPPEL—GROUNDS.

One party to a contract may not, by agreeing to a modification of the terms of payment, mislead the other party and then, when too late to make other arrangements, refuse to accept the terms agreed upon and defeat the right to exercise an option.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204-210; Dec. Dig. § 78.*]

3. TENDER (§ 16*) — REQUISITES AND SUFFICIENCY.

Acts which are in themselves insufficient to make a complete tender may constitute proof of readiness to perform so as to protect the rights of a party under a contract, where a proper tender is rendered impossible by circumstances not due to the fault of the tenderer.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 47-53; Dec. Dig. § 16.*]

4. TENDER (§ 15*) — REQUISITES AND SUFFICIENCY.

If no objection is made to a tender of the certificate of deposit or certified check on the ground that it is not lawful money, such tender is sufficient.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 39-46; Dec. Dig. § 15.*]

5. JUDGMENT (§ 273*)—DEATH OF PARTY—ENTRY OF JUDGMENT NUNO PRO TUNC.

Where a plaintiff or defendant dies after final argument, but before the entry of the decree, the court may direct the decree to be entered as prior to the death of the party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525-541; Dec. Dig. § 273.*]

Appeal from Court of Common Pleas, Centre County.

Bill by Lewis A. Schaeffer, now for use of Rembrandt Peale and another, against W. H. Coldren and others for specific performance. From a decree for plaintiff, defendants appeal. Modified.

Argued before FELL, C. J., and MES-TREZAT, ELKIN, STEWART, and MOSCH-ZISKER, JJ.

T. C. Hipple, of Lock Haven, and Stevens & Pascoe, of Tyrone, for appellants. C. La Rue Munson, of Williamsport, and John Blanchard and Edmund Blanchard, both of Bellefonte, for appellee.

ELKIN, J. Before proceeding to a discussion of the questions relating to the merits of the controversy between the parties to the original bill, it is necessary to consider whether the demurrer filed by Warfield, Harris, and the American Lime & Stone Company should have been sustained. This question has been discussed at length in the case of Schaeffer v. Herman et al., 85 Atl. 94, in an opinion this day handed down. It will not be necessary to elaborate the discussion for the purposes of the present case; it is sufficient to say that nothing done by Warfield, Harris, and the American Lime & Stone Company in connection with the second option has anything to do with the rights of the parties under the first agreement. The primary purpose of the bill is to enforce as against the Coldrens the specific performance of the first agreement by compelling a conveyance of the land to the parties who are asserting title thereto. Matters relating to the second option grew out of a separate transaction with which different parties are connected. The demurrer should have been sustained and the bill dismissed as to Warfield, Harris, and the American Lime & Stone Company. This, however, does not affect the right of the plaintiffs to demand specific performance and secure equitable relief as against the other parties properly included in the bill. As to the remaining parties, the bill may be maintained if the facts warrant it.

[1] It is a bill for specific performance of an optional agreement for the sale of land. In order to understand the questions involved, it is necessary to recite the material facts upon which the rights of the parties depend. Coldren and his wife, by a contract in writing, agreed to sell and convey a certain described tract of land to Schaeffer, his heirs and assigns, for the sum of \$8,000. The covenant to sell and convey was absolute on its face, but the entire agreement became optional by reason of a subsequent clause which provided that the contract shall be deemed null and void if the \$8,000 be not paid on a day specified. On the last day for exercising the option, Schaeffer paid \$100 for an extension of 10 days, which extension is in writing, signed by Coldren and his wife, as was the original agreement. By this extension, for which there was ample consideration, Schaeffer clearly had the right to exercise the option according to the terms of the agreement on or before July 15, 1905. A few days after Schaeffer secured the extension, he began negotiations with Coldren for the purpose of arranging different terms of payment. He desired to make a cash payment of \$2,500 and to secure the balance by a mortgage upon the property. The learned court below, sitting as a chancellor, found as a fact that Coldren agreed to the modified terms of payment several days before the

option expired, and that, according to the arrangement, Schaeffer was to have all the necessary papers prepared so that the transaction could be closed out on the following Saturday, when Coldren was to come to Bellefonte for this purpose. This was the last day upon which the option could be exercised, and the parties had agreed that Schaeffer should have a certified check for the cash payment of \$2,500, and be prepared to execute the necessary papers to secure the balance of the purchase money when the deed was delivered. Coldren did not appear in Bellefonte on the day appointed, and all of his actions indicate, as the chancellor has found, that his purpose was to prevent the consummation of the contract by evading Schaeffer in his effort to exercise the option within the time limited. When Coldren failed to appear in Bellefonte on the day agreed upon, Schaeffer drove out into the country, a distance of several miles, to tender performance of his part of the agreement in order to exercise the option. It is also found as a fact that Coldren had agreed to accept the certified check as part payment of the purchase money, and did not insist at any time upon a tender in money. Coldren was away from home, and Schaeffer was thus prevented from tendering the check and serving personal notice on him. He endeavored to ascertain the whereabouts of Coldren, and drove to a neighbor's house for the purpose of making inquiry, but without avail. Not being able to find Coldren, he returned to his residence and left the certified check with Mrs. Coldren, who had joined her husband in the agreement, explaining to her that he was ready to consummate the purchase according to the terms agreed upon, and that he was there for that purpose. Schaeffer returned to Bellefonte late in the afternoon, without being able to find Coldren to make a tender or serve notice upon him in person. He then concluded that he would take no chances as to a possible controversy with Coldren upon the question of the modified terms of payment, and that he would return to his residence and tender payment of the purchase money in full according to the original agreement. He secured another certified check for the balance of the purchase money, less a sum sufficient to satisfy a mortgage upon the property, which Coldren had agreed should be paid out of the proceeds. He again drove out to the home of Coldren for the purpose of making a tender for the full amount of the purchase money and thus serve notice of his election to exercise the option. When he arrived the house was dark, and the family apparently in bed. He knocked at the door, made noise, and called loudly in order to attract the attention of Coldren, who either did not hear, or would not respond. After making all possible efforts to tender the check and serve notice on Coldren, he drove away. This occurred on Saturday

night, the last day for exercising the option. On the following Monday morning Schaeffer again returned to the residence of Coldren and notified him in person of all he had done on the Saturday previous in making an effort to exercise the option and tender the purchase price. He then renewed his tender of a certified check for the entire balance of the \$8,000, less a sum sufficient to satisfy the mortgage, and notified him that he had left the other certified check for \$2,500 with Mrs. Coldren when he called on Saturday. Coldren refused to accept the check so tendered, or to do anything else looking to a consummation of the transaction until he had consulted counsel. He made no objection to the form of the tender, or to the certified checks, nor did he offer at that time to return the certified check for \$2,500 left with his wife on the previous Saturday. Five days later Coldren, through his attorney, returned the certified check for \$2,500 and other papers to Schaeffer, stating that the option had not been exercised according to its terms and had expired by limitation. All of these facts were found by the chancellor, who decreed specific performance.

[2] Appellant asks a reversal upon the ground that the option was not exercised within the time specified and according to the terms of the agreement. This position is technical in the extreme and looks to the form rather than the substance of the transaction. If Coldren agreed to the modified terms of payment, as the chancellor found he did, and thus misled Schaeffer in exercising his rights under the option, he would be estopped from setting up his own bad faith as a defense in a proceeding instituted to enforce the contract. It would be most inequitable and unjust to permit one party to a contract to mislead the other party by agreeing to a modification of the terms of payment, and then at the last moment, when it was too late to make other arrangements, refuse to accept the terms agreed upon and thus defeat the right to exercise the option. Such a course of dealing would make the rights of parties under a contract depend upon a hide and seek game of chance, which equity will not tolerate.

[3] But aside from all questions relating to the modified terms of payment, what was done by Schaeffer at the last moment, when he found that he was being misled by Coldren, was a sufficient notice and tender of performance to protect his rights under the original agreement. Under the circumstances, he was fully warranted in returning to the residence of Coldren at night on the last day for exercising the option, prepared to tender the purchase money in full. He did everything that could be reasonably expected of him in serving notice of his election to exercise the option, and in making tender of the purchase money. That he did not succeed was not his fault, but the fault of Col-

dren, who, for purposes of his own, was attempting to evade performance of his part of the contract. Schaeffer showed his good faith by renewing the tender the next Monday morning, and by following it up when the case came on for hearing in the court below. We are all of opinion that, under the facts of this case, Schaeffer made a sufficient tender of performance within the time specified to exercise his rights under the original optional agreement, and that he was entitled to have that written contract specifically enforced in a court of equity. It has been frequently held that acts, insufficient in themselves to make a complete tender, may operate as proof of readiness to perform, so as to protect the rights of a party under a contract, where a proper tender is made impossible by reason of circumstances not due to the fault of the tenderer. 29 Am. & English Ency. of Law (2d Ed.) 697; Case v. Green, 5 Watts, 262, 30 Am. Dec. 311; Haupt v. Unger, 222 Pa. 439, 71 Atl. 843.

[4] It is also objected that the tender of certified checks was not a valid legal tender within the meaning of the law. It is true it was not a legal tender in money, but it has been frequently held that objection to the medium in which the tender is made may be waived. If no objection be made on the ground that it is not lawful money, a certificate of deposit is a sufficient tender. So, too, if a check be tendered by a debtor who has sufficient money in bank to pay it, and the creditor refuses to receive it for some other reason, but not because it is a check, the tender is valid. 28 Am. & English Ency. of Law (2d Ed.) 26; Pershing v. Feinberg, 203 Pa. 144, 52 Atl. 22. See, also, Tiernan v. Roland, 15 Pa. 429. Something is said about the effect and manner of the certification of the checks in the present case. In view of the finding of the court below that Coldren agreed to accept a certified check, and made no objection of to the tender on this ground, it is not material to this controversy how it was certified.

[5] It is also urged that the learned court below erred in directing the decree to be entered nunc pro tunc as of the day when the case was submitted for decision after final argument. After final hearing and argument, but before filing the opinion, Coldren, one of the defendants, died. The court upon request directed the decree to be entered nunc pro tunc as of the date of the argument. The general rule is that the death of either party operates as an abatement of the suit, or a suspension of the proceeding, until it is properly revived. This general rule, however, is subject to a very important exception, and the case at bar is within that exception. Where a plaintiff or defendant dies after final argument, but before the entry of the decree, the court may

direct the decree to be entered as of a date prior to the death of the party. This is almost universally recognized as proper practice. 2 Daniel's Chancery (4th Am. Ed.) 1544; 5 Ency. of Pleading and Practice, 968; Mitchell v. Overman, 103 U. S. 62, 26 L. Ed. 369; Gunderman v. Gunnison, 39 Mich. 815; Vroom v. Ditmas, 5 Paige (N. Y.) 528; Griffith v. Ogle, 1 Binn. 172. Numerous other cases could be cited to the same effect. It may be stated, as a general rule, that a nunc pro tunc order may always be made when the delay has arisen from the act of the court and has not been occasioned by the parties. After a careful examination of the record, we find no substantial merit in the contention that the equity rules were disregarded in not entering a decree nisi and in what followed when the final decree was entered nunc pro tunc. The record shows that there was substantial compliance with all of these rules, and that the objections are not only technical, but without merit, as disclosed by the facts.

In view of what has been said at the beginning of this opinion, the first assignment of error must be sustained, and the bill dismissed as to Warfield, Harris, and the American Lime & Stone Company. The plaintiffs, having improperly included these defendants in the bill, should pay their costs, and it is so ordered. Those parts of the decree that relate to these defendants against whom the bill has been dismissed must also be excluded. The decree as it affects the remaining parties, and as it relates to the specific performance of the original agreement, should be, and is, affirmed.

Decree modified so as to exclude clauses 2 and 3, and, as modified, it is affirmed. Costs of Warfield, Harris, and the American Lime & Stone Company to be paid by appellees, and all other costs to be paid by the remaining appellants.

MACHEN v. MACHEN & MAYER ELECTRICAL MFG. CO. et al.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. CORPORATIONS (§ 311*)—OFFICERS—RIGHT TO INSPECTION OF BOOKS.

A director has the unqualified right to inspect corporate books upon the mere showing that he is a director and has demanded permission to examine and been refused.

[Ed. Note.—For other cases, see Corporations. Cent. Dig. §§ 1374-1375½; Dec. Dig. § 311.*]

2. CORPORATIONS (§ 311*)—OFFICERS—RIGHT TO INSPECTION OF BOOKS.

It is no justification for refusing a corporation director's request to inspect the books that, prior to his last election as director, he had neglected his duties as an officer of the corporation, interfered with its management, and promoted a competing company of which he

was president, and that he does not allege wrongdoing on the part of defendants.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1374-1375½; Dec. Dig. § 311.*]

3. MANDAMUS (§ 129*)—SUBJECTS OF RELIEF—ACTS OF CORPORATE OFFICERS.

Resident directors and officers of a foreign corporation, which is registered and has its plant and principal office and all its books within the state, may be compelled by mandamus to permit another director to inspect the corporate books and papers to enable him to perform his duties as director, and the grant of the writ in such case is not an interference with the management of the internal affairs of the corporation, and it is the only adequate remedy where the books and directors having custody of them are in the jurisdiction of the court, and a foreign court cannot grant the relief.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 264; Dec. Dig. § 129.*]

Appeal from Court of Common Pleas, Philadelphia County.

Application by Charles Hudson Machen for mandamus against the Machen & Mayer Electrical Manufacturing Company and others to compel inspection of corporation records. From a judgment refusing peremptory mandamus, plaintiff appeals. Reversed, with directions.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZIS-KER, JJ.

Garrett A. Brownback and Roberts, Montgomery & McKeehan, all of Philadelphia, for appellant. D. J. Callaghan, of Philadelphia, for appellees.

MESTREZAT, J. This was a petition filed in the court below for a mandamus by one of the seven directors of a foreign corporation, doing business in this state, requiring the six other directors and the officers of the corporation to permit the petitioner to inspect the books, documents, and papers of the corporation to the end that he might be able to perform his duties as a director thereof.

The petition and amended petition for the writ set forth the facts in detail, but they may be summarized as follows: The Machen & Mayer Electrical Manufacturing Company was organized in 1907 under the laws of New Jersey for the purpose of manufacturing and selling electrical specialties and supplies in the city and county of Philadelphia, Pa., and was duly registered under the laws of Pennsylvania as a foreign corporation doing business within the state. The manufacturing plant, and substantially all of the property of the corporation, as well as its chief place of business and its books of account, minute books, the stock books, and all of its papers and documents, are and always have been in the county of Philadelphia. The plaintiff and the six individual defendants are directors of the corporation, and he owns 156 of the 633 outstanding shares of its capital stock. Charles Horn is

the president, general manager, and assistant treasurer, Walter D. Bryson is the secretary, and Alfred Brannen is the treasurer, of the company. The plaintiff, the individual defendants, except J. Edward Fagen, and all of the stockholders are and have been since the incorporation of the company citizens and residents of Pennsylvania. The individual defendants residing in Pennsylvania have the custody and possession of all the books of account, records, papers, and documents of the corporation. The plaintiff is the registered agent of the corporation in Pennsylvania. There is no statute or law of New Jersey or by-law of the corporation regulating the inspection of books, documents, papers, and records thereof by the directors. The by-laws provide that the business affairs of the company shall be managed and controlled by the board of directors, and that regular meetings of the board shall be held on the first Monday of each month. The only meetings of the directors held since March 13, 1911, at which there was a quorum, were the regular meetings held in the months of July and October. Defendants Herman, Horn, and James Brannen hold but one share each in the stock of the company, and Bryson owns ten shares. Fagen is a resident of New Jersey and was elected a director in order to comply with the laws of that state. One share of the stock stands in his name, but he is not the real owner of it, and it was transferred to him to qualify him as a director.

The business affairs of the company have not been managed by the board of directors, but by the executive committee in conjunction with Charles Horn, the president. On several occasions the plaintiff asked permission of the other directors and officers of the company to inspect the books, documents, and papers thereof in order to enable him to properly perform his duties as director. He also requested information as to the manner in which the affairs of the company had been conducted, and asked to see a financial statement of the company. All of his requests were refused. He then instituted this proceeding for a mandamus requiring the defendants, at such times as might be reasonable and convenient for the purpose, to permit him to inspect the books, documents, and papers of the corporation to the end that he might be able to perform his duties as director. An alternative writ was awarded and served on all the directors except Fagen. A motion was made to quash the writ on the ground that the court was without jurisdiction, but it was overruled.

The defendants then filed a return to the alternative writ. It does not deny the facts set forth in the petition except the averment that there is no statute or law in New Jersey regulating the inspection of the books, documents, and records of the company by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the directors of the company. It alleges, as a justification for refusing the plaintiff's request for permission to inspect the books and documents, that, prior to his last election as director, the plaintiff neglected his duties as president and secretary of the company, interfered with the general management of its affairs, prevented the general manager from attending to his duties, canceled instructions given by the general manager as to selling goods, that he was promoting a competing concern, that he put in circulation a printed card stating that he had resigned from the defendant corporation, that he had not made any charges or allegations of wrongdoing or irregularities on the part of the officers of the company, and that in a report from Bradstreet it was set forth that the plaintiff was president of another company. The plaintiff demurred to the return, which was overruled, and the court entered judgment for the defendants. From that judgment, this appeal was taken.

The appellant states and discusses two propositions: (a) The sufficiency of the facts averred in the petition to warrant the court below in granting the relief prayed for; and (b) the jurisdiction of the court to grant the relief.

[1] The appellees confine their argument to the second proposition, and thereby concede that, if the court had jurisdiction, the undisputed facts were sufficient to justify it in awarding a peremptory mandamus. We have stated the material facts set forth in the petition, and they are not denied in the return to the alternative writ. They show that six of the seven directors of the corporation, by the means disclosed in the petition, have deprived the plaintiff, the other director, of access to the books, documents, and papers of the corporation, and of the opportunity of exercising the legitimate functions of a director. We know of no authority, and have been referred to none, that sustains such conduct on the part of a majority of a board of directors of a corporation. It is the duty of directors to manage the affairs of the corporation and to keep in touch with the acts of its executive officers, and for that purpose they should secure all the information affecting the corporation obtainable from every available source. An important and essential part of this information must necessarily come from the books and documents of the corporation itself. They should disclose the true condition of the corporation, and thereby enable the directors to obtain correct information as to the management of its affairs by the officers whom they have selected for that purpose. It is therefore apparent that the directors should at all reasonable times be permitted to inspect the books of the corporation. Judge Thompson, in sustaining the right of a director to such inspection, says in his admirable work on Corporations (2d Ed.) vol. 4, p. 993: "Of this right of the director it has been said: 'The

duty of a director is to direct, and if he neglects this duty he is certainly guilty of a moral wrong, if not a legal one. To perform this duty intelligently it is essential that he should keep himself informed as to the business affairs of the corporation and as to the acts of all its executive officers, and, in order to keep himself so informed, he has the unqualified right to inspect its books, records and documents.'"

[2] The duty to manage the corporation rests alike upon each and every one of the directors, and therefore it is the right of each director to inspect its books and documents. There doubtless may be differences of opinion among directors as to the management of the affairs of the corporation; but, while the majority will control, they have not the authority and cannot be permitted to deprive the minority, by refusing an inspection of the books and papers, of the right to obtain information as to the affairs of the company. As said by Chief Justice Savage in *People v. Throop*, 12 Wend. (N. Y.) 183: "Surely such an outrage could not be defended, nor can we perceive any plausible apology for it." The appellees set up in the return to the alternative writ several reasons for refusing the appellant access to the books of the company; but, conceding the truth of the matters alleged in the return, it does not deprive him of the right of inspection. These reasons might be sufficient grounds to justify the stockholders in refusing to elect the appellant a director to manage the company's affairs, but that is a question to be considered and determined by the owners of the assets of the company, the stockholders, and not for the majority of the board of directors. Certainly the right of a director to inspect is superior to that of a stockholder, and we have sustained the latter's right in the face of an averment in the return of a belief that the demand for inspection was not in good faith but for the purpose of using the information as a director in a competing company. *Kuhbach v. Cut Glass Co.*, 220 Pa. 427, 69 Atl. 981, 20 L. R. A. (N. S.) 185. The other matters alleged, as reasons for denying the plaintiff the right of inspection, are likewise without merit. They are for the consideration of the stockholders, not for the plaintiff's codirectors. He is responsible to the stockholders, and not to his fellow directors, for the faithful discharge of his duties as a director. He has an unqualified right to inspect the books of the corporation, and all that he need show to entitle him to an inspection is that he is a director of the company, that he has demanded permission to examine, and that his demand has been refused. *People v. Central Fish Co.*, 117 App. Div. 77, 101 N. Y. Supp. 1108.

[3] The other and important question in this case is *res nova* in this jurisdiction. It is whether the courts of the state have jurisdiction by mandamus, under the facts dis-

closed by the record, to compel the directors and officers of a foreign corporation, registered to do business in this state, to permit a codirector to inspect the records, books, and documents of the corporation which are within the state and the jurisdiction of the court. The objection to the jurisdiction is that the corporation was chartered under the law of another state, and that the exercise of the power would be to interfere in the management of the internal affairs of a foreign corporation. This contention, we think, is without merit in view of the undisputed facts of the case. We have already stated the facts, and they need not be repeated here in detail. The plaintiff and the individual defendants, against whom relief is asked, are citizens and residents of the city of Philadelphia, and all the books desired for inspection are at the office of the company in the city, and the refusal to permit an examination of the books by the petitioner occurred at the company's office in the city. The company's manufacturing plant is likewise in the city, and the sales of its products are made in this and other states. Almost immediately after the company was incorporated, it registered in this state, as required by our act of Assembly, and has since continued its business in the city of Philadelphia. Its chief place of business is in Philadelphia, with a nominal office in Camden, which is required by the statute of New Jersey. Fagen, a nominal stockholder, resides in New Jersey, as required by the statute of that state; but he has not been served, and no relief in this proceeding is asked against him. The share of stock standing in his name belongs to one of the other defendants, and all of the other stock of the company is therefore owned by citizens and residents of this state. Personal service of the alternative writ was made on all of the individual defendants except Fagen.

The facts clearly show that there is no attempt on the part of the plaintiff to interfere with the internal affairs of the corporation. There is no demand for relief against the corporation, but against its directors and officers, who are citizens and residents of the state and within the jurisdiction of the court. It is not an attempt to enforce a claim against the corporation, nor to test the right of any officer or director to his office, nor to enforce a local law of the domiciliary jurisdiction of the company. The relief sought does not require the court to construe or enforce any law of New Jersey, or to interfere in any way in determining the rights or duties of the directors or officers of the corporation under the laws of the foreign jurisdiction. There is no demand here that the corporation be compelled to do anything, nor does the proceeding seek to adjudicate the rights of the stockholders in any matter concerning them. The plaintiff does not ask the court to exercise any visitatorial power over

the corporation or control its management. We are therefore at a loss to see how the granting of the relief sought in this proceeding will regulate or interfere in any way with the internal affairs of the corporation. It is simply a demand on the part of the plaintiff that he be permitted to see the books, records, and documents of the corporation that he may perform the duties of director which the stockholders and others interested in the corporation have the right to demand of him. To deny him this right is, in effect, to exclude him from the directorate of the corporation, as well as to announce the principle that a majority of the directors may, at their pleasure, exclude the minority from all participation in the management of the corporation. Unless the court assumes jurisdiction and grants the relief prayed for, the plaintiff is without any adequate remedy to enforce a manifest right. The books desired and the officers and directors having the custody of them, are within the jurisdiction of the court, and a foreign court could not grant the relief which the plaintiff seeks and to which he is entitled. It would be worse than idle to compel the plaintiff, a citizen of this state, to go to the domiciliary jurisdiction to seek the relief he asks here.

The New Jersey statute, which confers jurisdiction upon its courts to compel the books of the corporation to be returned to the state, cannot give the plaintiff proper and efficient relief. The decisions of the New Jersey court clearly disclose that fact. *Huyler v. Cragin Cattle Co.*, 42 N. J. Eq. 139, 7 Atl. 521; *Fuller v. Hollander & Co.*, 61 N. J. Eq. 648, 47 Atl. 646, 88 Am. St. Rep. 456. The courts of that state have no jurisdiction over the persons of the directors and officers except director Fagen, a resident of New Jersey, and it is admitted that the books of the corporation are within this jurisdiction. If, indeed, the courts of New Jersey could compel the return to that state of the books, as well as the directors and officers of the company who have charge of them in this state, the relief obtained, if any, would be attended with such delay and inconvenience as would practically be a denial of it in an efficient form. The plaintiff is attempting to enforce a common-law, and not a statutory, right in which the courts of this commonwealth, under the facts of the case, have undoubted jurisdiction. In such cases the remedy is properly enforceable in the forum where the records and their custodians are located. The writ goes against the officers who have possession of the books, and it necessarily must be issued in the forum where the books and their custodians may be found. They cannot be reached directly by process issued in any other jurisdiction. The enforcement of the writ, compelling the production of the books, will not result in the investigation of or interference with the internal affairs of the

corporation, nor will it affect the management of the corporation in any way whatever. We are therefore clear that the court below had jurisdiction to grant the relief prayed for in the petition and to compel the production of the books, documents, and papers of the corporation in the city of Philadelphia for inspection by the plaintiff.

The courts in other states have sustained the jurisdiction and granted such relief on the application of a stockholder of a private corporation. *Richardson v. Swift*, 7 *Houst. (Del.)* 137, 30 *Atl.* 781; *State ex rel. English v. Lazarus*, 127 *Mo. App.* 401, 105 *S. W.* 780; *Andrews v. Mines Corporation*, 205 *Mass.* 121, 91 *N. E.* 122, 137 *Am. St. Rep.* 428; 5 *Thomp. on Corp.* (2d Ed.) § 6742. In the *Andrews Case*, Chief Justice Knowlton, delivering the opinion, said (205 *Mass.* 122, 91 *N. E.* 123, 137 *Am. St. Rep.* 428): "The right which is sought to be enforced here is one of general, if not universal, recognition from early times. It is referred to in different cases as a right existing at common law. In order to enforce it, the court is not called upon to investigate the internal affairs of the corporation, or to make any order that affects it in the management of its business, or in the relations of stockholders to one another." In the *Lazarus Case*, *Goode, J.*, said (127 *Mo. App.* 407, 105 *S. W.* 782): "It (the proceeding) is simply intended to enforce a common-law right enjoyed by the relator as shareholder to examine the corporate records for proper purposes; and such remedy may be, and properly is, sought in the forum where the records are kept by their custodians; and it is our opinion that, by accepting the provisions of the Missouri statutes enabling foreign corporations to do business in the state, the respondent company, so far became subject to the jurisdiction of the Missouri courts that they may afford relief of the kind sought, if the circumstances are appropriate."

The right of a director to inspect the books of the corporation, like that of a stockholder, exists at common law; but the right of the former is unqualified, while the latter, to a certain extent, is a qualified right. The reason is that the duties of a director require him to be familiar with the affairs of the company in order that he may have sufficient information to enable him to join intelligently in the management of the concern. The protection of the interests of the company, therefore, require that his right to an inspection of the books be absolute. The inspection by a stockholder is primarily for the purpose of protecting his individual interest, and is not with the view of enabling him to perform his duty as a manager of the corporation. It is therefore a qualified right and depends in each instance upon the facts of the particular case. It may, and frequently does, interfere with and affect the internal affairs of the

corporation; and, when it does, the domestic court will withhold its aid and not grant the relief.

We have carefully examined the cases cited by the learned counsel for the appellees and are convinced that they do not rule the case at bar against the appellant. Their facts differentiate them clearly from the present case. They are cases of a stockholder and not of a director, and, as pointed out above, relief will frequently not be granted in such cases to a stockholder where it would be granted to a director. We think in the present case the plaintiff has, both by reason and precedent in other jurisdictions, established his right to the relief he seeks, and that the authorities cited by the appellees do not rule the case against him. We are all of the opinion that the court should have granted a peremptory writ.

The judgment of the court below is reversed, and it is now ordered, adjudged, and decreed that that court issue a peremptory writ of mandamus directed to the individual defendants served and each of them, requiring and commanding them and each of them, at such times as may be reasonable and convenient for the purpose, to give to Charles Hudson Machen, the plaintiff, with his clerk or clerks, access to all the books, documents, and papers of the defendant corporation in their possession, with the opportunity to make abstracts and copies therefrom. It is further ordered that the individual defendants, served in this case, pay the costs in this and the court below.

In re THOMPSON'S ESTATE.
(Supreme Court of Pennsylvania. July 2, 1912.)

WILLS (§ 545*)—CONSTRUCTION—RESIDUE—ESTATE BEQUEATHED—"BALANCE OF MY ESTATE."

Testator directed that the residue of his estate, after deducting \$5,000 for his widow, should be divided into three equal shares, one of which was to go to his daughter H., or her issue, and, in case she died subsequent to testator's death without lawful issue, then her shares should revert to the estate, to be distributed as the balance of his estate. *Held*, that H. took a life estate only in the share of the estate bequeathed to her, the words "balance of my estate" being used in the sense of the rest or residue of testator's estate, so that on the death of H. after the death of testator, and without issue, but leaving a surviving husband, her share passed to testator's other daughters as a part of the residue of his estate under the trust created of their shares, and the husband took no interest therein.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1171-1176; Dec. Dig. § 545.*

For other definitions, see *Words and Phrases*, vol. 1, pp. 678, 679.]

Appeal from Orphans' Court, Juniata County.

Judicial accounting by the executor of the Estate of Homer S. Thompson, deceased.

From an order dismissing exceptions to the report of Wilberforce Schwyer, auditor, Lydia Blake Thompson appeals. Reversed and remanded, with directions.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Mortimer C. Rhone, A. R. Jackson, both of Williamsport, and Will L. Hoopes, of Mifflintown, for appellant. J. Howard Neely, of Mifflintown, for appellee.

MESTREZAT, J. Homer S. Thompson died testate on the 2d day of March, 1909, leaving to survive him his widow, Harriet, and three daughters, Anna May, intermarried with Wilson A. Evert, Hannah Elsie, intermarried with H. B. Foresman, and Lydia Blake, unmarried, and certain collateral heirs. The daughters were all of full age at the death of the testator. By his will, dated July 24, 1901, the testator, after bequeathing to his wife all his household goods and kitchen furniture, directed that the residue and remainder of his entire estate should be converted into money. He then bequeaths \$5,000 to Dr. James F. Thompson, in trust to invest the same and pay over the interest thereof to his wife, Harriet, during her life, "and if her necessities require it, such portion of the principal as my said trustee may deem necessary, and from and immediately after the death of my said wife, I direct that the principal, * * * or so much thereof as may remain, shall be distributed as herein-after set forth." By the next or sixth item of his will he directs that the residue of his estate be divided into three equal parts or shares. One share he bequeaths to Dr. James F. Thompson, in trust to pay the interest or dividends thereof to his daughter Anna May, intermarried with Wilson A. Evert, during the life of the said Wilson A. Evert, or their issue, in the event of her death, and at his death the principal to Anna May or her lawful issue, and providing that, should she die without lawful issue, then the "share shall revert to my estate and be distributed as the balance of my estate." He then directs as follows: "One other of the full, equal third parts or shares of my residuary estate I give, devise and bequeath unto my daughter, Hannah Elsie, intermarried with H. B. Foresman, or their issue. Should my daughter, Hannah Elsie, die subsequent to my own death without lawful issue, then the said one-third part or share shall revert to my estate and be distributed as the balance of my estate. The remaining of the other of the full, equal one-third part or share, I give, devise and bequeath unto my daughter, Lydia Blake, or her issue. Should my said daughter, Lydia Blake, die subsequent to my own death without lawful issue, then the said one-third part or share shall revert to my estate and be distributed as the balance of my estate."

By item 7 the testator directs that at the death of his wife the \$5,000 held in trust for her, or so much thereof as shall remain, shall be distributed in the same manner and be subject to the same conditions and limitations as in the preceding (sixth) item of his will; and in item 10 he directs that if his wife, Harriet, be living at the death of Anna May, the latter leaving no issue, the income of Anna May's share shall be paid to Harriet during her life. By item 9, the testator directs that, "should all my daughters be dead without issue at the time of the death of my wife, I will and direct that whatever of my estate remain, shall be divided into four equal parts or shares and disposed of" to testator's brothers and nephews. Letters testamentary were duly granted to Dr. James F. Thompson. As directed by the will, Dr. Thompson, as trustee, invested the sum of \$5,000, the interest of which is payable to the widow during her life. He has filed an account, as executor, in which he has taken credit for the sum invested for the widow. The balance in his hands, as shown by his account, is for distribution.

The widow and children, alive at the death of the testator, are all now living, except Hannah Elsie, who died on the 14th day of April, 1910, intestate and without issue, leaving to survive her her husband, H. B. Foresman. The only question for determination here is the disposition of that part of the testator's estate which was bequeathed to his daughter Hannah Elsie. The interpretation of the other parts of the will and the disposition of the interests given to the other legatees may await the time when, if ever, a judicial adjudication becomes necessary. There is little or no ambiguity in the will. The testator has expressed himself so clearly and plainly that there should be little difficulty in distributing the estate in the future. For the present, we are only concerned with Hannah Elsie's share.

It needs a very brief discussion to determine the proper disposition of the one-third of the residue of the testator's estate given to his daughter Hannah Elsie. It is or must be conceded, as held by the learned auditor, that the language of the will imports a definite, and not an indefinite, failure of issue; and that therefore Hannah Elsie took a life interest only in the money bequeathed to her. Of this there can be no doubt, and it is unnecessary to refer to the authorities on the subject. The difficulty with the learned court below seems to have arisen in the construction of the words "balance of my estate." The bequest to Hannah Elsie was to her or her issue, with the direction that, if she "die subsequent to my own death without lawful issue, then the said one-third part or share shall revert to my estate and be distributed as the balance of my estate." The bequest to each of the three daughters concludes with the words, "then the said one-third part

or share shall revert to my estate and be distributed as the balance of my estate." The residue of his estate, after the bequest of the income of \$5,000 to his wife, was given, as will be observed, to his three daughters; the share to one daughter being placed in trust. It is apparent, we think, that he used the words "balance of my estate" in the sense of the rest or residue of his estate. The intention of the testator was that after the life estate of his daughter, Hannah Elsie, without issue, that her share or interest should be distributed as he had disposed of the rest or residue of his estate. The purpose of the testator was that his daughter should have the use of the one-third of the estate during her life, and that it should then go to her issue; but, failing issue, it should go, as he directed in that item of his will, to his two surviving daughters. He declares that the share of the deceased child "shall revert to my estate," and as part of the residue of his estate he bequeaths it in the same item of the will to the two living daughters. The testator has made the same provision as to the interests given the other two daughters. The share of the testator's estate to Hannah Elsie, she having died without issue subsequent to her father's death, became again, at her death, a part of the testator's estate, and passed to the other two daughters as though it had never been bequeathed to her. Her husband takes no interest in the share of the fund bequeathed to his wife for life.

There is no ground whatever for the contention that the testator died intestate as to the remainder after the life estate in Hannah Elsie's share. In apt terms the testator disposes of the remainder as well as the life interest given the daughter. To declare an intestacy as to the remainder of Hannah Elsie's share would be to ignore the plain language of the will. He anticipated the death of his daughter without issue, and provided, in that event, what should be done with the remainder. His intention is as clear and manifest as if, instead of the words used by him, he had directed that the remainder be distributed between his surviving daughters. They take the share in equal proportions, and hold it as each held the share originally given her.

It follows that the remainder of the share bequeathed to Hannah Elsie should be divided into two equal parts, and be held for her two sisters under the terms of the will. The income on her share due and unpaid at the time of her death is, of course, payable to her husband. If the two remaining legatees desire to enter security and obtain possession of the fund bequeathed them, they can make the proper application to the orphans' court, as required by the act of May 17, 1871 (P. L. 269), and their right to the possession of the fund by entering security can then be adjudicated. It may be that the parties may

desire the bequest to remain in the hands of the executor; but it will be time enough to determine their right to the fund when the question is raised on a proper application to the court for that purpose.

The decree of the court below is reversed; and it is now ordered that the share of the deceased daughter in the residue of the testator's estate, as shown by the account of the executor, be divided into two equal parts, and be held, under the terms of the will, for Anna May Evert and Lydia Blake Thompson. The costs of this appeal to be paid out of the estate.

DUNBAR FURNACE CO. et al. v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. CORPORATIONS (§ 645*)—FOREIGN CORPORATIONS—REGISTRATION—STATUTORY PROVISIONS.

Where a corporation has its principal office in Ohio, four mines in Michigan, a business office in Pittsburgh, and a registered agent in Pennsylvania, it has sufficiently complied with the constitutional requirement that no foreign corporation shall do any business in the state without having one or more known places of business and an authorized agent or agents on whom process may be served, and Act April 22, 1874 (P. L. 108), putting such provision into effect, though it has not registered an additional agent or established another place of business where it stores its ores in yards leased for the purpose, to be smelted by a furnace company under a contract made in Ohio by which the ores were to be sold and delivered to the furnace company from time to time, and paid for by pig iron delivered to the iron company and stored in the yards which it leased.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2513, 2514; Dec. Dig. § 645.*]

2. CORPORATIONS (§ 645*)—FOREIGN CORPORATIONS—REGISTRATION.

The law merely requires an agent to be registered by a foreign corporation for each separate office or place of business established within the state, and requires additional agents only when additional places of business have been established, and is not concerned about the number of places of business, which is determined by the corporation itself.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2513, 2514; Dec. Dig. § 645.*]

Appeal from Common Pleas Court, Fayette County.

Replevin by the Dunbar Furnace Company and another against the Pennsylvania Railroad Company. From the judgment, plaintiffs appeal. Affirmed.

See, also, 85 Atl. 109.

From the record it appeared that the Dunbar Furnace Company owned and operated an iron furnace at Dunbar. The Cleveland-Cliffs Iron Company is a foreign corporation with ore mines in Michigan and its financial offices in Pittsburgh.

The Iron Company furnished from its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mines in Michigan to the Furnace Company at Dunbar the ore which the latter desired to buy. The Furnace Company leased to the Iron Company storage yards at Dunbar. The yards were all marked with signs showing that they were the storage yards of the Iron Company. Under the contracts, the ore was shipped to Wister & Co. as agents of the Iron Company, and stored on said yards. As it was needed from time to time, it was delivered by Wister & Co. to the Furnace Company and paid for. Payment was sometimes made in pig iron, delivered to the Iron Company's agents and stored on the yards, and sometimes by notes secured by pig iron delivered and stored in the same manner, but only as collateral. The contracts and leases were first made orally in Cleveland, and subsequently the written evidences thereof were signed by the Iron Company in Cleveland and by the Furnace Company at Dunbar. The Iron Company had no office at Dunbar. After the receiver was appointed, the Iron Company put watchmen in charge of the yards and iron. Prior to that time the ore and iron had been in the custody and control of Wister & Co. and Reginald Palmer as agents of the Iron Company.

On February 13, 1911, the court of the receiver's appointment directed him to forbid the removal of any iron and in the event of removal to bring replevin. Thereupon the Iron Company proceeded to remove some of each of three classes of iron, in order that the questions raised by the creditors might be determined. Twenty-nine tons of No. 2 foundry pig iron were taken from 6,539 tons of iron which had been manufactured by the receiver out of ore on the ore yard at the date of the receivership under a contract and order of court providing that the iron should take the place of the ore as to the rights and titles of all parties. One hundred and seventy-two tons of No. 1 foundry pig iron were taken from about 25,000 tons of iron which had prior to the receivership been delivered by the Furnace Company to the Iron Company and stored on one of the yards in payment for ore used. Thirty tons of Gray Forge iron were taken from 13,311 tons of iron which had been delivered by the Furnace Company to the Iron Company as above, save that this iron was delivered not in payment for ore, but as collateral for notes given in payment for the ore as it was delivered. After default in payment of the indebtedness thereby secured, the Iron Company gave notice and sold pursuant to the terms of the pledge.

The court below held that the plaintiff was entitled to recover as to the 30 tons of Gray Forge iron, and the defendant as to the 172 tons of No. 1 foundry and 29 tons of No. 2 foundry iron. Both parties appealed. The present appeal was taken by the receiver of the Furnace Company.

Argued before FELL, C. J., and MES-
TREZAT, POTTER, ELKIN, and MOSCH-
ZISKER, JJ.

Abraham M. Beitler, of Philadelphia, A. Leo Well, of Pittsburgh, and Johnson & Rush, of Uniontown, for appellants. G. W. Pepper and W. B. Bodine, Jr., both of Philadelphia, D. M. Hertzog, of Uniontown, and Hoyt, Dustin, Kelly, McKeehan & Andrews, all of Cleveland, Ohio, for appellee.

ELKIN, J. [1] While the railroad company is named as the defendant in this action of replevin, it simply stands in the position of a stakeholder, not having any interest in the result of the litigation. The real parties are the receiver of the Furnace Company, on the one side, and the Iron Company, claiming title to the property in dispute, on the other. The Iron Company is a foreign corporation, having ore mines in Michigan, a principal office in Ohio, an office for the transaction of business in the city of Pittsburgh, and a registered agent in the state of Pennsylvania. It is found as a fact, and the evidence shows it to be a fact, that the Pittsburgh office was established and the authorized agent registered long before the execution of the contracts involved in the present controversy. If the establishing of an office in Pittsburgh and the registration of an agent in the office of the Secretary of the commonwealth are sufficient to meet the requirements of the Constitution and the act of 1874, there is no foundation upon which to base the contentions of appellant. The sole and only ground upon which the receiver undertakes to justify his assertion of title to the property in dispute is that the Iron Company, a foreign corporation, was not properly registered in Pennsylvania, and that, by reason of failure to comply with this requirement of the constitution and the statute, all business transacted in our state was unlawful, and all contracts made here illegal and void. If there had been no registration of an agent, or if an additional agent had not been registered for each separate and independent place of business, the position of appellant would be well taken, if the Furnace Company had title to the iron; but in the present case there was a properly registered agent and a designated place of business in the state. Under this statement of facts, the only question that can possibly arise is whether it was absolutely necessary, in order to comply with the law, to register an additional agent and establish another place of business at Dunbar where the ore was smelted and the pig iron produced. The Constitution provides that no foreign corporation shall do any business in this state "without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served." The primary purpose of the constitutional re-

quirement is to bring foreign corporations doing business in our state within the reach of legal process. *Construction Co. v. Passenger Railway Co.*, 204 Pa. 22, 53 Atl. 533. In the case at bar this primary purpose was served by registering an agent and establishing a place of business. Neither the Constitution, nor the act of 1874, requires more than one registered agent and one office or place of business, unless the foreign corporation has established two or more offices or places of business in the state, in which event there must be a registered agent in each office or place of business so established. *De La Vergne Refrigerating & Machine Co. v. Kolischer*, 214 Pa. 400, 63 Atl. 971.

[2] The state is not concerned about the number of offices, or places of business, a foreign corporation may choose to establish, but, when two or more are established, the law requires an agent to be registered for each separate office or place of business. The corporation, and not the state, determines whether in the conduct of its business more than one office, or place of business, is required. In the present case the Iron Company, in view of the business transacted by it in Pennsylvania, only deemed it necessary to establish one office and register one agent, and it did so. Certainly after it had established an office and registered an agent, it had the prima facie right to do business in Pennsylvania. Up to this point it had complied with the requirements of the law. Of course, if it had established another place of business, it would have been necessary to register another agent, but it did not do so, and, unless it be now held that the law required it to establish an office or place of business at Dunbar, this appeal is without any merit at all. After a careful examination of all our cases, we have reached the conclusion that nothing decided in any one of them requires us to hold as a matter of law that it was the duty of the Iron Company to establish a separate and independent office, or place of business, and to register an additional agent at Dunbar. To so hold would practically mean that every foreign corporation doing business in Pennsylvania would be required to establish an office and register an agent in each county of the state in which it transacted any business. Neither the Constitution, nor the act of 1874 (P. L. 108), nor the trend of judicial decisions, contemplates the necessity for such a harsh and confiscatory rule simply to bring a foreign corporation within the reach of legal process here. In those cases in which it was held to be necessary to register another agent there was in fact, separate and apart from the originally designated place of business, a separate business place, or a branch store, or an independent establishment, opened for the general transaction of business in the community where the new place was established. This was true in the case strongly relied on by appellant here.

Phoenix Silk Mfg. Co. v. Reilly, 187 Pa. 526, 41 Atl. 523. In the case at bar the Iron Company was not engaged in the transaction of business with the general public at Dunbar, and there was no necessity, legal or commercial, to establish a place of business there in order to have its ores smelted by the Furnace Company. The contracts relating to the smelting of the ore were executed by the officers of the Iron Company in another state, and the validity of their acts in this respect have not been, and could not be, successfully challenged. Contracts for the sale of the pig iron in the natural course of business would be made at the principal office of the company located in another state, or could just as well be made at the office established in Pittsburgh as at Dunbar. There was no business necessity for a separate office, or place of business, at Dunbar, and we can see no valid reason why the law should impose the duty of establishing a separate office there upon a foreign corporation which in the transaction of its business was not required, when it already had established a business office and registered an agent in the state. In morals, in right, and according to our view in law, the pig iron in dispute here is the property of the Iron Company, and nothing short of a violation of imperative rules of law would justify an act of confiscation in the interest of those, not the owners, as against the real owners. There is no such imperative necessity in the present case, and therefore no sufficient reason why this thing should be done. Appellant testified that prior to the receivership the title and ownership of the Iron Company to the ore and iron in dispute here had never been questioned by the Furnace Company. In other words, the Furnace Company did not then claim title to this property, but did fully recognize the ownership of the Iron Company in the same. If the Furnace Company did not have title to the property before the receivership, it is difficult to understand how the receiver acquired title afterward, nothing having occurred to interfere with the rights of the parties in the meantime. In an action of replevin the plaintiff must show title, or right of possession, and, while the decision of this point is not necessary to the determination of the rights of the parties involved in the present proceeding, it is very doubtful, to say the least, whether appellant met this burden, even if there had not been a proper registration. Without further discussion, it remains to be said that the registration of an authorized agent and the establishing of an office in the state were sufficient under the facts of the present case to meet the requirements of the law in this respect, and, the title to the property in dispute being in the Iron Company, it is entitled to possession of the same. The learned court below erred in holding that the Iron Company had not been properly registered as a foreign cor-

poration in Pennsylvania, but, inasmuch as the title to the iron in dispute in this appeal was held to be in the Iron Company on other grounds, the conclusion reached must be sustained.

Judgment affirmed.

DUNBAR FURNACE CO. et al. v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

CORPORATIONS (§ 645*)—FOREIGN CORPORATIONS—REGISTRATION—STATUTORY PROVISIONS.

Where a corporation has its principal office in Ohio, four mines in Michigan, a business office in Pittsburgh, and a registered agent in Pennsylvania, it has sufficiently complied with the constitutional requirement that no foreign corporation shall do any business in the state without having one or more known places of business, and an authorized agent or agents on whom process may be served, and Act April 22, 1874 (P. L. 108), putting such provision into effect, though it has not registered an additional agent or established another place of business where it stores its ores in yards leased for the purpose, to be smelted by a furnace company under a contract made in Ohio by which the ores were to be sold and delivered to the furnace company from time to time and paid for by pig iron delivered to the iron company, and stored in the yards which it leased.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2513, 2514; Dec. Dig. § 645.*]

Appeal from Common Pleas Court, Fayette County.

Replevin by the Dunbar Furnace Company and another against the Pennsylvania Railroad Company. From the judgment, the Cleveland Cliffs Iron Company files a cross-appeal. Reversed with directions.

The facts appear in Dunbar Furnace Co. v. Pennsylvania Railroad Co., 85 Atl. 108, and the opinion of the Supreme Court.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

G. W. Pepper and W. B. Bodine, Jr., both of Philadelphia, D. M. Hertzog, of Uniontown, and Hoyt, Dustin, Kelly, McKeehan & Andrews, all of Cleveland, Ohio, for appellant. Abraham M. Beitler, of Philadelphia, and A. Leo Well, of Pittsburgh, for appellee.

ELKIN, J. This is a cross-appeal by the Cleveland Cliffs Iron Company from the judgment entered by the court below in the case above stated. The trial court decided that a certain portion of the iron in dispute belonged to the Iron Company and a certain other portion to the receiver of the Furnace Company, and entered judgment accordingly. The Furnace Company took an appeal to this court, and the Iron Company to the Superior Court, because the amount involved in the judgment in favor of the receiver and

against the Iron Company was less than \$1,500. Under these circumstances, the Superior Court certified the case involving the smaller amount to this court. Both cases are now before us for decision, but the legal principles upon which the rights of the parties depend do not materially differ. In the appeal of the Furnace Company we have just decided that the Iron Company had properly registered an authorized agent in Pennsylvania on whom legal process could be served, and that an office, or place of business, within the meaning of the law, had been established. What was said in that case applies to this one. The title to the property in dispute here is in the Iron Company, and there is no distinction in principle between the two cases. The iron is piled on ground leased by the Iron Company and is set apart and marked as its property. The Iron Company through its employes has possession of the gray forge iron just as it has possession of the other iron in dispute. There is no doubt that it took the title and possession of this iron under a contract with the Furnace Company prior to the receivership, and that it has complied with the law as to indicia of ownership and right of possession. The gray forge iron, like the other iron in dispute, belongs to the Iron Company, and the learned court erred in holding that it did not.

Judgment reversed and record remitted, with directions to enter judgment in favor of appellant for the amount involved.

In re KORTRIGHT'S ESTATE.

Appeal of STORRS et al.

(Supreme Court of Pennsylvania. July 2, 1912.)

EXECUTORS AND ADMINISTRATORS (§ 218*)—"TESTAMENTARY EXPENSES"—CONSTRUCTION OF WILL.

Where a woman domiciled in England died possessed of personal property in England and Pennsylvania, and left two wills, one disposing of her Pennsylvania property and the other of her English property, and the latter provided that testamentary expenses and the duty on all legacies bequeathed free of duty should be paid out of the English property, the estate duty payable to the British government under St. 57 and 58 Vict. c. 30, is a testamentary expense payable out of the English property alone.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 759; Dec. Dig. § 218.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the adjudication of the estate of Martha Ellen Kortright, deceased. From a decree dismissing exceptions thereto, John Storrs and Percy Leigh Pemberton, executor, appeal. Affirmed.

See, also, 85 Atl. 111.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

*For other cases see same topic and section NUMBER in Dec. Dig. & An. D. G. Key-No. Series & Rep'r Indexes

W. W. Montgomery, Jr., of Radnor, for appellants. John G. Johnson, H. S. Prentiss Nichols, Charles H. Mathews, and Chapman & Chapman, all of Philadelphia, for appellees.

BROWN, J. Lady Martha Ellen Kortright, at the time of her death, January 18, 1907, was domiciled in England. Before her marriage to Sir Charles Edward Keith Kortright, she was a resident of Philadelphia. She died possessed of personal property valued at \$1,320,108.62, about one-fifth of which, amounting to \$240,244.38, was in London. The balance, valued at \$1,079,864.24, was in Philadelphia. She left two wills, one dated June 21, 1893, to which she added a codicil June 13, 1905. The other was executed in England February 27, 1905. The expressed purpose of the testatrix in executing this latter will was to dispose only of her property situated in England, and her expressed intent is in the following words: "The same shall take effect concurrently with and independently of another will which I have made so far as the same relates to or disposes of my property in America and investments belonging to me the dividend or interest on which are received by the Pennsylvania Company for Insurances on Lives and Granting Annuities or other my agents in America or any other property than my English property." By the sixth clause of her second will the testatrix directed that out of the proceeds of her English property, which she authorized her executors, the appellants, to sell, they should pay her "funeral and testamentary expenses and debts in England and the legacies hereinbefore or by any codicil hereto bequeathed and the duty on all legacies hereinbefore or by any codicil hereto bequeathed free of duty."

By the British finance act of 1894 (St. 57 and 58, Vict. c. 30), it is made the duty of an executor to pay to the government an "estate duty," declared by the act to be a "stamp duty" on "all personal property (wheresoever situate) of which the deceased was competent to dispose at his death." This estate duty on an estate exceeding £250,000 and less than £500,000 is 7 per centum of its valuation, as ascertained in accordance with the provision of the finance act. The amount of the estate duty to be paid to the British government on the estate of Mrs. Kortright was ascertained to be \$92,407.60, a portion of which the appellants have paid, and their claim, disallowed by the court below, was for contribution out of the American estate of a proportionate share of the amount due to the English government as estate duty. This claim was disallowed because the learned adjudicating judge below, sustained by the court in banc, construed the sixth clause of the English will as creating a fund out of the English property for the purpose of paying the funeral and testamentary expenses

of the testatrix, and as exonerating her American estate from such charges. If such was her intent, the appellants had no claim upon the fund before the court below for distribution, for, in dispensing her bounties, the will of the testatrix was supreme as to which of her beneficiaries should bear the burden imposed by the act of parliament upon her entire estate. The English government must be paid its estate duty on all of her property, wherever it was situated at the time of her death, but it was her right to provide a special and sufficient fund for the payment of that duty, and neither those taking the balance of that fund nor her personal representatives can question her right to provide that her American estate should pass to the beneficiaries named in her American will free from the payment of the estate duty or tax to the English government.

The testatrix intended that there should be two separate independent administrations of her estate, and that her property in England should be distributed in one way and that in America in another. By the English will she expressly directed that out of the funds to be realized from the sale of her property in England there should be paid her "funeral and testamentary expenses." What did she mean by "testamentary expenses"? She is presumed to have known what the English courts had declared these words to mean five years before she executed her will, and, having executed it with such knowledge, she must be understood as having intended to use the words in the sense given to them by the courts when applying the finance act of 1894 to them. In 1900, in *Yeo v. Clemow*, 2 L. R. Chancery Division (1900) 182, it was expressly decided by Sir Arthur Kekewich that the words "estate duty," as used in the act of 1894, was a testamentary expense. In so holding he said: "I am reluctant to introduce a new rule to add to 'testamentary expenses,' which term has been generously interpreted. But, having arrived at the conclusion that the court could not have refused to treat probate duty as a testamentary expense, I cannot avoid saying that estate duty which takes its place is also a testamentary expense. * * * I come to this conclusion with reluctance, for I do not know where it will lead us in some cases; but at the same time I do not see my way practically to say that this duty is not a testamentary expense." The same learned judge, in the same year, in *Wild v. Stanham*, reported in the same volume of reports, page 648, again held that an estate duty was within the meaning of the words "testamentary expense." The estate duty on the estate of the testatrix is therefore to be paid out of the fund which she created by her English will for the payment of testamentary expenses, and the fund representing her American property, not being chargeable with any of the expenses connected with the administra-

tion of her English estate, the claim of the appellants was properly disallowed.

Decree affirmed, at their costs.

IN RE KORTRIGHT'S ESTATE.

Appeal of COVINGTON et al.

(Supreme Court of Pennsylvania. July 2, 1912.)

CHARITIES (§ 27*)—VALIDITY—CAPACITY TO TAKE CHARITABLE GIFT.

Act April 26, 1855 (P. L. 328), Act May 9, 1880 (P. L. 173), and Act May 23, 1895 (P. L. 114), provide for carrying into effect any disposition of property for charitable purposes in excess of the annual income which the corporation to which the transfer is made is permitted to receive as far as practicable. Act July 7, 1885 (P. L. 259), provides that property disposed of by will for a charitable use, if void for uncertainty or certain causes other than that it is in excess of the power of the corporation to receive, shall go to the heirs and next of kin of the decedent. *Held*, that where a testatrix gives the residue of her estate to four charitable and religious corporations, and at her death two of them hold assets equal to or exceeding the amounts permitted by their charters, the next of kin have no standing to object to a decree before adjudication of the estate increasing the limit of assets of the two corporations sufficiently to permit them to take the bequests, nor to the distribution to the corporations in accordance with the bequest.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 14; Dec. Dig. § 27.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Martha Ellen Kortright. From a decree dismissing exceptions to adjudication, George W. Covington and others appeal. Affirmed.

See, also, 85 Atl. 109.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Alex. Simpson, Jr., and J. Morris Yeakle, both of Philadelphia, and George B. Covington, of New York City, for appellants. John G. Johnson, H. S. Prentiss Nichols, and Charles H. Mathews, all of Philadelphia, for appellees.

BROWN, J. The testatrix gave the residue of her estate, amounting to \$1,236,989.25, equally to the Presbyterian Hospital in Philadelphia, the Board of Home Missions of the Presbyterian Church in the United States of America, the Board of Education of the Presbyterian Church in the United States of America, and the Presbyterian Board of Relief for Disabled Ministers and the Widows and Orphans of Deceased Ministers. Two of these organizations—the first and fourth—held assets at the time of the death of testatrix equal to or exceeding the amounts which their respective charters authorized them to hold, but, after her death, the powers of each were enlarged by a decree of one of the courts of common pleas of Philadelphia county, and at the time of the ad-

judication in the court below each was authorized to receive an annual income in excess of what would be realized from one-fourth of the residuary estate of the testatrix. The appellants, her next of kin, objected to the award of one-fourth of the residuary estate to either the Presbyterian Hospital in Philadelphia or the Presbyterian Board of Relief for Disabled Ministers and the Widows and Orphans of Deceased Ministers, on the ground of its incapacity to take the bequest, and their contention is that, as the two bequests have failed, the testatrix died intestate as to one-half of her residuary estate, and the same has passed to them as her next of kin. The court below refused to sustain this contention, and from the decree awarding to each of the appellees one-fourth of the residuary estate there have come these appeals by the next of kin of the testatrix.

If the bequests to the appellees had not failed at the time of the adjudication, the appellants had no standing in the court below, and have none here; and, if their appeals are to be dismissed because the bequests had not failed, no other question raised by them or the appellees will call for any discussion.

It is first to be noted that the bequests to the appellees are not void because they are given by a will not executed in compliance with the requirements of the statute regulating the execution of a will making a charitable or religious bequest. It was executed more than one calendar month before the decease of the testatrix, and was attested by two credible and, at the time, disinterested witnesses.

The sole contention of the appellants is that the bequests failed because they gave to each of the appellees an annual income in excess of what it was entitled to receive. Did the bequest fail for that reason? Starting with the act of April 26, 1855 (P. L. 328), there is found in it an express declaration of legislative intention that no disposition of property for any religious, charitable, literary, or scientific use shall fail by reason of its being in excess of the annual income which the corporation to which the bequest is made is permitted to receive; but, where such a disposition is made, the duty of the orphans' court is, by its decree, to carry into effect the intent of the testator so far as the same can be ascertained and carried into effect consistently with law or equity, and, if the disposition be in excess of the annual value permitted to the corporation by law, "such disposition, so far as exceeding the power of the courts to determine the same by the rules of law or equity, shall be taken to be further regulated and disposed of by the Legislature of the commonwealth in manner as nearly in con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep's Indexes

formity with the intent of the donor or testator as practicable." Following the act of 1855 is the act of July 7, 1885 (P. L. 259), which provides that in the disposition of property by will, made or to be made for any religious, charitable, literary, educational, or scientific use or purpose, if the same shall be void for uncertainty, or the object of the trust be not ascertainable, or has ceased to exist or be an unlawful perpetuity, such property shall go to the heirs at law and next of kin of the decedent, as in the case of persons who have died or may die intestate. It is to be observed that this act, in enumerating the cases in which bequests shall fail and go to the next of kin of the testator under the intestate laws, is silent as to a bequest or gift to an organization or corporation in excess of the annual value allowed to it by law. There next comes the act of May 9, 1889 (P. L. 173), which declares "that no disposition of property heretofore or hereafter made for any religious or charitable use, shall fail for want of a trustee or by reason of the objects ceasing, or depending upon the discretion of a last trustee, or being given in perpetuity, or in excess of the annual value limited by law; but it shall be the duty of any court having equity jurisdiction in the proper county, to supply a trustee, and by its decrees to carry into effect the intent of the donor or testator, so far as the same can be ascertained and carried into effect consistently with law or equity, subject to an appeal as in other cases in said courts respectively, and to be reviewed, reversed, affirmed or modified by the supreme court of this state."

Finally, there is the act of May 23, 1895 (P. L. 114), slightly amending the tenth section of the act of 1855, but expressly preserving the intention expressed in that section to save a bequest to a charitable use from failure when the same may be in excess of the annual value which the charitable legatee may be permitted to receive. With the express legislative intention found in the acts of 1855, 1889, and 1895, that a disposition to a charitable use shall not fail because it may be in excess of the annual value permitted by law to the legatee, the court below proceeded to discharge the duty imposed upon it of making a decree to carry into effect the intent of the testatrix. If the decree made is not a proper one, it is not open to objection by the appellants, for the acts of assembly referred to will not permit the bequests to fail and pass to the next of kin of the testatrix. There was

therefore no right in them at the time of her death to demand that any portion of her residuary estate should pass to them because of an alleged disregard of the law, for the very act under which they claim provided how the bequests should be saved; and, if the disposition made by the testatrix exceeded "the power of the court to determine the same by the rules of law or equity," then the bequests are to be taken as having "been made subject to be further regulated and disposed of by the Legislature of this commonwealth," in manner as nearly in conformity with the intent of the testatrix as practicable. When the appellees claimed their respective bequests at the adjudication in the court below, each had become empowered to receive it by decree of the court of common pleas, and, even if the learned court below did err in awarding the bequests to them—which we do not even intimate—the next of kin and heirs at law of the testatrix have no standing to protest. The acts of 1889 and 1895 have taken away from them all right to object. In *Frazier v. St. Luke's Church*, 147 Pa. 258, 23 Atl. 442, it was said by Mr. Chief Justice Paxson: "A gift to the lame, the halt, and the blind, is not to fail in the nineteenth century, because the legal title is given to the person or corporation incapable of taking it, or even forbidden by law to take it." While this may have been drastic, we may now conservatively say that, under our statutes, the bequests of the testatrix to the appellees could not fail, and it became the duty of the court below to save them. The only answer of learned counsel for appellants to this is that the acts of 1855, 1889, and 1895 relate only to bequests for religious or charitable uses, and do not apply to gifts to religious or charitable organizations or corporations. Of this the learned court below said: "The distinction between a gift to a charitable corporation already in existence or to be organized and a gift for a charitable use seems to be without a difference." To this we may add that as the appellees were created for religious and charitable purposes, and for such purposes alone, the bequests to them are for charitable and religious uses alone, and cannot be devoted to or used for any other purposes. And, in addition, the eighth section of the act of 1855 speaks not of religious or charitable uses, but of charitable or religious societies, congregations, associations or corporations.

The appellants having no right to complain of the decree made by the court below, their appeals from it are dismissed, with costs.

BLACKMER v. McCABE et al.

(Supreme Court of Vermont. Addison. Dec. 11, 1912.)

1. RELEASE (§ 29*) — OPERATION — JOINT WRONGDOERS.

A release of one joint tort-feasor by an instrument under seal is a conclusive discharge of all; but an unsealed discharge of one will not operate as a discharge of all, unless it appears that the payment made was received in full satisfaction.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. § 29.*]

2. RELEASE (§ 29*)—CONSTRUCTION AND OPERATION — JOINT WRONGDOERS — RELEASE NOT UNDER SEAL.

In trover for an automobile, taken by the two defendants and by one B. and one S., the defendants set up a parol writing by which the plaintiff, in consideration of \$50 paid by B. and \$50 to be paid, released B., upon an understanding that the release was for only a part of the plaintiff's damages, and was not to release his claim for compensation as against others, and a parol receipt and agreement given to S., after recovery against him in trover, reciting the receipt of \$100 from him as damages for the conversion, fixing the damages at \$400, and providing that the damages remaining unsatisfied, for which S. remained liable, were reduced to \$200 and the case continued. *Held*, that the receipt and agreement given to S. left the plaintiff the right to proceed for unsatisfied damages either against S. or the defendants.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. § 29.*]

Exceptions from Addison County Court; Frank L. Fish, Judge.

Trover by Arthur J. Blackmer against Charles E. McCabe and William Tisdale. Judgment for plaintiff, and defendants bring exceptions. *Affirmed*.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Charles I. Button, of Middlebury, for plaintiff. J. B. Donoway, of Middlebury, for defendants.

MUNSON, J. The two defendants, with one Bearor and Smith, the plaintiff's chauffeur, took the plaintiff's automobile without his consent and wrecked it by mismanagement. The defendants introduced in evidence a parol writing, by which the plaintiff, in consideration of \$50 paid by Bearor and \$50 to be paid, agreed to release Bearor from all further expense by reason of such taking, upon an expressed understanding that the release was for only a part of the plaintiff's damages, and did not release his claim for compensation as against the other members of the party. It also appeared that the plaintiff had sued Smith in trover, and had received \$100 from him as damages for the conversion, and had given him a parol receipt and agreement, which stated that the damages in the case were established at \$400, and that by reason of this payment the damages remaining unsatisfied, for which Smith remained holden, were reduced to \$200, and

that the case was to be continued. Relying upon these writings, the defendants moved for the direction of a verdict.

[1, 2] The defendants make no contention regarding the general doctrines applicable to the discharge of joint tort-feasors, as set forth in several of our cases. See *Eastman v. Grant*, 34 Vt. 387; *Sloan v. Herrick*, 49 Vt. 327; *Dufur v. Boston & Maine Rd.*, 75 Vt. 165, 53 Atl. 1068; *Robinson v. St. Johnsbury, etc., R. R. Co.*, 80 Vt. 129, 66 Atl. 814, 9 L. R. A. (N. S.) 1249, 12 Ann. Cas. 1060. A release of one joint tort-feasor by an instrument under seal is a conclusive discharge of all; but an unsealed discharge of one will not operate as a discharge of all, unless it appears that the payment made was received in full satisfaction. This case is not one of technical release, for the writings are not under seal. The writings do not acknowledge the receipt of full satisfaction, but affirm the contrary. Neither writing contains anything that imports a discharge of the cause of action. The first expressly reserves the right to proceed against the other delinquents. The second is without reservation, and speaks of the unpaid balance as something for which Smith remains holden. It is upon this feature of the case that the defendants base their claim. They contend that the only possible construction of this agreement is that the plaintiff holds Smith's promise to pay the balance, and accepts that promise in full satisfaction. It is said that this arrangement has the same force as if the plaintiff had accepted Smith's note in satisfaction of the unpaid balance. We think this position is untenable, and that the agreement, properly construed, leaves the plaintiff at liberty to proceed for unsatisfied damages against either Smith or the defendants. It was proper to submit the case to the jury.

Judgment affirmed.

STIMSON v. WHITMORE.

(Supreme Court of Rhode Island. Dec. 6, 1912.)

1. MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—LATENT DEFECTS.

While a servant assumes the risk of dangers which are so patent and obvious that he either knows, or in the exercise of ordinary care should know, of their existence, he is under no primary obligation to investigate for latent defects, and to test the fitness and safety of the place, fixtures, or appliances provided him by the master.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

2. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—SIMPLE TOOLS—QUESTION FOR JURY.

The mere fact that a tool is a simple one will not raise a presumption of assumption of risk by the servant using it and relieve the employer from all obligation as to care for its

safety for use by his employes, but the relative simplicity of the appliance and all the circumstances of the case must be considered, and the question presented to the jury, where the case is not so plain that but one conclusion can properly be drawn.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

3. MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT—HIDDEN DEFECTS—INSPECTION—QUESTION FOR JURY.

A stool used in a shoe store for the purpose of reaching shoes and boxes of shoes which could not be reached from the floor, which consisted of a horizontal top with one side consisting of a board extending slantingly downward from said top at an angle of 45 degrees, with the legs attached both to the horizontal and slanting sides by means of screws underneath and concealed from view, in the absence of a special inspection, was not such a simple contrivance that an employe assumed risk of injury from the loosening of the screws and the coming loose of a leg while she was standing thereon.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by May Stimson against Swanton C. Whitmore. From a judgment for the defendant, plaintiff brings exceptions. Exceptions sustained and cause remitted, with directions.

Bassett & Raymond, of Providence (R. W. Richmond, of Providence, of counsel), for plaintiff. Boss & Barnefield, of Providence, for defendant.

JOHNSON, J. This is an action of trespass on the case for negligence, wherein the plaintiff sues for permanent injuries received by her while in the employ of the defendant; such injuries being caused by the breaking or collapsing of a stool furnished by the defendant to his employes, among other fixtures, appliances, and apparatus, means and instruments, which he used in his business of retail shoe dealer.

The plaintiff's amended declaration is in two counts. The first count avers, among other things, that it was the duty of the defendant to keep and maintain in safe and reasonable repair the fixtures, appliances, apparatus, means, and instruments with which he carried on his said business, so that the plaintiff, while in the exercise of due care, and while engaged in performing the duties of her employment, should not be injured. It then alleges that among such instruments and appliances furnished the plaintiff were certain stools to step upon, for the purpose of reaching shoes and boxes of shoes which could not be reached from the floor. The declaration further avers that said stools consisted of a horizontal top, and that one side consisted of a board extending slantingly downward from said top at an angle of,

to wit, 45 degrees; and, further, that the legs of said stools were situated underneath said stools, some attached to the horizontal top, and one or more to the slanting side. "And the plaintiff further avers that the legs of said stools were held in place and tightened by means of a screw or screws underneath said stools, as aforesaid, so that the connections of the same were concealed from view, and not obvious to the plaintiff without a special inspection."

The declaration goes on to state that one of the stools, and especially the connections of the legs thereon with the body of the same, was permitted to become worn and out of repair and unsafe for use, which the defendant knew, or by the exercise of reasonable care could have known, and which the plaintiff did not know, and could not have known by the exercise of reasonable care; that on the 2d day of February, 1911, while in the exercise of due care, and while standing upon one of said stools furnished by the defendant, the stool toppled over, throwing her to the ground and seriously injuring her, caused by the insecure fastening of the stool to its legs.

The second count sets forth practically the same facts, but alleges a duty of inspection.

To this amended declaration the defendant demurred: First. Because it does not appear in said counts that the plaintiff could not, in the exercise of reasonable diligence, have known that the stool and the connections of its legs were worn, out of repair, and unsafe, before she placed herself upon said stool. Second. Because it appears in and by said counts that the plaintiff had an equal opportunity with the defendant of knowing of the condition of said stool and its legs. Third. Because it appears in and by said counts that the plaintiff was not in the exercise of due care. Fourth. Because each of said counts fails to state a cause of action.

The case was heard on the 7th day of February, 1912, before a justice of the superior court on the demurrer to the defendant's amended declaration, and said demurrer was sustained. The plaintiff excepted thereto, and the case is now before this court on the plaintiff's bill of exceptions; the only exception relied upon being to the decision sustaining said demurrer.

[1] The plaintiff's counsel contend that the alleged defective condition of the stool was necessarily hidden by reason of its peculiar construction, as set forth in the declaration, calling attention to the averments that the connections of the legs with the seat of the stool were hidden from view, and were not obvious to the plaintiff without a special inspection, and argue that a servant is not deemed to have notice of or assume the risks of such defects as can be ascertained only by investigation and inspection, for the pur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pose of ascertaining that there is no danger.

The rule is stated in 26 Cyc. 1213, as follows: "A person assumes the risk of injury from dangers and defects which are so patent and obvious that he either knew, or in the exercise of ordinary care should have known, of their existence. On the other hand, a servant is under no primary obligation to investigate for latent defects and test the fitness and safety of the place, fixtures or appliances provided him by the master. He has a right to rely upon the obligation resting upon the master to exercise reasonable care to see that they are fit and safe; and, although the circumstances may be such that a servant is chargeable with knowledge of such defects as are patent and obvious, and of such defects as, in the exercise of ordinary care, he ought to have knowledge of, he is not to be deemed as having notice, or as assuming the risks, of such defects and insufficiencies as can be ascertained only by investigation and inspection, for the purpose of ascertaining that there is no danger."

Among the cases cited is *Whipple v. N. Y., N. H. & H. R. R. Co.*, 19 R. I. 587, 591, 592, 35 Atl. 305, 306, 307 (61 Am. St. Rep. 796), where the plaintiff, a brakeman, was injured, while climbing the side of a car, by reason of the proximity of a telegraph pole to the track. The court says: "It is urged that if the proximity of the pole to the track, which made it dangerous, was not sufficiently obvious to the plaintiff to put him on his guard against injury from the pole, it was not sufficiently obvious to the officers of the defendant for them to observe it in the exercise of reasonable care; and hence that it cannot be held that the defendant was negligent in maintaining the pole in its position. But the answer is that the officers of the defendant located the pole; that it was their duty to have so located it as to make it safe; and, consequently, that if they failed in that respect the defendant must be held chargeable for their default. The defendant further contends that the plaintiff was guilty of contributory negligence in attempting to climb the ladder of the car while the train was in motion, without looking to see whether he was in danger from the pole, instead of climbing to the top of the car before giving the signal to the engineer to go ahead, or remaining on the footboard of the tender until the car had passed the pole. But if the dangerous proximity of the pole to the track was not so obvious as to be discoverable by observation, and the plaintiff had no notice of the danger, we do not think that it can be held, as a matter of law, that he was guilty of negligence in not looking forward to see whether he was in danger from the pole before starting to climb the ladder."

In *Wrisley Co. v. Burke*, 203 Ill. 250, 257, 67 N. E. 818, 820, the court says: "The servant is under no primary obligation to

investigate for latent defects and test the fitness and safety of the place, fixtures, or appliances provided him by the master. He may assume that they are fit and safe, and, though the circumstances may be such a servant is chargeable with knowledge of such defects as are patent and obvious, and of such defects as, in the exercise of ordinary care, he ought to have knowledge of, the servant is not to be deemed as having notice or knowledge of such defects and insufficiencies as can be ascertained only by investigation and inspection, for the purpose of ascertaining that there is no danger." See, also, *Armour v. Brazeau*, 191 Ill. 117, 60 N. E. 904; *Green v. Sansom*, 41 Fla. 94, 25 South. 332; *Murphy v. Marston Coal Co.*, 183 Mass. 385, 67 N. E. 342; *Adams Express Co. v. Smith*, 72 S. W. 752, 24 Ky. Law Rep. 1915; *Illinois Steel Co. v. Mann*, 100 Ill. App. 367, affirmed in 197 Ill. 186, 64 N. E. 328.

[2] Counsel for defendant further argue that the stool was an appliance of such simple character that the employer is not liable for an injury to an employé using it, due to its obviously defective condition. Counsel cite, *inter alia*, *Sheridan v. Gorham Mfg. Co.*, 28 R. I. 256, 66 Atl. 576, 13 L. R. A. (N. S.) 687. In that case the allegation was "that the ladder which the defendant provided and gave to the plaintiff was unsafe and defective, in that certain iron points, or spurs, with which said ladder was equipped at its lower ends, had become dull and smooth, so that said ladder while in use was likely to slip on the floor; and that while plaintiff in using said ladder was standing on one of its rounds said ladder slipped and precipitated the plaintiff to the floor, thereby injuring him." The plaintiff in that case contended that, inasmuch as he had alleged in his declaration that he was in the exercise of due care, and had no knowledge of the danger of slipping incident to the use of the ladder, he had tendered proper issues of fact upon these points, and that his declaration was not, for that reason, demurrable. The court held *contra*, citing, *inter alia*, *Baumler v. Narragansett Brewing Co.*, 23 R. I. 430, 433, 50 Atl. 841, 842. In that case the court said: "The plaintiff's declaration in effect, in so far as it states the condition of things existing at the time of the accident, comes to this, viz.: that there were certain large vats in the defendant's brewery which were so situated as to leave an open space underneath, between them and the floor, of about 13 inches, which vats rested on supports through or between which there was an opening into said space. That no machine or implement occupied any part of said space, and no pitfall or defect of any sort existed therein, but that it was simply an open space, with a floor beneath and the vats above, supported as aforesaid, and that the plaintiff, being ordered to clean out said

space, crawled through the opening leading thereto, and, while working therein, became wedged and bound, as aforesaid." And at page 435 of 23 R. I., at page 842 of 50 Atl.: "The plaintiff further argues that the allegation in the declaration that he was in the exercise of due care is sufficient to rebut the claim made by defendant that plaintiff assumed the risk. We do not think so. The court must take the declaration in a case of this sort as a whole in determining whether it states a case; and, if it appears from all the facts stated therein that the plaintiff could not have been in the exercise of due care, the mere fact that it alleges that he was does not save it from being demurrable. We may also add that we do not agree with the plaintiff's contention that the allegations of lack of knowledge of the work, and the location and lack of warning regarding the same, prohibit the assumption that the danger was obvious, and that the plaintiff assumed the risk. When it is apparent, from the facts stated in a case of this sort, that if the plaintiff had used his senses he must have known of the danger complained of, no allegations which he may incorporate in his declaration as to lack of knowledge, lack of warning, or duty of the master will be allowed to overcome and rebut said facts and render the declaration sustainable. Such a declaration is inconsistent, and therefore demurrable."

It does not, however, necessarily follow that, because the appliance involved in a case is a simple one, the master is therefore ipso facto relieved of all obligation as to care for its safety for use by his employes, or that the risk must be presumed to have been assumed by the servant. In each of the cases last mentioned the simplicity of the appliance was clear. In any case under consideration the relative simplicity of the appliance and all the circumstances of the case must be taken into consideration. The case may be so plain that but one conclusion can properly be drawn, as in the cases last mentioned; or it may be such as, under the facts disclosed, to require its submission to the jury.

In the note to *Vanderpool v. Partridge* (Neb. 1907), 13 L. R. A. (N. S.) 668, the annotator gives the rule as to the liability of the master for injury by defect in common tools thus: "The rule of respondeat superior rests upon the assumption that the employer has a better and more comprehensive knowledge than the employe, and therefore ceases to be applicable where the employe's means of knowledge of the danger to be incurred is equal to that of the employer. Such is the case where the instrument or tool, the defect in which is the cause of the injury, is of so simple a character that a person accustomed to its use cannot fail to appreciate the risks incident thereto. The mere simplicity of a tool, as is apparent upon consideration of the basis, above stated, of the rule of

respondeat superior, will not exempt the master from all care, or relieve him from liability under all circumstances; but the capacity, intelligence, and experience of the servant, the character of the defects, his opportunity for detecting them, his situation and the circumstances calculated to withdraw his attention from them, as well as the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise, are factors of varying importance, which must also be taken into account."

In *Williams v. Garbutt Lumber Co.*, 132 Ga. 230, 231, 64 S. E. 69, 70, the court says: "While in a number of cases, in dealing with the particular facts involved, it has been held that the tool then being used, such as a stick with which to push cars, an ordinary hammer, or the like, was so simple in its character that the servant had, at least, equal opportunity with the master for observing it, and that he was at fault for not doing so, or that the master could not be charged with negligence, as a matter of law, for not inspecting it, and that therefore in such cases there could be no recovery, no arbitrary and invariable rule can be laid down by which it can be declared that a master is relieved from the duty of inspecting certain specified tools, regardless of the circumstances of the case. Nor can a court well undertake to make a catalogue of tools by name, and say that as to injuries caused by them there shall be an arbitrary exemption from liability on the part of the master. At least, the duty of the master must necessarily to some extent, depend, not merely upon the name of the tool, but also the circumstances under which it is furnished or kept for use, and under which it is used. The underlying principle, rather than the name of the tool, is the important matter."

* * * We do not find it necessary in this state to adopt any arbitrary rule as to tools bearing certain names, or described somewhat indefinitely as 'simple tools.' If what is called the 'simple tool rule' is based on the principle of equality or superiority of opportunity for knowledge on the part of a servant, that principle forms a part of the test applied by our Civil Code (sections 2611, 2612) in a suit against a master by a servant for an inquiry claimed to have arisen from the negligence of the master in failing to comply with the duties imposed on him in regard to machinery, and which, as already seen, has been held to apply in principle to cases arising from defective tools. The application of the rule that it must appear that the master knew, or ought to have known, of the defect or danger, and that the servant injured did not know, and had not equal means of knowing, such fact, and by the exercise of ordinary care could not have known thereof, to the facts of the particular case under investigation will furnish a solution

of the question of liability or nonliability. In the determination of each case, the nature, character and simplicity or complexity of the tool is, of course, an important factor for consideration. The case may be so plain, on the pleadings or evidence, that but one conclusion can legitimately be drawn, as in decisions of this court cited below; or it may be of such a character as, under the facts disclosed, requires submission to the jury."

[3] In our opinion, the stool, as described in the declaration in the case at bar, cannot be said to be an appliance so simple that the master was under no duty to inspect or to keep the same in safe condition for use by the plaintiff.

Applying to this case the test applied in the Baumler Case, we cannot say that it appears from the facts stated in the declaration that the plaintiff could not have been in the exercise of due care, or that it is apparent from the allegations of said declaration that if the plaintiff had used her senses she must have known of the danger complained of. The evidence, when introduced, may or may not make out a case upon which the plaintiff can recover; but, in our opinion, it cannot be said that the allegations of the declaration fail to state a case upon which a recovery may be had.

Our conclusion is that the decision of the superior court sustaining the demurrer was error.

The plaintiff's exception to said decision is sustained, and the case is remitted to the superior court, with direction to overrule the demurrer and for further proceedings.

MAGOON v. MARSHALL et al.

(Supreme Court of Rhode Island. Dec. 18, 1912.)

CANCELLATION OF INSTRUMENTS (§ 37*) — GROUNDS—PLEADINGS—SUFFICIENCY.

A bill to set aside a voluntary conveyance, which alleges that complainant is some 70 years of age, that for 20 years she has required the frequent attentions of a physician, that for a long period after the death of her husband one defendant stood in the relation of special trust, assisting her in business matters, including the preparation of a will devising her estate to a codefendant, that defendant brought to her two deeds, one conveying her real estate in fee to codefendant and the other a deed from codefendant and his wife to complainant conveying to her a life interest, that defendant explained that the deeds would take the place of the will and would prevent any contest over her estate, that the disposition of her property through the deeds would protect her from liability on notes, and that the statement of defendant regarding her relief from liability was untrue, but which does not show that complainant's mind had become so weakened as to render her in any way incapable of making a deed, and which does not allege that defendant had any personal interest in the real estate conveyed, or

that he would profit by the transaction, states no cause of action against either defendants.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-81; Dec. Dig. § 87.*]

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Suit by Betsey Magoon against John Marshall and others. From a decree dismissing the bill, complainant appeals. Affirmed, and case remanded.

Howard B. Gorham and Waterman & Greenlaw, all of Providence, for complainant. Littlefield & Barrows, of Providence, for respondents.

PER CURIAM. This is a bill in equity, brought by the complainant against John Marshall, Evelyn Marshall, his wife, and Charles R. Magoon, in which the complainant seeks to set aside her voluntary conveyance of certain real estate. The complainant represents that she is some 70 years of age, and for upwards of 20 years has been in a state of health requiring the frequent ministrations and attentions of a physician; that for a long period subsequent to the death of her husband the respondent Charles R. Magoon had stood in the relation of special confidence and trust, assisting her from time to time in a variety of business matters, including the preparation of a will devising her estate to the respondent Marshall, named therein as John Marshall Magoon; that in May, 1910, the respondent Magoon brought to her two deeds, one conveying her real estate in fee simple to said respondent Marshall, and the other conveying back to the complainant from said Marshall and wife a life interest therein; that the presentation of these deeds to her was accompanied by an explanation on the part of the respondent Magoon that they were to take the place of the will, which had not been executed, and would serve to prevent any contest over the complainant's estate after her death, as the respondent Marshall was not a blood relation, and, further, that the disposition of her property through the medium of the deeds would protect her from liability on her personal notes to Jane B. Knapp and the respondent Charles R. Magoon; that the statements of the said respondent Magoon regarding her relief from liability on the notes aforesaid were untrue, for the reason that the said Jane B. Knapp did not know of or consent to such an arrangement. The complainant further represents that, being unlearned in such matters, and relying wholly upon the representations of the respondent Magoon, she signed the deed conveying her real estate to the respondent Marshall without consideration and without understanding that she was giving an absolute title. The deed from the respondent Marshall and wife

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to the complainant, conveying back a life estate in the same property, was also executed and delivered. The complainant prays that the deed made by her to the respondent Marshall may be decreed to be void and of no effect, or that the respondents may be decreed to reconvey said estate to her in fee simple.

To the complainant's bill the respondent Magoon demurred upon the following grounds: "First. Said bill does not allege any fraud committed or undue influence exerted by the respondent Charles R. Magoon upon the complainant, nor any conspiracy between him and any other person to defraud the complainant in the transactions set forth in said bill. Second. Said bill does not set forth that the respondent Charles R. Magoon in any way profited by the transactions complained of in the bill, nor does said bill of complaint ask for any specific relief against said Charles R. Magoon. Third. Because the only relief prayed in said bill against the respondent Charles R. Magoon is that he together with his two co-respondents, be ordered to reconvey the premises mentioned in the bill, and the bill shows upon its face that this respondent has no legal or equitable right to make or to join in making such conveyance."

The respondent Marshall also demurred to the bill assigning as causes: "First. Because said bill does not set forth any fraud committed or any undue influence exerted by the respondent upon the complainant, nor any conspiracy between him and any other person to defraud the complainant in the transactions set forth in said bill. Second. Because said bill does not set forth any mistake of fact by the complainant in making and executing the conveyance mentioned in said bill, but the only mistake which she alleges relates to the legal effect of the deed which she executed, and is clearly a mistake of law, against which equity affords no relief. Third. Because, if any such mistake was made by the complainant, as alleged in said bill, it appears by said bill that it was not a mutual mistake of the complainant and this respondent or any other person. Fourth. Because, if any such mistake was made by the complainant, as alleged in said bill, it does not appear by said bill that such mistake was caused by this respondent, nor with his knowledge and consent."

These demurrers were sustained by the court below on the ground that the complainant's bill failed to state a case of fraud or to show any collusion between the respondents. While the bill contains some statements as to the complainant's ill health, extending over a period of 20 years or more, it is not claimed that her mind had become so weakened thereby as to render her in any way or to any extent incapable of making a deed or transacting business. It does not

appear that the respondent Magoon had any personal interest in the subject-matter of the controversy, or that he was in any way to profit by the transaction. It is evident that the complainant was desirous that the respondent Marshall should eventually succeed to her property. To that end she had had a will prepared, and the deeds before mentioned were understood by her to be a desirable substitute therefor, although she says that she was not aware of the full effect of the deeds, and was in that regard ill-advised by the respondent Magoon, upon whom she relied for advice in her business matters. We cannot infer that the respondent Magoon acted fraudulently, simply from the fact that he gave erroneous advice to the complainant, in the absence of anything showing collusion or personal interest. So far as the respondent Marshall is concerned, there is no allegation of fraud in the complainant's bill, and none therefore can be inferred.

After a careful scrutiny of the complainant's bill, and the demurrers filed thereto, we think that the court was without error in sustaining said demurrers and dismissing the bill.

The decree of the superior court dismissing the bill is therefore affirmed, and the case is remanded to said superior court for further proceedings.

GREENE v. MABEY et al.

(Supreme Court of Rhode Island. Dec. 13, 1912.)

1. INFANTS (§ 84*)—GUARDIAN AD LITEM—POWERS.

Though a guardian ad litem of an infant defendant may do such things as are clearly to the advantage of the infant, and may make agreements in regard to formal matters in the cause, he cannot admit anything against the infant or waive anything in his favor, but plaintiff must prove his whole case; and any admission or waiver is ineffectual, though contained in the answer filed by such guardian.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 236-244; Dec. Dig. § 84.*]

2. INFANTS (§ 84*)—GUARDIAN AD LITEM—POWERS.

A guardian ad litem of an infant may not enter into an agreement stating facts on which the decision of the court and its decree admitting a will to probate must be based, where, under the will, if valid, the estate will pass to the widow of decedent, while otherwise it will pass, subject to dower and widow's interest, to the infant.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 236-244; Dec. Dig. § 84.*]

Case Certified from Superior Court, Providence and Bristol Counties.

Proceedings by Chas. W. Greene against Leon A. Mabey and others for the probate of the will of Chas. N. Mabey, deceased. There was a decree of the probate court denying probate, and the executor appealed to the superior court, which certified the case to the

Supreme Court under Gen. Laws 1908, c. 298, § 4. Case remitted to superior court.

George L. Cooke, of Providence, for plaintiff. Charles B. Mason, of Warren, for guardian ad litem.

VINCENT, J. This case comes originally from the probate court of the town of Warren, from which it was appealed to the superior court for the counties of Providence and Bristol, and is now certified to this court by said superior court upon the following:

"Agreed Statement of Facts.

"In the above-entitled cause, which is at issue upon its merits, the said Charles W. Greene, appellant, the said Mabel T. Mabey, an appellee, and the said Leon Arthur Mabey, Clinton Lee Mabey, and Clayton Ray Mabey, infants, by Charles B. Mason, their guardian ad litem duly appointed, hereby agree upon and herewith submit to this court the following as a true statement of the facts in said action, to wit:

"Charles N. Mabey, late of said Warren, deceased, was the husband of said Mabel T. Mabey. The said Leon Arthur Mabey, Clinton Lee Mabey, and Clayton Ray Mabey are the children of said Charles N. Mabey and said Mabel T. Mabey. The said Mabel T. Mabey, after the decease of the said Charles N. Mabey, duly presented a petition to the probate court of the town of Warren, together with an instrument in writing purporting to be the last will and testament of the said Charles N. Mabey, and praying that the said will be proved and allowed, and that letters testamentary be issued to Charles W. Greene said appellant. The said probate court thereafter, upon consideration thereof, decreed that said instrument was not the last will and testament of said Charles N. Mabey, and then and there denied and dismissed her aforesaid petition. From this decree the said Charles W. Greene, named and appointed executor in said instrument, duly appealed to this court, which said appeal, together with said instrument itself, which is herewith produced, is now before this court.

"The said instrument in writing purporting to be the last will and testament of the said Charles N. Mabey, including the attestation clause thereof, is wholly in the handwriting of the said Charles N. Mabey, except the signatures of the witnesses thereto. On the afternoon of the 8th day of July, A. D. 1911, being the day, month, and year named in said instrument, David H. Potter, one of the witnesses to said instrument, was in his garage at his place of residence in said Warren, with the other witness thereto, to wit, John P. Brownell, both of whom were intimately acquainted with the said Charles N. Mabey, and the said Charles N. Mabey then came over from his own house, which was near by, bringing with him a pen, a

bottle of ink, and the said instrument in writing. He had just previously to that informed the said David H. Potter that he was going to bring his will over to sign and have him, said David H. Potter and the said John P. Brownell, witness it, and the said David H. Potter had thereupon cleaned off a place on the work bench and put a newspaper thereon for the purpose. The said Charles N. Mabey then showed both of them, the said David H. Potter and John P. Brownell, the said instrument in writing and told them that it was his will, and that he wished them to be witnesses to it. The said instrument, as then shown to them, contained all the writing that is now thereon, except the attestation clause thereof and the signatures of the witnesses thereto. Thereupon the said Charles N. Mabey, saying, 'I must first sign this myself,' placed the said instrument upon the newspaper on the said work bench, and then, in the presence of the said David H. Potter and John P. Brownell, wrote upon said instrument the attestation clause thereof, to wit, these words: 'Signed, sealed, published, pronounced and declared by Charles N. Mabey as and for his last will and testament in our presence who have at his request in his presence and in presence of each other hereunto set our names as witnesses.'

"As soon as he had finished writing, first the said witness John P. Brownell, and next the said witness David H. Potter, signed their names to said instrument, as said signatures now appear thereon, both in the presence of each other and in the presence of the said Charles N. Mabey. The said Charles N. Mabey thereupon took the said instrument and carried it away with him. He was then over 21 years of age and of sound mind and memory."

The appellant's reasons of appeal are as follows: (1) "Said instrument [to wit, said will] was the last will and testament of said Charles N. Mabey." (2) "Said instrument [to wit, said will] should have been proved and allowed by said probate court of Warren as the last will and testament of said Charles N. Mabey." (3) "Letters testamentary should have been issued by said probate court of Warren to said Charles W. Greene." (4) "Said order and decree ought to be reversed."

The statement of facts which is now presented to this court, by way of certification from the court below, is signed by Charles W. Greene, who is named as executor in the will, by Mabel T. Mabey, the widow of Charles N. Mabey, and by Charles B. Mason as guardian ad litem of Leon Arthur Mabey, Clinton Lee Mabey, and Clayton Ray Mabey, who are the minor children of the said Charles N. and Mabel T. Mabey.

The agreed statement of facts was evidently designed to hasten the disposition of the case and obtain an early settlement of the question involved with the least possible

expense, all of which would be most desirable if it could be accomplished in accordance with the law governing such matters.

The question, however, arises, in the outset, as to whether a guardian ad litem has any power or authority to make an agreement stating facts which shall be binding upon his wards, and upon which the court would be justified in entering a decree.

[1] Courts have always been exceedingly zealous in guarding the rights and interests of minors. They have usually permitted guardians and guardians ad litem to do such things as were clearly to the advantage of the ward, and when the advantage to the ward was not clear they have instituted inquiry, and have sometimes referred the question of advantage to a master, before giving heed to the agreement of such guardian. The agreement of the guardian ad litem in regard to mere formal matters, such as relate to the speeding of the cause, as, for instance, entering into a stipulation to transfer the case from one court to another court of like jurisdiction, has been sanctioned. *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 249. On the other hand, courts have refused to permit a guardian ad litem to make an agreement that the decision in one case shall determine that in another, although the cases involve precisely the same facts and the same parties, and substantially the same points of controversy, on the ground that a guardian ad litem had but one duty to perform, and that was to defend the suit. *McClure v. Farthing*, 51 Mo. 109.

The courts have been practically unanimous in holding that a guardian ad litem can admit nothing against and waive nothing in favor of his ward, but that the adversary of such infant must prove his whole case, whether it be in law or in equity; and it makes no difference if such admission or waiver is contained in and forms a part of the answer filed by such guardian. *Collins v. Trotter*, 81 Mo. 275; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Johnson v. McCabe*, 42 Miss. 255; *Litchfield v. Burwell*, 5 How. Prac. (N. Y.) 341; *Massie v. Donaldson*, 8 Ohio, 377; *Shultz v. Sanders*, 38 N. J. Eq. 156; *Stinson v. Pickering*, 70 Me. 273; *Crain v. Parker*, 1 Ind. 374; *Tuttle v. Garrett*, 16 Ill. 354; *Holden v. Hearn*, 1 Beavan, 445; *Claxton v. Claxton*, 56 Mich. 557, 23 N. W. 810.

The same doctrine has been held by the federal courts. In *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047, it was held that a next friend or guardian cannot, by admissions or stipulations, surrender the rights of the infant; and in *White v. Joyce*, 158 U. S. 128, 15 Sup. Ct. 788, 39 L. Ed. 921, the court held that where there are infant defendants, and it is necessary, in order to entitle the complainant to the relief he prays, that certain facts should

be before the court, such facts, although they might be the subject of admission on the part of adults, must be proved against infants; and that is also the doctrine which has received the approval and sanction of this court in the case of *Eaton v. Tillinghast*, 4 R. I. 278.

[2] If the will of Charles N. Mabey should be held to be a good and valid will, the estate of said decedent would pass to his widow, Mabel T. Mabey; otherwise it would pass, subject to dower and the widow's interest in the personal estate, to the three minor children before mentioned. The questions therefore submitted to this court, under the statement of facts, involve the disposition of the bulk of the decedent's property; that is, whether it shall go to the widow under the will, or to the children as heirs at law.

We think that it is clear, under the authorities cited, that a guardian ad litem cannot lawfully enter into an agreement stating facts upon which the decision of the court and its decree must be based, and that full proof of all facts which do not clearly appear to the court as advantageous to the infants must be established by proper testimony.

The case is remitted to the superior court for further proceedings in accordance with this opinion.

BASABO v. SALVATION ARMY, Incorporated.

(Supreme Court of Rhode Island. Dec. 16, 1912.)

1. CHARITIES (§ 39*)—CHARITABLE CORPORATIONS—SALVATION ARMY.

The Salvation Army is a charitable corporation.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 100; Dec. Dig. § 39.*]

2. CHARITIES (§ 45*)—CHARITABLE CORPORATIONS—LIABILITIES FOR TORTS OF SERVANTS.

A charitable corporation is liable like any other corporation for injuries to third persons caused by the negligence of its servants in the driving of its teams for its purposes, though it has not lacked diligence in the selection or retention of its servants, since the true relation of master and servant exists between it and its servants.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. §§ 80, 81, 102-104; Dec. Dig. § 45.*]

Case certified from Superior Court, Providence and Bristol Counties.

Action by Julian O. Basabo against the Salvation Army, Incorporated. There was a demurrer to the declaration, and the cause was certified to the Supreme Court under Gen. Laws 1909, c. 298, § 5, for determination of the question raised by the demurrer. Question answered in the affirmative, and cause remitted.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

A. B. Crafts, of Providence, for plaintiff. Gardner, Pirce & Thornley, of Providence (Henry W. Gardner, of Providence, of counsel), for defendant.

PARKHURST, J. This is an action at law by the plaintiff for the death of his minor daughter alleged to have been due to the negligence of a servant of the defendant. To this declaration the defendant demurred on the ground that the defendant corporation was described in said declaration as a charitable and eleemosynary corporation, and that it was as such not liable for the torts of its servants and agents. After arguments upon the demurrer had been heard in the superior court, the case was certified to the Supreme Court for the determination of the question raised by said demurrer, as being a question of such doubt and importance, so affecting the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings, under the provisions of chapter 298, § 5, of the General Laws of 1909. The question certified was framed on the language descriptive of said defendant corporation used by the plaintiff in his amended declaration, and is as follows: "Is a corporation, which is lawfully under its charter and in accordance with the purposes therein prescribed and authorized, doing business in the city of Providence for the purposes of distributing charity and assistance, and supplies of food and clothing and medicine to persons needy or sick or suffering in said Providence, and for the purposes of giving religious entertainments and instructions in said Providence and improving the morality of the people living in said city, and for all said purposes employing divers horses and teams and servants and agents in and about the streets and highways of said Providence in collecting clothing, food, supplies, medicines, and charities, and in distributing the same, and for its other purposes, liable for injuries to persons caused by the negligence of such servants and agents in the care and management of said horses and teams while employed for such purposes, where it is not shown or alleged that there has been any lack of care or diligence on the part of such corporation in the selection or retention of such servants or agents?"

The defendant's counsel contends that, under the facts stated in the question above quoted, the defendant is a charitable corporation, as to which no dispute is made by the plaintiff's counsel; and we are of the opinion that the defendant is a charitable corporation in accordance with definitions so often repeated in the cases that no citation of authority is necessary. The defendant's counsel further contends that, as such charitable corporation, it is not liable for the torts or negligence of its servants or agents, where, as is shown by the question, it has

not been guilty of negligence in the selection or retention of its servants or agents, and where there is no duty undertaken requiring the exercise of special care or skill such as that of a physician or surgeon. And the defendant's counsel cites numerous cases in support of its contention; but it will be found upon examination of the cases cited, where it has been held that a charitable corporation or institution is not liable, that the great majority of them are cases where suit was brought by a patient or inmate of the hospital or institution, who was receiving the benefit of the charity at the time of the alleged injury. Some of the cases cited absolutely deny the liability of a charitable corporation in any event to pay damages for injuries arising from the negligence of its servants or agents, either to a patient or inmate or to a third party, on the ground of public policy, saying (as in *Fire Ins. Patrol v. Boyd*, *infra*) that "it would be against all law and all equity to take those trust funds, so contributed for a special, charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants" of the charity, and arguing that, if such damages were to be allowed to be paid out of the trust funds, it would tend to destroy the charity, and to discourage the giving of money or other property for the establishment of charities. *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 647, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; *Gable v. Sisters of St. Francis*, 227 Pa. 254, 75 Atl. 1087, 136 Am. St. Rep. 879; *Whittaker v. St. Luke's Hospital*, 137 Mo. App. 116, 117 S. W. 1189; *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 78 Atl. 898, 33 L. R. A. (N. S.) 141; *Downes v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 802, 45 Am. St. Rep. 427; *Pepke v. Grace Hospital*, 130 Mich. 493, 90 N. W. 278 (no negligence shown, but approves *Downes Case*); *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 558, 4 Ann. Cas. 103; *Abston v. Waldon Academy*, 118 Tenn. 24, 102 S. W. 351, 11 L. R. A. (N. S.) 1179; *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453. Other cases cited, while arguing along the same general lines of public policy, limit the exemption of charitable corporations from liability for injuries occasioned by the negligence of physicians, surgeons, nurses, and servants, and agents to cases where there has been no negligence on the part of the defendants in the selection or retention of such persons. *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; *Union Pacific R. Co. v. Artist*, 19 U. S. App. 612, 60 Fed. 365, 9 O. C. A. 14; *Van Tassell v. Manhattan Eye & Ear Hospital*, 15 N. Y. Supp. 620;¹ *Elghmy v. Union Pacific R. Co.*, 98

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 60 Hun. 585.

Iowa, 538, 61 N. W. 1056, 27 L. R. A. 296; Plant System, etc., v. Dickerson, 118 Ga. 647, 45 S. E. 483; Railway Co. v. Buchanan, 126 Ky. 288, 103 S. W. 272, 11 L. R. A. (N. S.) 711; McDonald v. Mass. General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Benton v. City Hospital, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436; Farrigan v. Pevear, 193 Mass. 147, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484, 8 Ann. Cas. 1109; Thornton v. Franklin Square House, 200 Mass. 465, 86 N. E. 909, 22 L. R. A. (N. S.) 486.

We think these latter cases must be regarded as entirely inconsistent with the general proposition of the exemption of charitable corporations on grounds of public policy set forth in the previous cases, as was said in reference to many of these cases by Gaynor, J., in Kellogg v. Church Charity Foundation, 128 App. Div. 214, at page 217, 112 N. Y. Supp. 566, at page 569: "In many if not most of the cases a ground for the nonliability for the torts of agents or servants of charitable institutions is that to pay damages for such torts would be a diversion of their funds from the trust purposes for which they are donated by the charitable, and thus a contravention of the trust, and that as such institutions have no other funds it would be futile to allow judgments to be taken against them in such cases. But the opinions of the judges in these same cases almost invariably except cases where the agent or servant was incompetent and there was negligence in his selection; failing to take note that it would be as much a diversion of the trust funds to pay damages for the tort of negligence in selection as for any other tort. If the rule exist it must necessarily apply to all torts and in all cases. The only support for the argument that it does exist is found in the remarks of judges in certain rather old English cases, which were repudiated in later cases, and never had a direct application to actions of tort against charitable corporations such as are now common. It is true that an action does not lie against a trustee under a will, or the like, as such, for his torts or those of his servants in the affairs or administration of the trust. He has to be sued individually; but the reason is purely technical, and the courts allow the judgment against him individually for damages to be paid out of the trust funds, if he was free from willful misconduct in the tort. No rule, therefore, that trust funds may not be used to pay damages for torts in the administration of the trust exists even in the case of ordinary express trusts, let alone in the general trusts of charitable corporations. Powers v. Mass. Homeopathic Hospital, 109 Fed. 294 [47 C. C. A. 122, 65 L. R. A. 372]; Bruce v. Central Meth. Ep. Ch., 147 Mich. 230 [110 N. W. 951, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150]; Hewett v. Association, 73 N. H. 556 [64

Atl. 190, 7 L. R. A. (N. S.) 496]. The position of such a corporation in respect of its torts would seem to be the same as that of an individual carrying on similar charitable work with donated funds or with his own funds. I do not understand that if my servant, sent out by me on an errand of mercy or charity, negligently runs over one in the street, I am not liable for his act." These views were approved by the Court of Appeals of New York (although the decision was reversed on other grounds) in Kellogg v. Church Charity Foundation, 203 N. Y. 191, 194, 96 N. E. 408 (38 L. R. A. [N. S.] 481).

We are of the opinion that the doctrine of the absolute exemption of charitable corporations is very much weakened by the position taken by the courts in these later citations, and is practically repudiated by them, whatever general remarks the courts may have made in regard thereto, when the same are submitted to a careful and logical consideration. And this is all the more apparent when we consider the doctrine laid down in Powers v. Massachusetts Homeopathic Hospital, 109 Fed. 294, 303, 47 C. C. A. 122, 132 (65 L. R. A. 372), where, after a very careful review of the authorities up to the date of decision (1901), the United States Circuit Court of Appeals repudiated the doctrine of general exemption on the ground of public policy, and placed the exemption of the defendant in the case at bar, where it was sued for negligence of a nurse by a patient injured, upon the ground that: "One who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants." To paraphrase the illustration put by the learned judge before whom this case was tried, it would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able, not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of those thousand wounded men. We cannot perceive that the position of the defendant differs from the case supposed. The persons whose money has established this hospital are good Samaritans, perhaps giving less of personal devotion than did he, but, by combining their liberality, thus enabled to deal with suffering on a larger scale. If, in their dealings with their property appropriated to charity, they create a nuisance by themselves or by their servants, if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like

any other individual or corporation. The purity of their aims may not justify their torts; but, if a suffering man avails himself of their charity, he takes the risks of malpractice, if their charitable agents have been carefully selected." The same doctrine was hinted at, though not fully developed, in the case of *Hearns v. Waterbury Hospital* (1895) supra, 66 Conn. 98, on page 125, 33 Atl. 595, on page 604 (31 L. R. A. 224), where it says: "Such patient, who may be injured by the wrongful act of a hospital servant, is not a mere third party—a stranger to the transaction—he is rather a participant." So in *Downes v. Harper Hospital* (1894) supra, 101 Mich. 555, on pages 559, 560, 60 N. W. 42, on page 43 (25 L. R. A. 602, 45 Am. St. Rep. 427), the court seems to recognize the same principle where it says: "It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition." Certain other cases have been cited on behalf of the defendant which relate solely to the denial of the right of recovery for injuries arising from negligence of agents and servants of public institutions, some of which are hospitals, some penal or reformatory institutions, where the functions performed are those of a state or of a municipal corporation, and where the ground of exemption is that the defendant is performing a public function of the state, or of a municipal corporation, and shares the immunity of the state or of such municipal corporation from suit. *Benton v. City Hospital*, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436 (in one aspect); *Noble v. Hahnnemann Hospital*, 112 App. Div. 663, 98 N. Y. Supp. 605; *Williamson v. Louisville Industrial School*, etc., 95 Ky. 251, 24 S. W. 1065, 23 L. R. A. 200, 44 Am. St. Rep. 243; *Corbett v. St. Vincent's*, etc., 177 N. Y. 16, 68 N. E. 997. The case of *Fordyce et al. v. Women's C. N. Library Ass'n*, 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485, cited by defendant, is to the effect that the real estate of a charitable corporation dedicated to charitable uses cannot be sold under execution on a judgment against the corporation. These latter cases are not in point in this inquiry.

We have referred at some length to the above cases, which are cited on behalf of the defendant, in order to classify them, and in the endeavor to show that the doctrine of the general immunity of charitable corporations from liability for damages occasioned by the negligence of servants and agents on grounds of public policy is not so widely held as was contended in argument, but, in its broadest sense, is confined to seven states, from which the cases first referred to are taken; and that the doctrine of qualified immunity, in cases where no negligence ap-

pears in the selection or retention of agents or servants, does not logically rest upon grounds of public policy, as somewhat loosely argued in the second list of cases, above referred to, but could properly and logically be rested in most cases upon the doctrine that the physicians and surgeons in attendance upon patients in hospitals, or the nurses who are under the direction of such physicians or surgeons, are not in general the servants of the defendant charity in the true sense of the relation of master and servant, because, as to the nature and manner of their services, they are not under the direction of the defendant, but that they become and remain the servants of the patient so long as they are in attendance upon such patient; and that the full duty of the defendant charity has been performed if it has exercised due care in the selection of competent persons for such service.

It has been suggested on behalf of the defendant that the principles set forth by this court in *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675, are not applicable in the decision of the case at bar and should not be applied; and that in view of the numerous decisions of other courts, rendered since that case was decided, this court should not adhere to that decision. That case has been carefully re-examined in the light of all the cases cited by the parties hereto, and of some other cases which are cited by neither party, and this court sees no reason to modify the conclusions reached in said decision, or in any respect to recede from them or to doubt their correctness, upon the facts of that case as reported. It is true that, in many of the cases decided by other courts since 1879, the *Glavin* Case has been referred to, in some it has been criticised, but in none of them has it been fully and correctly stated, nor do we find any case which is quite on all fours with it.

As we have already indicated above, in speaking of the relation between a charitable hospital corporation and its physicians and surgeons, that such relation is in general not that of master and servants, we find in the *Glavin* Case, 12 R. I. page 423, 34 Am. Rep. 675, the following discussion: "It is quite conceivable that a corporation might not agree to do more than furnish hospital accommodations, leaving the patient to find his own physician or surgeon. In such a case the corporation would plainly not be liable for the torts of the physicians or surgeons, for in such a case they would not be its servants, and it would not have assumed any responsibility in their selection. But that is not this case. Here the physicians or surgeons are selected by the corporation or the trustees. But does it follow from this that they are the servants of the corporation? We think not. If A. out of charity employs a physician to attend B., his sick neighbor, the physician does not become A.'s servant,

and A., if he has been duly careful in selecting him, will not be answerable to B. for his malpractice. The reason is that A. does not undertake to treat B. through the agency of the physician, but only to procure for B. the services of the physician. The relation of master and servant is not established between A. and the physician. And so there is no such relation between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has power to dismiss them; but it has this power, not because they are its servants, but because of its control of the hospital where their services are rendered. They would not recognize the right of the corporation, while retaining them, to direct them in their treatment of patients. But, though the relation of master and servant cannot be said to exist between the hospital and the physicians and surgeons attendant on it, the hospital does nevertheless assume a responsibility in that it uses its own judgment, or that of its trustees, in selecting them, and impliedly, therefore, undertakes to exercise reasonable care to get such as are skillful and trustworthy in their professions. A patient has a right to rely on the exercise of such care, and consequently if, through the neglect of the hospital to exercise it, he receives an injury, he is entitled to look to the hospital for indemnity, unless the hospital enjoys some extraordinary exemption from liability. In the case at bar, however, the injury was not received from a physician or surgeon, but from a surgical interne, and it may be that a surgical interne stands on a different footing. There are some cases of minor importance in which the internes are allowed to act as physicians and surgeons, and in such cases I think that their relation to the corporation does not differ from that of a visiting physician or surgeon. But the internes act in still another capacity. The corporation undertakes to furnish physicians and surgeons for all kinds of cases, including the most critical. It has a regular staff of physicians and surgeons. But inasmuch as these are not, like the internes, constantly in attendance at the hospital, they must frequently be sent for. The corporation undertakes to send for them, and of course it must do it through an agent. The internes are the persons appointed to perform this duty for it. A rule of the hospital prescribes that in all cases requiring immediate and important action, in all doubtful cases, and in all cases requiring an immediate operation, the interne shall send for the surgeon of the day, and, if he cannot be found, for one of the other surgeons. Here, then, we have the relation of principal and agent, or master and servant. If the interne neglects to call the surgeon in the class of cases designated, his neglect is the neglect of the corporation. Now the plaintiff contends that his injury was such that, under the rule, a sur-

geon should have been immediately sent for, and that the interne's neglect to do it cost him his arm. He also contends that the corporation did not use proper care in selecting the interne, who was incompetent for his position, and thereby he suffered the injury complained of. He contends that he was entitled to recover on both these grounds, and, if the evidence was sufficient to establish them, we think that he was entitled to recover on both grounds, unless the hospital enjoys some peculiar immunity. This brings us to the important question whether the hospital does enjoy any peculiar exemption from liability. The claim that it enjoys such an exemption rests upon two grounds, to wit, on the ground of public policy, and on the ground that the hospital had no funds except such as are exclusively dedicated to the charitable uses for which it was established, and which therefore cannot be applied to indemnify a patient who has been injured by the negligence or malpractice of a physician or surgeon, or of a medical or surgical interne. The first ground is the ground on which the plaintiff was nonsuited. The argument is that hospitals, like the Rhode Island Hospital, are a public benefit; but if they are liable for the torts of the physicians or surgeons attendant on them, or of the medical or surgical internes, or of their nurses and other servants, people will be discouraged from voluntarily contributing to their foundation and support, and therefore public policy demands that they shall be exempted from liability. In our opinion the argument will not bear examination. The public is doubtless interested in the maintenance of a great public charity such as the Rhode Island Hospital is, but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully, and to that extent, therefore, it has an interest against exempting any such person and any such corporation from liability for its negligences. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it. Whether it shall be or not is not a question for the court, but for the Legislature." The court then proceeds to a critical examination of the earlier authorities in England upon which it was supposed that the doctrine of the absolute immunity of trust funds was founded, and shows satisfactorily, to this court at least, that such doctrine of absolute immunity has no logical foundation.

The Glavin Case is peculiar in this: That, while by the rules of the defendant corporation it was provided that "in all cases requiring immediate and important action, in all doubtful cases, and in all cases requiring an immediate operation, the interne shall send for the surgeon of the day, and, if he cannot be found, for one of the other surgeons" (12 R. I. page 425, 34 Am. Rep. 675),

the case shows that this was not done; but that after the abortive attempts of an incompetent interne to stop the hemorrhage by ligating certain arteries, and after the placing of a tourniquet upon the arm to stop the hemorrhage so tightly as to stop the circulation, the patient was left in this condition for nearly 17 hours before the arrival of a surgeon who was skillful enough to ligate the arteries, whereby the injury complained of, resulting in gangrene and loss of the arm, was caused. We find no such case among all the numerous cases cited, nor do we find that any court, in referring to the Glavin Case, has adequately set forth the peculiar features of the negligence complained of as the cause of the injury. The Glavin Case thus stands for four things: First, it sets forth the true relation of a charitable corporation to the skilled attendants, such as physicians, surgeons, and nurses, whose services are furnished to its patients, showing that such skilled attendants are not in general the servants of the corporation in that they are not under the control of the corporation as to their treatment of patients, and that, if they are selected with due care, their negligence is not the negligence of the corporation, and we are of the opinion that upon this principle, in most of the cases cited relating to such corporations, their immunity from responsibility for damages might have been more logically and properly founded; second, that there are certain duties to patients which are corporate duties, such as the exercise of due care in the selection of skilled and competent attendants and the exercise of due care in the summoning of such attendants in a case where the condition of the patient requires such service, and that the agent of the corporation, whose duty it is to summon such attendants, is in such case the agent and representative of the corporation, whose negligence is deemed to be that of the corporation itself; third, that the doctrine of the general immunity of a charitable corporation from liability for damages, on the ground of public policy as involving the diversion of trust funds from the purposes of the trust, has no logical foundation; fourth, that, where such a corporation has funds available for the general purposes of the corporation, it may apply such funds to pay damages for which it is held liable notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them" (12 R. I. page 428, 34 Am. Rep. 675), even though certain property, such as its real estate, may be "subject to so strict a dedication that it cannot be diverted to the payment of damages." 12 R. I. page 429, 34 Am. Rep. 675. So much for the general principles of liability as they are to be and have been applied as between a charitable corporation and its beneficiaries.

When we come to the question of liability

of such corporations for their negligence or the negligence of their servants or agents resulting in injuries to third parties, who are not in the relation of inmates, patients, or beneficiaries, we find comparatively little clear authority. Among all the cases heretofore referred to, where charitable corporations have been held to be immune from liability, we find only one clear case which declares such immunity in relation to injury suffered by a third party by reason of the negligence of its servants. This case is *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745, where it appeared that plaintiff's intestate, while walking on the street, was killed by the negligent act of a servant of the patrol in throwing a bundle of tarpaulins, which had been used to cover goods at a fire, from a window in the building where the fire had occurred upon Boyd, the plaintiff's intestate. The court held that the Fire Insurance Patrol was a charity and not liable under the doctrine of general immunity heretofore discussed (and which this court has repudiated). This case is to some extent offset by the case of *Newcomb v. Boston Protective Dept.*, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778, where a similar corporation was sued in tort for personal injuries occasioned to the plaintiff, a cab driver, by a collision between his cab and a wagon of the defendant, through the alleged negligence of the driver of the wagon, a servant of the defendant. The Massachusetts court held that the defendant was a private corporation, not a charity, and attempted to distinguish the defendant from the Fire Insurance Patrol in the previous case, but we think the distinction is not well made out. In the *Newcomb Case* the plaintiff was held entitled to recover. We are of the opinion that the *Newcomb Case*, in holding that the defendant was not a charity, is a better reasoned case than that of *Fire Ins. Patrol v. Boyd*, supra. Certain other cases which hold that such charitable corporations are not liable for injuries to employees due to negligence in having machines out of order, or in not giving proper warning or instruction, are *Whittaker v. St. Luke's Hospital*, 137 Mo. App. 116, 117 S. W. 1189, where the doctrine of general immunity is held; *Cunningham v. Sheltering Arms*, 61 Misc. Rep. 501, 115 N. Y. Supp. 576, and *Farrigan v. Pevear*, 193 Mass. 147, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484, 8 Ann. Cas. 1109, in which two latter cases the plaintiffs appear to have been inmates and beneficiaries of the charity. In the case of *Noble v. Hahnemann Hospital*, 112 App. Div. 663, 98 N. Y. Supp. 605, where the plaintiff sued for injuries suffered by reason of the negligence of the driver of defendant's ambulance in colliding with a wagon in which the plaintiff was sitting, the defendant was a charity and was representing the city in the performance

of a municipal function, and was held not liable on both grounds. And see *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566, Id., 203 N. Y. 191, 194, 96 N. E. 406, 38 L. R. A. (N. S.) 481, supra, where, under similar circumstances, the liability of a charitable corporation was sustained. With these exceptions, which we do not find to be of even persuasive authority in the case at bar, we find that the adjudicated cases, which have dealt with the question of the liability of a charitable corporation to its servants or to third parties for injuries arising from negligence, have held in favor of the plaintiffs.

In the case of *Hewett v. Association* (1906) 73 N. H. 556, 64 Atl. 190, 193 (7 L. R. A. [N. S.] 496), a nurse in the employ of the defendant, a charitable corporation, who was receiving wages and instruction in consideration of her services as such nurse, was placed by the superintendent in charge of a patient suffering from diphtheria, of which the superintendent had notice, but neglected to give notice to the nurse. The nurse, not knowing the nature of the case, took the disease, and, for the injury to her caused thereby, brought suit. She was held entitled to recover. Exemption from liability was claimed by the defendant on the same grounds of exemption as set forth in many of the cases above cited. After examining the statutes of New Hampshire under which the defendant was incorporated, and finding therein no express exemption from liability, the court proceeds to a careful examination of the cases holding such corporations exempt from liability on general grounds of public policy, and the court finds from the evidence that the plaintiff was a servant or employé of the defendant corporation. In stating its conclusions upon this branch of the case, the court says as follows: "If she had been employed by an individual to attend a member of his family afflicted with smallpox, of which he had knowledge, but of which he did not inform her, and she took the disease without fault on her part and suffered damage therefrom, it would not be seriously denied that he was guilty of actionable negligence in not informing her of the danger to which he exposed her. It was his duty arising from his employment of her, or from the contractual relation of master and servant existing between them, to warn her of the danger incident to the service which he knew, or under the circumstances ought to have known, and of which he knew she was ignorant, though in the exercise of ordinary care. And this duty is a nondelegable one. *Hamel v. Company*, 73 N. H. 386 [62 Atl. 592]; *Englisch v. Amidon*, 72 N. H. 301 [56 Atl. 548]; *Wallace v. Railroad*, 72 N. H. 504, 514 [57 Atl. 913]. To say that a similar duty was not imposed upon the defendant for the benefit and protection of the plaintiff, because it is a charitable corporation, is to

relieve such corporations from the reasonable obligation of exercising the care ordinarily required of, or contractually assumed by, men in general in the prosecution of their legitimate business. The necessity for such an exceptional holding is not apparent. Since the property of the defendant is held for the general purpose of maintaining a hospital, without other specific limitation, it is no more exempt from being appropriated to the payment of damages occasioned by the negligence of the hospital than is the property of an individual, which he holds for commercial or charitable purposes, for the consequences of his negligence. In conducting the affairs of a hospital, its officers and agents are as liable to commit acts of negligence as are the officers and agents of a railroad or other business corporation. Men in general are not uniformly careful. Experience shows that negligence—the failure to exercise ordinary care—is to be expected when men engage in industrial pursuits. It may not inappropriately be said to be necessarily incidental in the accomplishment of most practical results through the agency of men. The donors of the defendant's property for hospital purposes were not ignorant of this fact, and are presumed to have given the trust property, knowing that it might be required for the liquidation of claims in tort, as well as for claims in contract, incurred in carrying out the purposes of the corporation. Indeed, its conceded authority to contract for the employment of nurses and other necessary agents would seem to include power to respond in damages for all breaches of such contracts, one essential or incidental element of which is its duty to exercise care as well as its duty to pay the stipulated compensation. No conditions were imposed upon the defendant, either by its charter or by the donors of its property, by which the contracts of employment it was obliged to make with its servants should have a different effect from that usually given to such contracts, or that the relations between it and its employes should be legally different from those usually subsisting between master and servant. There is therefore no substantial reason for holding that it did not owe the duty to the plaintiff of warning her of the dangers of her employment under the law as applied to the ordinary relation of master and servant. In this respect the Legislature has not invested it, either expressly or inferentially, with peculiar powers." This case was not cited by either party in the case at bar, but it is evidently referred to in the defendant's supplemental brief, where it is said: "In New Hampshire a charitable corporation is now liable for the acts of its servants and agents to the same extent as a business corporation, and there are decisions to this effect, but they are based solely upon the New Hampshire statute, which declares in plain terms

that such corporation shall be so liable. These decisions in New Hampshire are therefore not in point upon this question, although they have been cited by the Michigan and New-York courts in the decisions above referred to." There is no ground for such a statement. The New Hampshire Supreme Court refers to the statutes only to show that the defendant was incorporated as a charitable corporation, and that there was no express statutory exemption from liability. The decision of the case is based entirely upon general considerations as above set forth.

In *Bruce v. Central M. E. Church* (1907) 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150, two members of the court found that the defendant was not a charitable corporation and therefore not exempt. But six members of the court agreed that the defendant was a charitable corporation, and proceeded to examine the doctrine of the exemption of such charitable corporation from liability for negligence. In this case plaintiff was an employé of a contractor engaged in decorating the church building, and sued for injuries sustained by reason of the breaking of defective scaffolding furnished by the agents of the defendant. The majority opinion, after setting forth the reasons for holding the defendant to be a charitable corporation, proceeds to the examination of the case of *Downes v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427, *supra*, where some of the language used was consistent with the doctrine of general exemption on grounds of public policy, and says as follows: "I conclude, therefore, that we cannot hold the principle of the decision in *Downes v. Harper Hospital*, *supra*, inapplicable, upon the ground that the funds of the church are not charitable trust funds. This leads us to the inquiry, Is there any other ground upon which we should hold *Downes v. Harper Hospital* inapplicable? There is this distinction between *Downes v. Harper Hospital* and this case, *viz.*, in the *Downes* Case plaintiff was a patient in defendant's hospital, and therefore a beneficiary of the charitable trust administered by the hospital corporation, while in this case he was an employé of defendant's contractor, and not a beneficiary of the trust administered by defendant. If we hold that the principle of the *Downes* Case applies to the case at bar, we must declare that that principle exempts a corporation administering a charitable trust from all liability for the torts of its agents, and, as a corporation can act only by and through its agents, that it is exempt from all liability whatsoever for torts. What is the principle underlying the *Downes* Case? Does it exempt a corporation administering a charitable trust from all liability for torts? Those who answer this question in the affirmative cannot support their position by

appealing to the reasoning of the opinion in that case. While that opinion says, 'The law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution,' the pith of its reasoning in my judgment is contained in the following words: 'It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employes, though such acts result in damages to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition.' " And after referring to a large number of the cases heretofore cited, the opinion goes on (page 252 of 147 Mich., page 953 of 110 N. W., 10 L. R. A. [N. S.] 74, 11 Ann. Cas. 150): "In the latest of these cases (*Powers v. Homeopathic Hospital*), the opinion is exhaustive and elaborate, and discusses nearly all the authorities. It is held that the ground upon which liability is denied is that of assumed risk; the court saying: 'One who accepts the benefit of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants.' If this is correct, it is scarcely necessary to say that that principle has no application to the case at bar. Is it correct? The ground upon which liability is denied in nearly all the foregoing cases is that stated in the *Downes* Case, *viz.*, that it would thwart the purpose of the trust; that is, it would oppose the will of the founder of the trust to pay from the trust funds damages caused by an agent's torts. It is entirely logical to say that this will must be recognized by beneficiaries of the trust. It may justly be said that the benefit of the trust is extended to them and accepted by them upon the implied condition that they shall recognize that will. By becoming beneficiaries, they agree to recognize it. But I can see no ground upon which it may be held that the rights of those who are not beneficiaries of a trust can in any way be affected by the will of its founder. The rights of such persons are those created by general laws, and the duties of those administering the trust to respect those rights are also created by general laws. The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust. Such a holding must rest upon the argument that the advantages reaped by the public from

such trusts justify the exemption; that is, as applied to this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound—and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual—it should be addressed to the legislative, and not to the judicial, department of the government. It is our duty as judges to apply the law. We have no authority to create exemptions or to declare immunity." The opinion then further very carefully examines the underlying authorities in the English cases of *Duncan v. Findlater*, 6 Clark & F. 894, and *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686, with the subsequent cases, and shows that the doctrine stated in many of the cases that those administering a trust fund are not responsible for the torts of their agents, because damages for such torts cannot be paid from the trust fund, is not well founded, as this court has already held in the *Glavin Case*, supra. And finally, in disposing of this question, the opinion says (page 255 of 147 Mich., page 954 of 110 N. W., 10 L. R. A. [N. S.] 74, 11 Ann. Cas. 150): "I conclude from this reasoning that corporations administering a charitable trust, like all other corporations, are subject to the general laws of the land, and cannot therefore claim exemption from responsibility for the torts of their agents, unless that claim is based on a contract with the person injured by such a tort, and that *Downes v. Harper Hospital* and other similar cases are consistent with this rule. They rest upon the principle, correctly stated in *Powers v. Homeopathic Hospital*, supra, viz., that the beneficiary of such charitable trust enters into a contract whereby he assumes the risk of such torts. It is not surprising that years should have elapsed before the correct legal principle governing these cases was announced in *Powers v. Homeopathic Hospital*. The discovery of correct legal principles, like the discovery of scientific and social truths, requires time and patient investigation."

In *Hordern v. Salvation Army* (1910) 199 N. Y. 233, 237, 92 N. E. 626, 627 (32 L. R. A. [N. S.] 62, 139 Am. St. Rep. 889), the action was brought to recover for personal injuries sustained by the plaintiff, a journeyman mechanic, who was engaged in making repairs upon a boiler upon defendant's premises, through the defective condition of a runway or staging leading from a door in the boiler room. The defendant claimed exemption from liability as being a religious or charitable corporation. The court cites many of the cases above referred to where such corporations have been held to be totally immune from liability, as well as those where they have been held immune on the ground that they were performing governmental functions, and also those where the immunity is

made dependent upon the relation the plaintiff bears to the defendant, and says: "In all it is recognized that the beneficiary of a charitable trust may not hold the corporation liable for the neglect of its servants. This is unquestionably the law of this state" (citing cases). And after discussing certain other cases in New York, where defendant charitable corporations have been held liable to third persons for negligence, repudiates the doctrine of the nonliability of trust funds for payment of damages arising from negligence, citing with approval from *Hewett v. Association*, supra, *Bruce v. Central M. E. Church*, supra, *Powers v. Mass. H. Hospital*, supra, and concludes: "We can add nothing to the force of this reasoning, but simply express our concurrence therein, as well as in the argument of Judge Lowell." This case was subsequently approved by the New York Court of Appeals in *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 194, 96 N. E. 406, 407 (38 L. R. A. [N. S.] 481), where the court says: "It must now be regarded as settled that a charitable corporation is not exempt from liability for a tort against a stranger because of the fact that it holds its property in trust to be applied to the purposes of charity."

In *Kellogg v. Church Charity Foundation* (1908) 128 App. Div. 214, 112 N. Y. Supp. 566, we find circumstances somewhat analogous to those in the case at bar. There a driver of an ambulance belonging to the defendant, a charitable hospital, negligently ran down a person who was travelling on a highway, and who was in the exercise of due care. Judge Gaynor made a careful review of the authorities, classifying them as to the reasons assigned for the immunity of charitable corporations from liability, and we have already quoted from this opinion where the doctrine of the immunity of trust funds from liability for damages is repudiated. It is sufficient to say that the conclusion of the court is that a charitable institution is liable for the negligence of its servants resulting in injury to persons who are not patients or beneficiaries.

These doctrines were approved by the New York Court of Appeals in *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 194, 96 N. E. 406, 38 L. R. A. (N. S.) 481, supra, although in that court the judgment of the Appellate Division was reversed on the ground that the evidence showed that the ambulance driver was not the servant of the defendant, but was the servant of the livery stable keeper who furnished the horse and driver for the use of the defendant. See, also, *Gartland v. N. Y. Zoological Society*, 185 App. Div. 163, 120 N. Y. Supp. 24; *Donaldson v. Com'rs of Hospital*, 30 New Br. 279. It is to be noted, also, that, while it was held by the Supreme Judicial Court of Massachusetts in *McDonald v. Mass. General Hospital* (1876) 120 Mass. 432, 21 Am. Rep. 529, that a public charitable hospital was not liable for an in-

jury to a patient caused by negligence of its agents, and this doctrine was approved in *Benton v. City Hospital* (1885) 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436, and in *Farrigan v. Pevear* (1906) 193 Mass. 147, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484, 8 Ann. Cas. 1109, yet the same court, in suits against religious and other charitable corporations, has, in several instances in contemporaneous cases, held the defendants liable for injuries to third parties arising from the negligence of agents and servants of the defendants. *Mulchey v. Methodist, etc., Soc'y et al.* (1878) 125 Mass. 487; *Davis v. Central, etc., Soc'y* (1880) 129 Mass. 367, 37 Am. Rep. 368; *Smethurst v. Barton Square Church* (1889) 148 Mass. 261, 19 N. E. 387, 2 L. R. A. 695, 12 Am. St. Rep. 550; *Stewart v. Harvard College* (1886) 12 Allen, 58. And while the court says in *Farrigan v. Pevear*, 193 Mass. 147, 149, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484, 8 Ann. Cas. 1109, *supra*, that the question of the liability of a public charity for the negligence of its servants or agents does not appear to have been raised or decided in either the *Davis* Case or the *Smethurst* Case, it is remarkable that such ground of exemption was not suggested either by counsel or court, if the doctrine of exemption could by any possibility have been thought to apply in cases where the parties injured were third parties standing in no beneficiary relation to the defendants. We cannot believe that counsel in those cases would have failed to raise the question so recently decided in favor of defendants in the hospital cases if they had not seen the distinction which we believe to exist between the two classes of cases.

In view of the principles above set forth, this court is of the opinion that both upon reason and upon authority, so far as the cases directly apply to the case at bar, the defendant corporation, although it is a charitable corporation, is liable, as any other corporation, for injuries to third persons caused by the negligence of its servants and agents in the care and management of its horses and teams while employed for its purposes, even though it is not shown or alleged that there has been any lack of care or diligence on the part of the defendant in the selection or retention of such servants or agents. We believe that public policy does not require any such exemption from liability as is claimed by the defendant in this case, but, on the contrary, that such exemption would be contrary to true public policy. We are clearly of the opinion that the true legal relation of master and servant existed between the defendant and the drivers in its employ at the time of the alleged injury, and that, just as such a servant has a lawful right to recover his stipulated wages for his services and to recover damages for breach of his contract of service on the part of his master, so, also, would he be entitled to recover for injuries

due to the negligence of his master as in other cases of master and servant, and so, also, would his master be liable for his torts and negligence while in the service of the master as in any other case. It would, in our opinion, be manifestly unjust and contrary to public policy to hold that a person run over and injured on a public highway by a horse and wagon belonging to the defendant and driven by the defendant's servant, through the negligent acts of such servant, would not be entitled to recover against the master, but could only recover against the negligent servant, while a person injured under similar circumstances by the servant of an expressman, or the driver of a cab belonging to a liveryman, would be allowed to recover against the master. There is no reason or logic in the attempted distinction between the servant of the defendant and the servant of any other person or corporation. We answer the question submitted to this court in the affirmative.

The papers in the case will be sent back to the superior court sitting within and for the counties of Providence and Bristol, with our decision certified thereon for further proceedings.

GOLLIGHER v. PENNSYLVANIA R. CO.
(Supreme Court of Pennsylvania. July 2, 1912.)

COURTS (§ 489*)—INJURIES TO RAILROAD EMPLOYEES—JURISDICTION OF STATE COURT.

Under Act of Congress April 22, 1908, c. 149, 35 Stat. 65, known as the Federal Employer's Liability Act, and amendment of April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324), a state court has jurisdiction of an action by a railroad employé for personal injuries while working on the train of defendant railroad company engaged in interstate business.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1341, 1372-1374; Dec. Dig. § 489.*]

Appeal from Court of Common Pleas, Fayette County.

Action by Ralph B. Golligher against the Pennsylvania Railroad Company. Judgment for defendant on demurrer, and plaintiff appeals. Reversed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

D. W. McDonald, of Uniontown, E. T. Levengood, of Youngstown, Ohio, and James R. Cray, of Uniontown, for appellant. S. B. Lloyd, of Philadelphia, and R. W. Playford, of Uniontown, for appellee.

PER CURIAM. It is alleged in the statement of claim that the plaintiff was a brakeman in the employ of the defendant company, and that he was injured because of the negligence of the engineer and fireman of a train engaged in the transportation of interstate commerce. The defendant demur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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red on the ground that the statement was insufficient in law. The demurrer was sustained, and judgment was entered for the defendant, for the reasons that there could not be a recovery in the action under the laws of this state, and that an action under the Federal Railroad Employer's Liability Act of April 22, 1908, c. 149, 35 U. S. Stat. 65, or its amendment of April 5, 1910, c. 143, 36 U. S. Stat. 291, could not be maintained in the courts of this state. Since the decision of the court of common pleas, the question involved has been authoritatively settled by the decision of the Supreme Court of the United States in *Mondou v. New York, New Haven & Hartford Railroad Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, in favor of the plaintiff.

The judgment is reversed, and the record is remitted to the common pleas for further proceedings, with leave to the defendant to plead.

O'BRIEN v. PENNSYLVANIA COAL CO. (Supreme Court of Pennsylvania. July 2, 1912.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—PASSAGEWAYS—INSUFFICIENT WIDTH—STATUTES—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a track repairer by being struck by a passing "trip" of loaded cars coming down the slope of a mine, by reason of the insufficient width of the slope, defendant's negligence in failing to make the passageway of sufficient width, or provide escape holes in the sides, as required by Mining Act June 2, 1891 (P. L. 176), art. 12, rule 43, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 228*)—INJURIES TO TRACKMAN IN MINE.

Mining Act June 2, 1891 (P. L. 176), art. 12, rule 21, provides that when any person is about to ascend or descend a shaft or slope the headman or footman shall inform the engineer by signal, and, in the absence of a headman or footman, the person or persons about to ascend or descend shall give and receive the signals in the same manner. *Held*, that such rule was limited to persons about to ascend and descend; and that a track repairer in the slope, who was injured by being struck by a descending trip of loaded cars, was not guilty of contributory negligence in failing to comply therewith.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

3. MASTER AND SERVANT (§ 286*)—WIDTH OF SLOPE—STATUTORY REQUIREMENTS.

Mining Act June 2, 1891 (P. L. 176), art. 12, rule 43, provides that every passageway used by persons in a mine, and also for the transportation of coal or other material, shall be of sufficient width to permit persons to pass moving cars with safety, or safety holes in the sides shall be constructed. *Held*, that the construction of a safe passageway on one side of the slope, without regard to its width or number of tracks, is not, as a matter of law, a sufficient compliance with the statute, since

whether such a passageway is sufficient depends on the circumstances of the case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

4. DAMAGES (§ 216*)—PERSONAL INJURIES—EARNING POWER—INSTRUCTIONS.

In an action for injuries to a servant, it was proper for the court to direct the jury that the measure of damages was the present worth of plaintiff's future earnings.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

5. DAMAGES (§ 216*)—INSTRUCTIONS—PREJUDICE.

In an action for injuries to a servant, defendant could not complain on appeal because the court warned the jury not to consider a claim, made by plaintiff's counsel, that the capitalization of plaintiff's future earnings would be from five to six thousand dollars.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

6. WITNESSES (§ 268*)—CROSS-EXAMINATION.

Where no request had been made that the jury view the premises where plaintiff was injured, it was error for defendant's counsel to ask plaintiff's witness, on cross-examination, whether he was willing to accompany a person whom the court would designate to the premises to verify the correction of measurements to which the witness testified.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by John O'Brien against the Pennsylvania Coal Company in trespass to recover damages for personal injuries. From a judgment for plaintiff for \$4,000, defendant appeals. *Affirmed*.

While plaintiff's witness James Flynn was on the stand, he was asked the following question on cross-examination: "By Mr. McGahren: Q. You are willing to go there with any engineer or person whom the court will designate and verify this, are you? By Mr. Lenahan: I object as highly improper. By Mr. McGahren: Q. Are you willing to accompany any man whom the court will designate to make this measurement at the point where you say to prove the correctness of this? The Court: I sustain the objection. Note an exception and seal a bill for defendant."

The court charged in part as follows: "Counsel for plaintiff has argued to you upon the reasonableness of the supposition that, earning \$1.80 a day, he would probably live 13 or 15 years; that he would earn \$540 a year; and that during that time he would earn possibly five to six thousand dollars. The stenographer says that counsel stated that he had capitalized it at five to six thousand dollars. You will observe that the interest on the amount capitalized at five to six thousand dollars would be from \$300 to \$360 a year, and that would cover almost or at least three-quarters of the amount of his earnings for a year, and that would still leave him the principal, at

the end of his life, possibly intact. It is clear, gentlemen, you cannot apply any such arithmetical rule. You are to consider, along with the argument of counsel, the advantage to the plaintiff of a present payment to cover the whole period. It is the present worth—I repeat it, it is the present worth—of his future earnings which is the measure of damages."

Defendant introduced the following point: "Ninth. The court is requested to instruct the jury, in the event that they find the plaintiff is entitled to recover damages on account of loss of earning power, as to the manner of ascertaining the present worth of the same, and how the verdict as to damages should be capitalized in fixing the amount of the same. By the Court: As I stated to you, gentlemen, in passing upon this question on the loss of earning power, it is your duty, first, to consider whether the injury is permanent or temporary, and whether it will affect his earning capacity, how long he may reasonably be expected to live and to work, what amount of work he will probably perform, and what wages he will probably earn, and what amount they will probably have increased or diminished above or below \$1.80, which he was earning, as he said, at the time of the accident, and, having arrived at his future earnings, then you determine from that what these future earnings are worth to-day. What is the present worth of these earnings? Determine, as I say, the future earnings in the manner which I have detailed to you. Having determined that, then it is for you to say what is the present worth of these future earnings."

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZIS-KER, JJ.

John McGahren, of Wilkes-Barre, and Warren, Knapp & O'Malley, of Scranton, for appellant. C. B. Lenahan and John T. Lenahan, both of Wilkes-Barre, for appellee.

BROWN, J. [1] At the time the appellee was injured, he was in the employ of the appellant as a track repairer. It owned and operated a colliery, in which there was a rock slope 212 feet in length. On this there were two railways having a gauge of 3 feet each, with a space between them of 2 feet, to allow ascending and descending cars to pass. The bodies of the mine cars projected 8½ inches beyond the outside rail of each track. The space between the bodies of these cars and the side or rib of the slope was a matter in dispute on the trial. As the appellee was at work on one of the tracks, a "trip" of loaded cars came down towards him, and he attempted to escape it by rushing to the side or rib next to the track upon which he was working. He stood upright there, with his back against the side; but the cars struck him, and he was

seriously injured. The negligence of which he complains was the failure of the appellant to observe rule 43, art. 12, of the mining act of June 2, 1891 (P. L. 176), which provides that "every passageway used by persons in any mines, and also used for transportation of coal or other material, shall be made of sufficient width to permit persons to pass moving cars with safety, but if found impracticable to make any passageway of sufficient width, then holes of ample dimensions, and not more than one hundred and fifty (150) feet apart, shall be made on one side of said passageway. The said passageway and safety holes shall be kept free from obstructions and shall be well drained." The statement specifically charges a disregard of this statutory duty, and avers that, as a consequence of appellant's neglect in this respect, the appellee was injured. The jury found—and upon sufficient evidence—that the appellant had not regarded its duty as imposed upon it by the act of assembly.

Counsel for appellant seem to think, and earnestly so contend, that the appellee's case could not have gone to the jury but for the testimony of James Flynn as to the width of the slope; and that his testimony ought not to be regarded as sufficient to show that there had not been a safe passageway between a moving car and the rib or side of the slope. In asking this court to so hold, reasons are given which might very fairly have been addressed to the jury in asking them not to credit Flynn's testimony; but it is not for us to say that "a reading of the testimony of this witness will show that the means which he adopted to qualify himself for his task were not such as any fair, unbiased, or reasonable man would sanction or approve to arrive at a correct result in a matter of so much importance." Whether a witness is fair and unbiased, or unfair and biased, is exclusively for a jury; and if Flynn was to be believed by the jury in this case they could fairly have found, as they probably did, notwithstanding what counsel for appellant regard as discrepancies in his testimony, that he knew, not only from his long familiarity with the slope, but from actual measurements, that it was not of the width testified to by the witnesses for the appellant, and that a safe passageway had not been maintained, as required by the act of 1891. But the case was not "finally submitted" to the jury on the testimony of Flynn, as counsel for appellant contend. Its negligence was made out by the testimony of the plaintiff and one Luke Connors, as brief extracts from it will show.

The plaintiff testified in part, as follows: "Q. When you saw the car coming down—the loaded trip coming down—how far were you from it? A. I was, maybe, about 30 feet; might be a little more. Q. How far was the unloaded trip coming up from you; about the same distance? A. About the same distance. Q. Then, when you saw the

car coming down and the one coming up, what did you do? A. I made for the rib. Q. That is, you made for the side? A. Yes; the side—that is, the rib. Q. Then what did you do? A. I stood up to it. Q. Just come down and show the jury how you stood up against the rib. Suppose, coming along here— A. I had not time. I stood up this way; tried to save myself. Car come hit me, and that is all I know. Q. Wait. About what was the distance from the track to the rib at the place where you were struck? Q. About how far? A. About 8 inches. The Court: By the 'track' you mean the outside rail? Mr. Lenahan: From the outside rail, yes; the rail nearest the rib. Q. What, then, did the car do to you as you were standing there against the rib? A. It hit me, and it dragged me a piece until I fell under the car." On cross-examination, in describing the distance between the rib and the outside rail on the opposite track, the following appears in his testimony: "Q. There was a rope attached to this empty car that was coming up? A. Yes, sir. Q. You could have stepped over that rope? A. Yes; but I would be just as bad that side as— I would be hit one side as bad as the other. Q. You would have been hit? A. Yes; the other trip would have hit me. Q. The body of the car on the light track did not run up against the rib; there was some space between the rib and the body of the car on the other side? A. Was not a foot. Q. You did not measure it to know? A. Of course I did, because the end of the tie went up against the rib. From the rail to the rib is no more than seven or eight inches. Q. The space on the other side—that is, the light track—between that and the rib, between the car and the rib, was wider than the right-hand side, was it not? A. Not a bit."

Connors, who had worked on the slope from the time it was first operated up to the time of the accident, and was entirely familiar with the situation, testified as follows: "Q. Whether or not you are familiar with the plane there? A. I am. Q. Taking a point about the middle of that slope or plane, what was the distance from the rail nearest the rib, what was the distance from that rail to the rib? Q. (Defendant's counsel) Did you measure it? A. No, sir. Q. (Plaintiff's counsel) Saw it frequently? A. Saw it often. I was going to mention how near I could do it by the eye. Q. What was the distance? A. I would call it about 10 inches. Q. How about on the other side? A. Much the same."

The defendant's negligence having been thus made out by the testimony of the plaintiff and his witness, if they were to be believed by the jury, the court submitted to them that question, as well as the contributory negligence of the plaintiff in not going over to the other side of the slope, in the following clear and correct instruction: "If, after a careful consideration of all the testimony,

you are satisfied that there was no safe passageway of sufficient width to permit persons to pass moving cars, and that the plaintiff was not guilty of contributory negligence—that is, any negligence on his part which contributed to the injury; that he was using due and reasonable care under the circumstances—then your verdict should be for the plaintiff. If, on the other hand, you believe that there was no space of sufficient width to permit persons to pass moving cars with safety on the left-hand side, but that there was a space of sufficient width to permit persons to pass with safety on the right-hand side, even though the defendant company were negligent and violated the statute in not providing a passageway on the left-hand side, if the plaintiff could by reasonable care and diligence reach the right-hand side and secure a place of safety, it was his duty to do so, and, even though the defendant was guilty of negligence, the plaintiff could not recover, because it was his duty, if he could by exercising reasonable diligence and due care, to go to the side where a safe passageway was provided. In passing upon this question as to whether he exercised due care and diligence, it is your duty to take into consideration the conditions as they existed at the time of the accident—the plaintiff's age, his ability to reach the passageway, if such there were, the location of the two tracks, the two moving ropes, one moving up and the other moving down the plane over which he would have to cross, and the danger, as he stated, of encountering the car on the other side—all these facts are for you to take into consideration in passing on the question of the plaintiff's contributory negligence and his duty to take reasonable care of himself, and whether or not he could have reached the other side, if there was a safe place at that point, bearing in mind the plaintiff was not obliged to put himself in danger in reaching that side."

[2] It is further contended that appellee was guilty of contributory negligence, and that the court should have so instructed the jury, because he had disregarded rule 21 of the act of 1891, which is as follows: "When any person is about to descend or ascend a shaft or slope, the headman or footman, as the case may be, shall inform the engineer by signal or otherwise of the fact, and the engineer shall return a signal before moving or starting the engine. In the absence of a headman or footman the person or persons about to descend or ascend shall give and receive the signals in the same manner." At the time the appellee was injured, he was not about to descend or ascend the slope. For two hours prior thereto he had been at work about midway between the top and bottom. Rule 21 is, on its face, applicable to one who is about to "descend or ascend a shaft or slope," and the four rules immediately preceding it, to be read in connection with it, clearly show that it applies

only to persons at the head or foot of a slope or shaft. Rule 17 prescribes the number of persons to be hoisted or lowered at one time; rule 18 the qualification of the engineer in charge of the engine; rule 19 how he shall work it; and rule 20 the signals for ascending or descending. The first, second, third, fourth, fifth, and ninth assignments are overruled.

[3] The sixth assignment complains of the refusal of the court to instruct the jury that the defendant company was not required to maintain a safe passageway on both sides of the slope to permit a moving car to pass persons in safety. The purpose of the act of 1891 is to provide for the safety of persons passing mining cars in coal mines. It is silent as to a passageway on each side of a slope. It says nothing of the number of passageways to be maintained in mines. What it requires is that every passageway used by persons in mines shall be of sufficient width to permit them to pass moving cars with safety. In the present case there were two tracks, and the act of 1891 was for the safety of those upon either of them. To provide for such safety, a passageway on only one side of a slope might be insufficient; for here, even if there had been a safe one on the opposite side, the plaintiff could not, according to his testimony, have reached it without danger of being struck by the ascending car. A safe passageway on one side of a slope, without regard to its width or the number of tracks upon it, is not all that the act of 1891 requires; and it has never been so held. One such passageway may or may not be sufficient, and whether it is or is not must depend upon circumstances. In the present case the appellee was working on the track next to the side of the slope which did not have a safe passageway. Suppose there had been a safe one on the other side, he could not have reached it in safety; and the affirmation of defendant's eighth point would have relieved the defendant entirely of the charge of negligence, if the jury should have found that there was a safe passageway on the opposite side. In *Reeder v. Lehigh Valley Coal Co.*, 231 Pa. 563, 80 Atl. 1121, cited as an authority calling for the affirmation of the defendant's eighth point, there was but a single track; and a passageway on one side of it, if of sufficient width and unobstructed, was all that the act required. The question raised by defendant's eighth point was neither raised nor passed upon in that case.

[4-6] While the court's answer to defendant's eighth point, which is the subject of the seventh assignment, might have been fuller on the instruction asked for, we do not regard it as reversible error, in view of what was said in portions of the general charge, not assigned as error, on the question of the measure of damages. That portion of

the charge complained of by the eighth assignment was an instruction to the jury not to regard the "arithmetical rule" which counsel for plaintiff had given them for their guidance in passing upon the measure of damages. There is no reason why appellant should complain of this. The offer, the exclusion of which is the subject of the tenth assignment, might, if it had been allowed, have been the first step in a departure from the orderly trial of the cause, and there was no abuse of the court's discretion in overruling it. If the appellant had so desired, the premises might, under the rules of court, have been viewed by the jury.

The assignments are all overruled, and the judgment is affirmed.

LINCOLN et al. v. WAKEFIELD et al.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. APPEAL AND ERROR (§ 724*)—ASSIGNMENTS OF ERROR—NECESSARY ASSIGNMENTS.

Where one assignment of error fairly raises the question desired to be reviewed, it is improper to file other assignments in different forms presenting the same question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.*]

2. CONVERSION (§ 22*)—RECONVERSION—"DE-SIRE."

Where all the parties interested in certain real estate, which had been converted into personalty, joined in a petition for the discharge of the executor under the decedent's will, in whom legal title to the land was then vested, on the ground that they "desired" to hold the property as real estate, and the heirs subsequently joined in a conveyance of part of the land, such acts constituted a reconversion, regardless of the fact that they used the word "desire" instead of "intend."

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 66-72; Dec. Dig. § 22.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2028-2030; vol. 8, pp. 7635, 7636.]

3. CONVERSION (§ 22*)—RECONVERSION—PARTIES—MARRIED WOMAN—MINORS.

An agreement for reconversion of personal property into realty was not invalid because one of the parties in interest was a married woman, and her husband did not join, the agreement having been executed subsequent to Act June 3, 1887 (P. L. 332), providing that a married woman may acquire and dispose of property in the same manner as if she were sole, nor because the guardian of a minor heir joined in the agreement without leave of court; his act having been subsequently approved by the court and by the minor on arriving at age.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 66-72; Dec. Dig. § 22.*]

4. PARTITION (§ 63*)—FINDINGS—EVIDENCE.

A finding in a partition suit that a married woman had sold her interest to a cotenant held not sustained by the evidence.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 188-185; Dec. Dig. § 63.*]

5. PARTITION (§ 86*)—RIGHT TO RENTS—ADJUSTMENT.

An adjustment of rents between tenants in common must be had as of the date of the final partition of the real estate or distribution of the proceeds realized from the sale thereof, as provided by Act June 24, 1896 (P. L. 237).

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 247-249, 252; Dec. Dig. § 86.*]

6. PARTITION (§ 86*)—ADJUSTMENT OF RENTS—HEARING.

The office of master in chancery having been abolished, an adjustment of rents between tenants in common in partition must be made before the trial court, unless the parties agree that the master in partition shall act as a referee for that purpose.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 247-249, 252; Dec. Dig. § 86.*]

7. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—STATEMENT OF CLAIMS.

All questions covered by assignments of error which appellant desires the Supreme Court to consider must be comprehended by or referred to in appellant's statement of the questions involved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

Appeal from Court of Common Pleas, Huntingdon County.

Bill by J. G. Lincoln and others against Harry G. Wakefield and others for partition. From a decree for complainants, defendants appeal. Modified and affirmed.

The following letter, purporting to be signed by Jane Miller and William Miller, her husband, was offered in evidence:

"Dwight, March 28, 1903.

"Dear Brother: I received the deed a few days ago but I have not heard from you to know if you accepted my proposition. If you have, you send notes, \$500.00 in each note, payable as soon as you think you can do it but I want one in a year from May. Have Tommy sign them. Then we will send deed as H. B. Dunn wants it. I will send you what he wrote to me.

"Postscript. John, if it costs anything for me to sign the deed before a notary public, send the cost of it for pay day is a good way off."

Argued before FELL, C. J., and MES-TREZAT, ELKIN, STEWART, and MOSCH-ZISKER, JJ.

L. H. Beers and Howard L. Henderson, both of Huntingdon, for appellants. R. W. Williamson, J. F. Schock, and J. R. & W. B. Simpson, all of Huntingdon, for appellees.

MOSCHZISKER, J. This is a proceeding in partition on the equity side of the court. When the case was here before (Lincoln v. Africa, 228 Pa. 546, 77 Atl. 918), we were obliged to send it back for a retrial. The defendant who entered the former appeal is again the appellant, and the few points essential to a determination of the case are involved in a maze of 50 assignments of error.

[1] Before entering upon a discussion of these points, we take occasion to say that the practice of multiplying specifications of error tends to hurt rather than to help the proper consideration of a cause. When one assignment squarely raises a point, it is unnecessary and bad practice subsequently to reiterate it in different forms, as was done in this case. Here we have been obliged to read and digest 55 printed pages, when but comparatively few would have been ample for the purpose of bringing the real issues upon the record. We shall not attempt to pass upon each of the 50 assignments, but shall take up and determine the essential points which they bring before us.

[2] It is contended that there could be no partition, because the real estate in question was converted into personality by the will of Andrew Heffner. The testator died August 16, 1872, leaving a widow and six children. He appointed executors, and directed them to sell his real estate and divide the proceeds. All concede that this was a conversion; but the appellees contend that the parties in interest effected a reconversion of the property in 1888 by formally agreeing to hold the same as real estate. To which the appellant replies that the evidence depended upon was not sufficient to show a reconversion; that she was a married woman, and her husband did not join in the alleged agreement to reconvert. Further, that another of the heirs was a minor at the time, and her guardian had no authority to join in such an agreement. The record shows the facts to have been as follows: On December 8, 1888, Benjamin Heffner, surviving executor under the will of Andrew Heffner, presented a petition to the orphans' court praying for his discharge, in which he averred, *inter alia*, that his accounts were settled to date, and that the only debt of the estate was a mortgage, which he had no funds to pay; that the time had come for him to sell the remaining real estate in order to carry out the provisions of the testator's will; but that the heirs were "desirous of retaining the same as real estate in place of personal property as contemplated by said will," and therefore he had no duties to perform. To this paper was attached the following: "We, the undersigned, widow, children, etc., of Andrew Heffner, of the township of Walker, deceased, do hereby join in the petition of Benjamin Heffner, hereto attached, and agree that we desire the real estate mentioned in the will of the said Andrew Heffner to remain unsold, and to be held by us as real estate, and also that the said Benjamin Heffner, shall be discharged as executor of said will according to the prayer of his petition." This was signed by all parties in interest, including the appellant and the guardian of a minor child of one of the heirs, who had died after the decease of the testator. The

court granted the prayer of the petition and discharged the executor.

Did the joint execution of this paper serve to work a conversion? "It was competent for the heirs, formally, or by some decisive act to that effect, to take the land in lieu of the money," and thus to reconvert their interests into real estate. *Henderson v. Henderson*, 133 Pa. 399, 408, 19 Atl. 424 (19 Am. St. Rep. 650). Such reconversion could be worked "by acts in pais, * * * of such a character as to leave no reasonable doubt of the intent." *Beatty v. Byers*, 18 Pa. 105, 108. If the document under consideration expresses any intent, there can be no doubt that it was to hold the property referred to as real estate. It appears that since the time of its execution the heirs generally have treated such property as real estate, and that in 1903 all of them, including the appellant and her husband, joined in a deed for part thereof, which they had sold to one Hamer, and that they had used the purchase money to pay off the mortgage mentioned in the petition for the discharge of the executor. While this conveyance of a part of the testator's real estate might not, in itself, have been sufficient to work a reconversion of the interests of the heirs in the particular land now in controversy, "it is very evident from the tenor of the deed that the grantors considered themselves as having an interest in the land as land" (*Rice v. Bixler*, 1 Watts & S. 445, 455); and the court below had the right to take cognizance of this, as also of the fact that the purchase money was used to pay off the mortgage on the balance of the property. We are of the opinion that the act of all the heirs in joining in the request for the discharge of the executor, in whom the legal title to the land was then vested, upon the express ground that they desired to hold the property as real estate, together with their subsequent acts in relation thereto, was sufficient to justify the conclusion that a reconversion had been accomplished.

The fact that in expressing the intent to hold the property as real estate the heirs used the words "we desire" instead of "we intend" has no particular significance, when we consider the words employed in connection with their context and the circumstances under which they were used. Even in a will words precatory in form, when plainly used to express an intention, will be construed as mandatory. *Stinson's Estate*, No. 1, 232 Pa. 218, 81 Atl. 207, 36 L. R. A. (N. S.) 504.

[3] But we have to consider the appellant's contention that, since she was a married woman at the time she joined in the execution of the paper in which the intent was expressed, her act was of no avail. Some early cases from other jurisdictions, such as *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600, decided in 1853, have been cited

to us to the effect "that it is competent for a feme covert to elect to take the land instead of the money, but that such an election can only be made under such forms and solemnities as by law are required to enable her to convey her fee." It is to be noted, however, that these cases were decided at a time when a married woman was "incapable of changing the nature of her estate, because of her being under coverture and unable to contract." *Oldham v. Hughes*, 2 Atkyns, 452. With us in 1888, the date of the reconversion, while a married woman could not mortgage or sell her real estate, unless her husband joined in the deed, generally speaking, she had full power to contract in relation to and "acquire * * * or dispose of property * * * in the same manner as if she were a feme sole" (Act June 3, 1887 [P. L. 332]); and an election by those entitled, to take land instead of the money to be derived from its sale, is but "an appropriation of their interests under the will to the acquisition of the land, as upon a purchase." *Mellon v. Reed*, 123 Pa. 1, 17, 15 Atl. 906, 909. Under the circumstances, we do not feel that the coverture of Mrs. Miller would affect the reconversion.

It is true that the agreement to reconvert was signed by the guardian of a minor; but that fact cannot avail this appellant. Although the guardian did not ask leave to join with the other heirs, nevertheless, when the orphans' court acted upon the petition for the discharge of the executor, it in effect approved the action of the guardian. Again, when the court granted him leave to join in a subsequent sale of a part of the real estate, it once more, in effect, approved his act. But more than this, the minor herself, upon arriving at age, did not disaffirm or raise any objection to the acts of her guardian; and, when included as a defendant in these proceedings, neither she, nor those who represent her, filed any answer, or otherwise joined in the contentions urged by the appellant. On the whole, we conclude that the evidence was sufficient to justify the court below in determining that the interests of the several heirs had been converted into real estate in the year 1888, and in assuming jurisdiction of the petition for partition thereof.

[4] The plaintiffs averred, and the trial judge found, that the appellant had sold her interest in this real estate to one of the other heirs in 1906. In the first place, it is doubtful if the evidence depended upon was sufficient to prove a sale of any character. It certainly was not sufficient to support a parol sale of real estate between tenants in common and by a feme covert. The oral testimony was neither clear, direct, nor specific; no actual contract was shown; and the possession and use of the property after the date of the alleged sale appears to have continued just about as before. The letter

from the appellant to her brother, relied upon by the plaintiffs, was written in 1903. It is vague and indefinite, and makes no direct reference to the land in question or to a sale of the appellant's interest therein; and the testimony concerning the \$450 draft and the \$50 in cash sent by the supposed purchaser to the appellant fails to show that the \$500 was in payment of purchase money. This letter and the indorsement of the draft by the appellant and her husband were the only writings in relation to the alleged purchase of Mrs. Miller's interest; and, under the circumstances, they were not sufficient to take the transaction out of the statute of frauds, or to support a sale of real estate by a married woman. Hence the learned court below erred in holding that the appellant's share or interest in the property in partition had passed to the plaintiffs, and the assignments which cover the rulings to that effect must be sustained.

[5-7] In the answer filed by the appellant, she avers: "I deny that the alleged purchasers by the alleged parol sale ever paid to me the sum of \$450 on May 31, 1906, and thereafter the sum of \$50 more, as purchase money; but, on the contrary, I aver that the said sums * * * were paid to me on account of my share of the income, which in equity was due me from the said farm and mill [the real estate in partition], * * * and that there is still due me as an equitable share of the income * * * about \$900." The trial judge was asked to make specific findings as to the income and rental value of the land, and that the appellant was entitled to \$981.66 thereof. This was refused. We are not prepared to say that the evidence depended upon was sufficient to justify the appellant's requests; and, in addition, this was not the proper time to make an adjustment of the profits of the land. The act of June 24, 1895 (P. L. 237) provides: "In all cases in which any real estate is now or shall be hereafter held by two or more persons as tenants in common, * * * in case of partition of such real estate held in common as aforesaid, the parties in possession shall have deducted from their distributive shares of said real estate the rental value thereof to which their cotenant or cotenants are entitled." But the adjustment must take place as of the date of the final partition of the real estate or distribution of the proceeds realized from a sale thereof; and, since the office of master in chancery is abolished (*Palethorp v. Palethorp*, 184 Pa. 585, 39 Atl. 489; *Lincoln v. Africa*, 228 Pa. 546, 77 Atl. 918), the trial court must make the necessary findings, unless the parties agree that the master in partition shall act as a referee for that purpose, as provided in the equity rules. At the proper time, if the facts show a present enforceable liability from any of the other tenants in common to

the appellant, the court below should ascertain the amounts due and make the adjustment according to the respective legal rights as they may then appear. We shall not undertake to forecast or adjudge those rights at the present time, since the questions are not properly before us; but if they are to be tried cases shedding light upon most of them can be found in the books. In point of fact, although assigned for error and argued, these questions concerning the adjustment of the profits or rental value of the real estate are not comprehended in the appellant's statement of the questions involved, as they should have been if her counsel desired them considered. *Willock v. Beaver Valley Railroad Co.*, 229 Pa. 526, 79 Atl. 138; *Smith v. Lehigh Valley Railroad Co.*, 232 Pa. 456, 81 Atl. 554.

The record is remitted to the court below, with directions to modify its orders and decrees so as to include the appellant in the partition, in accordance with the views herein expressed. The costs to be paid by the appellee.

In re TIMMES' ESTATE.

APPEAL OF SHIPE et al.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. WILLS (§ 316*)—TESTAMENTARY CAPACITY—ISSUE DEVISAVIT VEL NON.

Under Act March 15, 1832 (P. L. 146) § 41, an issue devisavit vel non is a matter of right, where there is a substantial dispute on a material question of fact.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 742-749; Dec. Dig. § 316.*]

2. WILLS (§ 316*)—TESTAMENTARY CAPACITY—DEVISAVIT VEL NON.

Where testator was an old man, and the evidence is uncertain as to whether he was in possession of his faculties at the time he adopted a writing as his will, and whether he knew what property he owned and what disposition he desired to make of it, an issue devisavit vel non should be granted.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 742-749; Dec. Dig. § 316.*]

Appeal from Orphans' Court, Northumberland County.

In the matter of the estate of Nicholas Timmes. From an order refusing an issue devisavit vel non, George A. Shipe and Claude Shipe appeal. Reversed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

W. H. M. Oram, of Shamokin, for appellant. J. A. Welsh, John I. Welsh, and C. K. Morganroth, all of Shamokin, for appellee.

FELL, C. J. At the time the decedent signed the writing offered for probate as his will, he was an old man, greatly enfeebled in body and mind, and lying in a hospital where he had been taken for treatment. Ac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cording to the testimony of the hospital physicians, he had cerebral hemorrhages and hardening of the veins and was suffering with dementia that accompanied paralysis. He was dull, apathetic, hard to arouse, oblivious of his surroundings, and incapable of any intelligent act. He had an estate of about \$70,000 and no relatives living in this country of whom he knew. For a number of years he had lived in the family of the petitioners for an issue devisavit vel non and later in the family of the proponents of the will. None of these persons was related to him, nor had any of them a claim on his bounty. As his life was fading away, and he was in a state of mind to assent to whatever was asked, there was a race between them to procure the last will.

In 1897, the decedent made a will giving all of his estate to Claude Shipe, one of the petitioners, and named the other petitioner as executor. This will continued unrevoked until December 6, 1909, when a second will was made dividing the estate between Claude Shipe and Annie Williams, in whose house the decedent was then living. On December 29, 1909, the decedent was taken from his home in Shamokin to a hospital in Philadelphia, and while there, on January 5, 1910, he signed the third will, in which Claude Shipe was named as the sole beneficiary. Having learned by inquiry of the making of this will, Annie Williams went from Shamokin to Philadelphia, and on the next day, January 6th, procured the signing of a fourth will, the one offered for probate, by which the whole estate is left to her and her children. On January 12th the decedent was removed from the hospital to her home in Shamokin, and he never afterwards left his bed. On January 29th he signed what is called a ratification of the fourth will, that of January 6th, confirming the gifts made thereby. He died February 4th.

[1, 2] The testimony in relation to the condition of the decedent, while at the hospital, from December 29, 1909, till January 12, 1910, was of such a character as to justify the judge of the orphans' court that, standing alone, it required the granting of an issue, but an issue was refused because of the so-called ratification of the will on January 29th. The writing of January 6th was not, according to the testimony, a will made by the decedent, but a will made by others, when he did not know where he was or what he was doing. The circumstances under which the decedent's signature was obtained on January 6th, and the fact that an adoption of the writing was deemed essential, indicate indirection that calls for the closest scrutiny, and requires clear proof that the decedent adopted the writing as his own at a time when he was in possession of his faculties and knew what property he owned, and what disposition he desired to make of

it. Such proof was not furnished, and the issue should have been allowed. Under section 41 of the act of March 15, 1832 (P. L. 146), an issue devisavit vel non is of right where there is a substantial dispute upon a material question of fact, and the test is whether, under all the testimony, a verdict against the will should be allowed to stand. *Graham's Estate*, 225 Pa. 314, 74 Atl. 169.

The order of the court is reversed, and the record is remitted, with direction that an issue be granted in accordance with the prayer of the petition.

**BOROUGH OF MOUNT CARMEL v.
LEHIGH VALLEY COAL CO. et al.**

(Supreme Court of Pennsylvania. July 2, 1912.)

**APPEAL AND ERROR (§ 1165*) — REVERSAL —
GROUNDS.**

A decree will be reversed and the cause remanded where the record is voluminous and the findings of facts or law are numerous and the answers of the court to requests are confusing and conflicting, leaving it uncertain as to what, in the judgment of the court below, were the facts or the law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4522; Dec. Dig. § 1165.*]

Appeal from Court of Common Pleas, Northumberland County.

Bill by the Borough of Mount Carmel against the Lehigh Valley Coal Company and others. From the decree, the Lehigh Valley Coal Company appeals. Reversed and remanded.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZIS-KER, JJ.

D. W. Kaercher, of Pottsville, S. P. Wolverton, Jr., of Sunbury, and F. W. Wheaton, of Wilkes-Barre, for appellant. George B. Reimensnyder, of Sunbury, and D. W. Kehler, of Mt. Carmel, for appellee.

MESTREZAT, J. Owing to the unprecedented delay in disposing of this case in the court below, it is with much regret that we are compelled to remand it and direct that it be heard anew by that tribunal. The bill was filed in September, 1902, and the final decree was not entered until October, 1911. If we were to dispose of the case in the present condition of the record, it would be at the risk of doing injustice to one or the other of the parties, and possibly to both. The record is voluminous, the requests for findings of facts and law are numerous and complicated, and the answers of the court thereto are in many instances confused and conflicting, leaving it uncertain as to what, in the judgment of the court below, are the facts or the law of the case. In his findings, the learned judge seems to have overlooked or disregarded several of the questions legitimately raised in the case, and failed to

note the obvious difference shown by the facts between some of the defendants named in the bill. In some instances, there are no specific findings of certain facts as to some of the defendants which are necessary to a just disposition of the case as to them. The decree is manifestly erroneous in that it requires the two appellants to forever keep free of culm and open the channel of the creek whether they or the other defendants deposit the culm and cause the channel to be closed. The relief prayed for in the bill was necessarily that each defendant be enjoined from continuing the wrongful acts being committed by himself, and the relief granted must conform to the prayer of the bill. The appellants are not responsible for the acts of other parties.

The question of multifariousness will depend on the parties defendant as they stand on the record at the time of the trial, and the facts as they appear from the evidence and are found by the court. The plaintiff company can determine by amending the record, if necessary, the parties against whom it can and will ask relief in this proceeding. As to multifariousness in pleading, Judge Freeman, in an extended note to *Mansfield v. Bristol*, 76 Ohio St. 270, 81 N. E. 631, 10 L. R. A. (N. S.) 806, 118 Am. St. Rep. 852, 10 Ann. Cas. 787, points out the distinction between an action at law for damages for maintaining a private nuisance and a bill for injunctive relief, and cites numerous American and English authorities sustaining the distinction.

The case will be tried de novo, without reference to the findings and rulings on the former trial. The facts and the law should be found and stated paragraphically as required by the equity rules, with such discussion as the court may deem necessary to a proper disposition of the case. We see no necessity for the 175 requests for findings of facts and law which were submitted on the former trial. The requests should be fewer in number and stated more clearly and concisely. The case has been pending for 10 years, and should speedily be disposed of. The testimony on the former trial may be used with such other evidence as the parties may desire to submit.

The decree of the court below is vacated and set aside, and the case is remanded for a rehearing.

KAUFFMAN et al. v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. RAILROADS (§ 348*)—ACCIDENT AT CROSSING—EVIDENCE.

A verdict for plaintiff in an action for injuries at a railroad crossing should be sustained, where the evidence of plaintiff showed that she stopped, looked, and listened when 100 feet

from the tracks, that she continued to look and listen as she drove on the crossing, and first saw the train 800 feet away, running 75 miles an hour, and no warning was heard, and that the rear of the wagon was struck on the last rail of the last track.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.*]

2. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In an action for injuries at a railroad crossing, the question of the contributory negligence of plaintiff held for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

Appeal from Court of Common Pleas, Lancaster County.

Action by Daniel G. Kauffman and Fianna B. Kauffman against the Pennsylvania Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

W. U. Hensel, of Lancaster, for appellant. J. W. Appel and T. Roberts Appel, both of Lancaster, for appellees.

PER CURIAM. One of the plaintiffs, Fianna B. Kauffman, was injured at a diagonal grade crossing of the defendant's road, where there were four tracks. According to her testimony, and that of her witnesses, she stopped, looked, and listened 100 feet from the tracks, where there was a danger signal erected by the defendant. This was the usual place for stopping, and from it she could see the tracks for the distance of 1,600 feet in the direction from which the train came. She continued to look and listen as she drove on the crossing, and first saw the train when she was halfway over the tracks, and when it was 800 feet from her and running 75 miles an hour. The rear of her wagon was struck on the last rail of the last track. The crossing was unguarded by gate or flagman, and no warning of the approach of the train, if given, was heard by her. Since the train may have come into view after she was committed to the act of crossing, it could not be said by the court that she negligently went on in the presence of danger, which she either saw or should have seen. The question of negligence was therefore for the jury.

The judgment is affirmed.

In re REED'S ESTATE.

Appeal of WARNER et al.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. DESCENT AND DISTRIBUTION (§ 45*)—EFFECT OF WILL—PROPERTY AFFECTED.

While the testator's intention as to that part of his estate disposed of by will should prevail, and may even be controlling as to the manner of holding and converting the entire estate, including a share which has lapsed, it will not alter the course of inheritance, or the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

character of a part of the estate which passes under the intestate law.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 123; Dec. Dig. § 45.*]

2. CONVERSION (§ 15*)—NATURE AND ELEMENTS—STATUTORY PROVISIONS.

Conversion is a fiction of equity, applied to carry out the intention of the testator, but, where that intention or purpose fails, it will not be applied, and, if there be a total failure of purpose, the heir at law takes, and may not only prevent a sale, but may compel the trustee, if any, to convey the real estate to him; while in case of a partial failure the heir takes his share according to the course of inheritance under the intestate law.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 28-37, 52; Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1562-1570; vol. 8, p. 7618.]

3. CONVERSION (§ 15*)—DIRECTION IN WILL—LAPSE OF LEGACY.

Where a will provides for the conversion of testator's realty, and for its distribution as personality, but a beneficiary dies before testator, the lapsed share passes under the intestate laws to heirs of the testator, and is not distributed as personality to his next of kin.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 28-37, 52; Dec. Dig. § 15.*]

4. EXECUTORS AND ADMINISTRATORS (§ 310*)—DISTRIBUTION OF ESTATE—PARTIAL DISTRIBUTION.

Where, in the distribution of a partial account, a distributee does not appear, on a subsequent distribution when he does appear, the inequality will be corrected by awarding him enough to make up his portion of the distributive share of both funds.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1264-1266; Dec. Dig. § 310.*]

Appeal from Orphans' Court, Erie County.

Adjudication of the third and fourth partial accounts of the trustee and administrator d. b. n. c. t. a. of Charles M. Reed. From a decree awarding distribution, Charles M. Warner and another, executors of Harriet W. Reed appeal. Affirmed.

The accounts were presented in open court and confirmed nisi, and upon exceptions being filed thereto E. L. Whittelsey, Esq., was appointed auditor.

The auditor filed a report, in which among others the following conclusion of law was reached: "Third. The lapsed legacy of the said Nellie Reed became on the death of the testator vested in the heirs at law of the said Charles M. Reed subject to the rights of Harriet W. Reed, widow, under the intestate laws of Pennsylvania." Exceptions to the auditor's report were subsequently dismissed, and the report confirmed absolutely.

Argued before FELL, C. J., and POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

C. L. Baker, L. Rosenzweig, and J. R. Haughney, and C. F. Haughney, all of Erie, for appellants. G. W. Pepper, W. B. Bodine, Jr., and H. Lausat Geyelin, all of Philadelphia, and Gunnison, Fish Gifford & Chapin, of Erie, for appellees.

ELKIN, J. [1] The first question raised by this appeal is whether the lapsed share of Nellie Reed goes under the intestate laws as real estate to the heirs of the testator, or as personal property to his next of kin. Nellie Reed predeceased the testator several months, unmarried, and without issue. That the gift to her lapsed and passed under the intestate laws was expressly decided by this court in Reed's Estate, 82 Pa. 428, and therefore this cannot be treated as an open question. It is contended for appellants that the will worked a conversion of the real estate, and that it was not the intention of the testator to give the residuary legatees an interest in land, but that they should take the proceeds of the sale of real estate as money. There can be no doubt that this was the intention of the testator, and, if no lapse had occurred, the entire estate would have been so distributed. But a lapse, not contemplated by the testator, did occur, and as to this share the will made no provision. It passed under the intestate laws, which must necessarily govern its distribution, no matter what the intention of the testator may have been as to those beneficiaries of his bounty who took under the will. As was said by this court in Reed's Estate, supra: "This lapsed legacy (in this case two-twelfths of the residuary estate) became distributable under the intestate law, as part of the estate not disposed of by the will, when it took effect by and at the death of the testator. Of this he died intestate. His testacy was therefore of only a part of his estate." While the intention of the testator should prevail as to all that part of the estate disposed of by will, and even may be controlling as to the manner of holding and converting the entire estate, including the lapsed share, it cannot be held to alter the course of inheritance, or the character of that part of the estate which passed under the intestate law. This seems to be the settled law of Pennsylvania.

[2] Conversion is a fiction of equity applied in proper cases in order to carry out the intention of the testator, but, where the intention, or purpose, fails, the fiction will not be applied. If there be a total failure of purpose, the heir at law takes, and may not only prevent a sale, but may compel the trustee, if the estate be so held, to make a conveyance of the real estate to him. In case of a partial failure of purpose, while the heir cannot prevent the sale, he takes his share according to the course of inheritance under the intestate law as if no will had been made. The authority of Ackroyd v. Smithson, 1 Bro. C. C. 508, has made this the settled law of England for more than a century. As far back as 1823 this court adopted the same rule and it has been followed in our state from that time to the present. Wilson v. Hamilton, 9 Serg. & R.

424; Luffberry's Appeal, 125 Pa. 513, 17 Atl. 447; Rudy's Estate, 185 Pa. 359, 39 Atl. 968, 64 Am. St. Rep. 654; Painter v. Painter, 220 Pa. 82, 69 Atl. 323, 20 L. R. A. (N. S.) 117; Thompson's Estate, 229 Pa. 542, 79 Atl. 173; Munderspaugh's Estate, 231 Pa. 376, 80 Atl. 870.

[3] In the light of these decisions, there is no escape from the conclusion that the lapsed share of Nellie Reed in the real estate of her father passed under the intestate law to the heirs of the testator, and was not distributable as personalty to his next of kin.

[4] While the second question relates, primarily, to the distribution of the balances accounted for in the third and fourth partial accounts, the distribution under former partial accounts is incidentally involved. In other words, the widow having received more than she was entitled to in the former distributions, and the legatees and heirs less than their shares under the will and the law, can there be such an equitable distribution under present and future accounts as to give each distributee his or her proper share in the entire estate? We cannot regard this as even a doubtful question under the authority of our own cases. Where in the distribution of a partial account a distributee does not appear, and the entire fund then for distribution is awarded to those distributees who do appear, the inequality will be corrected in a subsequent distribution of other funds belonging to the same estate by awarding him who received nothing on the first distribution enough to make up his proportionate distributive share of both funds. Grim's Appeal, 109 Pa. 391, 1 Atl. 212. Where the next of kin are awarded an amount of void accumulations in excess of their share, and the widow is thereby deprived of her share, the inequality will be corrected by subsequently awarding her out of the principal a sum sufficient to make good her share of the void accumulations. Grim's Estate, 147 Pa. 190, 23 Atl. 802. To the same effect are Yetter's Estate, 160 Pa. 506, 28 Atl. 847; Landmesser's Estate, 13 Pa. Super. Ct. 467; Stahl's Estate, 25 Pa. Super. Ct. 402. There is nothing new or novel in the principle underlying these cases. It is just, reasonable, and equitable. It is predicated upon the theory that in the distribution of a partial account the rights of distributees are not finally adjudicated. In an accounting by a trustee, it is recognized as an elementary principle that it is proper to compute the share of each distributee in the entire net fund accounted for, no matter whether there be one or several accounts, and to deduct from each share all former payments. It should not be overlooked that we are dealing with the estate of the testator and the rights of the beneficiaries. Each beneficiary is entitled to a certain share of the entire estate and the amount of that share can only be definitely ascertained when

all of the accounts are finally settled. All payments on account to a distributee, whether made direct by the executor, or trustee, or awarded on distribution of partial accounts, are to be deducted from his or her share when it is finally ascertained. This is what the rule of the above-cited cases means, and there is no reason in law or equity why it should be disturbed. The doctrine of *res adjudicata* in the sense urged by the learned counsel for appellants has no application to the facts of the present case. The adjudication of a partial account simply awards distribution of the fund then in court, and is not a final determination of the rights of the parties. Leslie's Appeal, 63 Pa. 355; Lease v. Ensminger, 5 Pa. Super. Ct. 329. The numerous cases called to our attention by the learned counsel for appellants, and upon which they rely to ask a reversal, can be easily distinguished from the case at bar. In the present case there is no effort to surcharge the accountants, or to open former adjudications, or to raise any question now that was litigated and decided in the distribution of former partial accounts, and nothing attempted to be done here gives rise to an equitable estoppel.

Decree affirmed, costs to be paid out of the funds for distribution.

CHRONISTER v. YORK RYS. CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

STREET RAILROADS (§ 117*)—COLLISION WITH WAGON—QUESTION FOR JURY.

In an action against a street railway to recover for injuries received in a collision with plaintiff's milk wagon, question of the railroad company's negligence and of plaintiff's contributory negligence *held* for the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

Appeal from Court of Common Pleas, York County.

Action by John E. Chronister against the York Railways Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Richard E. Cochran, John A. Hooper, George S. Schmidt, and Smyser Williams, all of York, for appellant. Joseph R. Strawbridge and J. St. Clair McCall, both of York, for appellee.

PER CURIAM. The right of the plaintiff to recover depended entirely upon the finding of facts by the jury. No question of law was involved, and there is nothing in the appeal that requires discussion. The case, as made out by the plaintiff's testimony, was that he was riding in his milk wagon on a borough street, on which the defendant had a single-track road. Because of the unevenness of

the surface of the street at the sides, he drove in the middle, with the wheels of his wagon astride one of the rails; that before turning on the track he looked back, when he could see 1,000 feet, and saw no car. After driving 350 feet, his wagon was struck by a work car, which came rapidly behind it, and of the approach of which no warning was given. If these were the facts, as the jury found them to be, he was entitled to recover. It was his right to drive on any part of the street, subject to the superior right of the defendant to the use of its track, and he should have had warning and ample time to get off the track. If, as testified to by the defendant's witnesses, the plaintiff had warning by gong, and turned so as to clear the track, and then suddenly turned back on the track in front of the car, his negligence would be a bar to recovery. This issue of fact is all there was in the case.

The judgment is affirmed.

IN RE GROTHE'S ESTATE.

Appeal of LOGAN.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. APPEAL AND ERROR (§ 1022*)—REVIEW—QUESTIONS OF FACT.

Where the finding of an auditor confirmed by the orphans' court that a testator did not stand in loco parentis to his grandsons, legatees under his will, is based on competent evidence and there is no manifest error, it will not be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

2. WILLS (§ 630*)—CONSTRUCTIONS—VESTED AND CONTINGENT ESTATES.

Where a contingency is annexed to the time of payment of a legacy only, and the legacy has been made by a previous request, it is vested; but, if annexed to the legacy, it does not vest till the contingency happens.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464-1480, 1486, 1487; Dec. Dig. § 630.*]

3. WILLS (§ 630*)—CONSTRUCTIONS—VESTED AND CONTINGENT ESTATES.

The legacies to the children of testator's son living at testator's death of \$1,000 each as they become 25 years of age are contingent on reaching the age of 25 years, and the administrator of a grandson dying subsequently to the decedent, but before reaching that age, is not entitled to the legacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464-1480, 1486, 1487; Dec. Dig. § 630.*]

4. EXECUTORS AND ADMINISTRATORS (§ 815*)—DISTRIBUTION OF ESTATE—ORDER—CONCLUSIVENESS—PERSONS CONCLUDED.

The report of an auditor in distributing the balance in the hands of a former administrator, which undertook to construe a legacy to testator's grandchildren of \$1,000 each as they became 25 years of age, awarding to each of the grandchildren then living including one who subsequently died under 25 years of age \$1,000 to be paid out of the proceeds of real estate remaining unsold when they should reach the age of 25 years, though absolutely confirm-

ed by the court, and though no appeal was taken from the decree of confirmation, was not conclusive on the living grandchildren of the testator as to the share of the grandchild who died before reaching 25, where they, if in existence at the time of the audit, were minors without guardians.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 815.*]

5. EXECUTORS AND ADMINISTRATORS (§ 815*)—DISTRIBUTION OF ESTATE—ORDER—CONCLUSIVENESS—MATTERS CONCLUDED.

A distribution by an auditor of funds in the hands of an administrator, though absolutely confirmed by the court without any appeal being taken, is conclusive only as to the fund he was appointed to distribute; and an attempt to make an award out of the proceeds of real estate not yet sold was beyond his power.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 815.*]

Appeal from Orphans' Court, York County.

In the matter of the estate of Frederick Grothe. From a decree dismissing exceptions to the recommitted report of Ed. Chapin, auditor, distributing the balance on the several accounts of the Security Title & Trust Company, administrator d. b. n. c. t. a., James J. Logan, administrator of the estate of Grover F. Grothe, appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

James J. Logan and John N. Logan, both of York, for appellant. Frederick B. Gerber and W. F. Bay Stewart, both of York, for appellee.

BROWN, J. Frederick Grothe died February 2, 1894. In the preceding month he executed a codicil to his will, and the following clause in it gives rise to the question raised on this appeal: "I give and bequeath unto the male children of my son Frederick W. Grothe living at the time of my death, the sum of one thousand dollars each as they become twenty-five years of age." At the time of the testator's death three sons of his son, Frederick W., survived him: Frederick C., who became 25 years of age November 14, 1908, and has received his money; Roy A., who is still living, under 25 years of age, and Grover F., who died February 12, 1910, in the eighteenth year of his age. James J. Logan, the appellant, is his administrator and claims (1) that the legacies given by the testator vested at the time of his death; and (2) that, as he stood in loco parentis to the legatees, the legacies bore interest from his death.

[1] The second contention involves a pure question of fact, and, the auditor and court below having found that the appellant had failed to show that the relation of parent and child had existed between the testator and his grandchildren, that finding would not be disturbed, even if appellant's first contention should be sustained.

[2] Upon the subject of vested and contingent legacies the rule of the civil law adopted in England and followed here is that, where the contingency is annexed to the time of payment only, and the legacy has been given by a previous bequest, it is vested; but, if the contingency is annexed to the legacy, it does not vest until the contingency happens. *Reed v. Buckley*, 5 Watts. & S. 517, 40 Am. Dec. 531. "On the subject of what constitutes a vested or contingent legacy, this court has, in many cases, iterated and reiterated the rule of the courts in England that where there is a substantive bequest or gift of a sum of money, to be paid at a future time, there the bequest or legacy is vested. But where there is no antecedent gift or bequest, independent of the period fixed for payment, then it is not vested, but contingent." *Bowman's Appeal*, 34 Pa. 19. This rule is more elaborately stated in *Smith on Executory Interests*, §§ 285, 286: "Where real or personal estate is devised or bequeathed to a person, when or as soon as he shall attain a given age, or when an event shall happen which may never occur at all, or at, or upon, or from and after his attaining such age, or the happening of such event, and there are no other words indicative of an intent to confer a vested interest, and nothing, in the form of the limitation itself, to indicate an intent merely to delay the vesting in possession or enjoyment, and no disposition of the intermediate income, in such case, the interest of the devisee or legatee will be contingent until he attains the age specified, or the event described has happened; for, although in this case the person is ascertained, yet the property is only given to him at a future period which may never arrive, and the gift can no more attach upon him before that period than it could if the testator, continuing to live, were to defer making any devise or bequest till such period had actually arrived."

[3] Frederick Grothe made no substantive bequest or gift to each of the sons of his son, Frederick W., living at the time of his death, to be paid at a future time. He gave to the male children of his son, Frederick W., \$1,000 each, but no one of them was to take the bequest at the time of his death, the payment of it only being postponed to a later period. The bequest of \$1,000 is to "each as they become twenty-five years of age." Until each reaches that age the legacy of \$1,000 is but a contingency, and, in the case of the grandson, Grover F., the contingency upon which his grandfather directed he should take never happened, for he died before he was 25 years old. His attainment to that age was the condition which the grandfather annexed to the vesting of the gift, and, if he were living now and not yet 25, his bequest would still be in the air. He died when he was but a little over 17 years of age, and with his death the contingent legacy ceased

to exist. Up to the time of his death he had not, under the terms of his grandfather's will, become eligible to take.

But it is urged that under *Reed v. Buckley*, supra, there ought to be read into the bequests to the grandsons of the testator the words "to be paid," or "payable," making the codicil read as follows: "I give and bequeath unto the male children of my son Frederick W. Grothe living at the time of my death, the sum of one thousand dollars each, to be paid as they become twenty-five years of age." It is true that in *Reed v. Buckley* an ellipsis was supplied, but this was done because the testator had made an unconditional, substantive bequest to each of his children by the following clause in his will: "I direct, that the net proceeds of my estate heretofore ordered by me to be disposed of, shall be equally divided between my remaining children, share and share alike, and at the times of their severally arriving at the age of twenty-one years." As the manifest intention of the testator was that each child was to be paid the bequest when he or she should attain the age of 21 years, the ellipsis after the word "and" was filled up by inserting the word "paid." This did not go to the intention of the testator, but simply made clear the sense of an uncompleted sentence. Nothing need be interpolated in the clause of the codicil before us to make it clear or to give it sense. The plain meaning of the testator's language is that only such grandsons as shall reach the age of 25 are to receive \$1,000 from his estate, and the eleventh clause of his will is confirmatory of the intention thus expressed in the codicil. That clause is: "Eleventh: I will and bequeath unto my grandson Frederick Grothe, the sum of four thousand dollars (\$4,000.00) to be paid out of my estate by my hereinafter named executor one year after my death to the guardian (of Frederick Grothe) appointed by the orphans court of York county, Pennsylvania." This grandson, Frederick Grothe, is one of the grandsons to whom the codicil refers, and the gift to him in the will was a present, substantive one, with payment of it postponed. If the testator had intended to make such gifts by his codicil, he would naturally have used the same, and not different, language, clearly expressive of a different intent.

[4] Another contention of the appellant is that the question of the vesting of the legacy in his decedent is *res adjudicata*. A former auditor in distributing the balance in the hands of a former administrator d. b. n. c. t. a. undertook to construe the codicil to the testator's will, and awarded to each of the three grandsons the sum of \$1,000, to be paid to them out of the proceeds of real estate of the testator remaining unsold, when they, respectively, reach the age of 25 years. The report of this auditor was absolutely confirmed by the court below in 1896,

and, as no appeal from the decree of confirmation was taken, it may have become final and conclusive upon all parties *sui juris* who appeared in person or by counsel before the auditor, or who had due, legal notice, actual or constructive, of the time and place of the hearings before him, and he acted within the scope of his authority. But, as the learned court below correctly held, this adjudication was not conclusive upon the grandchildren of the testator, who, if they were in existence at the time of the audit, were minors without guardians. It is for them that the present trustee is to collect and preserve the funds of the estate, and it is his right to now raise the question of the vesting of the legacies to the three grandsons of the testator.

[5] For another reason, the matter now in dispute is not *res adjudicata*. The distribution made by the former auditor is conclusive only as to the fund which he was appointed to distribute. When he attempted to make an award to the grandsons of the testator out of the proceeds of real estate not yet sold, he acted beyond the scope of his powers. *Guenther's Appeal*, 4 Wkly. Notes Cas. 41; *Elkne's Appeal*, 86 Pa. 313.

The assignments of error are all overruled, and the decree is affirmed at appellant's costs.

YORK TRUST CO. v. PULLMAN AUTOMATIC VENTILATOR MFG. CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

RECEIVERS (§ 198*)—COMPENSATION—COUNSEL FEES.

Where compensation of a receiver and allowance of counsel fees were based on the responsibility assumed, and successful management of the affairs of the corporation, an order fixing the amount will not be reversed without clear proof of error.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 392-396; Dec. Dig. § 198.*]

Appeal from Court of Common Pleas, York County.

Action by the York Trust Company against the Pullman Automatic Ventilator Manufacturing Company. From an order fixing the amount of receiver's compensation and counsel fees, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

V. K. Keesey, of York, for appellant. H. C. Brenneman and John J. Bollinger, both of York, for appellee.

PER CURIAM. This appeal is from an order fixing the amount of the commissions of a receiver and allowing counsel fees. The whole subject was carefully considered by the court, and the compensation of the receiver and his counsel was based on the work done, the responsibility assumed, and the successful management by them of the affairs of the corporation, by which it was

enabled to resume business. Such a finding as this will not be reversed by an appellate court, except on clear proof of error. We find nothing in the testimony that raises a doubt as to the correctness of the order made.

The order is affirmed, at the cost of the appellant.

In re AMERICAN TRANSFER CO. (Supreme Court of Pennsylvania. July 2, 1912.)

1. EMINENT DOMAIN (§ 10*) — EXTENT OF RIGHT—STATUTORY PROVISIONS.

Act April 11, 1866 (P. L. 1867, p. 1447), incorporating the Dispatch Company, provided that it should have power to provide and maintain machinery and apparatus necessary for the transmission of property intrusted to its care, whether on the surface of the earth or under it, and to enter on such lands and inclosures, streets, etc., as necessary for the purposes stated. Act March 16, 1868 (P. L. 331), supplementary to the former act, provided that nothing contained therein should be held to prohibit the corporation from transporting persons within their pneumatic tubes. Act April 23, 1870 (P. L. 1872, p. 1240), incorporating the Novelty Power Company, provided that the business of that company should be the receipt, delivery, transportation, and storage of goods of any kind. *Held*, that the American Transfer Company, possessing the powers conferred by these acts, cannot exercise the power of eminent domain to appropriate rights of way over private property to transmit electric power.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 35-48; Dec. Dig. § 10.*]

2. CORPORATIONS (§ 370*)—POWERS—IMPLICATION.

Corporate powers are not created by implication nor extended by construction, and no privilege is granted, unless expressed in plain and unequivocal words; and when a corporate body asserts its right to do a thing or to deprive an individual of his property for an adequate compensation it must be able to show that the right is conferred by unequivocal language of its charter.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1511-1518; Dec. Dig. § 370.*]

Appeal from Court of Common Pleas, Lancaster County.

Petition by the American Transfer Company to file a bond for the appropriation of lands. From a decree dismissing rule for the approval of the bond, the Transfer Company appeals. Affirmed.

Landis, P. J., filed the following opinion in the common pleas, dismissing the rule to show cause why a bond should not be approved:

[1] "Robert B. Risk is the owner of a tract of land, situated in Drumore township, in this county, and the petitioner, the American Transfer Company, is desirous of obtaining a right of way over the same, in order to construct, maintain, and operate thereon a line of wires, towers, and other structures, for the purpose of transmitting electric power. The said company has tendered to said Risk a bond in the sum of \$3,200, but he has re-

fused to accept it, on the ground that this company is attempting to exercise powers which it does not now possess. Therefore, that this question may be settled, a bond has been presented to this court, and we are asked to give it our approval. In order to come to a correct conclusion, it is first necessary to fully consider the respective acts of assembly relating to the incorporation of this company, to ascertain the extent of its corporate rights.

"By a special act of the General Assembly of Pennsylvania, prior to the Constitution of 1873, viz., the act of April 11, 1866 (P. L. 1867, p. 1447), the Dispatch Company was duly incorporated. The capital stock of the company was to be 5,000 shares of \$25 each; and section 3 of the act provided that it shall have power 'to provide, erect, operate and maintain machinery, engines, tubes and apparatus, which may be deemed necessary for the transmission of property of any kind, intrusted to the care of said corporation, whether upon the surface of the earth, or under the same; and for this purpose they are authorized and empowered, by themselves, their agents, engineers, and workmen, and with their tools, wagons, carts and horses, to enter upon such lands and inclosures, streets, lanes, and alleys, roads, highways, and bridges as it may be necessary to occupy, for the purposes aforesaid, or to obtain materials for the construction of said works, and to occupy, ditch, and lay pipes through the same, and the same to repair from time to time; and if any injury be done to private property the said company shall make compensation therefor, or give security for such compensation, according to the provisions of the eleventh section of an act entitled "An act regulating railroads," approved February 19, 1849 (P. L. 79): Provided, that before commencing the construction of their works, the said company shall file, in the office of the secretary of the commonwealth, a copy of the route of such works; and provided further, that the tubes or pipes of said company shall not be used for the conveyance of petroleum oil, and that nothing herein contained shall be construed to authorize the construction of an ordinary track locomotive railroad, with ordinary passenger and freight cars, upon the surface of the ground.'

"By the act of March 16, 1868 (P. L. 331), entitled 'A supplement to an act to incorporate the Dispatch Company, approved April eleventh, one thousand eight hundred and sixty-six,' it was provided 'that the Dispatch company, in lieu of filing in the office of the secretary of the commonwealth a copy of the entire route of their work as provided in the third section of the act incorporating said company, shall be required, before the construction of any section, to file a copy of the route of such section: Provided, that nothing contained in said act shall be held to prohibit the said corporation from transporting

persons within their pneumatic tubes, but that the corporation shall have no power to construct any ordinary steam locomotive or horse power railroad or railway upon the surface of the ground and that this act shall not be operative, unless approved by all the stockholders of the company, either in person or by proxy, within thirty days after its passage.'

"Under the act of April 26, 1870 (P. L. 1872, p. 1240), the Novelty Power Company was incorporated. The third section of this act declared 'that the business of said corporation shall be the receipt, delivery, transportation, storage, transmission, conveyance of goods, merchandise, letters, packages, messages, parcels, property of any and every kind and description; and it shall have power to provide such means, offices, structures, agencies, and appliances, mechanical and otherwise, and to use, hire, operate, construct and maintain the same as it may deem necessary for its purposes, and shall be entitled to all the provisions and privileges and subject to all the restrictions (except the proviso at the end hereof) which are conferred, set forth, referred to and granted in and by the third section of an act to incorporate the Dispatch Company, approved the eleventh day of April, eighteen hundred and sixty-six, as fully as if all of said privileges had been herein specifically set forth and recited at length; and may make and enforce its contracts, and establish, regulate and collect its charges, and shall have, enjoy and exercise all the rights, powers and privileges granted in and by this act, and the third section of the act incorporating the Dispatch Company as aforesaid, any law or ordinance to the contrary notwithstanding: Provided, that nothing herein contained shall be construed to authorize the construction of an ordinary locomotive railroad for the conveyance of passengers upon the surface of the ground.'

"The respondent, in his answer, declares, first, that the corporation has forfeited its franchises by nonuser; second, that at the time of the passage of the special acts electricity or electric power was not contemplated, that it was not intended to be included within the scope of the petitioner's charter, nor was it such property as the petitioner was given the right to receive, deliver, transport, store, transmit, and convey; third, that the petitioner had no right, under its charter, to exercise the power of eminent domain, for the purpose of appropriating rights of way over private property, to construct a line and apparatus for the purpose of transmitting electric power; and, fourth, that the petitioner was at one time engaged in transporting oil, and, as it had elected to engage in this kind of business, it is not enabled to exercise any of its corporate powers to engage in the business of transporting electric power."

The court, having decided that there was no forfeiture, proceeded as follows:

[2] "The second proposition is that, at the time the special acts were passed, electricity or electric power was not contemplated, and that it was not intended to be included within the scope of the petitioner's charter; and this is the only one which we need now discuss. We are disposed to think that there is merit in this proposition. 'Grants of franchises are usually prepared by those interested in them, and submitted to the Legislatures with a view to obtain the most liberal grant obtainable; and for this and other reasons such grants should be in plain language, certain, definite in nature, and contain no ambiguity in their terms, and will be strictly construed against the grantee.' *Cleveland Electric Railway Co. v. Cleveland*, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399; *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801. 'It is a general rule that "every public grant of property or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public."' 1 Cook on Corporations (6th Ed.) § 2; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353. In *Pennsylvania Railroad Co. v. Canal Commissioners*, 21 Pa. 9, Mr. Justice Black, delivering the opinion of the court, said: 'It may be that the privilege which the relators claim might arise by implication out of their charter, or some other of the acts cited by their counsel, if we were at liberty to give to them the broad construction which we sometimes apply to other laws of a different character. But corporate powers can never be created by implication nor extended by construction. No privilege is granted, unless it be expressed in plain and unequivocal words, testifying the intention of the Legislature in a manner too plain to be misunderstood. When the state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said; and words of equivocal import are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory, when they do find their way into the enactments of the Legislature. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference.' See, also, *Brown v. Radnor Township Electric Light Co.*, 208 Pa. 453, 57 Atl. 904. In accordance with this well-known rule, it was held, in *Bly v. White Deer Mountain Water Co.*, 197 Pa. 80, 46 Atl. 929, that, 'as a water

company has no right to supply water in territory adjacent to the place in which it is located, it has no authority, under its right of eminent domain, to condemn and appropriate waters for such purposes; and if it attempts to do so a landowner who is threatened with injury has a standing, under the act of June 19, 1871 (P. L. 1360), in equity, for an injunction to restrain such act.' It was also held that 'there can be no authority or power conferred upon a corporation by the certificate or letters patent, except such as are clearly given by or necessarily implied from the language of the statute under which they are granted. Equally true is it that the rights and privileges of a corporation must be written in the charter, or they do not exist. When a corporate body asserts its right to do a thing or deprive an individual of its property, even for an adequate compensation, it must be able to show that the right is conferred by the plain and unequivocal language of its charter.' See, also, *Schroeder v. Scranton Gas & Water Co.*, 20 Pa. Super. Ct. 255.

"The corporation act of April 29, 1874 (P. L. 73), provided for the incorporation of companies for 'the manufacture and supply of gas or the supply of light or heat to the public by any other means.' In *Scranton Electric Light & Heat Co.'s Appeal*, 122 Pa. 154, 15 Atl. 446, 1 L. R. A. 285, 9 Am. St. Rep. 79, it was held that this did not authorize the incorporation of companies for the supply of electric light to consumers. Mr. Justice Gordon, delivering the opinion of the court, said: 'Did the Legislature intend to embrace electric lighting in the language, "companies incorporated under the provisions of this statute, for the supply of water to the public, or for the manufacture of gas, or the supply of light or heat to the public by *any other means*?" Before answering this question, we must call attention to what has heretofore been regarded as an unalterable rule; that is, that a legislative grant to a corporation of exclusive privileges is, as said by Mr. Justice Green, in *Emerson v. Commonwealth*, 108 Pa. 111, to be construed most strictly, and we may add that every intentment not obviously in favor of the grant must be construed against it. Monopolies are favorites neither with courts nor people. They operate in restraint of competition, and are, hence, as a rule, detrimental to the public welfare; nor are they at all allowable, except where the resultant advantage is in favor of the public, as, for instance, where a water or gas company could not exist except as a monopoly. * * *. In the case above cited the sharpest technicality of construction was adopted in order to defeat the extravagant demand of the corporation claiming the exclusive privilege to furnish the city of Pittsburgh with natural gas for the purposes of fuel. But in the case before us it

is apparent that the Legislature did not, in the making of the act of 1874, intend to embrace lighting by electricity. It is true that the language of this statute seems, at first sight, to be broad enough to embrace all methods of lighting and heating then known, or that might thereafter become known, yet we suppose it will not be contended that the intention was to grant to this company the exclusive privilege of furnishing to the citizens of Scranton coal, wood, oil, and other well-known and ordinary materials for lighting and heating. Not, indeed, that the law-makers could not have conferred such power, but because it is not probable that they intended to confer a power so unreasonable. It is therefore obvious that we must consult not only the letter of the act, but also the intention of its makers. If, however, it were designed to embrace a method of lighting by electricity—a method not then in use for economic purposes—it is remarkable that the means necessary for its proper distribution were not provided for. Under the thirty-fourth section of the act, the only one upon which the plaintiff relies for its exclusive right, there is no power conferred to enter upon the public streets for the erection of poles and placing of wires; the privilege of so entering being confined to the laying of pipes only. From this it is clear that the Legislature had in mind, not a then unknown process of public lighting and heating, but a process involving the use of gas, or some similar material, for the distribution of which pipes only were necessary.

"In Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 Atl. 72, 9 L. R. A. (N. S.) 404, the company was incorporated in 1880 under the act of 1874, for the purpose of the manufacture and supply of light. Afterwards the company surrendered its original charter, and took out letters patent under the act of May 8, 1889 (P. L. 136), providing for the incorporation of companies for the supply of light, heat, and power by electricity. It was held that the right of the company to change its system from poles and wires to conduits was expressly provided for in the act of 1889. Mr. Justice Brown said: 'But the appellant was not authorized, under its original charter, to supply light by electricity. * * * In locating and installing their systems of distributing electricity, electric light companies are given, by this section, the right of eminent domain upon public streets, lanes, alleys, or highways outside of city or borough limits, and within such limits they may use the streets with municipal consent. This is a limited right of eminent domain; the limitation upon it being found in the words of the grant of it.'

"The act of May 8, 1889 (P. L. 136), provides: 'Clause 1. Every such corporation shall have the authority to supply light, heat and power, or any of them, by electricity, to the public in the borough, town, city or dis-

trict where it may be located, and to such persons, partnerships and corporations, residing therein or adjacent thereto, as may desire the same, at such prices as may be agreed upon, and the power, also, to make, erect and maintain the necessary buildings, machinery and apparatus for supplying such light, heat and power, or any of them, and to distribute the same, with the right to enter upon any public street, lane, alley or highway for such purpose, to alter, inspect and repair its system of distribution.'

"In *Brown v. Radnor Township Electric Light Co.*, 208 Pa. 453, 57 Atl. 904, it was held that an electric light company might be incorporated for a township, and that the word 'district' was not to be restricted merely to a division of a city or borough. It was also decided that such an incorporated company, by the express terms of the act, had a limited power of eminent domain, and, under such power, might enter upon the bed of a turnpike road and erect its poles and string its wires, notwithstanding the objection of abutting owners, who own the fee in the bed of the road. Mr. Justice Dean, in delivering the opinion of the court, said: 'It is difficult to see how the power thus conferred can be said to be by implication or construction. True no power to actually take and appropriate land is given; but an additional servitude is imposed upon the land, a servitude additional to that of the turnpike company, and this by express positive grant.' It is not, however, decided that such a company has the right, generally, to enter upon and occupy land; and that right would appear to be confined by the act of assembly to the public streets, lanes, alleys, or highways.

"It is a well-known fact that, although the force of electricity was known when the special acts of 1866 and 1870 were passed by the Legislature, yet it had never been applied for the purposes of light, heat, or power, in a public way; nor were any structures, such as are now contemplated, nor transmission lines for conducting electricity, then in use. In addition, the acts themselves seem to us to designate as the purposes intended something in the nature of pneumatic tubes, through which specific articles might be carried. The act of 1866 states the purpose of the Dispatch Company to be 'to provide, erect, operate and maintain machinery, engines, tubes and apparatus, which may be deemed necessary for the transmission of property of any kind intrusted to the care of said corporation, whether upon the surface of the earth, or under the same,' and the right is given to it 'to enter upon such lands and inclosures, streets, lanes and alleys, roads, highways and bridges, as it may be necessary to occupy, for the purposes aforesaid.' The act of 1870 declares 'that the business of said corporation [the Novelty Power Company] shall be the receipt, delivery, transportation, storage, transmission, conveyance of goods, merchandise, letters,

packages, messages, parcels, property of any and every kind and description.' And the act of 1868, which is a supplement to the act of 1866, declares 'that nothing contained in said act shall be held to prohibit the said corporation from transporting persons within their pneumatic tubes.' It cannot be contended that the electric wires which the company now intends to erect extend either upon the surface of the earth or under the same; and, as the general right of eminent domain is such an act of sovereign authority which even electric light companies do not, as we have shown, now possess, can it be reasonably supposed that the Legislature, in passing these special acts, had in contemplation the grant of any such power? If it had so meant, we think it would have said so, and that a failure to so declare is a denial of the right.

"Fully appreciating the importance of the question that is here raised, we are of opinion that the good of the public demands that such corporate powers shall not be considered as granted in charters of this character, unless express authority for their exercise is therein plainly indicated. As we are of the opinion that this company is not endowed with the power of eminent domain in respect to the purposes for which it seeks to exercise it, we discharge the rule to show cause why this bond should not be approved, and dismiss the petition, at the cost of the petitioner."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

W. U. Hensel, of Lancaster, for appellant.
John E. Malone and Spencer G. Nauman, both of Lancaster, for appellee.

PER CURIAM. The order dismissing the appellant's petition is affirmed on the opinion of Judge Landis.

In re FREY'S ESTATE.

Appeal of NELSON.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. BANKRUPTCY (§ 299*)—ACCOUNTING WITH TRUSTEE IN BANKRUPTCY OF BENEFICIARY—INTERVENTION.

Right of beneficiary to intervene in a proceeding by petitioner's trustees in bankruptcy to compel her testamentary trustee to account, where it is alleged that through losses not chargeable to the trustee the principal of the trust fund had been reduced and the loss made up from the income, and the petitioner might show that before she became insolvent she and her trustee entered into an agreement under which her trustees in bankruptcy have no right to ask for an account, was improperly refused.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 488; Dec. Dig. § 299.*]

2. APPEAL AND ERROR (§ 78*)—LEAVE TO INTERVENE—FINAL ORDER.

Where a denial of a petition to intervene would be a practical denial of relief to which petitioner for intervention is entitled, and can

obtain in no other way, refusal to permit intervention is a final order and appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 464-483; Dec. Dig. § 78.*]

Appeal from Orphans' Court, York County.

In the matter of the estate of Alexander J. Frey. From an order dismissing petition of Mary Nelson, who intervened, she appeals. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

John F. Kell and McClean Stock, both of York, for appellant. Henry C. Niles, George E. Neff, and James St. Clair McCall, all of York, for appellees.

BROWN, J. In asking that this appeal be quashed, counsel for appellees seem to think that it is from the decree directing an account to be filed by the testamentary trustee of the appellant. If it were from that decree, and the appellant had been heard in the proceedings in the court below leading up to it, the motion to quash would have to prevail, for a decree citing an executor or testamentary trustee to file an account is interlocutory, from which no appeal lies. *Paletorp's Est.*, 160 Pa. 316, 23 Atl. 689. The appeal is not from the decree to file the account, but from the refusal to allow the appellant to intervene in the proceedings instituted to compel her trustee to file it.

[1] To her petition, asking leave to intervene and show cause why an account should not be filed at the instance of the appellees, no answer was filed, and its averments are therefore to be taken as true. One of them is that, through losses not chargeable to the trustee, the principal of the trust fund has been reduced and the loss is to be made up from the income. If the appellant had been permitted to intervene, she might have been able to show that, before she became insolvent, she and her trustee entered into an agreement, in the face of which her trustees in bankruptcy have no right to ask for an account at this time, if at all; but her petition to be heard was denied and her trustee has been ordered to file an account, the costs and expenses of which will come out of the income provided for her by her father. She was directly interested and clearly had a right to be heard in the citation proceedings against her trustee, and, if the decree denying her a hearing as an intervener has done her a wrong for which she now has no remedy, it was final as to her, and she has a right to be heard on appeal from it. How is she now to be relieved from the costs and expenses of filing the account, if it ought not to have been filed, unless she is heard on this appeal? She was given no opportunity to show cause why it should not be filed, and it is too late for her to do so now, if she has been wronged by it. She, as well as the trustee, ought to have been heard. The decree as to him

is but interlocutory, and, on appeal from the decree finally confirming his account, he can renew his objections to being compelled to file it, and he will be heard; but not so with the appellant, to whom no opportunity was given to be heard why it should not be filed.

[2] While, as a rule, an appeal will not lie from an order refusing leave to intervene, because such order is not a final one, cases may arise where a denial of a petition to intervene would be a practical denial of relief to which the petitioner for intervention is entitled and can obtain in no other way; and in such cases the refusal to permit an intervention is a final order or decree as to the petitioner. *Henry v. Travelers' Insurance Co.*, 16 Colo. 179, 28 Pac. 318; *Credits' Commutation Co. v. United States*, 91 Fed. 570, 34 C. C. A. 12.

The order denying the appellant the right to intervene was, as to her, in the face of her unanswered petition, final, and, as she should have been permitted to intervene, the decree of the court below is reversed and the record remitted, with direction that she be made a corespondent with her testamentary trustee in the citation proceedings; the costs on this appeal to be paid by the appellees.

IN RE PARMER'S ESTATE.

Appeal of PALMER.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. APPEAL AND ERROR (§ 77*)—RIGHT OF APPEAL—INTERLOCUTORY DECREE.

An appeal will not lie from a decree directing executors to file an account, it not being final.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 444-463; Dec. Dig. § 77.*]

2. EXECUTORS AND ADMINISTRATORS (§ 472*)—DECREE FOR ACCOUNTING — SURCHARGING EXECUTORS.

The orphans' court, in making absolute a rule to show cause why citation to executors to file an account should not issue, cannot direct in the same decree that the executors shall charge themselves with a stated sum and interest, and with everything else with which they may be properly charged, after which the court will make distribution.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2025-2040; Dec. Dig. § 472.*]

Appeal from Orphans' Court, Lancaster County.

In the matter of the estate of Henry J. Parmer. From a decree ordering Henry K. Palmer and Emanuel R. Palmer, executors, to file an account, Henry K. Palmer appeals. Reversed in part.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

B. F. Davis, of Lancaster, for appellant. H. Frank Eshleman, of Lancaster, for appellee.

MESTREZAT, J. Henry J. Parmer died May 25, 1905, testate, and letters testamen-

tary were duly issued to Emanuel H. Palmer and Henry K. Palmer. No inventory of the estate was filed by the executors, and no account has yet been filed by them. On March 2, 1911, Eva Huss Stigelman, a niece and legatee under the will of the decedent, presented her petition to the orphans' court setting forth, inter alia, her interest in the estate, the names of the other parties interested therein, that a certain sum was due her from the executors, and praying that a citation be issued to Henry K. Palmer, executor, who had charge of all of the funds of the estate, commanding him to file an account, and upon adjudication thereof to pay over to her the amount shown to be due. The court granted a rule to show cause why a citation to file an account should not issue. A copy of the rule is not printed, and there is nothing in the paper book to show against whom it was issued. Henry K. Palmer filed an answer and supplemental answer, and, for the reasons therein set forth, prayed that the rule be discharged at the costs of the petitioner. The case was heard on the petition, answer, and depositions, and the learned court below made the rule absolute. In the opinion of the court making the rule absolute it is said: "In making this rule absolute we order Emanuel R. Palmer and Henry K. Palmer, as executors of the will of Henry J. Parmer, deceased, to charge themselves with \$2,500 and interest, and with any and every thing else with which they may be properly charged, after which the court will make the distribution."

This appeal is taken by Henry K. Palmer from the decree of the court making the rule absolute and awarding a citation, and surcharging the executors with \$2,500. The first assignment alleges that the court erred in making the rule absolute, and the second assignment alleges error in that part of the opinion and order which we have quoted.

[1] The first assignment cannot be sustained. The decree making the rule absolute and directing the executors to file an account is not a final decree, from which an appeal lies. *Palethorp's Estate*, 160 Pa. 316, 28 Atl. 689; *Starr's Estate*, 3 Pa. Super. Ct. 212; *Allen's Estate*, 20 Pa. Super. Ct. 32.

[2] The second assignment of error must be sustained. The court manifestly misunderstood the purpose of the proceeding instituted by the legatee. The executors had not filed an account of their administration of the estate, and it was solely for the purpose of compelling them to do so that Mrs. Stigelman could and did institute these proceedings. As we have just ruled, no appeal lies from that decree, and hence it must be obeyed. The court, however, in directing the executors to charge themselves with any specific sum, was in error. That question will arise when the account is filed. If the executors fail to charge themselves with any part of the assets of the estate, the court

will, on proper exceptions being filed, surcharge them. Whether they should be surcharged with any assets in addition to the estate shown by the account to be in their hands is a question to be determined on the adjudication of the account, and not on an application for a citation to compel the executors to file an account. The order directing the executors to charge themselves with any sum whatever was therefore premature, and should not have been included in the decree making absolute the rule to show cause why a citation should not issue requiring the executors to file an account. The surcharge fixed the executors for the amount, and therefore that part of the decree was final, and an appeal lies.

The appeal from the part of the decree making the rule absolute and directing the executors to file an account is quashed, and the part of the decree directing the executors to charge themselves with \$2,500 and interest is reversed.

IN RE MACOLUSO'S NATURALIZATION.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. JUDGMENT (§ 340*)—VACATION — AUTHORITY OF COURT.

All courts of record possessed as incident to their general jurisdiction authority to vacate or set aside a judgment or decree which is void and a mere nullity, and such authority may be successfully invoked wherever the action of the court has been procured by fraud, deception, or collusion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 686; Dec. Dig. § 340.*]

2. ALIENS (§ 71½. New, vol. 7 Key-No. Series)—NATURALIZATION—VACATION OF JUDGMENT.

The court's power to correct or purge its records may be exercised in the case of the naturalization of an alien as well as in any other case where the court has jurisdiction to act.

3. ALIENS (§ 71½. New, vol. 7 Key-No. Series)—NATURALIZATION—CANCELLATION OF CERTIFICATE.

From a petition to the court of common pleas of one county for a rule to show cause why a certificate of naturalization should not be canceled where it appears that the party whose name appeared on the certificate is dead and that his son resided in another county, service upon the son will be held sufficient, where the hearing is continued and ten days' notice is personally served on him by the justice of the peace of the county in which he resided.

4. ALIENS (§ 71½. New, vol. 7 Key-No. Series)—NATURALIZATION—CANCELLATION OF CERTIFICATE.

Act Cong. June 29, 1906, c. 3592, § 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 124), prescribing the procedure for setting aside a certificate of naturalization in case of fraud, does not deprive a state court of the power to enter a decree annulling a forged certificate and directing that it be surrendered for cancellation upon a private petition joined in by the district attorney of the county where the decree was entered.

Appeal from Court of Common Pleas, Luzerne County.

Petition by Frank Lucino for cancellation of the certificate of naturalization of Calogero Macoluso. From a decree granting the petition, John Macoluso appeals. Affirmed.

The court decreed that the certificate of naturalization should be surrendered for cancellation, and declared the same null and void. John Macoluso, a son of the person named in the certificate of naturalization, appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

William Wilhelm, of Pottsville, for appellant.

MESTREZAT, J. The desire of John Macoluso, the appellant, to hold and exercise the functions of the office of supervisor of Kline township, Schuylkill county, has resulted in a judicial decree that he is not a citizen of the United States. John was born in Italy and came to this country in his childhood. Since he became of age he has voted on an alleged naturalization certificate purporting to have been issued to his father, Calogero Macoluso, dated September 26, 1896, and bearing the seal of the court of common pleas of Luzerne county. John was elected supervisor of Kline township, Schuylkill county, in 1910. His countryman and opponent, Frank Lucino, instituted quo warranto proceedings against him in the common pleas of Schuylkill county on the ground that the alleged naturalization certificate of his father was fraudulent and void, and that therefore John was not a citizen. The court declined to proceed with the hearing and continued it until the court of common pleas of Luzerne county had passed upon the validity of the certificate of citizenship of Calogero Macoluso. Lucino then presented a petition to the common pleas of Luzerne county, in which the district attorney of that county joined, praying for a rule on the Macolusos to show cause why an order should not issue directing the certificate of naturalization issued to Calogero Macoluso to be delivered to the prothonotary for cancellation and that a decree annulling the same be entered by the court. A rule was granted on Calogero Macoluso to show cause why the decree of naturalization should not be annulled and the certificate thereof surrendered for cancellation. Subsequently an affidavit was filed by which it appeared that Calogero Macoluso was dead, and that his son resided in Schuylkill county. The hearing of the rule was then continued, and ten days' notice thereof was directed to be given John Macoluso. The rule and a notice of taking depositions were personally served on John by a justice of the peace in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Schuylkill county at least 10 days before the hearing on the rule to show cause and the time for taking depositions. John did not appear at the hearing of the rule nor when the depositions were taken. The depositions and record of the proceedings on the quo warranto in Schuylkill county were submitted to the court on the hearing of the rule, and after due consideration the court made "the rule absolute to surrender such certificate for cancellation, hereby adjudging the same to be null and void." From this order or decree, John Macoluso took this appeal.

The appellant contends that the court erred in making the order or decree in question because (a) the service of the rule on him was defective, and (b) the Act of Congress of June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 124), having provided a definite and specific mode of procedure to procure the cancellation of the naturalization certificate, it was exclusive and must be pursued.

[1] We see no merit in either of these positions. The learned court found on ample evidence that "no judgment or decree of this court was ever made naturalizing the said Calogero Macoluso, who is now dead; nor was any certificate ever issued by this court or under its authority certifying such naturalization, but the said certificate in the possession of the said John Macoluso is a forged and fraudulent certificate bearing the seal of this court without its authority." Under these facts, the court had the power and it was its duty to adjudge the certificate to be void and compel its surrender for cancellation. The certificate was not sustained by any record or entry of the court, and is therefore a nullity. In *re O'Sullivan*, 137 Mo. App. 214, 216, 117 S. W. 651. The authority to vacate, open, or set aside a judgment or decree is incident to all courts of record, of general jurisdiction, and extends to granting relief by opening or vacating such judgments or decrees as are utterly void and mere nullities. 23 Cyc. 893. Such relief is granted by virtue of the equitable powers of the court which may be successfully invoked in all cases when the action of the court has been procured by fraud, deception, or collusion. This court has frequently recognized the doctrine. *Hambleton v. Yocum*, 108 Pa. 304; *Smaltz v. Hancock*, 118 Pa. 550, 12 Atl. 464; *Fisher v. Hestonville, etc.*, *Passenger Ry. Co.*, 185 Pa. 602, 40 Atl. 97; *Cochran v. Eldridge*, 49 Pa. 365, 370. In the last cited case, Woodward, C. J., delivering the opinion, said: "Whether the principles of these cases be applied by courts of chancery as an independent jurisdiction or by courts of law exercising equity powers is a matter of no significance. The material point is that such principles do pervade our jurisprudence, and it is well they

do, for they are only the dictates of natural justice and common sense. That wholesome maxim of the common law, that fraud vitiates whatever it touches, makes no exception of judgments at law. No court of justice will set aside or even be led to look into a solemn judgment on light or trivial grounds; but when it is alleged upon adequate proofs that a judgment in whole or in part has been obtained by a suppression of truth which it was the duty of the party to disclose or by the suggestion of a falsehood or by any of the infinite and therefore undefinable means by which fraud may be practiced, no court will allow itself, its records, and the process of law to be used as instruments of fraud."

[2] Naturalization is a judicial act. *Spratt v. Spratt*, 4 Pet. (29 U. S.) 393, 7 L. Ed. 897. For it is a cause to be heard and decided on evidence, and involves a question of legal right. *Rump v. Commonwealth*, 30 Pa. 475.

It follows that the doctrine of the above cases applies to setting aside or vacating orders or decrees of naturalization and cancellation of certificates of naturalization, and it has been so held. 2 Cyc. 115, and notes.

It is clear therefore that the court had the authority to prevent the continued fraudulent use of its seal by requiring the surrender of the certificate of naturalization which was a forgery and not authorized by a judgment or decree of the court.

[3] The appellant has no just ground to complain of the service of the rule made upon him. The rule and notice of the time and place of taking depositions under a rule issued for the purpose were served personally on appellant in Schuylkill county at least 10 days prior to the hearing by giving him true and attested copies thereof. It is true that the service was made by a justice of the peace of Schuylkill county, and not by a sheriff or constable; but that is immaterial. The service was not required to be made under the act of July 9, 1901 (P. L. 614). This is not an original proceeding, nor was the rule awarded against John Macoluso, the appellant. After the rule was issued against his father and the latter's death was suggested by an affidavit, the court continued the hearing on the rule and directed "ten days' notice thereof to be given John Macoluso." The service of this notice could be made by a justice of the peace or any other citizen of Schuylkill county. It was sufficient if notice of the proceedings were required to be given the appellant at all, which we must not be understood as conceding.

[4] The act of Congress of June 29, 1906, provides a procedure for setting aside and canceling certificates of citizenship obtained by fraud or otherwise illegally procured in any court exercising jurisdiction in natural-

ization proceedings. Section 15 enacts, inter alia, that "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured." This section, it will be observed, simply imposes the duty upon the United States district attorney of the proper district, when cause is shown by affidavit, to institute proceedings for canceling a certificate of citizenship. It does not, directly or inferentially, make the procedure exclusive or prohibit the enforcement of other remedies for striking down fraudulent naturalization certificates. The statute furnishes a new remedy for a wrong for which there was an existing appropriate remedy, and hence it is cumulative and not exclusive. *King v. Pomeroy*, 121 Fed. 287, 292, 58 C. C. A. 209. In the case of *United States v. Spohrer* (C. C.) 175 Fed. 440, 447, it is said: "The legislation of 1906 simply permits to be done by different courts and somewhat different procedure what before could, under like conditions, in my judgment, have been done by a bill in equity."

Whatever may be the proper interpretation of the act of 1906, we think it clear that it does not prevent a state court from controlling its own records in any case in which it has jurisdiction to act. If a state court has authority to naturalize aliens and issue certificates of citizenship, it is not within the power of Congress to deprive it of its equitable powers to correct any fraud upon, or fraudulent use of, its process. Congress may establish a uniform rule of naturalization, as authorized by the federal Constitution; but it certainly will not be presumed, in the absence of a declaration to the contrary, that such legislation prevents any court, state or federal, from annulling a certificate of citizenship bearing its seal which is a forgery. The power to correct and purge its records is inherent in every state court of general jurisdiction, and it may be exercised in the case of the naturalization of an alien as well as in any other case in which it has jurisdiction to act. It therefore follows that the act of 1906, relied on by the appellant, did not deprive the court below from entering its decree annulling the forged certificate of citizenship and directing that it be surrendered for cancellation.

The decree is affirmed.

HERR v. S. R. MOSS CIGAR CO. et al.
(Supreme Court of Pennsylvania. July 2, 1912.)

1. MECHANICS' LIENS (§ 207*) — WAIVER — TIME FOR FILING NOTICE.

Shortly before May 23d a materialman furnished to a prospective contractor estimates for lumber to be used in the erection of a building. On May 23d the contractor submitted to the owner a proposition for the erection, which was marked "Accepted," and which contained a proposition for the execution of a further formal contract. On the same day the contractor verbally instructed the materialman to furnish the lumber as required in accordance with his estimate. On May 31st work was begun on the foundations by the owner on his own account. On June 1st, a formal contract between the contractor and owner was executed, and on the same day a stipulation against mechanics' liens was executed and delivered to the owner, and on Monday, June 3d, it was put on record. Act June 4, 1901 (P. L. 438) § 15, as amended by Act April 24, 1903 (P. L. 297), provides that the right to file a claim may be waived by agreement between the claimant and the party with whom he contracts, and that proof that a duly signed contract to that effect has been filed in the office of the prothonotary of the court of common pleas within 10 days after the execution of the principal contract shall be evidence of such waiver. Act June 20, 1883 (P. L. 136), excludes Sunday from computation when it is the last day of a period within which a legal act is to be done. *Held*, that the stipulation was filed within the time required.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 381; Dec. Dig. § 207.*]

2. MECHANICS' LIENS (§ 122*) — PROCEEDINGS TO PERFECT — NOTICE OF INTENTION.

A materialman's notice of intention to file a mechanic's lien which fails to set forth the contract under which he claims is insufficient.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 165-170; Dec. Dig. § 122.*]

Appeal from Court of Common Pleas, Lancaster County.

Scire facias sur mechanic's lien by John F. Herr against the S. R. Moss Cigar Company, owner, or reputed owner, and others. From a judgment for defendants on special verdict, plaintiff appeals. Affirmed.

The jury found a special verdict by direction, upon which the court entered judgment for the defendant, and filed the following opinion by Landis, P. J.:

"In this case, a special verdict was rendered by the jury, in which all the material facts were with particularity found, and we are now asked respectively by the parties to enter judgment upon it.

[1] "It appears that H. G. & L. J. Dill, contractors, evidently contemplating the securing of a contract with the S. R. Moss Cigar Company, Incorporated, a short time prior to May 23, 1907, met John F. Herr, the plaintiff, and secured from him prices for lumber to be used in a building which was about to be erected, known as the Moss building. On May 23, 1907, the Dills sub-

mitted to the Moss Company a proposition in writing for the erection of this building, and the offer thus made was marked 'accepted.' Contained in this offer, however, were the words: 'We sign the within agreement, guaranteeing to execute a legal contract as soon as same can be properly drawn up, and herewith agree to furnish bond in the sum of sixty-nine thousand (\$69,000.00) dollars. Said bond to be approved by you and your architect and engineer.' On May 23, 1907, the Dill brothers had a conversation with Herr, in which they instructed him to furnish the lumber for the Moss building, to be delivered from time to time, on verbal orders, at the prices which had been submitted to them by Herr prior to May 23, 1907. They gave Herr the approximate quantities to be furnished, but, at that time, gave no definite orders as to classes of lumber, or dimensions, or lengths. On June 1, 1907, a regular contract was signed by the Dills and the S. R. Moss Cigar Company, Incorporated, for the construction of this building, and on the same day a paper was executed and delivered to the S. R. Moss Cigar Company, in which was the following stipulation: 'Now, for a valuable consideration, the said parties of the first part agree that no lien or claim of mechanics or materialmen, or of any other nature whatsoever, shall be filed by any one whatsoever, including the contractor himself, the parties of the first part hereto, or any subcontractor or materialman, against the building herein mentioned and contracted to be erected on the premises above described.' Between June 7, 1907, and December 26, 1907, inclusive, materials were furnished by Herr to the Dill Bros. for use in the Moss building, amounting to \$1,877.21, and all of these items make up the amount in the lien filed. Subsequently notice was given by Herr that he intended to file a lien, and on the 11th day of May, 1908, a lien was duly filed against the said building, and the present *scire facias* was issued to collect it. It was also found that on May 31, 1907, work was being done at the foundations of the building, but that this work was done by the S. R. Moss Cigar Company on its own account, and it was not included in the Dill contract for the erection of the building. Can the plaintiff, under this state of facts, maintain his lien?

"By section 15, Act June 4, 1901 (P. L. 431), and its amendment of April 24, 1903 (P. L. 297), it is declared that 'the right to file a claim may be waived by agreement between the claimant and the party with whom he contracts, or by any conduct which operates to equitably estop the claimant. If the legal effect of the contract between the owner and the contractor is, that no claim shall be filed by any one, such provision shall be binding; but the only admissible evidence thereof, as against a subcontractor, shall be proof of actual notice thereof to him, before any la-

bor or materials furnished by him; or proof that a duly written and signed contract to that effect has been filed in the office of the prothonotary of the court of common pleas of the county or counties where the structure or other improvement is situate, prior to the commencement of the work upon the ground, or within ten days after the execution of the principal contract, or not less than ten days prior to the contract with the claimant.' It has been found by the special verdict that the paper which is claimed to have been a waiver of the right to file liens against this building was filed in the prothonotary's office on Monday, June 3, 1907, and it has already been decided by the Supreme Court, in *Burger v. Moss Cigar Co.*, 225 Pa. 400, 74 Atl. 219, that this agreement was a valid contract by which every person entitled by law to file a mechanic's lien was prohibited from so doing. Therefore, it follows that, if this paper was filed within the time stipulated by the acts of 1901 and 1903, the plaintiff has no right to judgment.

"As we have before stated, the foundations of this building were constructed by the S. R. Moss Cigar Company for itself, and they were not included within the Dill contract. While the act of assembly provides that there shall be 'proof that a duly written and signed contract to that effect has been filed in the office of the prothonotary of the court of common pleas of the county or counties where the structure or other improvement is situate, prior to the commencement of the work upon the ground, or within ten days after the execution of the principal contract, or not less than ten days prior to the contract with the claimant' (this is evidently intended to mean the work on the ground under the contract by virtue of which the subcontractor claims, and it certainly cannot mean work done independently of that contract by the owners for themselves), if this interpretation of the act of assembly is correct, then no work was done in or about the construction of this building before the agreement or waiver was placed upon the record. But, in any event, the agreement waiving the right to file liens was filed in the prothonotary's office of this county within 10 days after the execution of the principal contract, and not less than 10 days prior to the contract with the claimant. The original proposition accepted by the Moss Company was dated May 23, 1907. The agreement of waiver of liens was filed in the prothonotary's office on Monday, June 3, 1907. The 10 days mentioned in the act of assembly would have expired on Sunday, June 2, 1907. But Act June 20, 1883 (P. L. 136), enacts: 'That where by any existing law or rule of court, or by any law or rule of court that may hereafter be enacted and made, the performance or doing of any act, duty, matter, payment, or thing, shall be ordered and directed, and where any court

shall, by special or other order, direct the performance or doing of any act, matter, payment, sentence or decree, and the period of time or duration for the performance or doing thereof shall be prescribed or fixed, such time in all cases shall be so computed as to exclude the first, and include the last days of any such prescribed or fixed period, or duration of time; provided, that whenever the last day of any such period shall fall on Sunday, or on any day made a legal holiday by the laws of this commonwealth, or of the United States, such day shall be omitted from the computation: And provided, that this act shall not apply to the payment of negotiable paper.' Therefore, as it is found that the agreement was filed on Monday, June 3, 1907 (and, if it is concluded that the acceptance of the Dill proposition constitutes the contract as made May 23, 1907, then that day was within the 10 days allowed by the act of assembly for the filing of the same, and it was a bar to the recovery of any claims by subcontractors under the Dill contract), if it is conceded (and it must be, for it has been so found by the jury) that the contract, though dated May 23, 1907, was executed on June 1, 1907, and that this was the real contract between the parties, then there can be no question in this regard, because the agreement of waiver was filed the second day thereafter.

[2] "Section 8, Act June 4, 1901, provides that 'any subcontractor, intending to file a claim, must give to the owner written notice to that effect, together with a sworn statement setting forth the contract under which he claims, the amount alleged to be still due and how made up, the kind of labor or materials furnished, and the date when the last work was done or materials furnished.' It is contended, on the part of the defendant, that no copy of the contract was set forth in the notice or statement which was served upon the S. R. Moss Cigar Company. The notice was to the effect that the plaintiff claimed a lien against the building erected 'by H. G. & L. J. Dill, for material and lumber furnished by me to the said H. G. & L. J. Dill, and used by them in the construction of your said building, the said lumber being furnished upon their verbal order, as shown by the sworn statement attached hereto.' The affidavit stated that 'H. G. & L. J. Dill, contractors, by various verbal orders, given at different times, ordered from him lumber and material which was used by the said H. G. & L. J. Dill in the construction of the building for the S. R. Moss Cigar Company at the corner of North Prince and West Lemon streets, and that the material furnished and the amounts paid and the amount still due and how made up, together with the date of the furnishing of the last material upon the said verbal order and contract, is as per the schedule attached hereto and marked "Schedule A."'

"In *McVey v. Kaufman*, 223 Pa. 125, 72 Atl. 503, it was decided that 'a condition precedent to the right of a subcontractor to file a lien is that he has given to the owners of the building written notice of his intention to file it, together with a sworn statement setting forth the contract under which he claims, the amount alleged to be still due and how made up, the kind of labor or materials furnished, and the date when the last work was done or materials were furnished;' that, 'if a notice by a subcontractor of an intention to file a lien is defective, the owner does not, by pleading to the scire facias on it, waive his right to make defense on the trial that a condition of the right to file the lien had not been complied with.' It was also held that 'a mere statement in the notice that a contract existed, without stating the date, or any of its terms, or whether it was written or oral, is insufficient.' In *Hart v. Lehigh Valley Railroad Company*, 41 Pa. Super. Ct. R. 224, the contract was set forth in the following terms: 'The contract under which I claim is as follows, to wit: Verbal and written orders and orders by telephone, by H. O. Hanson, contractor, to whom the above material was sold, or by orders by his foreman.' Under this notice, a rule to strike off the mechanic's lien was made absolute, and Henderson, J., delivering the opinion of the court, said: 'It is expressly required by this statute that the notice contain a sworn statement "setting forth the contract" and the amount alleged to be still due "and how made up." This provision is obligatory on him who would claim the benefits of the statute. Compliance with that which is specifically directed is necessary to secure a lien. Substantial conformity will not answer as to that.' He later added: 'The notice given in this case does not set forth the contract within the meaning of the statute, and the lien was, therefore, properly stricken from the record.' In *Miller v. Fitz*, 41 Pa. Super. Ct. R. 582, it was stated by Morrison, J.: 'Persons can only enjoy the benefits of the mechanic's lien law by complying with its requirements. If a notice by a subcontractor of an intention to file a lien is defective, the owner does not, by pleading to the scire facias on it, waive his right to make defense on the trial that a condition of the right to file a lien had not been complied with.' See, also, *Tenth National Bank of Phila. v. Smith Construction Co.*, 218 Pa. 581, 67 Atl. 872; *Wolf v. Penna. R. Co.*, 29 Pa. Super. Ct. R. 439; *Guarantee Building & Loan Association v. Connor*, 216 Pa. 543, 65 Atl. 1089.

"It is true that the bill attached to the statement in this case contains dates, quantities, and prices; but these are at variance with the contract which the plaintiff now alleges was made between him and the contractors, in that he now claims a verbal contract entered into on May 23, 1907, although no indication of such a contract appears either

er in the notice or in the statement attached. It would appear, therefore, that he has no right at this time to allege and prove a contract not contained in the notice or statement, and, for this reason also, his present action would seem to be not supportable. Be this, however, as it may, the first reason is all sufficient, and we now direct judgment to be entered on the special verdict in favor of the defendant.

"Judgment for defendant."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

John M. Groff, of Lancaster, for appellant. W. U. Hensel and Coyle & Keller, all of Lancaster, for appellees.

PER CURIAM. The judgment is affirmed for the reason stated in the opinion of the learned president judge of the common pleas.

KRIMMEL v. S. R. MOSS CIGAR CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. CORPORATIONS (§ 521*)—ACTIONS—QUESTION FOR JURY.

In an action on a verbal contract entered into by a corporation's president as its agent with a subcontractor to erect brick work on a building of the corporation to pay the subcontractor an amount due by the principal contractor, who had failed, and a sum necessary for his completion of his work at the contract price, evidence *held* to present a case for the jury.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2094-2098; Dec. Dig. § 521.*]

2. CORPORATIONS (§ 521*)—ACTIONS—QUESTION FOR JURY.

In an action against a corporation by a subcontractor on an agreement to pay him an amount due by the principal contractor, who had failed, and the contract price for completing the work, evidence *held* to present a question for the jury whether a receipt by the subcontractor "in full payment of account to date," and an attempt by him to collect the sum due from the principal contractor by mechanic's lien were inconsistent with the contract alleged by the subcontractor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2094-2098; Dec. Dig. § 521.*]

3. NEW TRIAL (§ 32*)—GROUNDS—REMARKS OF COUNSEL.

A new trial will not be granted for refusal to withdraw a juror on account of improper remarks of counsel, where the court compelled counsel to withdraw his statement, and the opposing counsel made no further objection, and took no exception.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 47; Dec. Dig. § 32.*]

Appeal from Court of Common Pleas, Lancaster County.

Assumpsit by Charles Krimmel against the S. R. Moss Cigar Company on a parol contract. From a judgment for plaintiff, defendant appeals. Affirmed.

The defendant offered in evidence the following letter, which was ruled out by the court: "Lancaster, Pa., Feb. 28, 1908. To the S. R. Moss Cigar Company, Lancaster, Pa.—We hereby notify you that we are unable to meet the current pay roll for labor on the building which we are erecting for you at the northeast corner of North Prince and West Lemon streets, Lancaster, Pa., and that on account of unexpected financial developments, we are unable to complete the same. And we hereby waive any notice or certificate, that may be required under said contract, previous to your entry upon said premises for the purpose of completing said building. H. G. & L. J. Dill. H. Gilbert Dill."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

W. U. Hensel and Coyle & Keller, all of Lancaster, for appellant. C. Eugene Montgomery and B. F. Davis, both of Lancaster, for appellee.

MESTREZAT, J. [1] In the court below the only question in dispute was, as conceded by both parties, whether the defendant company had made a contract with Krimmel, the plaintiff, to pay him the balance due for brick already laid under the Dill agreement, and for laying the brick to complete the buildings. We think the testimony ample to support the plaintiff's contention that the defendant company through S. R. Moss, its president, made the agreement with him as alleged in his statement of claim. We do not know that the defendant company seriously denies that such contract was made with the plaintiff, but it strenuously contends that the contract was made with S. R. Moss individually, and not with him for the defendant company. In the light of the facts disclosed by the evidence, we see little ground for such claim. The Dills, who were the contractors, had failed, and were unable to complete their contract. The plaintiff was a subcontractor under the Dills for laying the brick in the construction of a warehouse and factory. In December, 1907, there was a balance due Krimmel from the contractors which they did not and possibly could not pay, and he refused to proceed with the work because the contractors had not paid him in accordance with the terms of their agreement. If the testimony of the plaintiff is credible, S. R. Moss, the president of the defendant company and actively engaged in completing the warehouse and factory, saw the plaintiff, and requested him to proceed with laying the brick. The latter declined. Moss then told the plaintiff that "he was president for the company, and ought to see that the building gets finished." He said he had "\$22,000 laying back for us to pay, for me to pay, if I will finish the building." Shortly thereafter, about December 20, 1907, Moss and the plaintiff had an-

other interview. Moss again requested the plaintiff to complete the work, but he declined until, as he says, "Somebody will pay me." Moss then told him that he would pay him the balance due from the Dills, and pay him the contract price for completing the work. Under that agreement, the work was resumed by the plaintiff on December 20, 1907, and was finished in the spring of 1908.

Several witnesses on the part of the plaintiff, in addition to himself, testified substantially that Moss made the contract with the plaintiff. The latter's testimony, if believed, can leave little, if any, doubt that Moss was acting for the company and not for himself in making the agreement. All the facts point to that conclusion. Moss was the president of the company, and gave the building operation his personal attention. It appears that he made a contract with the plaintiff for some additional work on the buildings, outside of the latter's contract with the Dills. This was accepted and paid for by the company. It is true Moss was a large stockholder and interested in the success of the company, but the evidence discloses no reason why he individually should pay the Dill deficit and the balance necessary to complete the brickwork. It does not appear that the company was not able financially to compensate the bricklayer for his work. It is wholly improbable that Moss would individually have assumed to pay such indebtedness in view of the facts disclosed by the testimony. We think there was sufficient evidence to warrant the court in submitting the question, and the jury in finding that the contract was made by Moss for the company.

[2] We agree with the learned court below that whether the receipt and mechanic's lien contradicted the plaintiff's position that the defendant company had entered into an agreement with him to pay for the brickwork was an argument to be addressed to the jury, and was not a sufficient reason for the court to direct a verdict for the defendant. The receipt given by the plaintiff was "in full payment of account to date," but it was conclusively shown that it was given for money due the plaintiff on a contract made by Moss with him to do work outside that to be done under the Dill contract. While the court submitted for the jury's consideration the receipt as bearing upon the question of whether a new contract had been entered into by the parties, it necessarily could have little or no weight under the circumstances in determining that fact. The mechanic's lien and the affidavits thereto attached were evidence to go to the jury on the question of the new contract, and the learned judge submitted them with proper instructions.

There was no harm done the defendant by excluding the Dill letter. We can see no good reason under the evidence why the plaintiff should recover for one portion of

his claim and not for the other. By the contract on which he relies the defendant company agreed not only to pay him for the work yet to be done on the buildings, but also to pay him the money yet due him from the Dills. The contract is entire, and, if the plaintiff has failed to establish any part of it, he has failed to establish the whole agreement. The amount recoverable under the new contract would be the Dill deficit and the money to be paid on the subsequently completed work. It was therefore immaterial what time the letter was written notifying the defendant company that the Dills were unable, by reason of unexpected financial developments, to proceed with the work.

[3] In the condition of the record we cannot sustain the fifth assignment, alleging error by the court in refusing to withdraw a juror by reason of the use of improper language by plaintiff's counsel in addressing the jury. When the objection was first made, the learned judge announced that he would withdraw a juror, unless the plaintiff's counsel stated there was no evidence upon the subject of the remarks complained of. No definite ruling was then requested by defendant's counsel nor was any exception taken. Subsequently in his address to the jury a remark was made by plaintiff's counsel, which the defendant's counsel asked him to withdraw. The plaintiff's counsel then said he would modify the statement, and did so. The defendant's counsel made no further objection, made no request for the withdrawal of a juror, and no exception was asked for. Under these circumstances, we must infer that the counsel waived any objection they might have made to the remarks of plaintiff's counsel. In dismissing the motion for a new trial, the court, speaking of the alleged improper remarks of counsel, said: "It has been our custom, even when no objections have been raised by counsel, to interpose, so as to restrain conduct of this character; but we do not think in this case defendant's counsel are quite fair in urging the objection at this time. Though the remarks made to the jury were not supported by evidence, the jury were at once not only told so by the court, but, upon its insistence, by the counsel who uttered them. The case, as we have stated, was then proceeded with, without further interruption, and now, after seemingly acquiescing in the settlement of the dispute and after taking the chance with the jury of a favorable outcome, such alleged misconduct should not relieve them from the adverse verdict. Knowing that a juror would be withdrawn if the retraction was not considered sufficient by them, they took their chances."

In several recent cases we have reversed because of improper remarks made by counsel to the jury, and we have no intention of relaxing the rule announced in those cases. But, if opposing counsel desire to invoke the

protection of the trial court, they must act promptly, and call the court's attention to the objectionable language and give it an opportunity to deal with the offender as the facts may require. This is only fair to the court. If it then declines to act, the injured party should insist on his objection, and take an exception to the ruling. He cannot, by his silence, be permitted to leave the impression that he is satisfied with the court's action in the premises, and, after the rendition of an adverse verdict, have the verdict set aside, or the judgment thereon reversed by the appellate court. In the case at bar the court would have withdrawn a juror had the defendant's counsel insisted on their objection. Having failed to do so, they are not in a position to ask this court to reverse for an error in which they impliedly at least acquiesced.

The judgment is affirmed.

HEALY et al. v. HEALY et al.

(Supreme Court of New Hampshire. Hillsborough. Nov. 6, 1912.)

1. CONTRACTS (§ 93*)—RESCISSION—MUTUAL MISTAKE.

A written contract may be rescinded for a mutual mistake as to the legal rights of the parties, though the mistake is one of law, provided the party jeopardized can be relieved without substantial injustice to the other side.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 415-419; Dec. Dig. § 93.*]

2. PRINCIPAL AND AGENT (§ 37*)—POWER OF ATTORNEY—MISTAKE—RESCISSION.

The sons and daughters of deceased uncles and aunts and two of the surviving uncles and aunts of intestate, acting on the erroneous assumption that the cousins of the intestate as well as the uncle and aunt participated in the distribution of intestate's estate, petitioned for the appointment of one of the cousins as administrator, and, acting on the same erroneous assumption, all the parties and another uncle subsequently joined in a power of attorney to the administrator in his individual capacity however, authorizing him to sell the real estate and erroneously describing the parties to the power as heirs of intestate. Defendants, subsequently ascertaining their legal rights, revoked the power of attorney at a time when nothing had been done thereunder except to employ an auctioneer, for whose services plaintiffs had paid. Held, that defendants were entitled to rescind for mutual mistake on condition of repaying to plaintiffs the amount advanced for the auctioneer's services.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 59; Dec. Dig. § 37.*]

Exceptions from Superior Court, Hillsborough County; Mitchell, Judge.

Bill for specific performance by John F. Healy and others against Michael Healy and others. The bill was dismissed, and plaintiffs bring exceptions. Overruled.

The plaintiffs are sons and daughters of deceased uncles and aunts, and the defendants are two of the surviving uncles and aunts of John M. Harrington, who died in

February, 1908, intestate. On the petition of the plaintiffs, one of the cousins was appointed administrator of Harrington's estate, notwithstanding the defendants objected and petitioned for the appointment of another qualified person. The appointment was made upon the erroneous assumption that the cousins of the decedent, as well as the uncle and aunt, participated in the distribution of the estate. Acting on the same erroneous assumption, all the parties and another uncle subsequently joined in a power of attorney to the administrator, but in his individual capacity, authorizing him to sell the real estate, and erroneously describing the parties to the power as heirs of Harrington. This power was revoked April 6, 1909, by the defendants. At the date of revocation nothing had been done under the power except the employment of an auctioneer whose bill for services, amounting to \$10, has been paid by one of the plaintiffs. The plaintiffs claim that all the parties to the power of attorney assented to the mistaken view of the law upon which the administrator was appointed, and that his power was given to facilitate distribution of the estate among the parties. This the defendants deny, claiming that such was not the purpose of the power. This issue has not been tried, the court having ruled that, even if the defendants signed the power of attorney for that purpose, they are not concluded thereby since they acted under a mistaken apprehension of the law, and that they may now controvert it; that the signing of such power of attorney, under such misapprehension of their legal rights, does not conclude the real owners of the property from now insisting upon a distribution in accordance with the law. The court ordered that the bill be dismissed, and that the nieces and nephews who became parties to the power of attorney should be relieved of any obligation incident thereto. To the order of dismissal the plaintiffs excepted.

James A. Broderick, of Manchester, for plaintiffs. Andrews & Andrews and Arthur S. Healy, all of Manchester, for defendants.

PEASLEE, J. The only exception taken is to the order that the bill be dismissed. This order was apparently based upon the ruling that the defendants were entitled to rescind their agreement, and the question relating to rescission is thus presented. The plaintiffs insist that there was a contract for the distribution of the estate, and that the defendants are estopped to now deny that the plaintiffs are heirs thereto. As the decision rests upon the theory of rescission, there is no occasion to consider the claim of an estoppel by deed. If the agreement has been rescinded, its effect is abrogated. The parties stand as they would if it had not been made. The question is not what such an agreement would mean, or of its

legal effect, but whether the agreement exists.

[1] That a rescission may be had for a mutual mistake as to the legal rights of the parties seems to be well settled. In some cases this has been put upon the ground that there was no consideration for the promise, in others that there was a mistake as to the subject-matter, but usually upon the broad principle that justice and equity require such a rule. The dividing line between cases where these considerations should control and those which should be governed by the maxim that ignorance of the law excuses no one has not always been clearly defined. Pomeroy describes it thus: "Whenever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property, or contract, or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous, if not identical with, a mistake of fact." Of this rule he says: "The number of decisions which support it, and which it explains, is very great." Pom. Eq. Jur. § 849. "Whenever the mistake of law is mutual, and the party jeopardized thereby can be relieved without substantial injustice to the other side, then equity will afford redress, especially if the party to be benefited by the mistake invokes the aid of equity to put him in a position where the mistake will become advantageous to him." *Freichnecht v. Meyer*, 39 N. J. Eq. 551, 561; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91; *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 303; *Warder v. Tucker*, 7 Mass. 449, 5 Am. Dec. 62. And in this jurisdiction the fact that a mistake was one of law has not been considered as necessarily a bar to treating it as a ground for granting relief. *Parker's Appeal*, 15 N. H. 24; *Tilton v. Tilton*, 35 N. H. 430; *Bolles v. Dalton*, 59 N. H. 479; *Parsons v. Durham*, 70 N. H. 44, 47 Atl. 600; *Dame v. Wood*, 74 N. H. 212, 66 Atl. 484.

[2] Judged by any of the tests above suggested, these defendants were entitled to withdraw from their agreement. Assuming, as the plaintiffs claim, that the agreement covers a division of the estate with them, there was no consideration for the promise. The subject-matter—their interest in the estate—had no existence. And they are here seeking relief from a court of equity to the end that they may enforce an inequitable bargain. It may be conceded, as the plaintiffs argue, that the rule as to rescission does not apply where the agreement was entered into to settle disputed or doubtful claims. The arrangement here made was

not in any sense a settlement of a controversy. It was made because all the parties then supposed that the nephews and nieces were entitled to share in the distribution. There was no difference of opinion which was compromised, but simply a mutual mistake as to their rights in the premises. Believing that all were entitled to share in the estate, the parties made this agreement for the convenient disposal of the property. No action has been taken under the agreement, save the payment of \$10 by one of the plaintiffs. By the decree which was entered this is to be returned to him. The contract, if one was made, is still executory. Upon these facts, equity plainly requires the order which was made in the superior court.

Exception overruled. All concurred.

DUCHARME v. CITY OF BIDDEFORD.

(Supreme Judicial Court of Maine. Dec. 11, 1912.)

1. MUNICIPAL CORPORATIONS (§ 186*)—DE FACTO PATROLMAN—RIGHT TO COMPENSATION.

A de facto patrolman is not entitled to a salary for duties performed under color of an appointment, but without legal title to the office.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 510-517; Dec. Dig. § 186.*]

2. MUNICIPAL CORPORATIONS (§ 184*)—OFFICERS—REMOVAL AND APPOINTMENT.

When the board of police assumed control under Private Laws 1893, c. 625 (approved and taking effect March 28, 1893), providing for a board of police for the city of Biddeford, and providing in section 5 that the board shall not increase the number of police unless authorized by the city, in section 2, that the board may appoint and remove for cause, and in section 3 that the members of the police force shall continue in office unless removed by the board of police, the full number of patrolmen provided for by ordinance were legally in office. *Held*, that the removal of a patrolman of the board without cause, and the appointment of another in his stead, was illegal, and conferred no title to the office upon the appointee.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 482-486, 488-491; Dec. Dig. § 184.*]

3. MUNICIPAL CORPORATIONS (§ 186*)—OFFICERS—ACTION FOR SALARY—BURDEN OF PROOF.

Where, in a patrolman's action against the city of Biddeford for salary, it appeared that the full number of patrolmen were legally in office at the time the board of police assumed control and that his appointment was subsequent thereto, the burden was on plaintiff to show death, resignation, or legal removal creating a vacancy to fill which he could have legally been appointed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 510-517; Dec. Dig. § 186.*]

Action by Napoleon Ducharme against the City of Biddeford for salary as patrolman. Judgment for defendant.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

John P. Deering, of Saco, for plaintiff. Arthur J. B. Cartier, of Fall River, Mass., and Robert B. Seidel, of Biddeford, for defendant.

CORNISH, J. The plaintiff seeks to recover the sum of \$49.50, the amount of his salary as patrolman in the defendant city from September 5 to September 27, 1911, having been prevented from serving during that time by the chief of police.

[1] His right of action depends upon whether or not he was an officer de jure. His continued service for the 17 previous years may have made him an officer de facto, but a de facto officer has no legal right to the emoluments of an office the duties of which he may have performed under color of an appointment, but without legal title. *Andrews v. Portland*, 79 Me. 484, 10 Atl. 453, 10 Am. St. Rep. 280; *Dolliver v. Parks*, 136 Mass. 499; *Phelon v. Granville*, 140 Mass. 386, 5 N. E. 269. An action for salary therefore puts in issue the legality of the title to the office, and the vital question here is, not how long the plaintiff may have acted as patrolman, but whether he had a legal title to the office during the period covered by his writ.

[2] We think he had not. The following facts which appear in the agreed statement are conclusive upon this question:

On March 27, 1893, the city government of Biddeford, acting within its legal powers, passed an ordinance restricting the number of regular policemen to four, which ordinance is still in force. On the same date, Messrs. Newcomb, Mogan, Polardis, and Rumery were duly appointed and qualified as the four regular policemen of the city, and no one of them resigned or was removed prior to July 3, 1893.

By chapter 625 of the Private Laws of 1893, approved and taking effect March 28, 1893, a board of police was created for the city of Biddeford, with the same powers previously vested in the city government, except as provided in the act.

Section 5 of that act provided that "said board of police shall not appoint any larger number of police officers than the present mayor or board of mayor and aldermen, by the statutes of the state, city charter, ordinance, by-laws and rules of said city are now authorized to appoint, except as may be from time to time authorized by said city."

The effect of this section was to keep the number of regular policemen at four, as fixed by the city ordinance of March 27th, and no action has since been taken by the city increasing that number.

Section 2 of said act provides that "said board of police of the city of Biddeford shall have authority to appoint, establish or

organize the police force of said city, including the marshal and deputy marshal, and to remove the same for cause." And section 3 further provides that "the members of the police force of said city of Biddeford in office when said board of police are first appointed, shall continue to hold their several offices unless removed by said board of police."

So that, when the board of police assumed control of the police department on July 1, 1893, they assumed it with the four regular policemen appointed on March 27th, all of whom were legally entitled to continue in office, and none of whom could be removed by the board of police except for cause.

How did Ducharme receive his appointment?

[3] The records of the police board show that on July 1, 1893, the board on assuming control appointed Messrs. Goodwin, Mogan, Rumery, and Napoleon Ducharme regular patrolmen. Two of these, Mogan and Rumery, were two of the four appointed on March 27th by the city, but the case nowhere shows that the other two men previously appointed, viz., Messrs. Newcomb and Polardis, had either resigned, died, or been removed from office. If not, and the burden was on the plaintiff to show death, resignation, or legal removal, there was no vacancy in the existing police force, and the board had no authority to appoint either Goodwin or Ducharme. The board apparently regarded the appointment of Ducharme on July 1st as unauthorized and void, because two days later, on July 3d, the record reads, "It was voted that the following persons be removed from the police force, viz. Joseph Polardis," and five others who were apparently special police. "The following persons were elected police officers: Napoleon Ducharme. * * *"

It is evident that the board attempted by this vote to remove Polardis and appoint the plaintiff in his place, but such removal was illegal, and therefore the plaintiff's appointment was void. The board could remove Polardis only for cause after charges preferred, notice given, and hearing had. This arbitrary act on their part was utterly void. This was squarely decided in the case of *Andrews v. Police Board of Biddeford*, 94 Me. 68, 46 Atl. 801, where this same act establishing the police board of Biddeford and the powers of the board thereunder were fully considered by the court. That case is decisive of this. In *Cote v. Biddeford*, 96 Me. 491, 52 Atl. 1019, 90 Am. St. Rep. 417, the court in reaffirming the doctrine of *Andrews v. Police Board*, supra, say: "It is undoubtedly true that the action of the police board in attempting to remove the plaintiff and to elect a successor in the office was unauthorized and void. The plaintiff had been elected to the office just prior to the time when the act creating the

board of police went into effect, and he could only be removed for cause."

The burden resting upon the plaintiff to prove that he as an officer de jure has not been met, and the entry must therefore be: Judgment for the defendant.

HOLT v. NEW ENGLAND TELEPHONE & TELEGRAPH CO.

(Supreme Judicial Court of Maine. Dec. 11, 1912.)

1. WORDS AND PHRASES—"WAIVER."

"Waiver" is a voluntary relinquishment of a known right, benefit, or advantage which would have otherwise been enjoyed. It is essentially a matter of intention, which may be proved by a course of acts or conduct or by such neglect or failure to act as to induce the belief that it was the intention and purpose to waive.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381.]

2. ESTOPPEL (§ 52*)—GROUNDS OF EQUITABLE "ESTOPPEL"—INCONSISTENCY OF CONDUCT AND CLAIM.

Estoppel is a rule of law which prevents a party from asserting his right when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. His conduct need not be such as to deceive or mislead, but his acts, declarations, or silence must be of such a character as to have the natural effect of influencing the person to whom they are addressed to do or not to do, to his detriment, what he would not have otherwise done.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127; Dec. Dig. § 52.*]

For other definitions, see Words and Phrases, vol. 8, pp. 2494-2496; vol. 8, p. 7654.]

3. ESTOPPEL (§ 119*)—TRIAL AND EVIDENCE—QUESTION FOR JURY.

Estoppel is a question of law.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 119.*]

4. ESTOPPEL (§ 78*)—EQUITABLE ESTOPPEL—GROUNDS—INCONSISTENCY BETWEEN CONDUCT AND CLAIMS.

Plaintiff transferred stock of the Central Maine Telephone Company to defendant under a contract by which defendant was to transfer its own equipment at S. to the Central Maine Telephone Company within two years or forfeit \$500, and in two years the defendant's plan for consolidation was ratified at a meeting at which plaintiff presided, under which the transfer was made to the Maine Telephone & Telegraph Company, securing to all parties interested practically the same results as a transfer to the Central Maine would have done, and plaintiff thereafter participated in the reorganization in pursuance of the election at such meeting. Held, in an action to recover the \$500, as a forfeiture, that plaintiff by his conduct was estopped from claiming a forfeiture.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204-210; Dec. Dig. § 78.*]

Exceptions from Supreme Judicial Court, Somerset County, at Law.

Action by Carl M. Holt against the New England Telephone & Telegraph Company. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Gould & Lawrence, of Skowhegan, for plaintiff. Norman L. Bassett, of Augusta, for defendant.

SPEAR, J. This is an action of assumption in which the plaintiff seeks to recover \$500 for an alleged breach of contract. The plaintiff avers: That he was the owner of 351 shares of the capital stock of the Central Maine Telephone Company, a corporation organized under the laws of Maine, and having a place of business at Skowhegan, Me. That on the 27th day of February, 1905, he entered into a contract whereby he agreed to sell 351 shares, a majority, of the capital stock of the Central Maine Telephone Company to the New England Telephone & Telegraph Company, also a corporation duly organized by law. That the contract contained the following stipulation: "It is further agreed by the Telephone Company that if it shall not within two years from the date of this agreement transfer to said Central Maine Telephone Company its plant and equipment connected with the operation of its present telephone exchange at Skowhegan, Maine, it will pay to said Holt the further sum of five hundred dollars (\$500.00)." That on the 14th day of March, 1905, he transferred to the defendant the 351 shares, as stipulated, and that in all other respects he did fully perform all the requirements of the contract of sale between himself and the defendant, but that the defendant, notwithstanding the plaintiff's compliance with all the terms of the contract, failed and refused to perform its agreement and promise contained in the written memorandum above set forth, that, if it did not within two years from the date of the agreement transfer its equipment and exchange, it would forfeit to the plaintiff the sum of \$500. All these allegations are admitted by the defendant, but are sought to be avoided upon the averment of waiver and estoppel. We think this contention must prevail.

[1] 1. Waiver is a voluntary relinquishment of a known right, benefit, or advantage which would otherwise have been enjoyed. *Berman v. Fraternities H. & A. Ass'n*, 107 Me. 368, 78 Atl. 462. It is essentially a matter of intention, which may be proved by a course of acts and conduct or by such neglect or failure to act as to induce the belief that it was the intention and purpose to waive. *Burnham v. Austin*, 105 Me. 196, 73 Atl. 1089. It is also a question of fact. *Libby v. Haley*, 91 Me. 331, 39 Atl. 1004.

[2, 3] 2. Estoppel is a rule of law which prevents a party from asserting his rights when he has so conducted himself that it would be contrary to equity and good con-

science for him to allege and prove the truth. His conduct need not be characterized by an actual intent to mislead or deceive. His acts, declarations, or silence must be of such a character as to have the natural effect of influencing the person to whom it is addressed to do, or not to do, to his detriment, what he would not otherwise have done. *Rogers v. Portland & Brunswick St. Ry.*, 100 Me. 86, 60 Atl. 713, 70 L. R. A. 574. Estoppel is a question of law. *Libby v. Haley*, supra. It will be seen from these rules that waiver is a voluntary relinquishment of a known right; yet, if a party without such intention by his conduct or silence misleads the other party, he then is estopped.

[4] Applying these familiar principles of law to the conduct, acts, and necessary understanding of the plaintiff, touching the transaction of which he complains, we cannot avoid the conclusion that his attitude towards these proceedings, "all of which he saw, and a part of which he was," might well lead the defendant to the natural belief that he fully acquiesced in the result.

It appears that within two years from the date of the agreement the defendant had, with the knowledge and consent of the plaintiff, transferred its plant and equipment connected with the operation of its then existing telephone exchange at Skowhegan, Me., to the Maine Telephone & Telegraph Company, instead of to the Central Maine Telephone Company, as was stipulated in that paragraph of the contract already quoted. Without going into the evidence in detail, it would seem that the plan of consolidation which had been conceived by the defendant company was finally consummated by this transfer. On May 10, 1906, the annual meeting of the stockholders of the Central Maine Telephone Company was called at its office at Hinckley, Me. This meeting was adjourned to May 24, 1906, at Hotel Gerald Fairfield. The adjourned meeting was called to order by C. M. Holt, the plaintiff. A report of different officers was presented, and then directors for the succeeding year were chosen, of whom C. M. Holt, the plaintiff, was one. At this meeting, over which the plaintiff presided and in which he was elected a director, and in all the deliberations of which he took a part, action was taken which provided for the transfer of the Central Maine, the plaintiff's own company, to the Maine Telephone & Telegraph Company, and contemplated the transfer of the defendant company's exchange at Skowhegan. The various votes which were passed to carry this consolidation into effect covered in detail all the requirements necessary to fully consummate the purposes of the transaction. The plaintiff presided over the meeting during which were presented all the discussions, conversations, purposes, and votes, calculated to consummate the reorganization, represent-

ed in this change in the original contract, and understood everything that was going on; yet he did not protest anything that was being done, never intimated that he did not approve of the scheme, nor hint that it was not perfectly satisfactory to him. He remained silent, although an active participant in the whole transaction from beginning to end. The transfer to the Maine Telephone & Telegraph Company operated to secure to all parties interested practically the same results as a transfer to the Central Maine would have done. He also fully participated in the accomplishment of the reorganization, after the stockholders' meeting was held, in pursuance of the action thereof.

We cannot avoid the conclusion that, by this silent acquiescence and active participation, the plaintiff waived his right under the original contract, or was estopped to assert it. Exceptions overruled.

HOWE v. ASHLAND LUMBER CO. (Supreme Judicial Court of Maine. Dec. 11, 1912.)

1. NAVIGABLE WATERS (§ 39*)—RIPARIAN OWNERS—INJURIES RESULTING FROM RAFTING LOGS—LIABILITY.

The remedy of one whose land, bordering on a river, has been damaged by another negligently allowing its logs to jam on piers to such an extent as to cause the water to overflow the land and deposit thereon logs and other debris floating down the river is, under Rev. St. c. 43, §§ 7, 8, providing for the forfeiture of logs lodging on land adjoining any waters, and authorizing an owner of land to recover damages caused by logs of another lodging on his lands.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

2. NAVIGABLE WATERS (§ 39*)—INJURIES TO RIPARIAN OWNERS—RAFTING LOGS—LIABILITY.

A lumber company authorized by special act to erect piers and booms for the holding and sorting of logs floating down a river, provided the piers and booms do not obstruct navigation, and to condemn necessary land for the location and maintenance of the piers, may, in the exercise of due care, use its piers and booms for all purposes they are intended to subserve, without liability for any damage incident to or consequent on the result of such use.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

3. NAVIGABLE WATERS (§ 39*)—INJURIES TO RIPARIAN OWNERS—FLOATING LOGS.

Where the negligence of a lumber company, authorized by special act to erect and maintain piers and booms to collect and sort logs coming down a river, in maintaining its piers and booms co-operated with an unusual flood in overflowing riparian land, the company must compensate the owner thereof for the damages sustained; and it could not escape liability on the ground that the flood was an act of God.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

4. NAVIGABLE WATERS (§ 39*)—INJURIES TO RIPARIAN OWNERS—FLOATING LOGS.

Evidence held to support a finding that a lumber company maintaining, as authorized by special act, piers and booms for the collecting and sorting of logs floating down a river negligently allowed an accumulation of logs and debris on the piers, though it was practicable for it to run the logs through the openings between the piers to the booming ground below.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

5. NAVIGABLE WATERS (§ 39*)—MAINTAINING PIERS AND BOOMS—INJURIES TO RIPARIAN OWNERS—LIABILITY.

An owner of land bordering on a river may not recover from a lumber company maintaining, as authorized by special act, piers and booms to collect and sort logs floating down a river damages caused by an overflow of the land by merely proving negligence of the company in allowing an accumulation of logs and debris on the piers; but he must show that the company, in connection with the accumulation, was charged with a duty of anticipating that such a rainfall as caused the damage might occur, and that in anticipation of such an event it failed to remove the logs to the extent, at least, of preventing the flood which occurred.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

6. NAVIGABLE WATERS (§ 39*)—MAINTAINING PIERS AND BOOMS—INJURIES TO RIPARIAN OWNERS—LIABILITY.

In an action against a lumber company maintaining, as authorized by special act, piers and booms for the collection and sorting of logs floating down a river, for damages to riparian owner caused by an overflow of his land, evidence held to show that the rainfall causing the overflow, with the aid of the negligence of the company in allowing the formation of a jam on the piers, was not so unprecedented that the company was not required to anticipate it; and it was liable for the damages sustained.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.*]

7. APPEAL AND ERROR (§ 843*)—REVIEW—MATTERS UNNECESSARY TO DECISION.

Where the declaration demanded damages to soil, grass, and crops to the amount of \$500, and the uncontradicted evidence sustained a claim of \$500, the question of the amount of additional damages was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

Report from Supreme Judicial Court, Aroostook County, at Law.

Action by Nathaniel C. Howe against the Ashland Lumber Company. Cause reported to Supreme Judicial Court. Judgment for plaintiff.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Hersey & Barnes, of Houlton, for plaintiff. Powers & Archibald, of Houlton, for defendant.

SPEAR, J. This case comes on report. The facts show that the plaintiff, during the

period covered by his writ, was the owner of a farm upon the west side of the Aroostook river, containing an intervalle of about 14 acres bordering upon the river. The defendant is a corporation operating lumber mills at a dam across the Aroostook river near the village of Ashland, and about $6\frac{1}{4}$ miles down the river from the land of the plaintiff. Bearce Island is a short distance north of the plaintiff's land. Near the upper end of the island are erected three large piers, known as the "Upper Jam Piers." The water space from the west shore to the first pier is 70 feet; from the first pier to the second pier, 120 feet; from the second pier to the third pier, 120; from the third to the east shore, 65 feet. The defendant, for about 6 years, has used the river exclusively, for a distance of over 6 miles below the jam piers and about 8 miles above them, for the driving and booming of its logs coming into the river from above. There was a large booming privilege below the piers, which, during the period covered by the plaintiff's declaration, was entirely unused. It consisted of 3 miles of dead water, and was easily available for booming purposes.

[1] The plaintiff, in his writ, declares that in the years 1906, 1907, and 1908 the defendant negligently allowed its logs to jam and accumulate upon the jam piers immediately north of his land to such an extent as to cause the water to overflow his intervalle and deposit thereon logs and other debris floating down the river, to such a degree that he was damaged in each of these years and put to considerable expense in removing these deposits from his land.

It is the opinion of the court that the remedy for damages for these three years, under the plaintiff's declaration, if any there were, should have been sought under R. S. c. 43, §§ 7, 8.

But the plaintiff further alleges in his writ that "on the 1st day of April, 1909, and on divers other days and times between that day and the 1st day of November, 1909," the defendant carelessly and negligently allowed its logs to accumulate and jam upon these piers to the extent of causing the water to rise to an unusual height and flow back over his intervalle, and to remain there for so long a time as to destroy and render worthless a large field of potatoes.

[2] The defendant, however, while not controverting the overflow of the plaintiff's land and the destruction of his crops by water, contends that by virtue of a special act of the Legislature it was authorized to erect, at the place where located, piers and booms to collect, hold, separate, and sort logs, pulpwood, and other lumber coming down the Aroostook river. The act also provides that they shall not be so constructed as to impede navigation or unreasonably obstruct the common use of the river. It further gave the defendant company the right of eminent

domain to take and hold such lands as might be necessary for the location, erection, and maintenance of its piers and booms. But this provision of the act is immaterial to the consideration of the question in issue. We are unable to discover from the evidence that the defendant had in any way violated the provisions of this act in the location, erection, and maintenance of its piers.

[3] The only issue which, therefore, seems to be raised upon the law and the evidence is whether the defendant exercised reasonable care in the execution of the privileges conferred upon it by the Legislature. There can be no question that the defendant, within the exercise of due care, had a right to use its piers and booms for all the purposes they were intended to subserve, without liability for any damages incident to or consequent upon the result of such use. The intent and purpose of a legislative act conferring such privileges is to protect the exercise of those privileges to the full extent of the grant. This rule was stated in *Cushman v. Smith*, 34 Me. 247, as follows: "When a company only does what, by its charter, it is authorized to, and is free from fault and negligence it is not liable for consequences and damages." *Boothby v. Androscoggin & K. Railroad Co.*, 51 Me. 318, and *Lawler v. Baring Boom Co.*, 56 Me. 443, and cases cited. From these very cases it is equally well established that there may be a negligent use of a lawful right. The decisions are numerous and varied in declaring the application of this principle of law to the use of piers and booms. It is found in *Lawler v. Baring Boom Co.*, supra, on page 447, in this language: "The test of exemption from liability for injury arising from the use of one's property is said to be the legitimate use or appropriation of the property in a reasonable, usual, and proper manner, without any unskillfulness, negligence, or malice." In applying this general statement of the law to the specific use of a boom, the headnote in this case fairly summarizes the law as follows: "A boom company, being without fault or negligence in the erection and management of its boom, is not liable for the flowage of land not taken under its charter, caused by the boom, in co-operation of an unusual accumulation of logs and a large rise of water." Stated in the affirmative way, the converse of this principle is that, if land not taken under a charter is flowed by the co-operation of an unusual accumulation of logs and a large rise of water, through the fault or negligence of the boom company in the erection and maintenance of its booms, it is then liable for such flowage. In *Trevitt v. Barnes*, 21 N. Y. Wkly. Dig. 560, it is said: "One driving or floating logs on a navigable stream is required to exercise ordinary care to prevent the same from doing damage to the property of riparian owners." This rule is also extended to the exercise of such care as to prevent logs delivered in the stream from

creating jams sufficient to cause injury. In *Minnesota* is found the same rule. In *Michigan*, in *White River Log Co. v. Nelson*, 45 Mich. 578, 8 N. W. 587, 909, it is held: "When logs are allowed to form jams and cause flowage more than would otherwise exist, the person or company driving the logs is liable for damages to lands or crops resulting from such excessive flowage, when want of ordinary care is shown in not breaking up the jam." It is unnecessary to multiply quotations. In every state in the Union where lumbering operations have been made and floatable streams driven, this rule of law touching the negligent use of a lawful right has been declared. But the defendant, while not controverting the application of these well-established rules of law to the negligent management of a boom or piers, goes further and contends that, even though found negligent in permitting the logs to accumulate upon the piers, as claimed by the plaintiff, he should even then be excused from liability, upon the ground that the rise of water which overflowed the plaintiff's land was due to *vis major*. The rule of law pertinent to the issue of *vis major*, while familiar, has been very recently stated in *Emilie Willson v. Boise City*, 20 Idaho, 183, 117 Pac. 115, 36 L. R. A. (N. S.) 1162. Suit was brought against the defendant city for flooding certain lands and cellars where the city insisted that it was not liable for damages, basing its contention upon the claim that the flood was unprecedented and unusual, and therefore attributable to *vis major*, or act of God. Upon this contention the court say: "The decisive question, however, arises in this case as to what constitutes *vis major*, or the act of God, within the meaning of the law of negligence. Black, in his law dictionary, defines it thus: 'Any misadventure or casualty is said to be caused by the act of God when it happens by the direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man, and without human intervention, and is of such a character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by any reasonable degree of care or diligence, or by the aid of any appliances which the situation of the party might reasonably require him to use.'"

In *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 South. 374, the same court also says: "The term 'act of God,' in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them." In *Kansas City v. King*, 65 Kan. 64, 68 Pac. 1093, the court hold that an unusual flood, but such as had occasionally occurred, and of rare occurrence in that vicinity, yet, under the laws of nature, might be anticipated to occur again, was not within the rule of *vis major*. In *Ohio & M. R. Co. v. Ramey*,

139 Ill. 9, 28 N. E. 1087, 82 Am. St. Rep. 176, the same doctrine is declared; the court saying: "Though of rare occurrence, such rainfalls are not phenomenal, and therefore not beyond reasonable anticipation." It was here held that a cloudburst, which has irregularly and infrequently occurred, within the memory of man, in a particular locality, was not classed as *vis major*.

Upon the rules of law governing this case, there seems to be no particular controversy between the plaintiff and the defendant. The defendant, in his brief, says: "The propositions of law which are applicable to the case at bar are: First, 'If an inevitable accident, such as a flood which the defendant could not reasonably anticipate, caused the damage, and the acts of the defendant in no way contributed to the injury, he would not be liable.' That is, if the unusual flood and the defendant's negligence co-operated, the defendant would then be liable. Second, 'That the method provided in the special act of 1897 provides for the compensation of the plaintiff for such damage as he would suffer from the reasonable and proper use of the rights granted.' That is, for an unreasonable use it would be liable. Upon the application of these two principles of law to the facts, the rights of these parties are to be determined."

[4] The first question accordingly is: Did the defendant, in allowing its logs to drift down and accumulate upon the piers, as the evidence tends to show they did, make a reasonable use of the privileges granted it by the Legislature? It is the opinion of the court that it did not. We cannot avoid the conclusion, based upon fair inferences from the testimony, that the plaintiff has sustained the burden of showing that the defendant's logs, together with the driftwood and other debris which would naturally flow down the river with the logs, accumulated and jammed upon the piers until they filled the river from the very bottom to a height even with the top of the piers, which were 2 or 3 feet above high-water mark. The uncontradicted testimony shows that from the bottom of the river this jam was 24 to 30 feet high at the piers, and extended back about 40 rods. It also appears that this jam had been for a long time upon these piers, with no effort on the part of the defendant corporation to remove it, although Mr. West, who had driven the river nearly 50 years, says the logs "could be put down very easy." It should also be charged with the common knowledge that waste from the mills above—shingle butts, billets, shingle hair, sawdust, bark—and the natural debris of the stream, coming down against the jam and sifting into the interstices of the logs would construct what was a comparatively tight dam across the river. Nor is any valid reason shown by the defendant why it was not entirely practicable for it to have run these logs through the large openings between these piers to the

ample booming ground below. On the other hand, its manager admits that it was practicable, and that there was plenty of room. While ordinarily this condition occasioned no particular damage, as the water would percolate through this jam of logs sufficiently to prevent the formation of a pond above, we cannot believe that the defendant had a right, under the act of the Legislature, to allow this large accumulation of logs and debris to completely close this river for an indefinite time, so far as any act on its part seems to have been contemplated for its removal.

[5, 6] But the mere negligence of the defendant in allowing this accumulation would not be sufficient to enable the plaintiff to maintain his action. It is incumbent upon him to show that the defendant, in connection with this jam of logs across the river, was charged with the duty of anticipating that such a rainfall as had actually come and caused the damage complained of might occur, and that in anticipation of such an event it should have removed these logs to the extent, at least, of preventing the flood which occurred. Upon this phase of the case the defendant raised the question of *vis major*, or act of God, claiming that the rainfall was so unusual and unprecedented that the defendant was not required to anticipate it, and that consequently the flood was *vis major*. But we are unable to see the force of defendant's contention, either that the flood was *vis major*, or that, if *vis major*, it relieves the defendant.

The first proposition may be decided independent of the evidence by reference to that great fountain of all information—common knowledge. There is no claim in this case that there was a cloudburst, that this was a mountain stream, but simply that there was a heavy rain for three days in the month of September, 1909. There is scarcely a year when, during some month in the year, such a rainstorm does not occur; and it will be observed that there was not an element contributory to this flood, as it is called, outside the water of a very heavy rainfall.

It is attempted, however, to show that this rise of water above the piers was no higher than all along the river. But this contention is clearly negated by the testimony of the plaintiff, who says the river itself in front of his intervals rose from 12 to 15 feet "from the natural condition of the river before it started to rain." While at other places along the river defendant's witnesses say the water was, at the ordinary freshet height, "somewhere in the neighborhood of 4 feet, a little strong, I should think," as stated by Mr. Churchill. We think that it requires no evidence to establish the conclusion that every man of mature age and common experience must be held to anticipate that in this climate a rainstorm for three or four days may occur in any month of the year. We think it can even be said that it is not

unlikely to occur. Therefore our conclusion is that the rainfall which overflowed the river and flooded the plaintiff's intervals was not *vis major*. But, even if it was *vis major*, it does not relieve the defendant. It already appears that the accumulation of logs upon the piers was negligence and beyond the protection of the legislative act. If, therefore, the rainfall was unprecedented, the defendant's negligence co-operated with it to produce the rise of water above the piers and the overflow of the plaintiff's land. Without the jam, it is evident that the flood would not have been so great, and certainly could not have continued for any great length of time. This situation falls directly within the rule laid down in *Smith v. Western R. R. Co.*, 91 Ala. 456, 8 South. 754, 11 L. R. A. 619, 24 Am. St. Rep. 929, in which the court said: "While it is true that no human agency can prevent or stay an act of God, the act itself being that of omnipotence and irresistible, it is frequently the case that the results or natural consequences of an act of God, by the exercise of reasonable foresight and prudence, may be foreseen and guarded against. Where this can be done by the exercise of reasonable diligence and prudence, a failure to do so would be negligence, and subject the party upon whom this duty devolved to damages, although the original cause was an act of God." This rule was also declared in *Lake v. Milliken et al.*, 62 Me. 240, 16 Am. Rep. 456, in which the head-note fairly states the result of the opinion, as follows: "Every wrongdoer is, at least, responsible for all the mischievous consequences that might be reasonably expected, under the circumstances, to result from his misconduct. Where an injury is the result of two concurring causes, the party responsible for one of these causes is not exempt from liability, because the person who is responsible for the other cause may be equally culpable." Hence it could hardly be said that where the defendant's own negligence contributed that the consequences could be charged to the act of God.

At this point it is interesting to note that there is an apparent inconsistency in the decisions of the different courts in declaring, as was said in the Alabama case, that, although the original cause was an act of God, yet, if it could be avoided with the exercise of reasonable diligence and prudence, a failure to do so would be negligence. But, strictly speaking, *vis major* or act of God is such an unprecedented and extraordinary operation of the forces of nature that human providence is not required to anticipate its happening. Therefore, to say that *vis major* or act of God does not excuse, when negligence co-operates with it to produce injury, would seem to imply that human foresight should be held to anticipate the act of God. But in the practical application of these decisions it will be seen that, although the operation of

the forces of nature may be unprecedented, and in that sense the act of God, yet, if they are not the proximate cause of the injury, but are aided in producing it by the negligence of human agency, then such agency is not excused.

In other words, the fury of the elements may be the act of God; but its effect may be governed by the act of man.

Upon all of the evidence, it is the opinion of the court that the plaintiff has sustained the burden of showing that the defendant, in allowing its logs to accumulate and remain, as they did, upon the piers in 1909, was guilty of negligence.

The plaintiff also charges the defendant with negligence in allowing its logs to accumulate and remain upon the piers in the spring of 1910, when, on account of the freshet in June of that year, his meadow was again overflowed, and his growing grass, oat, and potato crop materially injured. From the evidence it is also the conclusion of the court that in 1910 the defendant was guilty of negligence in allowing these logs to accumulate entirely across the river and form a dam sufficient to cause the rise of water that produced the overflow upon the plaintiff's land. It appears from the evidence that it was entirely feasible for the defendant company to have run these logs down between these piers, so as to have prevented the jam which completely filled the river. Nor was it permitted to let the logs so jam by its legislative favor. While a mere violation of the act would not inure to the benefit of the plaintiff in this case, it may properly be recalled to show that the defendant, in accepting the legislative act, regarded with approval the feasibility of keeping the channel clear, as required by the act.

[7] Upon the question of damages alleged to have been sustained by the plaintiff in 1909, he declares upon an injury to the soil and grass then growing, upon which no evidence seems to have been offered, and upon damages to his potato crop, to the amount of \$500. Upon this allegation evidence was offered tending to show damages to the amount of over \$1,200 for the market value of the potatoes in the field, and additional damages for labor, phosphate, etc. Under the plaintiff's declaration it becomes unnecessary to discuss the question of amount, inasmuch as the uncontradicted evidence sustains this claim of \$500. The plaintiff also alleges injury to his grass, oat crop, and potato crop growing at the time of the freshet in 1910, and upon this we are inclined to take his figures upon the damages. He claims that the loss upon his potato crop was \$162, and upon his oat crop \$155, making a total of \$317. In accordance with the stipulation of the report, the entry must be:

Judgment for the plaintiff for \$867 and interest from the date of the writ.

CORNISH, J., concurred in the result.

JOHNSON v. PUBLIC SERVICE RY. CO.
(Court of Errors and Appeals of New Jersey.
Nov. 21, 1912.)

(Syllabus by the Court.)

**STREET RAILROADS (§ 86*) — CONSTRUCTION
AND MAINTENANCE — LIABILITY FOR INJURIES.**

While it is a rule that a railway company having the right to lay tracks in a public street, by the general principles of the common law and without either statute or ordinance or contractual obligation, is bound to lay its tracks in a proper manner, and to keep them in a proper state of repair, nevertheless liability of such a company for failing to keep the surface of the street in repair does not result from the mere fact that the corporation has been vested with a franchise or license to use the public street. The liability to maintain the pavement, as such, if it exists, must rest upon some statute or ordinance imposing such a duty, or must arise out of the obligations of a contract; and, in the absence of statute, ordinance, or contractual obligation creating such duty, a railway company is not liable to one of the traveling public, who is injured by stumbling over one of its tracks which is exposed by reason of the highway becoming depressed at the place of the accident, when such depression in the street has not been occasioned by the negligence of the company.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 150, 173, 183-185, 187; Dec. Dig. § 86.*]

Kalisch and Treacy, JJ., dissenting.

Error to Circuit Court, Hudson County.
Action by Martha Johnson against the Public Service Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Weller & Lichtenstein, of Hoboken, for plaintiff in error. Edwards & Smith, of Jersey City, for defendant in error.

WALKER, Ch. This writ of error brings up for review the propriety of a judgment of nonsuit granted by the Hudson circuit court. The case was one in tort for an injury received by the plaintiff while walking across Courtland street, at its intersection with Central avenue, Jersey City, on the night of November 17, 1910. At the point in question a flagstone on the street crossing had become depressed, and the plaintiff caught her foot on the north rail of the defendant company's trolley track, and fell with such force that both her arms were broken. The street at the point in question had been in the same condition about a year and a half.

The nonsuit was ordered upon the ground that no negligence had been shown on the part of the defendant, and this, in turn, was rested upon the ground that the defendant company owed no duty to the traveling public for the condition of the highway at the locus in quo. The case of *Fielders v. North Jersey St. Ry. Co.*, 68 N. J. Law, 343, 53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. Rep. 552, is controlling. Counsel for both plaintiff and defendant seem to con-

cede this. It is the only case but one, in our own courts, cited by counsel for the plaintiff in error, and is the only case cited by counsel for the defendant in error. In that case (*Fielders v. North Jersey St. Ry. Co.*) it was held that the liability of a railway company to maintain the pavement of a public street on which its tracks are laid does not result from the mere fact that the corporation has been vested with a franchise or license to use the street; that such liability, if it exists, must either rest upon some valid statute or ordinance imposing such duty or must arise out of contractual obligations. 68 N. J. Law, 346, 53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. Rep. 552.

The case at bar is barren of evidence showing any municipal ordinance requiring the defendant company to repair the street or maintain it at grade, nor have we been pointed to an act of the Legislature making such a requirement of the defendant company. The actionable negligence includes the notion that a legal duty has been violated, and as no legal duty by the defendant to repair the street is shown to exist in this case in virtue of a statute or an ordinance, that duty, if any, must arise out of the common law. The general principles of the common law require a street railway company which is authorized to lay its tracks in the public street, to lay them in a proper manner and keep them in a state of proper repair. 68 N. J. Law, 346, 53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. Rep. 552. This doctrine, however, does not come in aid of the plaintiff's case, because the proofs fail to disclose improper laying of, or want of repair in, the tracks of the defendant company. The injury to the plaintiff happened solely from the fact that one of the stones or flags forming a crosswalk had sunk, leaving a depression of 2½ feet in length and 1½ feet in width, and about 2½ inches in depth, running up to the northerly side of the north rail of the track and extending northerly between the rail and the curbstone.

Counsel for the plaintiff in error seeks to avoid the effect of *Fielders v. North Jersey St. Ry. Co.* by saying that this language in the opinion of this court in that case: "Nor is there anything to connect the defect with the defendant's rails or sleepers, or to show that anything done or omitted in the construction, maintenance, or operation of the railway produced the defect"—meant in that case that, if the injury to the plaintiff had been the result of falling over a rail or sleeper which the company had allowed to extend above the adjacent pavement (as in the case at bar), it would have been liable. In our opinion the language quoted from the *Fielders* Case is no authority for the position of the plaintiff in er-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ror, but on the contrary, affords ground upon which to rest the judgment of non-suit. There is nothing in this case to connect the defect (the sunken flagstone) with the defendant's rails or other construction, or to show that anything was done or omitted in the construction, maintenance, or operation of the railway, which produced the defect. The municipal authorities having charge of the highway appear to have been responsible for its condition at the time of the accident.

There must be an affirmance of the judgment of the court below.

KALISCH and TREACY, JJ., dissent.

WALKER v. BOARD OF CHOSEN FREEHOLDERS OF ESSEX COUNTY et al.
(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

COUNTIES (§ 65*)—TERMS OF OFFICE—CLERKSHIPS—"OFFICE."

The provisions of section 6 of "an act to reduce the number of members of boards of chosen freeholders," etc. (the Strong Act [P. L. 1902, p. 67]), concerning the terms of office of certain officers, do not apply to a mere clerkship in a county institution.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 97, 98; Dec. Dig. § 65.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4921-4931; vol. 8, p. 7736.]

Error to Supreme Court.

Action by Herbert Walker against the Board of Chosen Freeholders of the County of Essex and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Benjamin F. Jones, of Orange, for plaintiff in error. Frank H. Sommer, of Newark, for defendants in error.

GARRISON, J. The judgment of the Supreme Court is affirmed.

We do not find it necessary to consider the question decided by that court respecting the conflict between the provisions of the Strong Act (P. L. 1902, p. 65) and the Civil Service Act (P. L. 1909, p. 294), for the reason that the provision of the Strong Act upon which the plaintiffs in error rely applies only to "offices" and "officers," whereas the appointment they seek to sustain concerns a mere clerkship in one of the county institutions. That such an employment, judged by the nature of its duties, as shown by a stipulation, is not an office, is clear from our decisions, which are collected in the opinion recently filed in the case of *Fredericks v. Board of Health* (Sup.) 82 Atl. 528.

Even conceding that the holdover officers recognized by the Strong Act are to be treated as such by force of the language of the act under which they are appointed (P. L.

1900, p. 168), such construction does not extend beyond the officers and heads of departments specifically enumerated in section 6 of that act and "such other officers" as may be determined by the resolution of the board. The duties appertaining to the clerkship in question are performed by an agent employed by the board, and not by virtue of any office recognized by this act.

The effect of the Strong Act is not to invest this employment with the attributes of a position, still less to constitute it an office.

Upon this ground the judgment of the court below is affirmed.

STEVENSON v. AKARMAN.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

HUSBAND AND WIFE (§ 208*)—SERVICES OF WIFE—NURSING AND BOARD FURNISHED TO THIRD PERSON—RIGHT OF ACTION—"DOMESTIC DUTIES."

Services rendered by a wife in the home of her husband to a lodger residing with them, though consisting largely of personal attendance of the wife and including the nursing of the lodger when sick, were "domestic duties," for which, in the absence of an express promise by the lodger to pay the wife, she could not recover; the implied promise being to pay the husband, and not the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 760-764; Dec. Dig. § 208.*]

Error to Supreme Court.

Action by Exilda M. Stevenson against John N. Akarman. Judgment for plaintiff, and defendant brings error. Reversed.

Bourgeois & Coulomb, of Atlantic City, for plaintiff in error. Rulif V. Lawrence, of Freehold, for defendant in error.

GUMMERE, C. J. This suit was brought by Mrs. Stevenson against the executor of Mrs. Annoria Pawl, deceased, to recover for services rendered to her as a nurse during the last 17 months of her life. The trial resulted in a verdict for the plaintiff, and the present writ of error is sued out by Mrs. Pawl's executor to review the judgment entered thereon.

The proofs on the part of the plaintiff showed that she is a married woman, and that during the period covered by the services which are the basis of her claim she resided with her husband at their home in the village of Frenau; that Mrs. Pawl came to live with them as a boarder in March, 1909, and remained there until her death in July, 1910, paying her board each week; that during all of that period Mrs. Pawl was suffering with sciatic rheumatism, and required considerable care and attention, which was given to her by the plaintiff, who also acted as nurse for the invalid when occasion required; and that those services were rendered to her by the plaintiff without any promise on the part of Mrs. Pawl to make

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

any compensation therefor. At the close of the plaintiff's case there was a motion to nonsuit, upon the ground that the proofs disclosed no right of action on the part of the plaintiff against the executor of the decedent. The motion was refused, and in this we think there was error.

Services rendered by a wife in the home of her husband to a lodger residing with them, even though they consist largely of the personal attendance of the wife, and include the nursing of the lodger when sick, are within the range of her domestic duties, and, without an express contract or promise made by the lodger to the wife, the latter cannot maintain an action against him, or, in the case of his death, his executor, for the recovery of compensation for such services. The implied contract which the law raises in such a case is that the person to whom such services are rendered will make reasonable compensation therefor to the husband, and not to the wife. *Garretson v. Appleton*, 58 N. J. Law, 386, 37 Atl. 150; *Peterson v. Christianson*, 68 N. J. Law, 392, 56 Atl. 288; *Oakley v. Emmons*, 73 N. J. Law, 208, 62 Atl. 986.

There having been nothing in the proofs offered on the part of the defendant to vary the situation as exhibited by the testimony in the plaintiff's case, the judgment under review must be reversed.

AMERICAN MALLEABLES CO. v. TOWN OF BLOOMFIELD.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 99*) — CONSTRUCTION AND MAINTENANCE—GRADE CROSSINGS—AMENDMENT OF CONTRACT.

There is power to alter or amend a contract entered into between a railroad company and a municipality under statutes (3 C. S. 1910, pp. 4234, 4266, 4258) for the elimination of grade crossings, provided such alterations or amendments concern those matters which are included in the objects of the said legislation, namely, the security of life and property to be affected by a change of grade in railroad tracks or streets.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 293-296, 297-304; Dec. Dig. § 99.*]

2. MUNICIPAL CORPORATIONS (§ 226*)—CONTRACTS—POWER TO CONTRACT.

A municipal body has no power to indemnify one against his own act which may result in damage to the property of another, where public rights are not concerned.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 645-650; Dec. Dig. § 226.*]

3. MUNICIPAL CORPORATIONS (§ 115*)—ORDINANCES—REPEAL.

A mere resolution of the governing body of a municipality will not serve to repeal or modify a duly enacted ordinance. To do so necessitates action of like formality to that re-

quired for the enactment of the original ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 266½, 267; Dec. Dig. § 115.*]

4. MUNICIPAL CORPORATIONS (§ 115*)—ORDINANCES—REPEAL.

An ordinance judicial in its nature cannot be repealed wholly or in part, except upon due and proper notice.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 266½, 267; Dec. Dig. § 115.*]

Garrison and Trenchard, JJ., dissenting.

Error to Supreme Court.

Action by the American Malleables Company against the Town of Bloomfield, in the county of Essex. Judgment for plaintiff (81 Atl. 500), and defendant brings error. Affirmed.

Charles F. Kocher and Edward M. Collie, both of Newark, for plaintiff in error. Pitney, Hardin & Skinner, of Newark, for defendant in error.

VOORHEES, J. This writ of error, running to the Supreme Court, brings to test the judgment of that court in setting aside a resolution of the town council of the town of Bloomfield, adopted March 6, 1911, and all proceedings thereunder. The resolution thus removed authorized and directed the mayor and clerk to enter into and execute on behalf of the municipality a supplementary agreement with the railroads, providing for the modification of a previous contract between them, dated July 12, 1910, for the elimination of grade crossings, made pursuant to certain acts of the Legislature, viz., General Railroad Act 1903 (C. S. p. 4234), "An act to authorize any town or city to enter into contracts with railroad companies," etc., approved March 20, 1901 (C. S. p. 4266), and "An act to provide funds," etc., approved March 30, 1904 (C. S. p. 4258). The original contract, dated July 12, 1910, had been sanctioned by an ordinance, and had for its purpose the abolition of grade crossings in the town.

The prosecutor, the defendant in error in this court, owned the land upon which its manufacturing plant is located, abutting on Mechanic street, which ran between the railroad and the prosecutor's property, and enjoyed the use of a switch or industrial siding from the main line of the railroad across Mechanic street at grade to the prosecutor's lands. The scheme to elevate embodied the vacation of Mechanic street, and the substitution in lieu of the former industrial switch of an elevated siding to leave the main line in its elevated position, and thence to be carried upon abutments to the prosecutor's lands. The vacation of Mechanic street was in fact accomplished before the date of the resolution under review, and the work under the original contract had pro-

gressed so far that the railroad tracks had been moved westerly within the limits of what was formerly Mechanic street. The work of replacing the industrial siding in its proposed elevated position had so far advanced that the abutments had been completed for it to pass from the main tracks. Possession of the land, lying within the bounds of Mechanic street (vacated), reverting to the prosecutor upon its vacation, had been permitted to the railroad company, and the industrial sidings formerly existing had been removed.

A petition had been presented to the council on January 3, 1911, for the opening of a new street, which, for convenience, may be called New Mechanic street, to run practically parallel to old Mechanic street, close to, but westerly of its site, and through lands of the prosecutor. Because of an incorrect description of the new street, the petition was withdrawn, and again, in corrected form, presented on January 16, 1911. The proceedings to open this new street were restrained by injunction out of the Court of Chancery on April 3, 1911, still in full force. Such was substantially the condition of affairs at the time of the passage of the resolution, and the execution on the date of its passage of the supplementary contract, which modified the original contract by eliminating the industrial sidings of the prosecutor. In this resolution and contract the railroad stipulated "to purchase and acquire by condemnation or agreement all the lands required by them for the said improvement, lying within the boundary lines of said Mechanic street as heretofore existing, being specifically all of the land lying within the lines of Mechanic street abutting the lands of the American Malleables Company and the Hedden Iron Construction Company and which would revert to the full possession, use and enjoyment of the said American Malleables Company and the said Hedden Iron Construction Company upon the vacation of Mechanic street as aforesaid. The town shall pay to the railroad companies all money, costs and expenses in excess of twenty-five hundred dollars which the railroad companies shall be required to pay out and expend in and for the acquiring of all the said lands acquired by it within the lines of said Mechanic street for the purpose aforesaid. * * * The town shall indemnify and save harmless the railroad companies and their respective successors and assigns from and against all claims, demands, suits, actions, damages, costs and expenses which the railroad companies or either of them shall incur or be subjected to by or on account of the American Malleables Company and the Hedden Iron Construction Company and all persons whomsoever by reason of the omission or elimination or failure to reconstruct and maintain an industrial siding or switch leading from the main tracks of the railroad companies to

the lands and property of the American Malleables Company. No other or further amendment, alteration, or change in the said agreement between the parties hereto dated July 12, 1910, or in the work therein provided for as contemplated by this supplemental agreement except as herein specifically described and in all other respects the aforesaid agreement, dated July 12, 1910, shall be and remain in full force, virtue and effect."

[1] It is argued in behalf of the town that by the decision of the Supreme Court there has been a denial of power, under the existing legislation, to enter into a contract, such as the one under consideration is. Undoubtedly sufficient power has been given by the Legislature to enable the town to contract for changes in streets, their vacation or opening, for the purposes of securing safety to the public by means of the elimination of grade crossings, and thereby promote the interest of the municipalities. Such contracts, when properly made, the municipalities have plenary power to carry into execution by proper municipal proceedings in the manner provided by their respective charters (*Morris & Cummings Dredg. Co. v. Jersey City*, 64 N. J. Law, 587, 46 Atl. 609), and, of course, incidentally the structures to be erected may be made slightly, perhaps to the point of being ornamental (*Morris & Essex R. R. Co. v. Newark*, 76 N. J. Law, 559, 70 Atl. 194). Nor can the power to alter and amend such a contract be doubted, provided such alterations and amendments concern those matters which are included in the objects of the legislation in question, namely, the security of life and property, effected by change of grade in railroad tracks. But the abandonment of the proposed industrial sidings, at the time of the change in the original contract, did not tend to this purpose. Their proposed reconstruction was to be upon private properties, and thus the agreement to do away with them did not tend to promote the public good, or to confer any advantage upon the public.

Moreover, the opening of New Mechanic street was no part of the proposed work, as set forth in the original ordinance. It may be true that the subject had been mooted during the progress of the development of the elevation scheme, and that certain independent steps may have been instituted, looking to the opening of such a street, and there may have been in contemplation that, if the new street should be opened, the sidings would constitute an obstruction to it. But, for aught that appears, the street might never be opened. True, an application by property owners, pursuant to the Town Act (P. L. 1895, p. 218), under which Bloomfield has its legal existence, to open the new street was made, and is under consideration, but as before remarked, formed no part of the work, as originally contemplated in the ordinance and contract, nor is its location and

opening now provided for in the supplemental contract. It may never be opened, and the siding upon prosecutor's private property may nevertheless be destroyed. If the contracting parties had, in their supplemental agreement, provided for the opening of the new street, as incidental to the work of the elevation, and for the abolition of the sidings, as obstructive to such new street, and dangerous to the public, a different question would have been presented for decision.

The present agreement deals only with structures upon private property, except that it provides for the expenditure of public money for the benefit of the railroad companies in their acquisition, for their own purposes, of the lands formerly constituting the site of the vacated street to the amount of the cost of such acquisition, in excess of \$2,500, at which price the companies had theretofore secured an option to purchase contingent upon the construction of the industrial sidings. The town under the terms of the former agreement was free from liability for damage for vacation of Mechanic street in excess of \$2,500, and was not obliged to stand the cost of acquiring land in that street after its vacation for the benefit of the railroad company. In addition to the foregoing, the town agreed to indemnify the railroad companies for damages which might accrue to them by reason of the omission of the switches. The amendment to the contract, as matters stood at the time of its execution, in effect, compels the town to pay for the prosecutor's damages, caused by the removal of its private siding by the railroad companies.

[2] A municipal body has no power to indemnify one against his own act which may result in damage to the property of another, where public rights are not concerned. 2 Dillon, Mun. Corp. § 814. There may be cases where the grade crossing legislation may give such authority, when the act resulting in damages is inseparably connected with the agreed plan to carry out the object of such legislation, but that is not this case.

[3] The point has been made that an ordinance as distinguished from a resolution is required to authorize a contract, on the part of the municipality for the opening or vacating highways, or altering the lines or grades of streets, inasmuch as these acts are required by the statute under which Bloomfield is incorporated, to be done by ordinance, and such contracts are not self-executing. *Clark v. Elizabeth*, 61 N. J. Law, 565, 40 Atl. 616, 737. It is conceded that we have no authoritative decision in this state upon this point. It is not necessary to recount the arguments made for and against limiting the exercise of such power by ordinance only, for the original contract had in fact sprung from an authorization in the form of an ordinance. The further insistence is that the supplemental resolution assuming to al-

ter an ordinance and the contract cannot stand. That proposition must be sound if the original contract needed municipal action by way of ordinance to support it.

The plaintiff in error asserts authority in the original contract itself for its modification by mere resolution, in the following clause: "As it may be found necessary by both parties hereto, during the progress of said work, to make changes in plans or parts of plans, or in the construction of said work, it is hereby agreed that when such changes are approved by resolution of the town council of Bloomfield the work shall proceed in accordance therewith. A copy of such resolution shall be made a part of this agreement, and a certified copy thereof shall be furnished to the companies." And in another paragraph as follows: "It is further understood and agreed that either party hereto shall not be required to assume or participate in any expense or pay any sum of money whatever or do any work whatever, or contribute any lands or property in connection with any work, matters or things in this agreement mentioned or referred to, or shown upon the annexed plans, except the expenses, moneys, work, land and property which in this agreement are specifically provided to be borne, paid, done, performed or contributed by said respective parties, unless same shall be hereafter otherwise agreed to by a supplemental agreement duly executed." It argues that by reading these two paragraphs together it is to be gathered that changes by resolution, not involving extra expense or work, on the part of the railroad company, would be binding upon it, but, if extra expense and work were thus rendered necessary, then, to obligate the railroad to perform, there must be "a supplemental agreement duly executed." The argument is not persuasive. The contrasting provisions indicate rather that the railroad and the town in carrying on the work may find minor changes necessary, and, when such changes have the approving resolution of the municipal body, it shall be sufficient authority, on the part of the town, for the company to proceed accordingly. These changes evidently refer to those not substantially altering the scheme, or in any way involving the rights of third parties. The later quoted provisions bind the contracting parties to adhere closely to the terms of the original contract, except where a duly executed supplemental agreement shall change it. We conclude that these provisions are not sufficient to warrant by resolution an alteration of the scope and magnitude of that here presented.

To return, then, to a consideration of the effect of a resolution working a modification of an ordinance. The latter is of a higher grade than the former. There is abundance of authority holding that an ordinance cannot be amended, repealed, or suspended, ex-

cept by an act of equal dignity. 2 Dill. Mun. Corp. (5th Ed.) § 572; 1 Smith, Mod. L. Corp. § 548; 28 Cyc. 380; 21 Am. & Eng. Enc. of L. 1003; *City of Paxton v. Bogardus* (1903) 201 Ill. 628, 66 N. E. 853; *Bills v. City of Goshen*, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261; *Cascaden v. City of Waterloo*, 106 Iowa, 673, 77 N. W. 333. We are of opinion that by the weight of authority a mere resolution will not serve to repeal or modify a duly enacted ordinance, and that to do so necessitates action of like formality to that required for the enactment of the original ordinance.

[4] But, if we are in error in this regard, yet there is an insuperable obstacle to sustain the modified agreement in this case. It interfered with private rights; and therefore was judicial in its character. Its express object was to abolish a private siding existing at the time of its passage upon private property. It is settled by a long line of decisions that municipal action which affects or adjudicates regarding property rights, to be valid, can be taken only after notice actual or constructive has been given to those whose rights are affected. *Cape May v. R. R. Co.*, 60 N. J. Law, 224, 37 Atl. 392, 39 L. R. A. 609; *Camden v. Mulford*, 26 N. J. Law, 49; *Moore v. Haddonfield*, 62 N. J. Law, 386, 41 Atl. 946. In the last case it was held by this court that, "if the original ordinance was a judicial act, it could not be abrogated even in part, save upon notice." The prosecutor was a property owner, and it does not appear that it, or any other property owner, had actual notice or notice by construction of the contemplated resolution, or of the execution of the contract which followed immediately upon its passage. Every intendment must be made against the fact that any notice was given. This is sufficient to set aside the resolution.

The town, however, contends in opposition that the prosecutor has, in fact, no property rights to be affected, and that nowhere do any facts appear supporting such right in the siding, and that the passage of the resolution and the making of the contract were in no sense judicial acts. The argument is that the prosecutor has failed to show any contractual relation with the railroad companies either with regard to the original switch or the proposed switch to be substituted. It does appear that a switch existed there originally, and the agreement shows that a new one was to be substituted. The contention is that because a switch existed gave no right to its continuance, that it is there by sufferance, and cites *Swift v. D. L. & W.*, 66 N. J. Eq. 48, 57 Atl. 456, as

authority for the claim that no right to maintain the switch originally existed in the prosecutor, and that, in fact, it was unlawful, because crossing a public highway.

Whatever may have been the relation between these parties before the making of the agreement of July 12, 1910, the railroad companies, by that contract, agreed to construct a substituted siding, and the city assented to it, and in the carrying out of the general scheme of elevation it may be that sufficient authority was vested in the town, as well as in the railroad companies, to make a valid contract for the preservation of the prosecutor's access to the railroad tracks in this manner, and under the existing conditions. Moreover, by the terms of the agreement, a benefit was conferred upon the prosecutor in consideration for which the railroad companies had been enabled to acquire their option to purchase the lands of the prosecutor required for their improvement at a lower price than they otherwise would. So that, whatever may have been the status of the siding originally, it seems clear now that the prosecutor has a property right to its construction. In *Styles v. Long*, 70 N. J. Law, 301, 57 Atl. 448, this court held that one, not a party to a contract, has no status to sue upon it, if he be a person with whom the contracting parties never meant to come into contractual relations, and that a possible benefit to such party by the performance of a contract is not enough to give him the right to maintain an action upon it. To have that effect it must appear that the contract was made for his benefit. The agreement fairly shows, not only that the railroad companies and the town did contemplate contractual relations with the prosecutor, but that the former actually contracted for its benefit by agreeing to the construction of the substituted sidings, as delineated upon the plans accompanying that instrument.

It seems to us to be plain that property rights flowed to the prosecutor from it, and that, by the enforcement of the supplemental resolution, they will be swept away without notice. It is not an instance of third parties, being merely indirectly and incidentally advantaged through performance of the contract. To permit the blotting out of the rights of the prosecutor in this summary way would be equivalent to appropriating property without compensation and without due process of law.

The judgment of the Supreme Court under review will be affirmed.

GARRISON and TRENCHARD, JJ., dissent.

FRELINGHUYSEN v. FRELINGHUYSEN
et al.(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)*(Syllabus by the Court.)*WILLS (§ 634*)—CONSTRUCTION—VESTED OR
CONTINGENT INTERESTS—"DIRECT DESCENDANTS."

A testator directed that the remainder of his estate be held by his executor upon trust to pay the income to his wife until the youngest child then living reach the age of 21 years, and on the death of his wife to pay income to his four children, naming them, "or to the direct descendant or descendants of either of them in equal shares," or if the youngest child should reach the age of 21 years during the life of the wife, to pay one-third of the income to his wife and two-thirds to his said children, "or such of them as may then be living, or to their direct descendant or descendants share and share alike." *Held*, that the children took a vested interest in the income, subject to the trusts created, and that on the death of the widow, there being no gift over of the corpus, the children or the direct descendants of those deceased would take the trust fund absolutely, and that the words "direct descendants," as used by the testator, mean descendants of any child dying during the existence of the trust, and not descendants of those of the children living at the death of testator's wife and the termination of the trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

Bill in equity by George G. Frelinghuysen, executor, against Sara L. B. Frelinghuysen and others for the construction of the will of Peter H. Ballantine. From the decree, defendants appeal. Affirmed.

The bill of complaint in this cause prays the construction of the last will and testament of Peter H. Ballantine, deceased. He died leaving a widow and four children, three daughters and a son. The widow and testator's son, George, are now deceased. The latter left no descendants. Of the three daughters, two have children living, and whatever interest George had in the estate under the will was sold by his trustee in bankruptcy and purchased by two of his sisters.

So much of the will as is necessary for the determination of the questions raised reads as follows:

"(5) The remainder of my estate shall be held in trust by my executors, and the income thereof paid to my beloved wife, Isabella Linen Ballantine, until the youngest child then living shall reach the age of twenty-one years and on the death of my beloved wife, my executors shall hold for the benefit of and pay the income thereof to my children, Sara Linen, Isabel A., George A. and Mary C., or to the direct descendant or descendants of either of them in equal shares, subject to the provisions of section 7 hereinafter as to the share of George A. Ballantine.

"(6) That when my youngest child then

living shall reach the age of twenty-one years, the executors shall pay to my beloved wife one-third (1/3) of the income of my estate, and divide the other two-thirds (2/3) in equal shares between my children, Sara, Isabel, George and Mary, or such of them as may be then living, or to their direct descendant or descendants, share and share alike per stirpes, provided, however, that the payment of the income to any child or children aforesaid, or to a descendant or descendants of either shall be first approved by my beloved wife, otherwise the same shall be withheld for the benefit of that child from whom it may be so withheld.

"(7) That one-fifth (1/5) part of the share of my son, George A. Ballantine (provided for in section 5), in my estate shall be made over to him absolutely on his reaching the age of twenty-one years, and that in addition thereto three-fifths (3/5) of his share in my estate be made over to him on his reaching the age of twenty-eight years, provided the executors, with the approval of my beloved wife, if she is then living, may delay the payment of the last-mentioned part of his share, to wit, the three-fifths (3/5) part until such time as they may approve, and that the remaining one-fifth (1/5) part of his share be held in trust by executors for the benefit of my said son, George A. Ballantine, and his direct descendants."

"(9) I request that my executors sell all my unimproved real estate for the benefit of my estate."

"(11) That the house and lot No. 29 (27) Washington street, Newark, New Jersey, I will and bequeath to my daughter Sara Linen Ballantine Frelinghuysen, the amount paid for the same by me to be deducted from any share or portion which may hereafter be allotted or paid to her from my estate by my executors.

"(12) I hereby authorize my executors, with the consent of my beloved wife, to sell and dispose of any and all of my real estate, improved or unimproved, for the benefit of my estate."

By the decree appealed from it was adjudged that the trust provided in the fifth and sixth paragraphs terminated on the death of the widow of the testator, and that thereupon each of the three of the surviving children of the testator became vested with an absolute estate in one-fourth of the principal fund; that the assignees of testator's son, George, to whom his interest was conveyed by his trustee in bankruptcy proceedings, are vested with the remaining one-fourth part; and that the power of sale provided in paragraph 12 of the will ceased on the death of the widow. The grandchildren of the testator, claiming that they take the corpus of the estate after the death of testator's children, have appealed from this decree.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Collins & Corbin and Chas. B. Bradley, all of Jersey City, for appellants. Pitney, Hardin & Skinner, of Newark, for respondent. John O. H. Pitney, of Newark, for children of testator.

BERGEN, J. (after stating the facts as above). The contention of the grandchildren of the testator is that under the foregoing will the residuary estate must be held by the executors, after the death of the widow, in trust to pay the income, during life, to the children, and the corpus of the fund thereafter to the grandchildren of testator. The correctness of this claim depends upon the solution of the question whether the children take under the will a vested interest in the corpus of the trust fund or simply a life estate with remainder to the grandchildren.

There is no express gift of the principal; but there is a gift of the income of the residuary estate to the children without limitation, and without disposition of the remainder, which confers an absolute title in the fund from which the income arises, unless it clearly appears that a contrary disposition is intended. *Gulick v. Gulick*, 27 N. J. Eq. 498; *Post v. Rivers*, 40 N. J. Eq. 21.

The appellants insist that the true construction of this will limits the right of testator's children to a life estate with remainder over to them as the direct descendants of the children, and rest this claim upon the direction in paragraphs 5 and 6 that on the death of testator's wife his executors should hold the fund for the benefit of, and to pay the income thereof to, his four children, "or to the direct descendant or descendants of either of them in equal shares."

We fail to find anything in these paragraphs which indicates an intention to give the principal to the grandchildren, but, on the contrary, when read with other parts of the will, their clear meaning is that direct descendants of any child dying during the existence of the trust shall take as a substitute for a deceased parent, and in no way limits the estate of a child in the principal. That it was the intention of the testator to give his estate to his children in equal shares is manifested by other provisions in his will. In paragraph 7 he directs that one-fifth "of the share of my son, George," shall be made over to him absolutely on his reaching the age of 21 years, and in paragraph 11 he gives to his daughter Sara a house and lot, and then directs that the amount he had paid for it should be "deducted from any share or portion which may be hereafter allotted and paid to her from my estate." If it was not intended to give his children the principal of the fund from which the income was to be derived during the continuance of the trust, then neither of the children last mentioned had been given any share, one-fifth of which could be paid to one when he reached 21

years, or from which the value of the house given the other could be deducted.

In addition to the foregoing, we are of opinion that by using the words "held for the benefit of, and pay the income thereof to my children," in paragraph 5, he intended to give to his children the sole beneficial interest in the residue of his estate in equal shares; the principal being held in trust for a limited period, during which the income therefrom was payable as directed.

Reading paragraphs 5, 6, and 7 together, the purpose of the testator as therein expressed was that, during the life of his wife and the minority of his youngest living child, his estate should be held in trust, to pay the entire income to the widow until the youngest child reach the age of 21 years, and thereafter to pay the income to the widow and the children in the proportions set out in paragraph 6, during the infancy of his youngest child and the life of the widow, and thereafter the principal to his children to be their absolute property, except as to the share given to George, one-fifth of which was to be paid to him when he reached the age of 21 years, and three-fifths to be made over to him on reaching the age of 28 years, subject to the approval of his wife, if she should then be living, and that the remaining one-fifth was to be held in trust by his executors for the benefit of George and his direct descendants; in other words, the last one-fifth was to be held on the same terms as the shares given to his three daughters, to become payable when the trust terminated.

We are also of opinion that the active trust ended on the death of the wife, or at such time thereafter as the youngest living child reached the age of 21 years, and it being admitted that the youngest child has reached that age, and that the widow is dead, the shares of the children in the principal fund are now absolute and subject to payment.

The appellants rely upon the construction given to this will by the federal courts in a contest between George and the purchasers of his interest in the estate, sold through proceedings in bankruptcy. *Ballentine v. Ballentine* (C. C.) 152 Fed. 775. But while the court in that case declared that George took a life estate with a remainder in his children, that was not necessary to the decision of the question before the court, and was so considered by the judge who delivered its opinion, for he said: "In conclusion I would say that, whatever construction is put upon the clause under consideration, it seems to me that the fund must continue to be held in trust, at least during the lifetime of George, and that is all that need now be determined."

From this adjudication an appeal was taken to the United States Circuit Court of Appeals, where the court at first affirmed the decree, but upon rehearing modified it to

read as follows: "That the bill be and the same is hereby dismissed, without prejudice to complainant's rights to hereafter claim that the trust as to the last one-fifth of George A. Ballantine's share will cease upon the death of testator's widow." *Ballantine et al. v. Ballantine et al.*, 160 Fed. 927, 88 C. C. A. 109. So it was left undecided whether the trust as to the last one-fifth of George's share should cease upon the death of the testator's widow, which is one of the questions now before us, and we hold that the trust terminated with the life of the widow, and George's share then became payable.

Regarding the only other matter argued by the appellants, viz., whether the executor is vested with an unconditional power of sale over the improved real estate, we are of opinion that the decree correctly adjudged that the power ceased on the death of the widow whose approval is required.

The decree will be affirmed.

STATE v. CLAYTON.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(*Syllabus by the Court.*)

1. HOMICIDE (§ 286*)—INSTRUCTIONS—"DE-LIBERATION."

Upon the trial of an indictment for murder, the defendant was convicted of murder in the first degree by a jury who had been instructed that "the human mind acts so quickly that if you find that this man shot, and had the interval of time, however short, to form that intention, it is enough, if he formed the intention and carried it out, that is what is meant by deliberation in the law." *Held*, that this instruction was erroneous under *State v. Deliso*, 75 N. J. Law, 808, 69 Atl. 218, and *State v. Mangano*, 77 N. J. Law, 544, 72 Atl. 366.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 586-591; Dec. Dig. § 286.*]

Walker, Ch., and Bergen and Vredenburg, JJ., dissenting.

(*Additional Syllabus by Editorial Staff.*)

2. HOMICIDE (§ 340*)—WRIT OF ERROR—PREJUDICE FROM ERROR—INSTRUCTION.

An instruction that if defendant had any interval of time, however short, to form the intention to shoot, and did form the intention and carried it out, that is what is meant by deliberation in the law, is not rendered harmless by a correct definition in the body of the charge of the degrees of murder.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

Error to Court of Oyer and Terminer, Monmouth County.

Charles D. Clayton was convicted of murder in the first degree, and brings error. Reversed, and venire de novo ordered.

R. Ten Broeck Stout, of Lakewood, for plaintiff in error. John S. Applegate, Jr., of Red Bank, for the State.

GARRISON, J. The plaintiff in error was tried for the shooting and killing of a police

officer who was in the act of placing a hand upon his shoulder either to arrest him or to detain him, or to expostulate with him. The shot may have been fired on a sudden impulse or after premeditation and with a deliberate intent to kill. The jury found the latter.

[1] Upon the question of murder in the first degree, the following instruction to the jury is brought before us upon error assigned on a bill of exceptions: "If the shooting was done with deliberation and premeditation, if you find that beyond a reasonable doubt as I told you, then the crime is murder in the first degree. Now, as to the premeditation and deliberation, there need be no particular interval of time, as I told you. The human mind acts so quickly that if you find that this man shot, and had the interval of time, however short, to form that intention, it is enough if he formed the intention and carried it out. That is what is meant by deliberation in the law."

Of the error of this instruction there can be no doubt. In so far as it instructed the jury that the formation and execution of an intention to kill was what was meant by deliberation in the law it was directly opposed to what we decided in *State v. Deliso*, 75 N. J. Law, 808, 69 Atl. 218; and in so far as it instructed them that the interval of time, however short, required to form the intention to kill included sufficient time for premeditation and deliberation, it was opposed to what we decided in *State v. Mangano*, 77 N. J. Law, 544, 72 Atl. 366, as well as to the plainest dictates of reason, for, however brief may be the interval of time required for the performance of any one of the three mental acts involved in murder in the first degree, viz., premeditation, willfulness (i. e., intention), and deliberation, the fact remains that they are not only distinct mental acts, but also that one succeeds another as was pointed out in *State v. Deliso*. They cannot therefore be synchronous as is implied in this instruction.

As was said by Chancellor Magie in *State v. Zdanowicz*, 69 N. J. Law, 627, 55 Atl. 743, each requires "some appreciable time," if, therefore the briefest period of time appreciable be assigned for the performance of each of these mental acts they could not all be performed in the time thus required for the performance of one of them. Such a construction necessarily emasculates the statute in which the Legislature has defined the degrees of murder, and, in interpreting this statute, we are dealing with the most solemn subject to which language can be applied—the extinction of a human life by judicial decree. This extreme penalty the Legislature has declared in unmistakable language shall not be visited upon one who has committed the crime of murder unless it be found by a jury that he contemplated its commission (i. e., premeditated it), then

determined upon its commission (i. e., intended it), and then weighed such intent before carrying it into effect (i. e., deliberated). One who is capable of taking human life under these circumstances is in the eye of the law no longer fit to live.

Society has taken upon itself the responsibility for this decree, and the Legislature is responsible for the words in which it is couched, but upon us falls the responsibility of seeing that words having this awful import are given their actual meaning. The words used are "willful, deliberate, and premeditated." It is true that these words do not import any prescribable period of time, and that the mental acts to which they severally refer are capable of being performed with that degree of celerity with which the human mind is proverbially capable of acting.

An instruction to this effect, therefore, neither minimizes the words of the statute nor subtracts from their meaning and effect. On the other hand, an instruction that crowded the performance of these mental acts or of any two of them into the interval of time necessary for the performance of one of them *ipso facto* eliminates some part of the legislative definition, and to that extent detracts from the prescribed condition for which alone the law reserves its supreme penalty. Such was the error of the instruction before us.

[2] It is argued that this error was harmless because in the body of the charge the degrees of murder had been accurately defined. So they had; but how were the jury to know which was the law? Our theory of jury trials proceeds upon the fundamental assumption that the jury will take the law from the court, not that they shall be judges of its correctness or that as between two conflicting statements of the law they will unerringly single out the correct one.

Moreover, the circumstances under which the present instruction was given were calculated to impress it upon the jury as expressly intended for their guidance. The bill of exceptions shows that, after the jury had been charged and had retired, they came into court, and announced to the judge that they were unable to agree upon a verdict. The court was not willing to discharge them, but expressed a willingness to give them any instructions that they thought might aid them in their difficulties. Thereupon the foreman said: "Well, I think if you give us a little information upon premeditation, your honor, and also the laws as to first and second degree." An instruction given in response to this suggestion would naturally impress the jury strongly upon the point which the foreman's request showed was the debatable one in their minds. It is clear to us that the trial judge assumed that the jury would regard what he said as supplementing part of what he had already charged them

and not as a substitute for the whole of it, but he did not tell them so, and they could not know what was in his mind. The result was that the jury was misinstructed upon the critical feature of the case, for, while the commission of murder was fairly clear, its commission after premeditation and deliberation was by no means so clear.

The judgment must be reversed and a venire de novo awarded.

The plaintiff in error has argued that the trial judge erroneously charged the jury that a verdict of manslaughter could not be rendered, and also that he took from the jury the question whether or not the officer was killed while in the performance of his office and duty. An examination of the charge shows that neither of these criticisms is well founded. Each of these matters was left to the jury, as it was proper that it should be, the trial judge expressing his opinion upon the testimony, as it was his right to do. Such expressions are not subject to review. *State v. Hummer*, 73 N. J. Law, 714, 65 Atl. 249.

WALKER, Ch., and BERGEN and VRE-
DENBURGH, JJ., dissent.

CITTADINO v. SCHACKTER.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 164*)—INJURIES TO TENANTS—FIRE ESCAPES—REGULATIONS—WAIVER.

The plaintiff, a widow, was a tenant and had been such of the top floor of an apartment house for more than a year at the time of its partial destruction by fire, and endeavored to escape from a window, in the rear of her apartment, by means of a rope lowered from the roof (the house not being equipped with fire escapes, as required by the tenement house act of 1904 [P. L. p. 101]), fell to the roof of an extension, and sustained injuries for which she brought her action, against the landlord, the owner of the premises, for damages and obtained a judgment. *Held*, that there was no conclusive legal presumption arising from her conduct in remaining as a tenant that she had knowledge that there were no fire escapes and waived their erection.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

2. LANDLORD AND TENANT (§ 169*)—INJURIES TO TENANTS—REGULATIONS—WAIVER.

Whether or not the plaintiff had made any observations or had knowledge of the absence of fire escapes prior to the fire was for the jury to determine from the facts and circumstances of the case.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 644-646, 663-667, 681-684; Dec. Dig. § 166.*]

3. LANDLORD AND TENANT (§ 164*)—INJURIES TO TENANTS—REGULATIONS—WAIVER.

Merely length of time of occupancy, unaccompanied by some affirmative act or circumstance, on the tenant's part, showing an in-

tent to relieve the landlord from the consequences that might result to the tenant from the landlord's failure to perform the statutory duty imposed upon him, cannot relieve the landlord from responding in damages, in case a fire breaks out and the tenant suffers injury by reason of the absence of fire escapes.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

4. LANDLORD AND TENANT (§ 164*)—INJURIES TO TENANTS—REGULATIONS—WAIVER.

The tenant owed no duty to the landlord to examine and ascertain whether any fire escapes had been provided and might reasonably assume that the landlord had performed the duty imposed upon him by statute.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

5. LANDLORD AND TENANT (§ 164*)—INJURIES TO TENANTS—REGULATIONS—WAIVER.

Even though the plaintiff had discovered that the landlord failed to perform his statutory duty, she might reasonably assume that he would perform that duty at any time and not continue to disregard the law.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 630-641; Dec. Dig. § 164.*]

6. LANDLORD AND TENANT (§ 169*)—INJURIES TO TENANTS—REGULATIONS—WAIVER.

It was not error for the trial court to permit the jury to find from the evidence that the absence of fire escapes was the proximate cause of the plaintiff's injuries.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 644-646, 663-667, 681-684; Dec. Dig. § 169.*]

Error to Circuit Court, Hudson County.

Action by Ortenzo Cittadino against Isaac M. Schackter. Judgment for plaintiff, and defendant brings error. Affirmed.

Edwards & Smith, of Jersey City, for plaintiff in error. Myron Ernst and McDermott & Enright, all of Jersey City, for defendant in error.

KALISCH, J. The plaintiff, a widow, with her family of children, was a tenant occupying the top floor of defendant's tenement house in Jersey City at the time of its partial destruction by fire, in April, 1910. The house was not equipped with fire escapes, as required by the tenement house act of 1904 (P. L. p. 101). The plaintiff, in endeavoring to escape from a window in the rear of her apartment by hanging to a rope lowered from the roof, fell to the roof of an extension to the premises and suffered the injuries for which she brought this action.

[1] The plaintiff seeks to hold the defendant liable for failing to provide fire escapes, as required by the provisions of the act of 1904. It was conceded that the building was of the character, which, under the statute, made it necessary to be equipped with fire escapes. The plaintiff obtained a judgment against the defendant, and it is this judgment that the defendant below, who is the plaintiff in error, seeks to reverse, assigning as error the failure of the trial judge to nonsuit the plaintiff, and, at the close of the

case, to direct a verdict for the defendant upon the ground that the plaintiff, having occupied the premises for a year prior to the accident, must be deemed to have had knowledge that there were no fire escapes provided, and to have waived the erection thereof. Particular stress was laid upon the fact, by the plaintiff in error, that because it appeared in evidence that, the plaintiff having hung clothes out of the rear window once a week during that year, it must be deemed that she had knowledge that there were no fire escapes and hence acquiesced in the failure of the landlord to provide them. The plaintiff's testimony makes it uncertain whether or not she had observed the absence of fire escapes prior to the time of the fire, for, in answer to a question as to how long before the fire she observed that there were no fire escapes, she answered, "We never think it before until the fire come." And there is other testimony given by the plaintiff that tended to show that she never gave the matter any thought until the fire broke out.

[2] Whether or not the plaintiff had made any observation or had knowledge of the absence of fire escapes prior to the fire was for the jury to determine from the facts and circumstances in evidence. It follows, as a matter of course, if she made no observations or had no knowledge of the absence of fire escapes, her conduct in remaining as a tenant does not give rise to a conclusive legal presumption that she knew and therefore waived their erection, but at most is simply a circumstance which, together with the testimony and other circumstances in the case, was for the consideration of the jury whether the plaintiff had knowledge of the absence of fire escapes. Even though it appeared that the plaintiff had made observations, so that she knew before the fire occurred that the landlord had failed to provide fire escapes, it did not give rise to a conclusive legal presumption that she acquiesced in the landlord's violation of duty, for it does not appear what the character of the lease was under which she occupied her apartments. It may be that her original term had not expired at the time of the fire. If she became a tenant for a term longer than a year (she had occupied the premises for a year at the time of the fire), and had not known of the absence of fire escapes at the time she contracted for the apartments, we do not think that her remaining in possession under the lease, after becoming apprised of the absence of fire escapes, can be considered as a waiver of the duty of the landlord. That she would have been justified in attempting to terminate the lease because of the absence of fire escapes, the lease containing no provision relating thereto, is doubtful. Viewed in any aspect it would require the intervention of a judicial tribunal to determine the matter, and she was not bound to so conduct herself as to invite a lawsuit.

[3] It is congruous with reason to hold that mere length of time of occupancy, unaccompanied by some affirmative act or circumstance, on the tenant's part, showing an intent to relieve the landlord from the consequences that might result to the tenant from the landlord's failure to perform the statutory duty imposed upon him, cannot relieve the landlord from responding in damages, in case a fire breaks out and the tenant suffers an injury by reason of the absence of fire escapes.

[4] The tenant owed no duty to the landlord to examine and ascertain whether any fire escapes had been provided by the landlord.

[5] The tenant might reasonably assume that the landlord had performed the duty imposed upon him by statute. *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536. And even if the plaintiff had discovered that the landlord had failed to perform his statutory duty, she might reasonably assume that he would perform that duty at any time. The landlord was entitled to the presumption in his favor that he would obey the law and not disregard it. It was the defendant's plain disregard of his duty, under the statute, in failing to provide fire escapes, that resulted in the plaintiff's injury.

[6] The jury was permitted by the trial court to find that their absence was the proximate cause of the plaintiff's injury. There was no error in this.

The judgment of the circuit court will be affirmed.

IN RE VEAZEY'S WILL.

(Court of Errors and Appeals of New Jersey.
Nov. 13, 1912.)

(Syllabus by the Court.)

1. WITNESSES (§ 131*)—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED—"JUDICIAL INQUIRY."

Proceedings for the probate of a will are not a civil action, but a judicial inquiry to ascertain whether the instrument before the court is the last will and testament of the deceased, and section 4 of the Evidence Act (2 Comp. St. 1910, p. 2218) is inapplicable.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 565; Dec. Dig. § 131.*]

2. WITNESSES (§ 202*)—COMPETENCY—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

One who acts as attorney and counsel of a testator in the execution of a will may testify with reference thereto in a proceeding for probate thereof.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 756, 757; Dec. Dig. § 202.*]

Appeal from Prerogative Court.

In the matter of probate of the will of Thomas W. Veazey. From a decree admitting the will to probate, an appeal is taken. Affirmed.

The Camden orphans' court admitted the will to probate for reasons stated by Joline, J., as follows:

"Having determined to admit the above-named paper, to probate, it seems fitting that I should shortly make known my reasons for so doing.

"On the 11th day of May, 1910, Elizabeth L. Shaw filed with the surrogate a caveat against admitting to probate any paper purporting to be the last will and testament of Thomas W. Veazey, deceased. The testimony of the three witnesses to the will, of the scrivener, and of an architect was taken. It is unnecessary to consider the testimony of this last witness, as I conceive it to have no bearing upon the main issue, which is, Was this will executed in conformity with the laws of this state?

"Before considering the testimony of the witnesses, it may be well to ascertain the law relating to the attestation clause in cases where the recollection of the witnesses is not exact as to the execution of the will.

"In *Allaire v. Allaire*, 37 N. J. Law, 325, 326, affirmed in 39 N. J. Law, 113, it is held that the attestation clause is prima facie evidence of all the facts stated in it, and if the attesting witnesses, when called, admit their signatures, but through defect in memory, or for any other reason, fail to testify to the due execution of the will, it may be established on the presumption arising from the form of the attestation clause, unless there be affirmative evidence given to disprove its statements, and the court further on cites the language of Lord Lenzance in *Wright v. Rogers*, 1 L. R. Prob. and Div. 678, practically to the same effect.

"In *Mundy v. Mundy*, 15 N. J. Eq. 290-293, Chancellor Green states the law to be that the attestation clause with the signatures of the witnesses is prima facie evidence of the facts stated in it. It may be overcome by witnesses themselves, or by other witnesses, or by facts and circumstances irreconcilable with its verity. In *Tappan v. Davidson*, 27 N. J. Eq. 459-462, the court said, if it is doubtful on the evidence whether the will was not signed at the table, under such circumstances the presumption arising from the statement the attestation clause is not overcome. *Ayres v. Ayres*, 43 N. J. Eq. 569, 12 Atl. 621; *Elkinton v. Brick*, 44 N. J. Eq. 167, 15 Atl. 391, 1 L. R. A. 161; *Turnure v. Turnure*, 35 N. J. Eq. 440. In *McCurdy v. Neall*, 42 N. J. Eq. 334, 7 Atl. 566, it was held that, where the attestation clause is perfect, the court must have clear proof to warrant the conclusion that the will was not duly executed.

"Other cases to the same purport are: *Farley v. Farley*, 50 N. J. Eq. 434, 439, 26 Atl. 178; *Darnell v. Buzby*, 50 N. J. Eq. 727, 26 Atl. 676; *Stewart v. Stewart*, 56 N. J. Eq. 765, 40 Atl. 438; *Lacey v. Dobbs*, 61 N. J. Eq. 583, 47 Atl. 481; *Lacey v. Dobbs*,

63 N. J. Eq. 327, 50 Atl. 497, 55 L. R. A. 580, 92 Am. St. Rep. 667; *Beggans' Case*, 68 N. J. Eq. 574, 59 Atl. 874.

"The attestation clause in the case sub judice is as follows:

"Signed, sealed, published and declared by said Thomas W. Veazey, the testator above named, as and for his last will and testament in the presence of us who in his presence and in the presence of each other have hereunto subscribed our names as witnesses thereto."

The signature of Thomas W. Veazey appears opposite a seal above this attestation clause, and the signatures of E. Fullerton Cook, J. W. England, and Jacob S. Beetem, in the order named, appear thereunder. It is admitted that the will was taken into another room for Mr. Beetem's signature, but that is immaterial if Cook and England executed it properly. *Allaire v. Allaire*, 37 N. J. Law, 328.

"The attestation clause cited above is perfect, and it follows that it is prima facie evidence of all the facts stated in it, not to be overcome by lapse of memory of the witnesses.

"Now an examination of the testimony shows in substance the following facts: England admits that the signature of J. W. England to the will is his; that he saw Mr. Veazey sign it; that Prof. Cook, Mr. Veazey, the attorney, and Mr. Beetem were present; that it was in the College Library; that he was passing through the library at noon, and was asked to sign it, and that he then signed as a witness; that he said it was a will; and that he remained present until all the other witnesses signed their names.

"Cook admits his signature; that he has no recollection of seeing Veazey sign; that he was passing through the library, and Veazey asked him to sign or witness his will; that some one who was in the library was present, but that he cannot recall who it was; that he cannot say that it was England; that he does not remember seeing either England or Beetem sign their names; that he cannot say whether Veazey signed prior to him; that he has no recollection of the attestation clause being read over to him.

"Beetem admits his signature, but is generally ignorant of what occurred. He said that, if any one had asked him if he signed Veazey's will, he would have said no; that he has not the slightest recollection of it.

"It will be noticed that there is nothing in the testimony of either of these witnesses to negative the facts stated in the attestation clause. The first two admit that they were asked to sign a will. They all admit their signature. England says they were all present. Cook says that some one connected with the college was present. They do not say that they did not execute the will legally. There is a defect, a lapse of memory. They do not remember. There is nothing inher-

ent in the case to lead to the belief that the attestation clause does not correctly state the facts. There are no facts shown irreconcilable with its verity, and I must conclude that, in so far as these witnesses are concerned, the will is proved by the presumption arising from the form of the attestation clause. *Mundy v. Mundy*, 15 N. J. Eq. 293; *Allaire v. Allaire*, 37 N. J. Law, 326. If, however, I were in doubt, such doubt would be resolved in favor of the due execution of the will by the evidence of John D. Baltz, who drew it. He is a lawyer, a brother-in-law of the testator. He took the will to him to be executed, attended to its execution, and swears in detail to its execution, according to the law of New Jersey. Supplemented as his testimony is by the attestation clause, I cannot doubt that this will was duly executed by at least Cook and England, and that it should be admitted to probate.

"No evidence was offered to overcome the presumption afforded by the verity of the attestation clause. The effect of this, the verity of the attestation clause, is to throw the burden of proof upon the opponents of the will. *Turnure v. Turnure*, 85 N. J. Eq. 440; *Tappan v. Davidson*, 27 N. J. Eq. 460; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Allaire v. Allaire*, 37 N. J. Law, 312. The only evidence offered by the caveatrix was that of the architect as to the rooms and this affected the signature of Beetem alone. As before shown, this was unnecessary to the due execution of the will; I being satisfied that Cook and England had duly executed it. *Allaire v. Allaire*, 37 N. J. Law, 328."

French & Richards, of Camden, for appellant. Lewis Starr, of Camden, for respondent.

SWAYZE, J. [1, 2] The ordinary affirmed the decree upon the opinion of Judge Joline. We concur in the opinion, and would add nothing were it not for the fact that two objections to the admission of the testimony of Mr. Baltz are urged in this court. The first is that, as he is an executor and one of the proponents of the will, he is incompetent under the statute to testify as to transactions with the deceased. The second is that, as he was the attorney and counsel of the testator in the execution of the will, his evidence is incompetent for that reason. The first question raised has not been decided by this court. It has been the subject of decision in three cases in the prerogative court. *Mackin v. Mackin*, 37 N. J. Eq. 528; *Grant v. Stamler*, 68 N. J. Eq. 555, 59 Atl. 890; *McLaughlin's Will*, 59 Atl. 460. In all of these cases the testimony is held to be admissible. The reason was well stated by Chancellor Runyon in the case first cited. The statute applies only in the case of civil actions. Proceedings for the probate of a will are not a civil action, but a judicial inquiry to ascertain whether the instrument

before the court is the last will and testament of the deceased. We think the evidence was properly admitted so far as this objection is concerned. The other objection is equally untenable. The reasons are stated in Wigmore on Evidence, § 2314. We have nothing to add. The decree is affirmed, with costs.

SCHAUFFELE v. GREENBURG et al.
(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

CONTRACTS (§ 284*)—CONSTRUCTION—PERFORMANCE—APPROVAL.

A contract providing for a certificate of approval to be given by a third person will be construed to mean an approval of the subject-matter comprised within the terms of the contract, unless a contrary meaning clearly appear.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1292-1302, 1308-1317, 1326-1338, 1340-1346, 1350, 1351; Dec. Dig. § 284.*]

Error to Supreme Court.

Action by Conrad W. Schaufele against Abraham Greenburg and others. Judgment for plaintiff was affirmed by the Supreme Court (82 Atl. 921), and defendants bring error. Affirmed.

Stackhouse & Kramer, of Camden, for plaintiffs in error. Joseph Beck Tyler, of Camden, for defendant in error.

VOORHEES, J. The plaintiff made two contracts in writing with the defendant to wire his "moving picture parlor" in Camden. Each of these contracts specified what work was to be done, and the consideration to be paid. In one of the contracts this clause appears: "Making the total 198 lights and wiring done for arc machines passed by Phila. Suburban Underwriters Association, and certificates for the same." In the other contract was incorporated the provision: "All work to be first class best of material used, passed by Phila. Suburban Underwriters Association." The suit was brought to recover the entire consideration of each contract, together with certain extra work. Judgment was entered in favor of the plaintiff for the full amount. This judgment was affirmed by the Supreme Court.

At the trial the plaintiff admitted his inability to obtain a formal certificate from the Underwriters Association, and testified that the association insisted that there were defects in the building, not, however, connected with the work done by him, or comprehended in his contracts. He then offered three letters, addressed to the plaintiff by the association, signed by its managers, the first two pointing out why it refused to issue a formal certificate, and the last specifying

certain requirements yet to be performed, and stating: "Our inspector reports that this is not up to Mr. Schaufele, but to the owner, therefore Mr. Schaufele's work is approved." The letters were admitted over defendant's objection, but no grounds were stated. The only valid reasons assigned for reversal bear solely upon the legality of the admission of these letters.

The contracts were informal and indefinite, and differ from the usual form of building contracts, which generally provide for the production of an architect's certificate, as a condition precedent to entitle payments to be made. A contract providing for a certificate of approval to be given by a third person will be construed to mean an approval of the subject-matter comprised within the terms of the contract, unless a contrary meaning clearly appear.

A fair reading of these contracts demonstrates that the plaintiff's engagement was to produce an approval of the material and work which he agreed to furnish and perform, and that such engagement did not relate to other conditions which might exist in the building. The letters were evidential upon this point and were properly admitted by the trial court.

The judgment of the Supreme Court will be affirmed.

RUANE v. ERIE R. CO.
(Supreme Court of New Jersey. Nov. 18, 1912.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 124*)—INJURIES TO EMPLOYÉ—DUTY AS TO INSPECTION.

In a suit for damages arising from the death of a locomotive fireman, caused by the explosion of the boiler of the locomotive, the court charged that the duty of the defendant was to see that the inspection was so thorough as to disclose any defects in the locomotive, and to see that the machine was kept as far as human ability can keep it in perfect condition for the work which it is designed to do. Held erroneous, since the legal duty imposed upon the master is limited to the use of reasonable care and ordinary prudence under the circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

Error to Circuit Court, Hudson County.

Action by Martin Ruane against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Collins & Corbin, of Jersey City, for plaintiff in error. George L. Record, of Jersey City, for defendant in error.

MINTURN, J. The plaintiff, an administrator, brought suit against defendant to recover damages as the result of the death of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Patrick Ruane, a fireman employed by defendant upon one of its locomotives. The decedent met his death while engaged in his occupation by the exploding of the boiler in the locomotive upon which he was employed; the explosion having been caused, as plaintiff alleged, by the want of proper inspection and repair by the defendant. The jury found for the plaintiff, and we are asked to reverse the judgment upon various reasons assigned for error.

Our examination of the case has led us to the conclusion that in one respect only can it be said that there was legal error, which may have worked to the detriment of the defendant. The defendant met the insistence of the plaintiff with proof of inspection and repair, which it contended was as thorough and as reasonable as the law required, and as circumstances would permit, and the trial at circuit was conducted practically upon that issue. The learned trial court in its instruction to the jury used this language: "The law charges upon every one owning machines of any kind, locomotives or anything else, to inspect them properly at reasonable times, and to see that the inspection is so thorough as to disclose any defects in the machines or in the locomotives as it was in this case," and again, regarding the character of the inspection, "to see that the machine is kept so far as human ability can keep it in perfect condition for the work which it is designed to do." These instructions, we conceive, imposed an obligation of legal duty upon the defendant greater than the rule of law requires, and placed the defendant, as to the care and inspection of its locomotives, substantially in the status of an insurer against defects which human ability might be able to discover.

The legal rule of duty in such cases has been the subject of frequent consideration in this court and in the Court of Errors, and has been circumscribed invariably by the limitation of "reasonable care." Thus in the case of *Randolph v. N. Y. Central R. R. Co.*, 69 N. J. Law, 422, 55 Atl. 241, Mr. Justice Swayne, speaking for the Court of Errors, says: "The duty of the employer is to exercise reasonable care and skill in making inspections and tests at proper intervals. This duty is satisfied if the master use such reasonable precautions as a man of ordinary prudence would use for the safety of himself and his workmen under the circumstances. We think this duty is satisfied if the master exercises the same care that is ordinarily exercised, and that one engaged in practical operations is not bound to make either the inspection or the tests which may be possible in a laboratory or upon a small scale, and outside of the practical conduct of affairs." To the same effect is the language employed by Mr. Justice Magie in this

court in *Atz v. Manufacturing Co.*, 59 N. J. Law, 43, 34 Atl. 980, subsequently approved in the Court of Errors in *Baldwin v. Atlantic City Railroad Co.*, 64 N. J. Law, 232, 45 Atl. 810: "The master does not insure the safety of the machine, nor is he bound to extraordinary or the highest diligence respecting it, but only to use such reasonable precautions as a man of ordinary prudence would use for the safety of himself and his workmen under the circumstances." To the same effect is the recent case of *Bleiwise v. P. R. R. Co.*, 81 N. J. Law, 160, 78 Atl. 1058, in this court.

For this reason, we are of the opinion that the judgment below should be reversed, and that a venire de novo should issue.

ELDRIDGE v. PHILADELPHIA & R. R. CO. et al.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

DEATH (§ 38*)—LIMITATION OF ACTION.

The one-year limitation in actions for death contained in General Railroad Law (P. L. 1903, p. 674) § 58, is superseded and in effect repealed by the Death Act of 1907 (P. L. p. 386), by which actions for death may be brought at any time within two years, upon the doctrine that, when the Legislature frames a new and general rule covering an entire subject-matter, all earlier and different rules touching the same matter, are to be discarded in favor of such later rule.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 53; Dec. Dig. § 38.*]

Bergen, J., dissenting.

Error to Supreme Court.

Action by Sidney W. Eldridge against the Philadelphia & Reading Railroad Company. From a judgment of the Supreme Court (80 N. J. Law, 478, 79 Atl. 423) upon demurrer, plaintiff brings error. Reversed, and judgment entered for plaintiff.

C. McK. Whittemore, of Elizabeth, for plaintiff in error. George Holmes, of Jersey City, and John F. Reger, of Somerville, for defendants in error.

GARRISON, J. Briefly stated, the question is whether the one-year limitation for actions for death contained in the fifty-eighth section of the General Railroad Law (Pamphlet Law 1903, p. 674) is superseded by the Death Act (Pamphlet Law 1907, p. 386), by which actions for death may be brought at any time within two years.

This question is we think controlled by the rule that, "When the Legislature frames a new and general rule covering an entire subject-matter, all earlier and different rules touching the same matter are to be discarded in favor of such later rule." *Harrington's Sons Co. v. Jersey City* (1909) 78 N. J. Law, 610, 75 Atl. 943.

In an earlier case the same rule is thus stated by Chancellor Magie: "It is the settled doctrine of our courts that general laws, passed in compliance with the constitutional mandate, are to be construed as repealing inconsistent provisions of previous local or special laws, whether they contain an express repealer or not, and, if they deal with the subject-matter of such previous laws, a legislative intent is disclosed to supersede and abrogate the latter." *Smith v. Hightstown*, 71 N. J. Law, 536, 60 Atl. 393.

We have many other decisions to the same effect.

The application of this rule to the present case does not admit of the slightest doubt. In the Death Act of 1907 (P. L. 386) the Legislature by a general law framed a new and different rule covering an entire subject-matter which consisted in the giving of a right of action and of the right to bring such action at any time within the period of two years. That this is a general law covering the entire subject-matter with which it deals cannot be questioned any more than that it lays down a new and different rule from that contained in earlier statutes; and, when these two things concur, "all earlier and different rules touching the same subject-matter are," in the language of our decisions, "to be discarded in favor of such later rule." One earlier and different rule is that contained in section 58 of the Railroad Act by virtue of which, if effect be given to it, the right to bring the action within two years given by the Death Act of 1907 is curtailed to one year. This is repugnant to the rule we have adopted.

In the Supreme Court the case was thought to be controlled by the decision of that court in *Vail v. Easton & Amboy R. R. Co.*, 44 N. J. Law, 237, in which it was held that the provision of the special charter of the Railroad Company that actions for fire damages must be brought in one year was not affected by the subsequent re-enactment of the general statute of limitations. The principle applied was that, where the Legislature has taken a special class out of the operation of a general law, such class is not affected by the subsequent re-enactment of the law to which they had been made an exception. "This decision," in the language of the opinion below, "controls the present case."

This conclusion fails to note that in the *Vail* Case the special limitation granted to the Railroad Company was for a less period than that allowed for other actions on the case by the general statute of limitations then in force, thereby showing that the Legislature intended to give a different and more favorable statute of limitations than that given by the general statute; whereas, in the present case the limitation as to actions for death contained in the fifty-eighth section of the General Railroad Law was iden-

tical with that contained at the time in the Death Act, thereby, upon the reasoning of the *Vail* Case, showing that the Legislature intended that the limitation under each statute should be the same, certainly not showing, what was shown in the *Vail* Case, that the Legislature intended that the class covered by the Railroad Act should have a different and more favorable statute of limitations than that given by the Death Act.

There is also another obstacle to the application of the *Vail* Case, and that is that the Death Act is not a statute of limitations. The principle laid down by the *Vail* Case had reference to the conflict between two statutes of limitation, one special, the other general, where the special class had been excepted from the operation of the general law. In the present case there is no such conflict; for, while section 58 of the Railroad Law may perhaps be treated as a special statute of limitations, it is impossible to treat the Death Act as a statute of limitations without doing violence to all that has been decided upon that precise point.

It has been repeatedly and consistently held by the Supreme Court that the period within which the action given by the Death Act must be brought is an integral part of the remedy given by the statute, not a statute of limitations in the ordinary or general sense. This has been held both in questions of pleading and in matters of substance.

In *County, Adm'x, v. Pacific, etc.*, 67 N. J. Law, 48, 50 Atl. 906, it was said: "This special limitation is so closely related to the statutory remedy given as to be a part of it. It is created solely with the object of qualifying the right of action." This language was quoted with approval and applied by *Gummere, C. J.*, in his opinion in *Lapsley, Adm'x, v. Public Service, etc.*, 75 N. J. Law, 266, 68 Atl. 1113, and in *Bretthauer, Adm'r, v. Jacobson*, 79 N. J. Law, 223, 75 Atl. 560, he says, "This provision of the Death Act is not an ordinary statute of limitations." All of the decisions upon this point are to the same effect.

It is evident, therefore, that the conflict between two statutes of limitations to which the principle of the *Vail* Case might be deemed to be applicable, does not exist in the present case in which the conflict is between an earlier statute of limitations of actions for death and a later statute covering the entire subject-matter of such actions and laying down a new and different rule with respect thereto.

The doctrine applicable to such a conflict has been already stated.

The judgment of the Supreme Court should be reversed and judgment upon demurrer entered for the plaintiff in error who was the plaintiff below.

BERGEN, J., dissents.

HISOR v. VANDIVER.

(Supreme Court of New Jersey. Nov. 18, 1912.)

(Syllabus by the Court.)

1. ATTACHMENT (§ 47*)—NONRESIDENCE OF DEFENDANT—EVIDENCE.

In actions of tort where the special cause relied on is that the defendant is not a resident and that a summons cannot be served, the absence of evidence that a summons cannot be served, from the affidavit or proof presented to the judge or commissioner for the award of a writ of attachment, is the absence of a necessary jurisdictional fact prescribed by the statute empowering the judge or commissioner to make the order, and vitiates the entire proceedings.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 120, 861-876; Dec. Dig. § 47.*]

2. ATTACHMENT (§ 142*)—JURISDICTION OF COMMISSIONER.

The jurisdiction by the commissioner upon the proofs presented to him must be as formal and precise and appear in the order as is required in actions upon contract where a defendant is held to bail.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 392-394; Dec. Dig. § 142.*]

Action by William E. Hisor against Robert M. Vandiver. Motion by defendant to quash the writ of attachment was denied, and he brings certiorari. Writ quashed, and proceedings set aside.

See, also, 82 Atl. 526.

Argued before KALISCH, SWAYZE, and VOORHEES, JJ.

Hugh B. Reed, of Newark, for prosecutor. David W. McCrea, of Jersey City, for defendant.

KALISCH, J. This certiorari brings under review an application made by the prosecutor, the defendant below, to quash the writ of attachment and the proceedings had thereunder, and to release and discharge the bond given by the defendant in attachment for the release of the goods attached, and an order of the circuit court denying the application. The proceedings instituted by the defendant in certiorari, who is the plaintiff in attachment, against the prosecutor were by virtue of the provisions of section 84 of the practice act of 1903 (Laws 1903, p. 537), as amended by the act of 1907 (P. L. 1907, p. 273). The plaintiff's action against the prosecutor was based upon damages caused to his automobile by the alleged negligence of the defendant. The order of the Supreme Court commissioner was to the effect that it appeared to his satisfaction that the plaintiff is entitled to an order to hold R. M. Vandiver, the defendant, to bail, and that the bail be in the sum of \$1,200, and that a writ of attachment do issue out of the circuit court, etc., at the suit of W. E. Hisor against R. M. Vandiver in the sum of \$1,200. A writ of attachment was issued, and the property of the defendant attached. The defendant gave a bond under section 92 of

the practice act of 1903, and the property attached was released. Although the action is founded upon a pure tort, the attachment sued out summons the defendant to answer in an action upon contract. The materiality of this variance lies in the fact that by section 92 of the practice act, if the action is founded upon a contract, it is required that the bond shall be in double the amount of the plaintiff's claim or cause of action, or in double the value of the property attached, whereas, if the action is founded upon a tort, the court or judge fixes the amount of the bond as shall, under all the circumstances, be deemed reasonably conditioned for the payment of any judgment recovered in the action. It follows, therefore, that the bond given by the defendant was not in compliance with the statute, but this irregularity was due to plaintiff's own act in issuing the writ of attachment as if it were upon contract and not of tort.

The principal contention of the defendant in certiorari is that, the prosecutor having given a bond to secure the release of the goods, it was in effect a general appearance, and thereby waives a defect in the issuance of the writ, or at least, the object of the writ considered as process having been obtained, the writ itself will not be quashed. The giving of a bond to secure the release of the automobile did not constitute a general appearance. Aside from any consideration of the irregularity in giving the bond in question, and though it is conditioned for the payment of such moneys as shall be adjudged due to the plaintiff in attachment, it is to be observed, from the reading of the entire condition, that it expressly limits the effect of it to a special appearance. And arguendo, it is difficult to perceive how it can be asserted, with any show of reason, that the giving of a bond to secure the release of goods attached constitutes a general appearance operating as a waiver of all irregularities in the issuance of the writ any more than if the owner of attached goods had substituted money for the same. If the bond contained a condition for the appearance of the defendant, undoubtedly, at common law, it would have constituted a waiver of irregularities in the original process. But this is not the case here. Moreover, in the case sub judice, the condition of the bond given by the defendant in attachment, among other things, recites that he (R. M. Vandiver) having entered his appearance (specially) at the suit of said plaintiff, and the said R. M. Vandiver is about to apply to the said court to set aside the said writ and discharge his property from the lien thereof. This was a clear declaration of the defendant that he appeared specially and that he denied the legality of the issuance of the writ and of the proceedings instituted by the plaintiff in attachment. It is apparent that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this case differs essentially from the case of *Watson v. Noblett*, 65 N. J. Law, 506, 47 Atl. 438, which held that, after a general appearance to an attachment, the writ will not be quashed. Upon the authority of the case cited, the attachment in the case sub judice is a common-law attachment with the usual common-law incidents. This being so, the common-law rules prevail, and there may be a special appearance. But if any doubt could exist regarding the common-law rule as to the effect of the filing of the bond by the defendant and limiting it to a special appearance, section 91 of the practice act expressly provides for a special appearance. We think that, by virtue of section 86 of the practice act, it becomes wholly immaterial whether or not a general appearance has been entered by the defendant, since that section expressly provides that: "The practice and procedure in relation to the said writ, its effect, levy and return * * * shall be the same as in cases of attachment against nonresident debtors, and in relation to the vacation thereof when improperly issued, the same as for setting aside an order for bail." Section 61 of the practice act of 1903 provides: "Any justice of the Supreme Court or judge of the court out of which a *capias ad respondendum* shall issue may * * * determine upon the legality of orders for bail and discharged persons illegally arrested in civil actions whether bail has been given or not. * * * If an order for bail is set aside, the action shall not abate but the defendant shall be discharged from arrest and his bail discharged and the action shall proceed as if commenced by summons, unless otherwise ordered by the court or judge." It is therefore obvious, in view of this statute, that the filing of the bond by the defendant in attachment did not operate as a waiver of any right which he had to apply to the court for the vacation of the proceedings had against him because of their irregularity and insufficiency. Whether or not the action shall proceed as if commenced by summons or be quashed altogether rests in the discretion of the court.

The legal vitality of the writ of attachment is questioned upon the ground that it was issued in violation of sections 85 and 86 of the practice act. The eighty-fifth section, among other things, provides that the commissioner shall make an order awarding the plaintiff a writ of attachment which order shall prescribe the amount of the bond to be given on behalf of the plaintiff to the defendant, with sufficient sureties to indemnify the defendant for all damages resulting from the attachment, and taxed costs of suit if the suit shall be discontinued or dismissed, or if judgment therein shall be given. No such order was made by the commissioner. The eighty-sixth section, among other things, provides: "Upon filing with the clerk of a court out of which a writ of at-

tachment may issue the order awarding such writ and the proof upon which the same is founded and the bond approved by the court, judge or commissioner, such clerk shall issue to the sheriff or other officer a writ of attachment," etc. The plaintiff filed with the clerk the order awarding the writ and the proof upon which the same is founded, but no bond. To what extent these irregularities would affect the validity of the writ as a writ of attachment or as a summons was not argued, and therefore does not call for the expression of an opinion thereon.

It is familiar law that, where the irregularity consists in the omission to state a jurisdictional fact, such omission is fatal to the validity of the entire proceedings. Such an attack is made by the prosecutor upon the affidavit and the order made thereon by the commissioner awarding the attachment. The affidavit is clearly defective in failing to set out facts required by the act, which authorize a commissioner to award a writ of attachment. If the affidavit which is made the basis for the order of the commissioner is under the first subdivision of section 84, it must set out facts which would bring the defendant within sections 56 or 57 of the practice act.

Mr. Justice Voorhees in *Huffy v. Wilson*, 78 N. J. Law, on page 242, 74 Atl. on page 137, in considering sections 56 and 57 in their application to proceedings instituted under section 84 of the practice act, says: "In actions of tort, the rule is that there must be an order to hold to bail by a judge or commissioner, but only upon proof by affidavit disclosing a good cause of action and some special circumstances why the order should be made. *Bennett v. Benson*, 25 N. J. Law, 166. Actions for outrageous battery or mayhem and actions for seduction are said to be exceptions to this rule. *Wert v. Strouse*, 38 N. J. Law, 184. Special reasons ordinarily cited are nonresidence of the defendant or facts and circumstances from which it may be inferred that the defendant may not be in the jurisdiction to answer to a judgment when rendered." The order to hold to bail was indorsed upon the writ and was held to be sufficient. It was not required that the order to hold to bail in actions of tort must show upon its face that the commissioner had adjudicated upon the facts before him. This practice has been radically changed by the practice act of 1903. Section 56 provides: "The writ of *capias ad respondendum* shall not be issued in any action founded upon a tort, except upon proof by affidavit or otherwise to the satisfaction of the court in which the action is about to be commenced or to a judge or Supreme Court commissioner, of the grounds upon which bail is required, and thereupon the court * * * shall make an order for bail. * * * but no such order shall be made unless: * * * Third. The proof estab-

ishes special cause as heretofore for holding the defendant to bail." Thus it is to be observed that the Legislature has established the same procedure prescribed in holding to bail in actions upon contract. This being so, it follows that, before awarding the writ either of *capias ad respondendum* or attachment, the judge or commissioner must adjudicate upon the facts before him, and that he did so must appear upon the face of the order awarding the writ in the same manner as in actions upon contract to hold the defendant to bail. *Huffy v. Wilson*, supra, 78 N. J. Law, 243, 74 Atl. 137. Before disposing of the question relating to the validity of the order, it will be serviceable to examine into the sufficiency of the proof upon which the order is based.

[1] The special circumstances relied on for the issuance of the attachment is the statement in the affidavit to this effect: "That said R. M. Vandiver is a nonresident of the state of New Jersey, and, as deponent verily believes, a resident of Alabama." We think the affidavit is fatally defective in that it fails to set out that a summons cannot be served. The language of paragraph 2 of section 84 of the practice act of 1907, as amended, is to this effect: "Or is not a resident of this state, and that summons cannot be served." Not only must it appear by legal evidence that the defendant is not a resident of this state, but also that a summons cannot be served. The nonresidence of a defendant against whom an action of tort was about to be brought was a special reason justifying an order to hold to bail. *Bennett v. Benson*, 25 N. J. Law, 166.

By the amendment of the eighty-fourth section of the practice act of 1907, the first subdivision thereof provides that an attachment may issue where the plaintiff would be entitled to an order to hold a defendant to bail under the provisions of the act. Now we have seen that in a tort case, where it was necessary to allege a special reason for holding a defendant to bail, the allegation of nonresidence was sufficient for that purpose. What constitutes a nonresidence as will justify the issuance of a writ of attachment is well stated by Deput, J., in *Baldwin v. Flagge*, 43 N. J. Law, 498, as follows: "*Evans v. Perrine*, in this court, 35 N. J. Law, 221, and *Stout v. Leonard*, in the Court of Errors, 37 N. J. Law, 492, have placed this subject on a rational basis. A debtor may have his domicile in another state, and yet be exempt from process of attachment in this state. He may be in the habit of coming into this state so frequently and openly that a creditor, by watching an opportunity, may obtain a personal service of process upon him, and still he will be liable to process of attachment. A residence or place of abode in this state of a temporary or permanent character, at which a summons might lawfully be served, is the condition on which

process of attachment cannot be issued. If the debtor has not such a place of abode that a summons cannot be served at it, he is a nonresident within the meaning of the statute, and may be proceeded against by attachment." *Coles v. Blythe*, 69 N. J. Law, 204, 54 Atl. 240. Thus we observe that, our courts have defined a nonresident within the meaning of the attachment act to be one who is not a resident of this state or has no place of abode in this state, either of a permanent or a temporary character.

From the reasoning of the cases referred to, if a defendant came daily into this state to transact his business here and had his residence or place of abode in New York, he would be a nonresident within the meaning of the attachment act and amenable to the process of attachment. This was the state of the law at the time of the passage of the amendment of the eighty-fourth section of the practice act in 1907. It is highly important to bear this in mind, in view of the fact that, under the first subdivision of section 84, an order to hold a defendant to bail may be made in an action of tort where, as a special cause, there is an affirmation of his nonresidence.

We now turn to the second subdivision of section 84 which reads: "That the plaintiff has a cause of action the nature and particulars of which he shall specify and that the defendant absconds from his creditors or is not a resident of this state, and that summons cannot be served. * * *" This subdivision also applies to actions of tort. Now, since a summons may be served personally upon, as well as at the place of abode of, a defendant, the legislative declaration that an attachment may issue where it appears that the defendant is a nonresident, and summons cannot be served, manifestly requires that the affidavit upon which the process of attachment is applied for shall contain legal evidence of the facts showing that the defendant is not only a nonresident of this state, but also that a summons cannot be served. The first and second subdivisions of section 84, being in *pari materia*, must be read together, and then at once it becomes obvious that the Legislature, in affording this new remedy in actions of tort, intended that the naked affirmation of nonresidence shall not be a sufficient basis to obtain a writ of attachment unless it is accompanied by an affirmation of facts showing that a summons cannot be served. Of course what has been said does not apply to cases where the tort complained of is an outrageous assault and battery, mayhem, or seduction. For proof of the commission of any of these acts warrants an order to hold to bail without any other special cause, and consequently will suffice for the award of the writ of attachment upon the same basis. We are of the opinion that in those cases of tort where the special cause relied on is that

the defendant is not a resident and that a summons cannot be served, the absence of evidence that a summons cannot be served from the affidavit or proof presented to the judge or commissioner for the award of a writ of attachment is the absence of a necessary jurisdictional fact prescribed by the statute empowering the judge or commissioner to make the order, and vitiates the entire proceedings.

[2] The validity of the order awarding the writ of attachment is also attacked upon the ground that it does not show upon its face that the commissioner has exercised his judicial discretion and made a decision upon it, and that the proof of the particulars necessary to authorize the awarding of the writ was satisfactory. The contention of the prosecutor is that, since the passage of the act of 1903, such adjudication is necessary to the validity of the order. This phase of the case was present in *Huffy v. Wilson*, 78 N. J. Law, 241, 74 Atl. 137, and was satisfactorily dealt with in an opinion by Voorhees, J., holding that, "under the act of 1903, the order of the judge or commissioner must show upon its face that he has adjudicated upon the proofs presented to him, and that the proof of the particulars necessary to authorize the awarding of the writ was satisfactory." The adjudication by the commissioner upon the proofs presented to him must be as formal and precise and appear in the order as is required in actions upon contract where the defendant may be held to bail. The order under review wholly fails in that regard. Furthermore it appears by the order that it awards a writ of attachment against R. M. Vandiver, whereas the act requires that it shall be awarded against the goods and chattels of the defendant.

The writ of attachment will be quashed, and the proceedings had thereunder set aside.

JARMAN v. FREEMAN.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1912.)

(Syllabus by the Court.)

1. DEDICATION (§ 33*)—ELEMENTS—ACCEPTANCE.

The city of Atlantic City, as trustee for the public, has a right to accept a dedication of lands as and for a public street, granted to the city by deed from the owner of the fee.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 66; Dec. Dig. § 33.*]

2. DEDICATION (§ 53*)—RIGHTS ACQUIRED—MERGER.

When a city accepts a grant of dedication of lands for a public street from the owner of the fee, the private right of way therein of an abutting owner granted him by a prior owner of the dedicated lands becomes merged in the public easement, or is suspended thereby.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 96; Dec. Dig. § 53.*]

3. HIGHWAYS (§ 86*)—RIGHTS OF ABUTTING OWNERS—USE.

A member of the general public, and an abutting owner, has a privilege of passage and use of the public highway not incongruous with the purpose for which it was created.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 296; Dec. Dig. § 86.*]

4. HIGHWAYS (§ 86*)—STREETS—RIGHTS OF ABUTTING OWNERS.

A member of the general public, and an abutting owner, cannot be enjoined from using a public highway, so long as he so regulates his use of the common right as not to unreasonably interfere with other persons in their enjoyment of it.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 296; Dec. Dig. § 86.*]

5. APPEAL AND ERROR (§ 1108*)—DISPOSITION OF CAUSE—REVERSAL.

When it appears to this court by proofs taken in the court below and the admission of counsel that, between the time of filing the answer in the Court of Chancery and the date of the decree under review, the alley in question had been dedicated and accepted by the city as a public street, a decree restraining the defendant from using the alley for the purpose of hauling goods to and from his warehouse abutting the interior end of the alley will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4410; Dec. Dig. § 1108.*]

Appeal from Court of Chancery.

Bill in equity by Thomas J. Jarman, executor, against Abe Freeman. From a decree for complainant (83 Atl. 372), defendant appeals. Reversed.

Bourgeois & Coulomb, of Atlantic City, for appellant. Chandler & Robertson, of Atlantic City, for respondent.

TRENCHARD, J. This appeal brings up for review a decree of the Court of Chancery, directing that an injunction issue restraining the defendant from using a certain alley, called "Sherman Place," leading to his premises, in the city of Atlantic City.

The alley in question extends from the westerly side of New York avenue, a distance of 100 feet, to the easterly line of defendant's premises, and is paved with brick. The complainant owns the land along the southerly side of the alleyway for a distance of 100 feet.

The bill was filed by Jarman to restrain Freeman, the defendant, from using this alleyway. Upon a preliminary application relief was denied, because the learned Vice Chancellor then thought that "complainant's conduct had induced the defendant to erect his warehouse at the end of a certain alley in the belief that he would be permitted by complainant to use the alley." 78 N. J. Eq. 464, 79 Atl. 1065. Upon the final hearing an injunction was issued according to the prayer of the bill; it being then, in the opinion of the Vice Chancellor, "established as a fact that defendant erected his warehouse with full knowledge that complainant

would contest any effort upon the defendant's part to use the alley."

In order to intelligently discuss the propriety of the award of the injunction, it will be necessary to relate briefly the history of the alley.

The land owned by the complainant and the land traversed by the alley are part of a plot of land 100 feet in width on the south side of Atlantic avenue, and 150 feet in depth on the west side of New York avenue, which was formerly owned by Mrs. George Kelly. Her title thereto descended and became vested in John L. Kelly. John L. Kelly and his wife, on June 27, 1898, conveyed to Mary C. Jarman, the predecessor in title of the complainant, a portion of that land, being 40 feet in width on New York avenue; the beginning corner being 110 feet south of the southerly line of Atlantic avenue. The deed from Kelly to Jarman contained the following grant: "Together with the free and common use, right, liberty and privilege of an alley ten feet in width intended to be laid out and opened by the said grantor, parallel with and one hundred feet southwardly from the south line of Atlantic avenue, and extending westwardly from said New York avenue one hundred feet in depth, in common with the owners, tenants and occupiers of the lots of ground of the said grantor, and the said grantee, or their heirs, bounding thereon, as and for a passageway and water course, at all times hereafter forever, subject, however, to the payment of a proportionate part of the expense of keeping said alley in good order and repair at all times hereafter forever."

On January 21, 1901, David C. Folwell et al. conveyed to John L. Kelly the property now owned by the defendant, being 39 feet 6 inches in width on the south side of Atlantic avenue by 150 feet in depth; the beginning corner being 100 feet west of the westerly corner of New York and Atlantic avenues. On December 20, 1908, John L. Kelly conveyed to the Atlantic Safe Deposit & Trust Company a block of land situate at the southwest corner of Atlantic and New York avenues, being 100 feet in width on Atlantic avenue by 100 feet in depth on New York avenue, and extending to the northerly line of the 10-foot wide alley created in the deed to Jarman. In this deed Kelly granted to the trust company his right in said 10-foot wide alley in the following language: "Together with all the right, title and interest of the said party of the first part hereto in the ten-foot wide alley on the rear of said premises, to the depth of one hundred feet westwardly from New York avenue, reserving thereout, however, unto the grantor, his heirs and assigns, the use, privilege and liberty of all of said ten-foot wide alley, as and for a passageway and water course thereover, at

all times hereafter forever, for the benefit of the lands of said grantor, adjoining the lands herein described on the westerly side thereof."

The lands referred to as being on the westerly side of the alley in the grant to the trust company are the lands now owned by the defendant, Freeman; for on January 25, 1911, John L. Kelly and his wife conveyed to the defendant the plot of land which he had theretofore purchased from Folwell. In this deed to Freeman Kelly granted to Freeman the right to use said 10-foot wide alley in the following language: "Together with the use, right, privilege and liberty in common with others of, in and to that certain ten-foot wide alley or passageway known as Sherman Place, leading eastwardly from said lands and premises to New York avenue, the northerly line of which runs parallel with and one hundred feet southwardly from the southerly line of Atlantic avenue, as and for a passageway and water course, and to have ingress and egress thereover hereafter, forever."

The Vice Chancellor seems to have regarded the foregoing as the only material facts in the history of the title of the alley. But the record presented here for review contains other material matters, as we shall hereinafter point out. So regarding the situation, he proceeded in his conclusions to say: "The evidence discloses that the use which the defendant has been making of the alley, and which he proposes to continue to make of it, is under claim of right to use it in such manner and at such times as his convenience and business needs shall occasion for the purpose of hauling goods to and from his warehouse." Continuing he says: "It is now manifest that the continued use of the alley by the defendant for the purpose of hauling goods to and from his warehouse will not only interfere with the full enjoyment by the complainant of the easement as contemplated by the grant, but will also necessarily increase his burden of repair. The grant to complainant vests in him the right to use the alley as a way for the benefit of his adjacent land at any time. This right is in common with, and is to be exercised in connection with, a similar right of use of the alley by the owner of the fee for the benefit of his adjacent land. It follows that the right of use of the alley thus vested in complainant is only restricted by the similar right of the owner of the fee, and any extension of the use of the alley by the owner of the fee for the benefit of other lands is necessarily operative as a restriction of complainant's privileges coextensive with the magnitude of the extension; and the burden of repair is in like manner increased by the extended use." Whether, if we limited our consideration to such facts as the Vice Chancellor seems to have limited his, we should

reach the same conclusion, it is not now necessary to determine.

We find the following matters of fact disclosed by the proofs and the admissions of counsel, which we think must be met before this decree can be affirmed: The proofs presented to us show that the fee in the alley in question has been dedicated to the city of Atlantic City as and for a public street, and has been accepted by the city. On July 3, 1911, the Atlantic Safe Deposit & Trust Company (the owner of the fee of the alley in question), by deed, granted and dedicated the alley in question (describing it by metes and bounds) to the city of Atlantic City "as and for a public alley, street or highway, for all persons, at all times, freely to pass and repass on foot or with vehicles, animals, loads or otherwise, to, along, over and upon the same." There is among the exhibits returned to us a resolution accepting this dedication, apparently passed by the city council of Atlantic City, as follows: "Whereas, it is to the interests of Atlantic City that the ten feet wide alley off of New York avenue, and one hundred feet southerly of Atlantic avenue, thence extending westerly parallel with Atlantic avenue and one hundred feet distant therefrom, a distance of one hundred feet, should be under municipal control; and whereas, Atlantic City, at public expense has for a number of years past lighted said alley; and whereas, the owners of the legal fee to the land in said alley have conveyed and dedicated the same to Atlantic City, by deed bearing date the third day of July, A. D. nineteen hundred and eleven: therefore, be it resolved that Atlantic City accept such dedication, and hereafter maintain said alley as one of the public streets of said city."

[1] Proceeding now to a consideration of the effect of this proof, we think there can be no question that the city of Atlantic City, as trustee for the public, had a right to accept the dedication of the lands in question as and for a public street. *Atlantic City v. Associated Realities Corp.*, 73 N. J. Eq. 721, 70 Atl. 345, 17 Ann. Cas. 743; *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq. 139, 49 Atl. 822.

[2] The city having accepted such dedication, the complainant's private right of way granted to him by Kelly became merged in the public easement, or was suspended thereby. *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351, 11 Atl. 751.

In the present case, by the consummation of the dedication, the complainant has been relieved of the burden "of a proportionate part of the expense of keeping said alley in good order and repair" imposed in and by the grant to him.

[3, 4] Now the defendant, as a member of the general public, and as the owner of lands abutting the interior end of the alley, has a privilege of passage and use of this pub-

lic highway not incongruous with the purpose for which it was created. That right, we think, this injunction denied him. He was enjoined from using the alley for the purpose of hauling goods to and from his warehouse abutting the interior end of the alley.

Of course, every one using an easement in common with others is bound to so regulate his own use of the common right that he does not unreasonably interfere with other persons in their enjoyment of it. *Camden, etc., R. Co. v. U. S. Cast Iron, etc., Co.*, 78 N. J. Eq. 279, 59 Atl. 523. And for the unauthorized obstruction of a public highway there is ample remedy, ordinarily by indictment (*Attorney General v. Helshon*, 18 N. J. Eq. 410), and by injunction in a proper case. *Morris & Essex R. Co. v. Prudden*, 20 N. J. Eq. 530. But this case does not proceed upon the theory of an unauthorized obstruction of the public highway; nor is there any adequate proof of it.

[5] The only hesitation we have in reversing the decree below arises because the colloquy between court and counsel, when the dedicatory deed was put in evidence, indicated that the true significance of the proof was not pressed upon the attention of the Vice Chancellor. It seems that neither the dedication nor the acceptance had occurred at the time the bill was filed. It appears that the deed of dedication had been executed to the city at the time the answer was filed, and it was set up therein, and that it had been accepted before the taking of proof was concluded; for the resolution of acceptance is returned with proofs. It thereby appears that the dedication had been accepted by the city before the order under review was made. Moreover, we find this admission in the printed brief of counsel for defendant: "*At this time the owner of the fee has conveyed the right of the fee to the city, and on January 8, 1912, the city accepted the grant.*" By reference to the order awarding the injunction, we find that it is dated April 2, 1912. Since, therefore, between the time of the filing of the answer in the court below and the date of the decree under review, the alley in question had been dedicated and accepted as a public street, we think the injunction should not issue.

The result is that the decree under review will be reversed.

MCDEVITT v. DEACON.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

WILLS (§ 433*)—PROBATE—ANNULMENT.

The statute (section 20 of the orphans' court act [3 Comp. St. p. 3819]) declares that a transcript of any will duly proved shall be

competent evidence in any suit relating to real or personal estate, the same as if the will had been produced and duly proved. Such transcript, if it shows that the statutory requirements have been complied with, is prima facie proof of due execution of the will; and where, in an action of ejectment, the subscribing witnesses to the will testify to facts inconsistent with the attestation clause, and their testimony given in proceedings to probate the will, which, if believed, would overthrow the prima facie case, it was not error to refuse a direction in favor of the party seeking to invalidate the will, for whether the prima facie case had been destroyed was a jury question.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 924-936; Dec. Dig. § 433.*]

Error to Supreme Court.

Action by Thomas D. McDevitt against Harriet May Deacon. Judgment for defendant, and plaintiff brings error. Affirmed.

Charles C. Babcock and Garrison & Voorhees, all of Atlantic City, for plaintiff in error. Theodore W. Schimpf and James M. Sheen, both of Atlantic City, for defendant in error.

BERGEN, J. The plaintiff in error brought an action in ejectment against the defendant in error to recover the possession of an equal undivided eighth part of lands located in the county of Atlantic in this state. At the opening of the trial it was admitted that one James J. McDevitt died seised of the lands described in the plaintiff's declaration, and that he left a paper, purporting to be his last will and testament, which was admitted to probate in due form by the surrogate of the county of Atlantic, under which the defendant, as devisee, had taken possession of the lands to the exclusion of the plaintiff.

James J. McDevitt left four children, of whom the plaintiff was one; and it is not disputed that if his father died intestate he would be entitled to recover.

A certified copy of the will and of all of the proceedings relating to its probate were put in evidence, and it appears that the attestation clause was in due form, and that the subscribing witnesses certified that it was "signed, sealed, published, and declared by the above-named testator as and for his last will and testament in the presence of us, who in his presence and at his request, and in the presence of each other, have hereunto subscribed our names as witnesses thereto." In the proceedings relating to the probate, it appears that each of the subscribing witnesses declared, under oath, "that he saw the testator therein named sign and seal the same, and heard him publish, pronounce and declare the within writing to be his last will and testament," and that the other subscribing witness was present at the same time and signed his name as a witness, together with the deponent, in the presence of the testator and at his request, and in the presence of each other. The decree of the

surrogate admitting the will to probate was also produced and offered in evidence.

The plaintiff assailed the validity of the will upon three grounds, viz.: The mental incapacity of the testator; that he was unduly influenced in the making of the will; and that it was not executed according to the requirements of the statute. The jury found against the plaintiff on these issues, and the review now sought is based upon alleged errors committed at the trial.

The first, second, and third assignments of error are too indefinite and general in character to warrant a consideration of them. They refer to the exclusion and admission of testimony without pointing out what the testimony complained of was; and it is therefore impossible to ascertain whether there was any exception sealed to support them.

The fourth assignment challenges the refusal of the court to direct a verdict in favor of the plaintiff, and this is rested principally upon the claim that the plaintiff had shown by the testimony of the subscribing witnesses called at the trial that the will was not properly executed; for the questions as to mental incapacity and undue influence were clearly for the jury. One of the subscribing witnesses, Leland French, was asked: "Q. Now, will you please tell the court and jury just what happened and what was said respecting the placing of your name upon this paper? A. Why, I come in off my work around 5 o'clock. I was working 703 Atlantic avenue, or 706, and I went back in the shop and came out, and Jim McDevitt says: 'Lee, come here, I want you to sign a paper.' I says, 'All right.' Jim got up out of the chair, and I sat down and signed my name, not knowing what it was, and Jim went and sat on the platform. I signed my name and got up and went out back, and then he called on Samuel Dodson to sign his name. Q. Did you see Mr. Dodson sign his name to the paper? A. Yes; and after that I forget exactly just what did take place after that. I know I went back. Well, I went back in the shop, and I came out and bought oysters and went home. That is all I know. Q. Did Jim McDevitt say what it was? A. No. Q. Did he sign his name to it while you were there? A. Not in my presence; no." When this witness was asked about the deposition which he signed in the surrogate's office concerning the execution of the will, he said that he did not understand what it was; that it was read "off fast." On cross-examination the oath was read to him, and he was asked whether he understood it, and he answered: "Why, I suppose so; yes, sir." And he further testified with reference to the oath: "Q. When it was read to you that you saw the testator therein named sign and seal the same, didn't you know

what that meant? A. Yes, sir. Q. When you heard the words 'publish, pronounce and declare the within writing to be his last will and testament,' didn't you know what that meant? A. Yes, sir."

Samuel Dodson, the other subscribing witness, testified that at the time he signed as a witness that Mr. French, the other subscribing witness, was present; that the testator said, "'Boys, I got a paper here I want you to sign,' and produced the paper and we signed it." He further testified that he knew he was signing Mr. McDevitt's will, because he had spoken to him about it before. On cross-examination he was asked: "Q. Now, was that signature on there at the time the will was presented to you for signature? A. Yes, sir. Q. Did he say anything about it at all? A. Not to my recollection; no, sir. Q. Are you positive that he didn't say anything about it? A. No, sir; I am not positive that he didn't."

The affidavit which the witness Dodson made when the will was probated being read to him, he was asked: "Q. Now, freeing that of its verbiage, did you know that the substance of that affidavit was as I have read it when you signed it? A. Yes, sir. Q. And did you believe at the time you were signing that affidavit that the facts were as therein stated? A. Yes, sir. Q. Then you are not willing to swear that your recollection of the facts at this time is better than they were at that time, are you? A. No, sir. Q. And you believe now that the facts that were stated therein were true at the time you stated them? A. Yes, sir." This witness also testified: "Q. You also understood that you were swearing that Jim, at the time he made the will, was of sound and disposing mind and memory, didn't you? A. Yes, sir. Q. And you believe that, too, don't you? A. Yes, sir. Q. And the other facts as stated in the affidavit? A. Generally, yes; as far as I understand them, yes." The court then read to this witness that portion of the attestation clause which stated that the will was "signed, sealed, published, and declared by the above-named testator as and for his last will and testament in the presence of us, who in his presence and at his request, and in the presence of each other, have hereunto subscribed our names as witnesses thereto," and he was then asked: "Q. Was what was above your signature and what I have read to you true? A. He told me that it was already signed by him—not at that time. I could not swear to that time. Q. What I want to know is whether the statements made, as I have read them to you in this will and to which you subscribed, are true? A. He declared it to me; yes, sir. I can't swear to whether he declared it in the presence of Leland French or not." This testimony was given June 20, 1911, the will was dated December 18, 1909, and the affidavit taken July 25, 1910.

Section 20 of the orphans court act (3 O. S. 3819) declares that "the transcript of any will regularly proved and recorded in the prerogative office or in the office of the surrogate of any county in this state, and duly certified by the register or surrogate under his official seal, shall be competent evidence in any court of this state in any suit or controversy in relation to the title to any estate, real or personal, devised or bequeathed thereby, the same as if the original will had been produced and proved by the attesting witness."

It was held, in *Allaire v. Allaire*, 37 N. J. Law, 312, that a transcript of the record of a probate of a will devising lands, made before the surrogate, is competent evidence in an action of ejectment if the record is in proper form; and, while the heir may contend that upon the proof made before the surrogate the will has not been executed in compliance with the statute, still, if the proofs contained in the record show that the will was executed with all the formalities required by the statute, the probate will be prima facie evidence, and will, of itself, be sufficient to establish the title, if not overcome by counterproof. The record in this case is in complete form, and is prima facie evidence of the defendant's title. *Darnell v. Buzby*, 50 N. J. Eq. 725, 26 Atl. 676, and cases there cited.

In *Mundy v. Mundy*, 15 N. J. Eq. 290, Chancellor Green, sitting as ordinary, speaking of the effect of the attestation clause said: "The attestation clause, with the signatures of the witnesses, is prima facie evidence of the facts stated in it. It may be overcome by the witnesses themselves, or by other witnesses, or by facts and circumstances irreconcilable with its verity. If there is no attestation clause, the case is different. In one case there must be affirmative proof of publication and of the other requisites; in the other, there must be affirmative proof of the want of those requirements."

In the case now under consideration there was a proper attestation clause, as well as a record in due form of the admission of this will to probate; and the present contention of the plaintiff in error is that the trial court should, as a matter of law, have directed the jury that it conclusively appeared that this prima facie case had been overthrown by the testimony of the subscribing witnesses. In the case of *Allaire v. Allaire*, supra, the matter was before the Supreme Court on a rule to show cause, where the court might properly pass upon the question of preponderance of evidence; while in the present case strict rules of law are to be applied, one of which is that all debatable questions of fact must be determined by the jury, and whether the plaintiff had overthrown the prima facie case which the record established in favor of the defendant was clearly a jury question. This will was executed in December, 1909. In July

following the subscribing witnesses declared, under oath, that all the formalities necessary to constitute a due execution of this will had been observed; and whether they were then testifying to the truth, or correctly remembered the facts in June, 1911, a year after they had testified as they did before the surrogate, seems to us to be essentially a jury question, and the trial court committed no error in submitting it to the jury for their consideration.

To assume as conclusive and as sufficient to withdraw from the jury the question whether a will with a perfect attestation clause, duly admitted to probate upon the oath of the subscribing witnesses affirming the observance of all statutory requirements, the testimony of such witnesses given long after they assisted in the execution of a will, even if inconsistent with the attestation clause, and their testimony given in the proceedings admitting the will to probate, deprives the jury of the right to determine whether the prima facie case arising from the attestation clause and the decree of probate has been overcome, and removes from their consideration what is essentially a jury question; for the presumption of law is largely in favor of the due execution of a will so attested, and a perfect attestation clause is a most important element of proof, and whether it has been destroyed by counterproof is a question of fact.

We think there was no error in refusing to direct a verdict for the plaintiff under the circumstances disclosed in this case.

We have examined the other assignments of error argued by the plaintiff in error and find nothing in them which requires consideration.

No error appearing in this record, the judgment below will be affirmed.

CLARK v. PUBLIC SERVICE R. CO.

(Supreme Court of New Jersey. Nov. 21, 1912.)

(Syllabus by the Court.)

1. STREET RAILWAYS (§ 90*)—OPERATION—CARE REQUIRED—INSTRUCTIONS.

Upon the authority of the case of *Van Blarcom v. Central R. R. Co.*, 73 N. J. Law, 540, 64 Atl. 111, it was error to instruct the jury that it was the duty of the motorman and conductor to use "a high degree of care" to avoid a collision with plaintiff's automobile.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 190-192; Dec. Dig. § 90.*]

2. NEW TRIAL (§ 40*)—PROCEEDINGS TO PRODUCE—NECESSITY FOR EXCEPTIONS.

A verdict based upon an erroneous rule of law as to the defendant's liability may be set aside on rule to show cause, although no exception to the erroneous instruction was taken at the trial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 62-66; Dec. Dig. § 40.*]

Action by Mary J. Clark against the Public Service Railroad Company. Verdict for plaintiff. Heard on rule to show cause. Rule made absolute.

Argued June term, 1912, before GUMMERE, C. J., and GARRISON and BERGEN, JJ.

Lefferts & Hoffman and Leonard J. Tynan, all of Newark, for the rule. Lintott, Kahrs & Young, opposed.

GARRISON, J. The plaintiff's contributory negligence was theoretically a question for the jury, but as she was seated on the rear seat of the automobile, and there is no testimony as to any situation or circumstance bearing upon her negligence, the failure to leave the question to the jury should not disturb the verdict.

[1] The verdict, however, must be set aside because of an erroneous instruction to the jury on the question of the defendant's liability. The trial court in the charge, speaking of the duty of the defendant's servants, i. e., the motorman and conductor, said: "They should have exercised their faculties of observation; that is, they should have used a high degree of care." This characterization of the duty of the defendant's servants is directly opposed to the case of *Van Blarcom v. Central R. R. Co.*, 73 N. J. Law, 540, 64 Atl. 111, in which the Court of Errors and Appeals held that to use the words "a high degree of care" in this connection was an injurious error that required a reversal.

[2] The circumstance that no exception to the charge in this respect was taken at the trial is no bar to the setting aside of the verdict upon a rule to show cause, if a rule of law injurious to the defendant has been erroneously charged to the jury upon an essential feature of the case. *Hatfield v. Central R. R. Co.*, 33 N. J. Law, 251; *Butler v. Hoboken, etc., Co.*, 73 N. J. Law, 45, 62 Atl. 272; *Otis Elevator Co. v. Headley*, 81 N. J. Law, 173, 80 Atl. 109. The fact that the cases cited were concerned with the rule of damages is insignificant, as the doctrine in question is of general application.

The rule to show cause is made absolute.

DRANOW v. SHERRY et al.

(Court of Errors and Appeals of New Jersey. Oct. 1, 1912.)

(Syllabus by the Court.)

WILLS (§ 538*)—CONSTRUCTION—GIFT OVER—TIME OF TAKING EFFECT.

Where there is a bequest to one person, and, in case of his death, to another, the gift over will be construed to take effect only in the event of the death of the first legatee prior to the period of distribution, unless a contrary intention appears in the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1162; Dec. Dig. § 538.*]

Appeal from Court of Chancery.

Bill by Harry Dranow against Cassie Sherry and others. From an order in chancery, complainant appeals. Affirmed.

John Bentley, of Jersey City, for appellant. Charles B. Bradley, of Jersey City, for respondents.

GUMMERE, C. J. The complainant by his bill in this cause seeks to have a judgment, which he recovered against the defendant Cassie Sherry, decreed to be a lien upon certain lands which stand in her name as the guardian of Joseph Gerard Sherry, now deceased.

The rights of the parties to the litigation depend upon the true construction of the will of Owen Sherry, who died in November, 1907, and who was the father of Joseph Gerard Sherry. The pertinent parts of the will are as follows:

"(2) I give, devise and bequeath to my son, Joseph Gerard Sherry, and to his heirs and assigns forever, any and all property real or personal which I now possess, or which I may become entitled to.

"(3) That the income thereof shall be devoted to the support and maintenance of the said Joseph Gerard Sherry, and if the income shall not be sufficient to support him, then so much of the principal shall be used as may be necessary for his support.

"(4) That in the event of the death of my said son Joseph Gerard Sherry I give, devise and bequeath to Cassie Sherry, and to her heirs and assigns forever, all property real or personal which I may be possessed of at the time of my death."

"(6) I hereby appoint my executrix Cassie Sherry hereinbefore named guardian of my said son Joseph Gerard Sherry."

The land upon which the complainant seeks to have his judgment impressed as a lien was purchased by the defendant Cassie Sherry during the lifetime of her ward, Joseph Gerard Sherry, with funds out of the personal estate of the testator. Shortly after the investment was made, Joseph Gerard Sherry, who was an infant only three years of age, died; and the question for determination is whether the funds which are now represented by the lands in controversy are a part of his estate, or whether, upon his death, they passed under item 4 of the testator's will to the defendant Cassie Sherry.

By the use of the words "in the event of the death of my said son," appearing in paragraph 4 of the will, the testator applied terms of contingency to an event of all others the most certain and inevitable; and to satisfy them it is necessary to connect the son's death with some occurrence in association with which it is contingent.

When the occurrence which the testator has in mind in using language like that quoted is not specified in the will, and the be-

quest is immediate (i. e., in possession), the words used can only refer to the contingency of the death of the first legatee happening during the lifetime of the testator; and so, in construing bequests of this character, it has become a settled rule in the law of wills that the first legatee takes absolutely if he survives the testator, and the gift over is defeated. Jarm. on Wills (6th Eng. Ed.) c. 56, § 1; Hawkins on Wills, p. 254.

Counsel for the appellant, while conceding the rule to be as stated, contends that it is not applicable to the present case because, as he claims, it appears from the context of the will that it was the purpose of the testator that his estate should not become absolute in his son until the latter should reach the age of 21, and that the contingency which he had in mind in framing the fourth paragraph of his will was the death of his son before reaching that age. This contention is based on the language of the third paragraph of the will, which authorizes the expenditure of income, and so much as may be necessary of the principal, for the support and maintenance of the son. But to give to this provision the meaning claimed for it is not only to nullify the absolute gift to the son contained in the second paragraph of the will, but also to radically change the provision of the legacy to Cassie, in the event of the son's death, from a gift of all the testator's property of which he might be possessed at the time of his death, to so much thereof as should not have been used for the maintenance and support of the son.

The plain and only purpose of the third paragraph of the will was, as it seems to us, to leave the guardian of the son free to use her own judgment in the matter of the sums to be expended for his maintenance and support during his minority, even to the extent of the using of the corpus for that purpose if the guardian should deem it advisable.

It follows therefore that the contention of the appellant is not justified by the language of the testator, that the legacy to Joseph Gerard Sherry became absolute upon the death of his father, and that the defendant Cassie Sherry has no interest in the testator's estate.

The order appealed from will be affirmed.

SMITH v. PRUDENTIAL INS. CO. OF AMERICA.

(Court of Errors and Appeals of New Jersey. Nov. 18, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§ 291*)—APPLICATION—STATEMENTS AS TO HEALTH.

Where the applicant for life insurance certifies that his health is good according to the best of his knowledge and belief, a recovery may be had, on the death of the assured, if it appear that he had reason to believe, and did believe, that at the time he was in good health,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

although it subsequently develops that this was not in fact his condition, for his statement was not unqualified, but only to the extent of his knowledge and belief.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 681-690, 694-696; Dec. Dig. § 291.*]

2. EVIDENCE (§ 322*)—REPUTATION OF APPLICANT FOR INSURANCE.

The applicant's reputation "for being an intemperate user of alcoholic beverages" is not admissible to contradict a statement in his application for life insurance that, while he used intoxicating liquors, he did so temperately, for it is not offered to affect credibility, but in denial of a fact, pertinent to the issue raised, and not difficult to prove, if true, by the acts of the insured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1203-1213; Dec. Dig. § 322.*]

Error to Supreme Court.

Action by Delphine Smith against the Prudential Insurance Company of America. Judgment for plaintiff, and defendant brings error. Affirmed.

Louis H. Miller, of Millville, and Edward D. Duffield, of Newark, for plaintiff in error. Howard Carrow and William J. Kraft, both of Camden, for defendant in error.

BERGEN, J. This writ was brought to correct alleged errors at the trial of the issues embraced in a Supreme Court record, sent to the Cumberland county circuit court for trial, at which the plaintiff recovered a verdict for the amount due on a life insurance policy, on which the judgment under review was entered in the Supreme Court.

The errors assigned are directed to the charge of the court; to the construction by the court of the policy and the written application therefor, which by its terms is made a part of the contract of insurance; and to rulings on the admission and rejection of testimony. The application contained a number of questions, and answers made to them by the applicant, the correctness of which he affirmed by the following declaration: "I hereby declare that all the statements and answers to the above questions are complete and true to the best of my knowledge and belief, and I agree that the foregoing, together with this declaration, shall constitute the application and become a part of the contract of insurance hereby applied for, and it is further agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and the said policy shall not take effect until the same shall be issued and delivered by the company, and the first premium paid thereon in full, while my health is in the same condition as described in this application." This certificate was signed by the applicant July 12, 1909, and on August 12, 1909, he was examined by the physician of the defendant, who reported the applicant to be a first-class risk.

The first premium was paid by the insured, and the policy delivered to him on August 20, 1900. He died July 2, 1910.

The first point argued as a ground for reversal is based upon an exception taken to the refusal by the court to charge the following request: "That the burden of proof is upon the plaintiff to show that, at the date of delivery of the policy and payment of the first premium, the insured was in good health." What the court charged was: "The plaintiff in this case does accept the burden of proving to your satisfaction that Mr. Smith was, on the date of the issuance of the policy, in the same condition of health as described in the application blank, but in the application and in the declaration he says, 'The statements and answers to the above questions are complete and true to the best of my knowledge and belief,' so that when he said in the application in answer to the question: 'Q. Are you in good health?' 'A. Good'—he declared that was true to the best of his knowledge and belief. And I charge you, therefore, that all you have to find, in order to make this policy effective against the company, is that he answered truly to the best of his knowledge and belief that he was in good health. In other words, he need not necessarily have been in good health, if he honestly believed he was in good health when this policy was issued and when he made the application and the declaration."

[1] We are of opinion that, the statement regarding condition of health when the application was signed being upon knowledge and belief, all the plaintiff was required to show was that the applicant, when he signed the application, and the policy was delivered to him, had reason to, and did, believe that he was in good health. It is not necessary in this case to consider which of the statements are to be deemed warranties and which not, within the fair meaning of the contract, based upon the bona fide opinion and belief of the applicant, as might be required where the applicant has unqualifiedly certified that all the statements are true, as in *Dimick v. Met. Life Ins. Co.*, 69 N. J. Law, 384, 55 Atl. 291, 62 L. R. A. 774, for in this case all of the statements were certified to be upon knowledge and belief, and it falls within that class of cases illustrated by *Anders v. Knights of Honor*, 51 N. J. Law, 175, 17 Atl. 119, in which Chief Justice Beasley said, regarding the certification of truth upon knowledge and belief: "It seems to the court that this accepted declaration by the assured that he has answered the questions to the best of his knowledge and belief must be held to exclude the idea that he had undertaken to answer them in a more unqualified manner. If his statement was an engagement that his answers were absolutely true, no reason appears for the presence of this

subsequent statement that such answers were but relatively true. In fine, the several parts of this contract will not consist unless upon the theory that the assured warranted, not the absolute truth of his answers, but only their truth to the extent of his knowledge."

The cases which the plaintiff in error has cited on his brief are not applicable to a case where the condition of health at the time of the application and its remaining unchanged until the policy was issued is upon information and belief. In *Gallant v. Met. Life Ins. Co.*, 187 Mass. 79, 44 N. E. 1073, the contract was that no obligation was assumed by the company, unless at the time the policy was issued the insured was alive and in sound health, and it did not appear that the statements of the insured were, by the terms of the contract, limited to knowledge and belief.

So, also, in the case of *Barker v. Met. Life Ins. Co.*, 188 Mass. 542, 74 N. E. 945, the statement of the applicant was "that I further declare, warrant, and agree that the representations and answers made above are strictly correct and wholly true," which was a warranty that they were true, and not that the applicant believed they were true.

In *Packard v. Met. Life Ins. Co.*, 72 N. H. 1, 54 Atl. 287, judgment was rested upon the same sort of a policy. And so examination of all the cases cited show that the condition of health was warranted unqualifiedly, and not upon knowledge and belief.

We are of opinion that the trial court correctly interpreted the legal effect of this contract, and that the question whether, to the knowledge and belief of the applicant, he was in good health, was properly submitted to the jury. On this question there was conflicting testimony, and the verdict of the jury establishes the fact that the applicant, according to the best of his knowledge, believed he was in good health when he made the application and when the policy was issued.

The next point pressed on the argument rests upon the refusal of the court to direct a verdict for the defendant because the insured represented to the defendant that no application for insurance on his life was pending in any other company at the time he applied for insurance in the defendant company, while the testimony was conclusive that between the application to the defendant company and the issuing of the policy deceased had made an application to another company for life insurance, which was yet pending when the defendant's policy was delivered, although afterwards refused.

There is nothing in the contract which requires that, at the time when the policy was delivered, the condition that no application to another company was pending should continue until the policy was issued,

as in the case of the health of the insured, and such a covenant will not be implied to work a forfeiture of a life insurance policy. The only situation which the application in this case required to remain unchanged was the condition of the health of the applicant.

The trial court submitted to the jury for their determination the question whether the applicant, when he answered truthfully that no application was pending in any other insurance company, acted honestly, or whether he signed the defendant's application intending to make an application to another company, and concealed that fact from the defendant, and instructed the jury that if, "under all the testimony in this case, you find that when Mr. Smith gave that answer he did intend to make another application to another company, and after having made that application he did intend to withhold that from this company in fraud, then I charge you that it is just as though there had actually been another application pending at the time and he knew it; but it is a question of what was his mental attitude. Was he honest when he made the statement, or was he dishonest?"

This charge in no way injured the defendant, for the conditions that were to remain unchanged until the policy was delivered were limited to "while my health is in the same condition as described in this application."

The next point argued is that it was error to refuse a direction for the defendant because the insured in the application had falsely answered the following question, "Q. Have you, so far as you know, ever had any serious illness or disease?" to which he answered, "No." This the defendant argues was conclusively shown to be false, because, in replying to a question put by the medical examiner of the defendant, the insured stated that he was last attended by a physician five years before for pneumonia, at which time he was sick in bed for two weeks, and then completely recovered, while at the trial it developed he had had three attacks of pneumonia, one twelve years before, another about five years before, lasting about four weeks, and the third three or four years prior to his death.

We think the trial court properly refused to direct a verdict on this ground, because, while in his application the insured was not of opinion that he had had a serious illness, still in answer to the question put by the medical examiner representing the defendant company he stated the facts. Whether an illness is serious or not is a question of fact, and not of law, and to forfeit a policy by directing a verdict, simply because the applicant, upon a statement of facts made known to the company from which a serious illness might be inferred, was of opinion that the illness was not serious, could not be supported. The question in our opinion was one of fact and

justified the refusal of the trial court to direct a verdict for the defendant.

The next point argued is that the court committed an error in submitting the question of fact to the jury which he did in the following language: "Now, there again, gentlemen, you take into consideration the question of what Mr. Smith had in his mind. Did he regard the illness as serious? If he did, and he told the company he had no serious illness and he knew it at the time he signed this application, that worked a fraud upon the company. But even if he remembered he had pneumonia, and he did not think it was a serious illness and that he spoke the truth as he saw it, then the company cannot escape on that defense."

The argument against this is that it requires the defendant to carry the burden of showing not only that the insured had suffered serious illness, but that he had not forgotten the fact. We do not think this a fair criticism, for knowledge and intent can be established by proof of circumstances from which it may be inferred, and all the defendant was required to do was to show a condition which would charge the defendant with knowledge that his illness was a serious one. In this case the circumstances relating to this question were presented to the jury, and they were told that, if the insured knew that the illness was a serious one, then his denial in his application that he had ever had a serious illness worked a fraud upon the defendant company.

When the company accepted this risk, they knew the precise extent of the illness of the applicant, which they now desire to have this court hold, as a matter of law, was a serious one. It did not then deem it sufficiently serious to prevent it from issuing the policy, and as forfeitures are not favored in the law, if by any intendment a ground can be found to defeat them, we are of opinion that the defendant company, in accepting this risk with knowledge of the conditions which the insured interpreted not to be a serious illness, raises the presumption that the company itself did not consider that he had been seriously ill, and that this presumption remained until they had satisfied the jury that the insured knew, or ought to have known, that his illness had been serious.

[2] It is next argued that the trial court improperly excluded testimony offered by the defendant relating to the reputation of the insured for intemperance. The insured in his application stated that he had never been intemperate in his habits, and in his declaration to the medical examiner that he had never used malt or spirituous liquors to excess.

The defendant produced several witnesses who testified to particular instances from which it was claimed that it might be inferred the insured was accustomed to use intoxicating liquors to excess, and that he

was intemperate in such use. That he did use intoxicating liquors was not denied, but to what extent was a question of fact to be determined from the testimony, for there was testimony on the part of the plaintiff that, while the insured drank intoxicants occasionally, the use was never intemperate. The witnesses on both sides had known the insured for many years, and the jury had before it the facts regarding the conduct of the insured in the use of liquor, from which they could judge whether the use was intemperate or to excess.

The defendant then offered to prove the reputation of the insured in the community where he lived "for being an intemperate user of alcoholic beverages." This, and other questions of like tendency, were rejected, and the ruling is the subject of several assignments of error. We are of opinion that the questions were properly rejected. Reputation as proof of a fact that cannot otherwise be conveniently shown is permitted in certain cases as one of the exceptions to the rule forbidding hearsay testimony, an exception which courts are not inclined to extend.

The testimony in this case was offered, not to affect credibility, but as substantive proof of a fact, viz., that the insured was addicted to the intemperate use of intoxicating liquor contrary to his statement that he was not. Evidence of general reputation is original and not hearsay "so far as it is offered, not to prove the fact reputed to be true, but merely the probability that through the reputation, rumor, or other communication, a party has become aware of a certain fact if it existed." 1 Greenleaf, Ev. § 101. But, in order that an exception to the rule exist, there must be some kind of necessity for its recognition, the usual one being the difficulty of getting better evidence. Such a difficulty cannot be said to exist where the reputation called for depends upon provable facts, or where, as in this case, they are proved in denial of a statement pertinent to plaintiff's case. The issue here is: Did the insured tell the truth when he said that, while he used intoxicants, he did so temperately?

To admit evidence of general reputation on this issue would result in allowing hearsay testimony to be given regarding a material question, the determination of which would settle the issue presented. The plaintiff in error refers to the case of *Neudeck v. Grand Lodge*, 61 Mo. App. 97, and if we could approve the reasoning it would have some bearing on this case. In that case the applicant denied that he had ever been addicted to the intemperate use of intoxicating liquors, or that he did use them either daily or habitually. The trial court refused proof of reputation, and the appellate court in reversing this ruling held that reputation of such character, standing

alone, was not admissible, but, taken in connection with proof of acts which tended to show that the insured was addicted to the intemperate use of liquors, it would possess some slight probative force and therefore become admissible. No cases are cited which support this view.

We are not persuaded that where proof of reputation, standing alone, is inadmissible, it becomes admissible whenever there is proof of facts from which a jury might infer a foundation for the alleged reputation. Proof of the acts of a party is the best evidence of the fact ultimately to be proved, viz., intemperance, and, having that proof, the necessity for resorting to a weaker grade does not exist, and the principal reason for making an exception to the hearsay rule is absent. After a careful examination of the case last cited, we are not convinced that it expresses the true rule which should be applied to the case under review.

We are of opinion that reputation for intemperance is not admissible evidence to contradict a statement, made by an applicant for life insurance, that while he used intoxicating liquors he did so temperately, for it is not offered to affect credibility, but in denial of a fact, pertinent to the issue raised and not difficult to prove, if true, by the acts of the insured, which is the best evidence, and therefore find no error was committed on this branch of the case.

We have examined the other assignments of error and find in them nothing which required a reversal of this judgment, and it is affirmed.

HARRIS v. AMERICAN CASUALTY CO. OF READING, PA.

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§ 424*)—CONSTRUCTION OF POLICY—"COLLISION."

"Collision" means the act of colliding, and imports striking together; violent contact. Both bodies need not be in motion.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 424.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1258, 1259.]

2. INSURANCE (§ 424*)—RISKS—COLLISION—"OBJECTS."

Water and land are "objects," and an automobile which runs into either or both collides with an object or objects.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 424.*]

3. INSURANCE (§ 148*)—CONSTRUCTION OF CONTRACT—CONSTRUCTION IN FAVOR OF ASSURED.

It is a familiar rule that, if a policy of insurance be susceptible of two meanings, that construction is to be adopted which is most favorable to the insured. Conditions and stipu-

lations in such a policy are to be construed most strongly against the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 148.*]

For other definitions, see Words and Phrases, vol. 6, pp. 7875, 7876; vol. 8, pp. 7735.]

4. INSURANCE (§ 424*)—RISKS—COLLISION—UPSET.

A provision in an insurance policy that damages to an automobile resulting from collision due wholly or in part to upsets shall be excluded does not operate to defeat recovery where an automobile ran off a highway bridge, was precipitated into the water below, and landed at the bottom of the stream upside down, the collision not being due to the upset; the upset being rather the result of the collision. When the car ran off the bridge, dynamic force and gravitation determined the position in which it would strike first the water and then the bed of the stream; its final position being merely incidental to collision with the water and the land.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 424.*]

Vredenburg, J., dissenting.

Error to Supreme Court.

Action by Howard G. Harris against the American Casualty Company of Reading, Pa. Judgment for defendant, and plaintiff brings error. Reversed, and venire de novo awarded.

Wilson & Carr, of Camden, for plaintiff in error. John H. Backes, of Trenton, for defendant in error.

WALKER, Ch. The writ of error in this case brings under review the propriety of the direction of a verdict for the defendant in the Atlantic circuit where the issue between the parties was tried before a jury. The plaintiff in error was the owner of an automobile which was being driven by his chauffeur over a bridge on the highway between Atlantic City and Pleasantville. The sides of the bridge were protected by guard rails made of posts and planking. The car crashed through the rail on one side, and was precipitated into the stream below. The machine turned upside down after leaving the bridge, and rested in an inverted position on the bed of the stream. By agreement of counsel, it was stipulated that the liability of the defendant insurance company, if any, was the sum of \$1,200. There were no disputed facts, and the question turned upon the construction of the contract of indemnity by which the plaintiff was insured by the defendant company. The policy was one insuring the plaintiff against loss and expense or both arising from ownership, maintenance, or use of an automobile, with an indorsement on the policy insuring against damage resulting from an automobile collision, which indorsement, so far as pertinent, reads as follows: "In consideration of an additional premium of seventy-five dollars (\$75.00) this policy, subject to all its provisions and conditions, is hereby extended to include loss or damage to any automobile

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(including equipment) enumerated and described in the warranties, resulting solely from collision with any moving or stationary object; (excluding however) * * * (c) damage resulting from collision due wholly or in part to upsets." At the conclusion of the case each side moved for the direction of a verdict; the plaintiff, because the car collided with a moving and a stationary object, namely, the water and the earth under the bridge, and the defendant, because the moving water and stationary earth beneath, with which the machine came in contact, were not moving and stationary objects contemplated in the policy, and because, further, the machine upset, and the company was not, under the terms of the policy, liable for damages caused by an upset. The learned trial judge observed that he was unable to conclude that the damage to the plaintiff's automobile was the result of a collision with a moving or stationary object within the meaning of the policy, and therefore directed a verdict for the defendant; whereupon the plaintiff prayed an exception, which was granted and sealed accordingly.

Counsel for the defendant in error argues that there was no injury occasioned by reason of the collision of the automobile with the guard rail on the bridge, that whatever injury occurred was sustained by immersion and contact with the bed of the stream, and that the plaintiff's counsel at the trial disaffirmed any right of recovery on account of the collision with the guard rail. An inspection of the record does not show that the plaintiff's counsel unequivocally committed himself to that position. True, in arguing against defendant's motion for the direction of a verdict, the plaintiff's counsel remarked that the guard rail was not a factor except so far as it may have retarded the accident, but was not a factor in causing the accident, so that the situation was as though the machine had fallen off an unguarded roadway. Prior, however, to the motion for direction of a verdict, counsel for the plaintiff was asked by the court if he made any claim for damage by reason of the contact or collision with the rail, and he answered there would be some incidental damage that the car in colliding with the rail probably suffered, breaking lamps and so on, but that the question of damage was fixed at \$1,200, and, if they were entitled to anything, it was \$1,200, so he did not think it necessary to prove damages in any way. This was consistent with the declaration which counts for an injury occasioned by the automobile being brought into collision with the guard rail of the bridge as well as by collision with a certain moving object, namely, the water of the stream below, and a certain stationary object, namely, the bed of the stream below the water. It might well be decided upon this state of facts that the

collision with the guard rail occasioned at least nominal damages, and that as the parties had stipulated that, if there were damages, they should be assessed at \$1,200, the judgment should be reversed and a *venire de novo* awarded; but this question is not decided, as the same result is reached upon other grounds, which will shortly be stated.

[2] As there could have been no collision without the presence of an object with which to collide, we will first consider whether the water of the stream and the earth beneath it were objects within the meaning of the policy. The Standard Dictionary defines "object" as "anything which comes within the cognizance or scrutiny of the senses; especially anything tangible or visible. * * * Anything, whether concrete or abstract, real or imaginary, that may be perceived or apprehended by the mind; that of which the understanding has knowledge." Water and land, therefore, are objects—physical objects. They are not abstract or imaginary, but tangible, visible, concrete, and real, and may be perceived and apprehended by the mind. The understanding has knowledge of them.

[1] "Collision" means the act of colliding; a striking together; violent contact. See Standard Dictionary. The Supreme Court of the United States in *London Assurance Co. v. Companhia De Moagens Do Barreiro*, 167 U. S. 149, at page 155, 17 Sup. Ct. 785, at page 787, 42 L. Ed. 112, at page 119, speaking to the subject of collision in admiralty law, said: "As to the first, we think that the vessel was 'in collision' within the meaning of the language used in the certificate which represented and took the place of the policy. It was not necessary that the vessel should itself be in motion at the time of the collision. If while anchored in the harbor a vessel is run into by another vessel, it would certainly be said that the two vessels had been in collision, although one was at anchorage and the other was in motion. * * * It is impossible, as we think, to give a certain and definite meaning to the words 'in collision,' or to so limit their meaning as to plainly describe in advance that which shall and that which shall not amount to a collision, within the meaning of this policy." Equally so with reference to any other form of policy. Just as certainly so with reference to an automobile insurance policy. Both bodies need not be in motion; but, if both had to be moving in order that there be a collision ordinarily, it would not be so in this case, for, by the very terms of the policy sued on, the plaintiff is entitled to recover damages resulting solely from collision with any moving or stationary object. Therefore he is entitled to damages (stipulated as to amount), unless within the meaning of the policy the moving or stationary object must be perpendicular, instead of horizontal. There are no words in

the policy which limit the meaning of the object to a perpendicular one.

Suppose a person driving an automobile along a road comes to a place where a highway bridge over a chasm had fallen away, and the machine be precipitated to the ground below, can it be said that there could be no recovery under such a policy as is here sued on because the damage to the machine was caused by collision with the flat earth, instead of some upright or perpendicular object on the earth? We think not. To hold that there could be no recovery under such circumstances would be to misconstrue terms of a contract concerning which there is no room for construction, because the meaning is perfectly plain. Again, suppose an automobile ran off a bridge over a stream, and one of the rear wheels caught on an upright, and the car hung suspended in the water, and was considerably damaged by the flow of the water, can it be asserted that no compensation could be recovered for that damage under the terms of a policy such as sued on, because, forsooth, the car did not collide with a moving object? Water is certainly an "object," and it "moves," and the policy undertakes to insure against damage occasioned by collision with a moving object. The liability it seems would be within the express terms of the policy.

[3] But, assuming that there is such ambiguity in the terms of the policy, that would make it at least doubtful as to whether collision with water and land, horizontal objects, was within the terms of the policy, still it is a familiar rule that the words used in a policy of insurance should be interpreted most strongly against the insurer where the policy is so framed as to leave room for two constructions. *Liverpool, etc., Ins. Co. v. Kearney*, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460. Therefore, if there be any doubt as to whether moving water or the surface of the land under it, being horizontal objects, are within the terms of the policy, which doubt is not conceded to exist, still the law governing the construction of the sort of contract under consideration comes in aid of the plaintiff's contention, and makes the defendant's liability plain.

[4] It remains only to discuss the question of "upset"; defendant's counsel contending that, damages due to that cause not being recoverable within the terms of the policy, the direction of a verdict for defendant was right. It is true that it is provided in the indorsement insuring against damage resulting from collision that "damage resulting from collision due wholly or in part to upsets" shall be excluded. But it cannot be said that the collision of the plaintiff's automobile with the water and land under the water was caused by an upset. It may be

that the car upset by reason of contact with the water or the earth, but the collision was not due to an upset—the upset may have been the result of the collision. The provision in the policy cannot mean that, where collision has first taken place, there can be no recovery because, as the result of the collision, the machine is upset. When the car ran off the bridge, dynamic force and gravitation determined the position in which it would strike first the water and then the bed of the stream. Its final position was merely incidental to the collision.

The above views lead to a reversal of the judgment of the circuit court and to the award of a venire de novo.

VREDENBURGH, J., dissents.

MORSE v. CONLEY.

(Supreme Court of New Jersey. Nov. 18, 1912.)

(Syllabus by the Court.)

BROKERS (§ 75*)—COMPENSATION—"CONSUMMATION" OF SALE.

Where the contract between the purchaser and seller of real estate contained a provision fixing the compensation of the agent who procured the purchaser, and also fixing the period of payment of such compensation as the time "of the consummation" of the sale, *held*, in an action by the agent to recover his commissions, that the consummation of the sale contemplated by the parties was the passing of the title, and that the agent's compensation under the contract was contingent upon that.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 75.*

For other definitions, see *Words and Phrases*, vol. 2, p. 1482.]

Appeal from District Court of Newark.

Action by Myron W. Morse against Grace G. Conley. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Jay Ten Eyck, of Newark, for appellant. Gifford & Miller, of Newark, for appellee.

MINTURN, J. On April 14, 1904, the plaintiff, a real estate agent in Newark, and defendant entered into a written contract for the sale of certain real estate, the property of defendant, in that city at the figure of \$30,000. On July 13, 1911, in pursuance of the plaintiff's negotiations, the defendant entered into a written contract of sale of the premises with one Victor F. Struck for \$20,000, on account of which price Struck paid \$500 to defendant; the remainder of the purchase price to be paid on the day of passing title by another cash installment, and the execution and delivery of a bond and mortgage for the balance. The agreement contained in its final paragraph this provision relative to the plaintiff's services, "And Mrs.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

E. V. Conley agrees to pay to Myron W. Morse a commission of two and a half per cent. for services in the matter of the consummation of the sale at the time of the consummation of the same." The proposed purchaser, Struck, was unable, by reason of financial inability, to conclude the sale and consummate the transaction in accordance with his contract, and the defendant still remains the owner of the property. The plaintiff brought this suit to recover his commissions upon the theory that he had performed his part of the contract, and that the defendant had not shown that she had performed her part by attempting to compel Struck to perform his. The trial court gave judgment for defendant. It is clear that the second contract was intended to take the place of the first between these parties as a practical concrete business proposition defining their respective rights in view of the fact that, after an interim of seven years between the execution of the two documents, a new condition had arisen which brought forth a bidder for the property, and the reduction of the consideration of sale from \$30,000 to \$20,000, and the fixing of the plaintiff's compensation at the old rate, but upon new conditions. The trial court properly viewed the contract as a substitute for the earlier agreement. *Crowley v. Myers*, 69 N. J. Law, 245, 55 Atl. 305. The question as to the plaintiff's right to maintain a claim for commissions under a contract to which he was not a party was determined by this court in the affirmation in *Tapecott v. McVey*, 81 Atl. 348. The principle is familiar that the plaintiff becomes entitled to his commissions upon procuring a person able and willing to purchase. *Ryer v. Turkel*, 75 N. J. Law, 677, 70 Atl. 68.

In the case at bar the person procured as a purchaser was apparently willing, but under the testimony unable, to purchase, so that one of the essentials to compliance with the terms of the contract under the legal rule imposing liability upon the owner was here manifestly lacking. In addition to that barrier to recovery, the plaintiff, who drew the contract in question, limited his right to the payment of commissions to the period "of the consummation of the sale at the time of the consummation of the same." The contract in question was entered into by the proposed buyer and seller, and the plaintiff was not a party to it. In construing its language, therefore, we have to apply to it a meaning such as the parties to the contract intended giving to it, and for that purpose we find it unnecessary to invoke testimony or evidence aliunde the writing. Their meaning of the period of consummation is specified and defined in the contract itself, and we are not left to conjecture regarding it. Manifestly as to them, the only parties to the contract, its consummation was fixed as the time when the balance of the purchase money

would be paid, a bond and mortgage delivered, and a deed of conveyance executed and delivered to the purchaser. After stating this consummation of the contract, the provision regarding plaintiff's compensation concludes the agreement, and must be read and construed in the light of the entire document and the transaction in contemplation between the parties, which was the passing of the title. The plaintiff, having thus fixed the period of payment, is bound by his agreement.

The case of *Hinds v. Henry*, 36 N. J. Law, 328, settled the rule in this state, and upon that adjudication has afforded the ratio decidendi of all subsequent adjudications in this state dealing with the subject that a broker may by special agreement with his principal, so contract as to make his compensation dependent on a contingency which his efforts cannot control, even though it relates to the acts of his principal. *Dresser v. Gilbert*, 81 N. J. Law, 358, 79 Atl. 1044; *Rauchwanger v. Katzin*, 82 Atl. 510.

The judgment will be affirmed.

CURLEY et al. v. MAYOR AND ALDERMEN OF JERSEY CITY.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(*Syllabus by the Court.*)

EVIDENCE (§ 142*)—RELEVANCY—VALUE—AMOUNT PAID FOR OTHER PROPERTY.

In the trial of an issue before a jury to determine the amount to be paid for lands condemned by a municipality for park purposes, evidence is admissible of the price paid by such municipality at private purchase without condemnation proceedings for other lands to become part of the same park, where such other lands are substantially similar to the land in question, and it does not appear that there was any special circumstance, not applicable to the latter, which made the price paid for the former abnormal. The mere fact that the municipality, making such purchase at private sale, had the power of condemnation is not such a special circumstance.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 416-423; Dec. Dig. § 142.*]

Walker, Ch., and Garrison, J., dissenting.

Error to Circuit Court, Hudson County.

Appeal by Michael J. Curley and others from the award of commissioners in condemnation proceedings by the Mayor and Aldermen of Jersey City. Judgment for the condemnors, and the landowners bring error. Affirmed.

Collins & Corbin, of Jersey City, for plaintiffs in error. James J. Murphy, of Jersey City, for defendants in error.

WHITE, J. The defendant in error (hereinafter called the city) brought condemnation proceedings against the plaintiff in error (hereinafter called the landowners), owner and mortgagee respectively of lands condemn-

ed by the city for park purposes in Jersey City. The landowners appealed from the award of the commissioners, and an issue was formed as to what amount should be paid to the landowners, which issue was tried in the Hudson county circuit court before a jury. The trial court admitted evidence of the price paid by the city at private sale to it, without condemnation proceedings being instituted, for two properties immediately adjoining the property in question, and admittedly substantially similar to it, which the city had purchased to become a part of the same park. It is contended, on the part of the landowners, that this evidence was inadmissible, not because of dissimilarity, but because the purchaser (the city) had the power to condemn the lands purchased if the owner had refused to sell them at the price in question. It is argued that because of this circumstance the sale was, in a sense, a forced sale, or at least that the price was the result of a compromise, and is not therefore evidence of fair market value. This contention is the only point involved in the case.

In condemnation proceedings the landowner is entitled to receive, and the party condemning is bound to pay, the fair market value of the property. That fair market value is what a willing purchaser would pay and a willing seller would take for the property under circumstances reasonably calculated to produce a fair sale. In order to ascertain what would be such a fair market value, evidence of the price at which sales have taken place by willing sellers to willing purchasers, under such circumstances, of properties of substantial similarity in the neighborhood, and of recent occurrence, is admissible. This is so because such sales are supposed to have been made at the fair market value. Substantially this is true, and, from a practical standpoint, the result is as satisfactory as is possible with reference to anything of such a shifting and uncertain nature as market value of real estate. Almost all sales, however, are necessarily influenced on one side or the other by considerations outside of the fair market value of the property. Either the seller is influenced by the circumstances of his affairs, which make it desirable for him to sell even at some sacrifice, or else he thinks he is getting more for his property than its real worth; and, on the other hand, the purchaser has some special need or use for the property which makes it more valuable to him than to others not having such need, or else he thinks he is buying at less than the property is really worth. If the sale, as here, takes place between parties, one of whom has the power to condemn, it may likewise be that the seller or the buyer, and possibly both, are influenced by other considerations as well as by what they think is the fair market value of the property. The seller may think that if he does not sell amicably he will be put to the expense of being properly

represented at the condemnation proceedings; but, on the other hand, he doubtless weighs against this the fact that a jury is very apt to give a liberal market value for properties taken under condemnation for the very reason that the owner is being compelled to sell against his will. The purchaser, on the other hand, knowing that what the law requires him to pay is at least a fair value, and knowing that a jury is inclined to construe this as meaning a value particularly "fair" to the man who sells against his will, may also be somewhat influenced. But, in the absence of extraordinary circumstances, we are unable to see, as a general rule, why private sales to parties having the right to condemn do not come quite as near representing in their results true market value as do such sales made between parties, neither of whom have this power. It is easy enough to imagine special circumstances, falling in each class, where the result in the price obtained is, because of such special circumstances, so clearly abnormal as to destroy the similarity which must exist in order that the evidence shall be admissible. In other cases where the special circumstances are not of sufficient importance to produce this result, they may nevertheless affect the weight of the evidence, and be used for that purpose before a jury. This is so whether the purchaser is or is not a party having the power to condemn.

In *Hadley v. Freeholders of Passaic County*, 73 N. J. Law, 187, 62 Atl. 1132, certain property was condemned by the board of freeholders for the purpose of constructing thereon the approach to a bridge over the river. Evidence was admitted of the price which the same board of freeholders had, at private purchase, paid for the property on the other side of the river for the other approach. The Supreme Court, in an opinion by Chief Justice Gummere, said in that case: "The first error assigned is to the admission of the testimony of one Zabriskie as to the price which he received from the board of freeholders of Bergen county for land directly across the river from Mrs. Hadley's, and upon which the other abutment of the bridge apparently was to rest. This testimony seems to us to have been competent." In the present case, not only does it not appear that the condemnation power had any undue influence in fixing the price at which the sales in question were made, but, on the contrary, it affirmatively appears that, as to one of these sales, it was made at the asking price of the seller, and was not therefore either a compromise or the result of any oppressive influence. Under these circumstances, we think the evidence was properly admitted.

The judgment under review should be affirmed.

WALKER, Ch., and GARRISON, J., dissent.

ELMENDORF et al. v. AMERICAN COMBUSTION CO. et al.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

COURTS. (§ 19*)—JURISDICTION—PERSONAL RIGHTS.

The owner of a patent, a New Jersey corporation, licensed one of the defendants to manufacture the patented device. He assigned the license to a New York corporation. Stockholders of the New Jersey corporation filed a bill to set aside the license as fraudulent. No notice was served upon the licensee or his assignee, the New York corporation, and neither was amenable to process of New Jersey. *Held*, that the subject-matter of the suit was the right claimed by the New York corporation and questioned by the complainants, and that this right had no situs in New Jersey which would sustain the bill as a proceeding in rem.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 47-52; Dec. Dig. § 19.*]

Appeal from Court of Chancery.

Bill by John E. Elmendorf and others against the American Combustion Company and others. From an order denying a preliminary injunction complainants appeal. Affirmed.

The American Combustion Company owned certain patent rights, and licensed the defendant Lucas to manufacture the patented devices. Lucas assigned to the defendant the Anthony Company, a New York corporation. The charge of the bill is that the transaction was fraudulent to the injury of the stockholders of the American Combustion Company, who are the present complainants, that the American Combustion Company was substantially controlled by the defendants, and that the directors have refused to comply with the request of the complainants to institute actions to set aside the license. The American Combustion Company alone appeared. No notice was served upon the Anthony Company or Lucas within this state, and neither is amenable to our process. The Vice Chancellor thereupon denied a preliminary injunction.

Vredenburg, Wall & Carey, of Jersey City, for appellants. George W. Flaacke, of Jersey City, and John S. Parker, of New York City, for respondents.

SWAYZE, J. (after stating the facts as above). The contention of the appellants is that the suit is a proceeding in rem. They disclaim the idea that the license or even the letters patent are a res within this state, and insist that the rights secured under the letters patent are the res over which the court has jurisdiction. The owner, they argue, is the New Jersey Company. Since the license agreement did not transfer the ownership of the patent, the situs is the domicile of the owner. This argument, however, confuses the patent right with the right under

the license, which is in derogation of the exclusive right of the patentee, and is in fact so much subtracted from that right. It is begging the question to say that the license agreement did not transfer the ownership of the patent. It transferred at any rate a right under the patent by way of license, and whether or not that transfer is valid is the question to be decided. Jurisdiction to decide that question cannot be predicated upon the assumption of the very point in issue—the validity or invalidity of the license.

The subject-matter of this suit is the right claimed by the Anthony Company, and questioned by the complainant. Unless that subject-matter is within the jurisdiction of this court, the learned Vice Chancellor was right in denying the injunction. A patent right is not a right to manufacture the patented article. Any one may do that in the absence of the patent. The right is to prevent others from manufacturing. The effect of a license is merely to permit the manufacture of what would otherwise be subject to restraint at the suit of the patentee. It is in effect an agreement exempting the licensee from liability for infringement, a privilege which he may set up in defense in an action against him for infringement by the owner of the patent. Assuming that it has a situs in any proper sense of the word, that situs must be at the domicile of the owner of the privilege who alone can avail himself of it, and can have no occasion to do so until he is sued for infringement. The situs cannot be at the domicile of the owner of the patent, for it is an interest adverse to his, and comes into play only when he asserts an exclusive right under the patent. It might as well be argued that a right to manufacture the patented article in England, when it is patented only in the United States, had a situs here, and that the right of the English manufacturer could be determined in his absence by a suit against the American patentee.

The assumption that the right of the patentee has a situs is moreover unwarranted. The right is granted by the federal government and is as broad as its jurisdiction. It exists in California and Alaska as well as in New Jersey, and has no situs in any particular state. Upon this subject the decisions of the federal courts must be followed. In *Stevens v. Gladding*, 17 How. 447, 15 L. Ed. 155, the court held in a copyright case that there was nothing in any act of Congress or in the nature of the rights themselves to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of states and districts. The same reasoning applies to patent rights, as the Supreme Court of Massachusetts held in *Carver v. Peck*, 131 Mass. 291. In *Jewett v. Atwood Suspender Co.* (C. C.) 100 Fed. 647, a judge of an insolvency court in Vermont had assigned a patent

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

belonging to the insolvent debtor; the complainant claiming title under that assignment sued for infringement and the defendant pleaded want of title to the patent in the complainant. The court said: "Patents can be reached under the bankrupt law because they are wholly subject to the laws of the United States. They cannot be reached otherwise for debts except by proceedings which compel a personal assignment." In *Wilson v. Martin-Wilson Automatic Fire Alarm Co.*, 151 Mass. 515, 24 N. E. 784, 8 L. R. A. 309, the Massachusetts court sustained an assignment by a court officer of a patent belonging to a debtor under statutory proceedings for that purpose, but they rested the power upon the personal jurisdiction of the debtor. The court said: "A patent right is not like a material substance. So far as it has location at all, it is within every part of the United States. But it has no such location anywhere that a particular state can say this property is within my jurisdiction. I will not allow any other state to deal with it, but I will control it by my own laws for the benefit of my own people." In the recent case of *P. H. & F. M. Roots Co. v. Decker*, 111 Minn. 458, 127 N. W. 417, the Minnesota court had to deal with the validity of an assignment from the patentee to his wife, both of whom were residents of Missouri. The attempt of counsel was to sustain the jurisdiction by reason of the fact that a Minnesota corporation was manufacturing the patented article and paying a royalty for the privilege. The court said: "The validity of the transfer of the letters patent from Decker to his wife is therefore the first essential question to be determined in the action. The government grants to an inventor the exclusive privilege of manufacturing and selling a certain named article. It is an incorporeal right, franchise, or privilege attached to the person, protected by law as a property right, but having no situs separate from the individual who possesses it. This right may be transferred, in which case the assignee occupies the position of the patentee; but the character of the privilege remains the same. It follows that, before the court can deprive an individual of this privilege, it must have complete jurisdiction of him personally. No statute could eliminate this requisite; for, to permit a court in the absence of jurisdiction over defendant, personally, to determine his personal privileges, would not constitute due process, but would deprive one of property without notice or hearing." "An action to determine the ownership of letters patent is strictly in personam, jurisdiction to determine which must be obtained by personal service of process upon the defendant within the territorial limits of the court's jurisdiction." The case of *Hildreth v. Thibodeau*, 186 Mass. 83, 71 N. E. 111, 104 Am. St. Rep. 560, is very similar to the case at bar. The title of the nonresident

defendant to the letters patent was assailed as fraudulent. The jurisdiction of the Massachusetts court was sought to be sustained on the ground that the proceeding was in rem. The court, however, held: "To give jurisdiction over this patent, it would be necessary to show that the title of Duff & Kitzmiller is fraudulent as against the plaintiff, or is subject to equities in his favor which give him a right to control the patent. Such proof is a condition precedent to the proper exercise by the court of any jurisdiction over the patent. To a suit to determine a question of this kind the owners of record are necessary parties. Jurisdiction over them which will authorize a trial of the question must be obtained before a court can deal directly with the patent as property."

The utmost claim that can be made under these cases is that our courts having jurisdiction of the New Jersey corporation can determine as against it the title to the patent and compel its assignment; but that is very different from determining in its favor the question of title without personal jurisdiction of the adverse claimant. The last two cases above cited are authority for the position that it cannot be done. Where there are adverse claims to the title, and the situs depends upon the fiction that movables follow the person, the very question to be determined is who is the owner whose ownership draws to it the situs. If in the present case our courts have jurisdiction because one claimant of the patent right is domiciled here, the courts of New York would have jurisdiction if an adverse claimant was domiciled there. The existence of the claim does not determine the situs in any event. It can only be the rightfulness of the claim, and that rightfulness is the very point to be determined.

In *Amparo Mining Co. v. Fidelity Trust Co.*, 75 N. J. Eq. 555, 73 Atl. 249, we held that, so far as such intangible rights could be said to have a situs, it must be where they could be effectually dealt with. The right to be dealt with in the present case is a right of defense, and not a right of action. The defendant, the Anthony Company, would never need to bring a suit against the American Combustion Company upon the license. That license is of moment when the owner of the patent asserts a right to enjoin the licensee; but the right of injunction can only be effectually dealt with in a jurisdiction where the licensee is subject to process and the method of dealing effectively with the license is by plea in defense of the action and by replication thereto averring its invalidity. If the courts of the domicile of the owner of the patent have jurisdiction in the absence of personal service upon one licensee they have jurisdiction over all licensees, no matter how numerous, and thus by virtue of the same *res* have jurisdiction over licensees claiming under entirely distinct rights. This cannot be.

We think the Vice Chancellor was right in denying the injunction. The order is affirmed, with costs. It is unnecessary to decide what decree may be made against the American Combustion Company, since the injunction sought was against the nonresident defendants.

THOMSON v. CENTRAL PASSENGER RY. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1912.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 428*)—REPRESENTATION BY OFFICERS—NOTICE.

A corporation is not chargeable with information casually obtained by a director, when he is not officially engaged for the corporation, from the mere fact of the director's knowledge.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.*]

2. CORPORATIONS (§ 428*)—REPRESENTATION BY OFFICERS—NOTICE.

The president of the defendant company without authority from it entered into an agreement in the name of the company with Jordan, which agreement was assigned to the plaintiff, for the delivery of a certain amount of bonds of the company, or a sum of money in case of the nondelivery of the bonds, in consideration of the bringing about of the settlement of certain legal proceedings pending against said company. There were six directors besides the president. The only evidence offered to prove knowledge on the part of the company was that the president showed it to one director before execution who objected to it, and that the plaintiff's attorney, meeting another director, casually referred to the agreement. *Held*, that this was insufficient to charge the defendant with such knowledge as to impute a ratification of, or acquiescence in, this agreement, and that the direction of a verdict for the defendant was proper.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.*]

Walker, Ch., and Minturn and White, JJ., dissenting.

Error to Circuit Court, Atlantic County.

Action by William R. Thomson against the Central Passenger Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 80 N. J. Law, 328, 78 Atl. 152.

Gilbert Collins, of Jersey City, for plaintiff in error. Thompson & Smathers, of Atlantic City, for defendant in error.

TREACY, J. The suit is based upon a writing purporting to be an agreement of the defendant by which it agreed with one Jordan, in consideration of his procuring the dismissal of certain suits then pending against it, to pay to Jordan or his assigns the sum of \$10,000 in the first-mortgage bonds of the defendant company immediately upon the issue of said bonds, and to pay to said Jordan or his assigns said sum of \$10,000 within one year from date in the

event the bonds should not be created and issued as aforesaid. Jordan assigned the agreement to one Swigard, who, in turn, assigned to the plaintiff herein. The court below directed a verdict for the defendant on the ground that the agreement, which is the foundation of the suit, is not the agreement of the defendant by direct authorization or ratification thereof. The defendant obtained a franchise to lay a railway track along Virginia avenue, in Atlantic City. Two owners of property abutting on said avenue, as well as the People's Traction Company, another street railway company in Atlantic City, brought various suits and proceedings against it in the courts of law and equity in this state, and had succeeded in tying up the proposed improvement by restraining orders. In this posture of affairs the agreement sued upon was entered into. It was signed by the president and secretary, and had the corporate seal attached. The case was in this court before (80 N. J. Law, 330, 78 Atl. 152), and it was held that a verdict for the defendant should have been directed on the ground that "the undisputed evidence shows that the agreement is not the agreement of the company either by direct authorization or by any ratification thereof." Justice Garrison writing the opinion, said: "The agreement that was the basis of the action was of a peculiar character, and not in the ordinary course of the defendant's business. * * * Obviously such an agreement, in order to bind the corporation, must be its act either by its corporate action or by its ratification or acquiescence or because made by its authorized agent. In point of fact the agreement was made by the president in the name of the corporation, but without its authority or the knowledge of its other directors."

[1, 2] In order to meet this criticism, the plaintiff upon the new trial of the case attempted to show knowledge of the agreement on the part of the directors of defendant upon the theory, apparently, that such knowledge would have presented a case for the jury on the question of ratification or acquiescence. The testimony of two of the witnesses at the former trial was read by consent. The remaining testimony from which it is attempted to prove knowledge of the agreement on the part of the directors was that of the attorney for the plaintiff who testified that he met one of the directors (Lowrey) after the agreement, he could not remember where, and "referred to the contract, and told him we expected to get our settlement at the end of the year, and he said to me, 'I hope you will,'" and the testimony of the defendant's president, who said that, before delivering the agreement, he brought it to Kuehnle, a director, who angrily objected to it, and refused to have anything to do with it. There were seven

directors of the company. It does not appear that three of them ever knew of the agreement, while another, the secretary, who attested the signature of the president did so as a mere formality without knowing what the agreement contained, a fifth objected to the execution of it and refused to have anything to do with it, while the only information which the sixth and only other director besides the president appears to have had was a casual remark made by the attorney for the plaintiff to him on the street or elsewhere. This evidence did not prove knowledge of the transaction upon which a ratification of, or acquiescence in, an unauthorized act of an officer can be imputed to a corporation. The remark made by plaintiff's attorney to Lowrey, who does not appear to have been active in the business of the company, and who was one of a number of directors, was not notice to an officer in the course of his duties. He might not have given the matter any further thought; he might have thought it referred to a matter which had been regularly acted upon by the other directors in his absence. The information was not communicated by him to the other members of the board.

The judgment will be affirmed.

WALKER, Ch., and MINTURN and WHITE, JJ., dissenting.

MACBRIDE v. ROGERS.

(Supreme Court of New Jersey. Nov. 18, 1912.)

1. BROKERS (§ 63*)—COMMISSIONS—REAL ESTATE.

One who agreed in writing to pay a commission for securing a buyer for his land cannot escape paying by the mere fact that he had conveyed the land before the broker procured a customer.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79, 81, 94, 96; Dec. Dig. § 63.*]

2. APPEAL AND ERROR (§ 1011*)—CONFLICTING EVIDENCE—VERDICT.

Where the evidence is conflicting, the trial court is the proper judge of the weight thereof.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from District Court of Hoboken. Action by John MacBride against Peter F. Rogers. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

August W. Rosinger, of Newark, for appellant. G. Rowland Munroe, of Newark, for appellee.

MINTURN, J. In reply to an inquiry by the plaintiff, a real estate agent, the de-

fendant indicted the following reply: "Kearny, N. J., Jan'y. 27, 1910. Mr. John MacBride, 95 Roseville Avenue, Newark, N. J.—Dear Sir: Replying to your note, of 17th relating to property at 557 and 559 Orange street, Newark, N. J., would state that I am prepared to receive an offer for same and if satisfactory would sell. If you secure a purchaser at a price which I consider proper, I will allow the usual commission of 2½ per cent. Very respectfully, Peter F. Rogers." Thereafter the plaintiff procured a purchaser for the property at the price of \$12,000, which was the figure agreed upon between plaintiff and defendant; but the defendant declined to accept the purchaser, upon the ground that he (the defendant) had sold the property two weeks prior thereto for practically the same figure, and upon the same terms. The plaintiff instituted this suit to recover the commissions due by reason of his proposed sale, and the District Court rendered judgment in his favor. To reach that conclusion the court must have found the facts substantially as detailed by the plaintiff, and as herein narrated; and we are concluded by that finding, where there is testimony to support it.

[1] The oral testimony was of a conflicting character, but in essentials the plaintiff's case was that of an agent who, upon written authorization by the owner, had procured a purchaser able and willing to purchase upon the terms proposed, so that, upon the well-settled rule governing such a status, the plaintiff became entitled to his compensation. *Hinds v. Henry*, 36 N. J. Law, 328; *Ryer v. Turkel*, 75 N. J. Law, 677, 70 Atl. 68.

In other respects the facts presented in this case are in essence similar to those presented in *Payne v. Twitchell*, 81 N. J. Law, 193, 81 Atl. 350, where this court sustained a judgment in favor of the agent, and held that one who has agreed in writing to pay another commission for securing a buyer for his land cannot escape paying the agreed compensation by the mere fact that he had conveyed the land, before the commission was earned. To the same effect is *Dresser v. Gilbert*, 81 N. J. Law, 358, 79 Atl. 1043.

[2] In so far as it is attempted to differentiate the two cases upon the facts alleged to be wanting in this case, it must suffice to say that the trial court, upon what it considered sufficient testimony, found that the necessary facts existed in the proof; and we are not called upon to weigh the sufficiency of that proof.

Our examination of the other questions raised during the trial of the case has led us to conclude that upon the whole the judgment should be affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

DUNPHREY v. FARR & BAILEY MFG. CO.
(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 221*)—ASSUMPTION OF RISK—INJURY TO EMPLOYÉ.

Where a carpenter using a small circular saw told his employer's foreman that it "needed setting, he could do nothing with it," and the foreman said, "Well, get some one to set it for you (which he did), and we will go over all the saws on Saturday," this complaint and promise so obviously had reference to the work to be turned out by the saw, and not to an increased danger to the carpenter using it, which clearly was not contemplated by either of them, that no alteration of the assumption of risk rule resulted therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-640, 644-647; Dec. Dig. § 221.*]

Swayze, Trenchard, Minturn, Kalisch, and Bogert, JJ., dissenting.

Error to Supreme Court.

Action by Benjamin F. Dunphrey against the Farr & Bailey Manufacturing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

William J. Kraft and Howard Carrow, of Camden, for plaintiff in error. Lewis Starr, of Camden, for defendant in error.

WHITE, J. This is a writ of error to review the judgment of nonsuit entered by the Supreme Court in the Camden circuit.

The plaintiff, a carpenter, 62 years old, in the employ of defendant, was using a tool known as a circular saw, which was operated by steam power on a shaft located below the surface of a table, so that the top of the saw extended up about four inches through a small slit in the top of the table, and so that, by laying a board upon the table and pushing it against the saw while it revolved, the board could be sawed as desired by the plaintiff then engaged in making boxes and frames for certain concrete work in the defendant's factory. The work the plaintiff was doing was such as he was accustomed to do, and the tool he was using, the circular saw, was a kind of tool which he had been well accustomed to use in his trade. At the time the accident happened the plaintiff was sawing a board about three feet long with this circular saw, and was feeding the board to the saw, pushing it from him with his right hand, and holding it down on the table with his left hand, when it flew up at the end furthest from him by reason, as he says, of the far edge of the saw, where it comes up through the slit in the top of the table, binding in the cleft which the saw had made in sawing the board, and causing the board to fly up, so that the plaintiff, in an effort to hold it down and prevent its coming up in his face, brought his left hand in contact with the revolving saw, which cut off two fingers and the thumb of his left hand. The plain-

tiff was, and had been, using this saw frequently, as he did his other tools, and he was obviously in a better position to observe the condition of the tools with which he was working than any one else. There were a number of other saws hanging above the table before him for him to select from and put on the shaft in place of the saw in use should it become desirable for any reason for him to change it.

This being the situation, it is urged that the defendant became liable for this injury because of a notice given by the plaintiff to defendant's foreman that the saw was in bad condition and a promise by such foreman to have it fixed, accompanied by a direction to the plaintiff to continue using it in the meantime. The evidence to support this contention was given by the plaintiff himself, and is as follows: "Well, Mr. Tucker and I was running the saw and ripping out some strips, and I started a strip and the saw commenced to bind, and Billy, the foreman—I never heard his last name—he came in and I said, 'Billy, I can't use that saw. I think, if the saw was set, it would have more opening to clear the wood.' He said: 'Get somebody to set it for you, and I will have the saws fixed up Saturday afternoon.' So Mr. Tucker took the saw off and Mr. Diehl set it for me." This was on Thursday, and the accident happened on the Saturday morning following. Again, on cross-examination, the plaintiff testified that he said to the foreman: "Billy, I can do nothing with this saw. It ought to be set, so as to give more opening to clear the wood." And the foreman answered: "Well, get somebody to set it." And again, on redirect examination: "Q. When you talked to the foreman, Billy, that you spoke of, what was it you said to him, what did you complain of? A. That saw binding. Q. And was there anything said why it was binding by either of you at that time? A. At that time I told him I thought it ought to be set, it would cut easier. Q. What did he say to that? A. He told me to get somebody to set it for me if I didn't want to do it, and Frank Diehl came in and set it. Q. He set it? A. Yes." And, finally, on recross-examination: "Q. I want to know just what complaints you made to Billy, the foreman, about that saw, as to what was the matter? A. Yes; I understand. I said to Billy, 'That saw needs setting,' and Billy said, 'All right, get somebody to set it for you if you don't want to.' And I went out of the shop and Frank Diehl came in. Frank Diehl set the saw for me, and Tucker took it and put in on. Q. Was there anything else said to Billy, the foreman, by you? A. No; only Billy said before he went out he was going to have them fixed up Saturday afternoon when there wasn't very much sawing to be done. Q. Was that after or before the teeth of the saw were set by Diehl? A. That was before."

It is perfectly evident from this testimony

that what the plaintiff had in mind when he complained to the foreman, and what the foreman understood from the complaint (for that is exactly what it said), was not that the saw was out of order in the sense of increasing the personal danger to the person operating it, but that it was not in condition to do the work as rapidly and as efficiently as it should. The complaint was that the saw "needed setting" in order for it to do the proper amount of work in a proper manner. To a carpenter "setting his saw" means with reference to the saw practically the same thing as "sharpening his axe" means to a woodsman with reference to his axe. It not only is not extraordinary or unusual, nor a defective condition in the sense in which that term is customarily used, particularly with reference to danger of personal injury, but it is something of constant occurrence, and is incidental to the use of the tool in its normal condition. It becomes necessary to "set" a saw just as it becomes necessary to "sharpen" an axe, and for the same reason, namely, because it becomes dull through use. All saws have to be "set" frequently if in use, just the same as all axes in use have to be frequently sharpened. The cutting efficiency of a saw results from the fact that its edge is shaped into teeth which when drawn across the article to be sawed cut a cleft out of that article the exact width of the thickness of the saw at its cutting edge. If the teeth of the saw remain in the original plane of the remainder of the body or blade of the saw, the width of the cleft which the saw will cut is exactly the same as the thickness of the blade of the saw. When this is so, obviously the entire blade in revolving or passing through the cleft made by the saw will rub against the sides of that cleft, causing friction, and preventing the saw from doing the work, which friction, of course, will increase as the cleft cuts further into the article. In order to avoid this situation, the teeth of the saw are "set"; that is, every alternate tooth is bent a very little out of the plane of the blade of the saw in one direction, and the other teeth are bent to the same extent in the opposite direction. This forms a wider cutting surface on the edge of the saw, and consequently a wider cleft is cut into the article being sawed so that the body of the blade of the saw will then not be as thick as the cleft is wide, and will not touch its sides. The constant tendency, resulting from use of the saw, however, is to wear and bend the teeth back toward their original plane, and as a result the first bending process, called, "setting," must be repeated from time to time to overcome this tendency.

We think, therefore, from the clearly un-

derstood meaning of the language used in this complaint and promise that it affirmatively appears that neither the servant nor the employer contemplated anything other than the effect upon the quality and quantity of the work to be produced, and that such a thing as a thought of any additional personal danger to the servant is expressly negated by the substance of the complaint. It seems to us the same as if a man employed to chop wood had gone to his employer and said, "This axe is dull. I cannot do anything with it. It needs grinding;" and the employer had said, "Well, whet it up on the whetstone the best you can, and I will have it ground Saturday afternoon." Certainly this complaint and this promise could not, by any possibility, be construed as having reference to anything but the efficiency of the axe in performing the work of cutting the wood.

Mr. Labott deduced from *Tesmer v. Boehm*, 58 Ill. App. 609, and *Chicago Bridge Co. v. Hayes*, 91 Ill. App. 269, the proposition that "the general rule as to the effect of the promise (to repair, etc.) has no application to a case where neither the master nor the servant contemplated any additional danger to the servant in the use of the defective instrument, but only improvement in the work done with it." *Labatt, Mast. & Ser.* § 422, note 8. This principle was applied in *Baile v. Detroit Leather Co.*, 73 Mich. 153, 41 N. W. 216, and also in *International Railway Co. v. Turner*, 3 Tex. Civ. App. 487, 23 S. W. 146. Mr. Justice Parker in the opinion of this court in *Towler v. N. J. Adamant Mfg. Co.*, 79 N. J. Law, 147, 74 Atl. 279, in distinguishing that case from the cases above mentioned, called attention to the fact that in all of those cases it affirmatively appeared from the notification itself that it was given in the interest of the work, and not with reference to a condition of increased personal danger to the servant. We think that in the present case a like purpose of the notification affirmatively appears from the notification itself, and that the learned trial judge properly entered a nonsuit.

No consideration has been given to the question of whether or not the Act of 1909 (P. L. p. 114), entitled "An act to extend and regulate the liability of employers for injury or death to employees in certain cases," might have any bearing, because it appears that the notice, which, by the terms of the act, must be given in order to invoke its application, was not given in this case.

The judgment is affirmed.

SWAYZE, TRENCHARD, MINTURN,
KALISCH, and BOGERT, JJ., dissent.

LESCHZINER et al. v. BAUMAN.

(Court of Errors and Appeals of New Jersey.
Nov. 23, 1912.)

(Syllabus by the Court.)

BROKERS (§ 60*)—COMPENSATION—PERFORMANCE OF CONTRACT.

A contract with real estate brokers for the payment of a commission for the sale of certain real estate, to be paid "on the day of passing title or July 15th," is a contract based upon the contingency of the sale of the property and the passing of title to the purchaser procured by the agents. In the absence of proof of the fulfillment of that contingency, a direction of a verdict for the defendant *held* proper.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 91; Dec. Dig. § 60.*]

Error to Circuit Court, Essex County.

Action by Siegfried Leschziner and others against Henry L. Bauman. Judgment for defendant, and plaintiffs bring error. Affirmed.

Pierce & Hoover, of Newark, for plaintiffs in error. Lum, Tambllyn & Colyer, of Newark, for defendant in error.

MINTURN, J. The contract between the parties to this litigation reads as follows: "I herewith agree to pay to S. Leschziner & Company a commission of \$1,250 on the day of passing title or July 15th, for the sale of the Rudolph, Stella, Caroline and Crescent apartment houses to the Home Coupon Exchange Company. H. C. Bauman."

In directing a verdict for the defendant at the close of the case, the learned trial court said: "The question reduces itself to a simple matter of construction whether this agreement to pay a commission on the day of passing title, or July 15th, for the sale of this property is an agreement conditional on the passing of the title on that day."

The difficulties surmounting the construction of the agreement arise from the fact that the property in question was not sold, but that on the day of the execution of the agreement another agreement for the exchange of properties was entered into between the defendant and the Home Coupon Exchange Company, which ultimately failed of fruition, because that company was unable to furnish a marketable title to the defendant of the premises which it had agreed to exchange. The plaintiffs not having made sale of the premises, and the proposed exchange having failed for valid reasons, the concrete inquiry thus presented is whether, under such circumstances, the plaintiffs are entitled to recover under their agreement.

It will be observed that the agreement is based upon two assumptions as conditions precedent to its enforcement. The first is that title shall pass, and the second that there shall be a sale of the defendant's apartment houses to the Home Coupon Exchange Company. The fact is conceded that title

did not pass, and the record of the case presents no question for us to consider as to the bona fide character of the objections that were urged and resulted in its failure to pass. It is also conceded that there was no sale of the property in the ordinary mercantile sense in which that term is used in such agreements, and according to which we are bound to construe the language of the contract. These being the facts as presented by the record, it is difficult to perceive in what essential respect the case at bar can be differentiated so as to eliminate it from the rule laid down in *Hinds v. Henry*, 36 N. J. Law, 328. In that case Mr. Justice Depue, speaking for the Supreme Court, and reviewing the authorities upon the subject, held the rule to be that "the broker may also, by special agreement with his principal, so contract as to make his compensation dependent on a contingency which his efforts cannot control, even though it relate to the acts of his principal. A contract of that character is binding, and no action can be maintained until the contingency has arisen." The doctrine of that case has provided the rule of conduct and adjudication in this state for nearly 40 years. In varying phases of fact it has been followed or distinguished, as the reason of the rule would seem to warrant; but the underlying principle of the case is based upon the fundamental theory of contractual law that parties may make their contracts to depend upon such conditions and contingencies as to them may seem suitable, and not violative of any legal rule, and that they are binding accordingly in a court of law.

The cases of *Dresser v. Gilbert*, 81 N. J. Law, 358, 79 Atl. 1043, and *Rauchwanger v. Katzin* (Sup.) 82 Atl. 510, in the Supreme Court, are readily distinguishable upon the facts, and in both cases the rule applied in *Hinds v. Henry* was recognized and applied. In the former case the owner agreed to pay the agent when the former's farm was sold, regardless of the procuring agency of sale. The contingency there was the fact of sale, and, that having arisen, quite manifestly the rule became applicable. In the latter case the owner had it in his power, to fix a time for settlement after the agent had undeniably performed his part of the contract, but refused to do so, and *Hinds v. Henry* was invoked to justify his wrongdoing. The court, however, upon the doctrine involved in the maxim, "*Actus legis nemini facit injuriam*" (*Melbourne v. Stewart*, 5 T. R. 381), held that, since it was within the power of the principal to fix the date of settlement, the rule of legal construction which has for its fundamental purpose the ascertainment of the intent of the parties could not be held to assist a wrongdoer in escaping a just liability by reason of his own unreasonable act in refusing to fix a period of settlement

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which the very instrument sued upon contemplated would be fixed by him.

In *Courter v. Lydecker*, 71 N. J. Law, 511, 58 Atl. 1093, Mr. Justice Reed, applying the rule in the Supreme Court, said: "The condition in all such employments is that the broker shall obtain a sale. The broker's right to recover compensation in such cases is dependent upon his obtaining a sale. His right to commissions, by the terms of the present contract, is in express words dependent upon his obtaining a sale."

In *Volker v. Fisk*, 75 N. J. Eq. 498, 72 Atl. 1011, the present Chancellor, construing such an oral agreement, said: "Her [the agent's] commissions could have been earned only upon negotiating a valid, not an invalid, sale."

When it is recalled that the rule laid down in *Hinds v. Henry* contains as one of its essential elements the fact of the ability of the purchaser to conclude the bargain upon the terms of the proposed contract, it becomes at once manifest that the commissions of a broker cannot be considered as earned where, by reason of the inability of the proposed purchaser to conclude the sale by taking title to the premises, the entire transaction fails, and no sale in fact takes place. Such was the posture of affairs in the case at bar; and if the controversy here be determinable upon that ground, resulting from the inability of the proposed purchaser to fulfill his contract, it is difficult to perceive upon what legal theory of liability the plaintiffs can sustain their case.

Upon the other hand, the language of the contract makes it manifest that until title shall have passed as the result of a sale to the proposed purchaser the contingency or condition upon which the legal right to a claim for commissions is based has not arisen, and upon this aspect of the case *Hinds v. Henry* is controlling, and presents the legal rule which justifies the direction at the circuit.

The judgment is affirmed.

OUTWATER v. BENSON et al.

(Court of Chancery of New Jersey. Nov. 21, 1912.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS (§ 469*) — SETTLEMENT OF ACCOUNTS — JURISDICTION IN EQUITY.

"The Court of Chancery should not interfere in the settlement of accounts of executors and administrators if any progress has been made in the cause in the orphans' court, unless some good cause is shown."

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2000-2012, 2013; Dec. Dig. § 469.*]

Bill by Richard Outwater against John O. Benson and Jacob De Lazler. Dismissed.

Francis Scott, of Paterson, for complainant. John O. Benson, of Paterson, for defendants.

LEWIS, V. C. John O. Terhune died on or about the 16th day of April, 1911, leaving a will, dated April 14, 1911, in which, after making certain bequests, he proceeded as follows: "The residue of my estate I give, devise and bequeath to my relatives as the law in such cases provide."

The testator was a bachelor, and his nearest relatives were first cousins and the descendants thereof, and altogether the collateral heirs who are entitled to a share in said estate number not less than 100 persons.

The said will and testament, after contest, was sustained by the Passaic orphans' court, and said executors duly qualified, and are now acting as such, and there is no appeal from the decision of the Passaic orphans' court upon said will.

The complainant sets up that he is a second cousin to the testator, and that he is entitled to a share of the estate, and prays that said clause of said will above quoted may be construed, so that the complainant will be determined to be one of the collateral heirs of the testator and entitled to a portion of his estate, and to the end that a reference be made, whereby it can be ascertained who are the heirs of the testator, and upon what principle the order of distribution can be made, and that this court take jurisdiction in this case for the purpose of doing justice in said matter among all parties legally entitled and concerned.

The complainant further says that the executors are disposed to recognize his claim, but that a number of persons, who are remote relatives of the testator, have sent in claims to said executors, which claims the executors are disposed to pay, but which claimants the complainant denies are entitled to any share of such estate.

The complainant claims his right under the statute of distribution, and particularly under the act of 1899 (P. L. p. 204). He sets forth his relationship to the deceased, and declares under that statute that he is related, and wants a decree of the Court of Chancery to direct the executors to recognize him in the distribution of the estate.

The executors, answering, say that they think he is entitled to a share in the estate under that act. They admit, also, as stated by the bill, that numerous other collateral heirs are claiming under the same act to have a share in said estate. They also state, by way of cross-bill, that they have settled up said estate, are now ready to file their final account, but are in the dark as to who the heirs are, under the provision of the will of the testator.

There is a request, not only by the claim-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ant, but by the defendants, who, in their cross-bill, become complainants, as to how to distribute an estate which they are ready to distribute.

I fail to see any reason why the Court of Chancery should be asked to take jurisdiction in this cause; for it is well established that a court of equity will not interfere with the ordinary jurisdiction of the orphans' court in the settlement of the accounts of executors or administrators, unless for some special cause, if any progress has been made in the orphans' court; and the Court of Chancery cannot be compelled to construe a will, except as incident to some relief which may be afforded by a final decree; nor can it be induced to give counsel and advice to the parties generally.

The masters and examiners of the Court of Chancery are ex officio masters and examiners of the orphans' court, and the orphans' court may refer to a master and examiner any matter upon which it may be necessary to have the report of a master, who performs the same duties as in proceedings in the Court of Chancery.

"Except for some special reason, the Court of Chancery will not interfere with the ordinary jurisdiction of the probate court in the settlement of the accounts of executors and administrators." *Rutherford v. Alyea*, 54 N. J. Eq. 411, 34 Atl. 1078; *Frey v. Demarest*, 16 N. J. Eq. 236.

"Where there are no special reasons for going into equity, the orphans' court is the proper tribunal, and should be selected by all parties for settling the accounts of executors and administrators." *Salter v. Williamson*, 2 N. J. Eq. 480, 35 Am. Dec. 513. See, also, *Clarke v. Johnston*, 10 N. J. Eq. 287; *Hoagland v. Cooper*, 65 N. J. Eq. 407, 56 Atl. 705; *Frey v. Demarest*, 16 N. J. Eq. 236; *Search v. Search*, 27 N. J. Eq. 137; *Baxter v. Baxter*, 43 N. J. Eq. 82, 10 Atl. 814; *Smith v. McDonald*, 69 N. J. Eq. 765, 61 Atl. 453.

The language of the testator in the clause above quoted is clear, and under the orphans' court acts of 1898 (P. L. p. 715) and 1899 (P. L. p. 206) there should be no difficulty in readily ascertaining who are the distributees.

I cannot see that this is a case which calls for the interposition of the Court of Chancery.

For these reasons, I shall advise a decree of dismissal.

STATE v. GALLAGHER.

(Supreme Court of New Jersey. Nov. 21, 1912.)

(Syllabus by the Court.)

1. HOMICIDE (§ 142*) — INDICTMENT — ISSUES AND PROOF.

The offense charged by the allegation in an indictment that the defendant committed an as-

sault upon E. with intent to kill the said E. may be sustained by proving that the assault was made upon E. with the intent to kill G.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 250-259; Dec. Dig. § 142.*]

2. INDICTMENT AND INFORMATION (§ 169*) — ISSUES AND PROOF.

Facts pleaded in an indictment according to their legal effect may be proved by evidence that determines their legal character.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 535; Dec. Dig. § 169.*]

3. CRIMINAL LAW (§ 25*) — ELEMENTS OF OFFENSE — INTENT.

The general principle of the criminal law that the intent with which an act is done determines the legal character of its consequences, although such consequences operate upon a different person from that intended, applies to statutory, as well as to common-law, crimes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 28; Dec. Dig. § 25.*]

4. CRIMINAL LAW (§ 369*) — INDICTMENT — EVIDENCE — ADMISSIBILITY UNDER INDICTMENT.

Upon the trial of the accused for committing an assault upon E. with intent to kill E., proof that his intention was to kill G. is relevant, and not evidence of a distinct offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

Error to Court of Oyer and Terminer, Hudson County.

James J. Gallagher was convicted of assault with intent to kill, and brings error. Affirmed.

Argued June term, 1912, before GUMMERE, C. J., and GARRISON and BERGEN, JJ.

Alexander Simpson, of Jersey City, for plaintiff in error. Pierre P. Garven, of Jersey City, for the State.

GARRISON, J. The plaintiff in error, who was indicted and convicted in the Hudson oyer of committing an assault upon William H. Edwards with intent to kill the said Edwards, has returned the entire record of the proceedings had upon the trial with the writ of error bringing up the bill of exceptions as signed and sealed in the cause as authorized by section 136 of the Criminal Procedure Act (2 Comp. St. 1910, p. 1863).

The first point argued by counsel for the plaintiff in error is that, unless the assault upon Edwards was made in the execution of a specific intent to kill Edwards, the statutory crime (P. L. 1906, p. 430) was not committed. This is presented by error assigned upon exceptions to the charge and to the court's refusal to charge the defendant's requests.

The court charged that if the defendant shot, intending the consequences of his unlawful act, the jury might infer that he intended to kill whoever he struck. The jury was also in effect instructed that they might find the defendant guilty of an assault with intent to kill Edwards if the fact was that he intended to kill some one else. This was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

in response to a question put to the court by the jury.

The court refused to charge a request that: "If the shot which wounded Mr. Edwards was intended for Mayor Gaynor, then the defendant would not be guilty under the first count of the indictment."

The real question in the case is presented by the denial of this request.

[1] The facts to which the jury were to apply the law were that the defendant boarded a steamship lying at a pier in Hoboken, and, after inquiring for Mayor Gaynor, approached him, and, placing a revolver within a few inches of his head, discharged it with effect, a second shot taking effect upon Edwards, who had precipitated himself between them to avert the defendant's attempt upon Mayor Gaynor's life. This wounding of Edwards having been charged in the indictment as an assault upon him with the intent to kill him, the question that has been argued is whether in proving the crime thus charged the state was restricted to proving the existence in the mind of the defendant of a specific intention to kill Edwards to the exclusion of proof of an intent to kill some other person, under the general doctrine of the criminal law that the intention with which an act is done establishes the legal character of its consequences. Concretely the question is: Was the defendant guilty as charged if the shot that wounded Edwards was intended to kill Mayor Gaynor? The question is squarely raised by defendant's counsel, and is as squarely decided in his favor by the cases he has cited from other jurisdictions which are collected in 26 Century Digest, § 112, title "Homicide."

An examination of these decisions fails to satisfy us of the soundness of their reasoning, where reasoning is resorted to, which is not always the case. They fail to recognize the fundamental character of the general principle of the criminal law to which allusion had been made. That principle is that the intent with which a criminal act is done determines the legal character of its consequences. This doctrine by its very terms applies to cases where the consequences of the criminal act differ from those intended by the criminal, and it is common knowledge that this doctrine has its chief application in cases where such consequences have operated upon a different person from that intended. That this doctrine is derived from the common law does not detract from its fundamental character or restrict its operation to common-law offenses. The notion for which counsel contends, and for which he cites the cases referred to, viz., that this doctrine does not apply to statutory additions to the Criminal Code, seems to us to be based upon a distinction without a difference.

The other and sounder view is that illustrated by the case of *State v. Bectsa*, 71 N. J. Law, 322, 58 Atl. 933, in which the doc-

trine in question was applied by our Court of Errors and Appeals to the statutory addition to the common law of murder by which murder in the first degree is described and in effect created. 'Bectsa had killed a girl whom he had no intention to shoot, but, as his act of shooting was done with the intention to commit murder by a willful, deliberate, and premeditated killing, the judgment of murder in the first degree based on a verdict rendered under such a judicial instruction was sustained.

This case, which is authoritative upon the application of the general doctrine in question to statutory additions to the law of crimes, illustrates the only logical view.

It would be a strange perversion of reasoning for instance to hold in the present case that, if Edwards had been killed, the defendant would have been guilty of murder or of murder in the first degree as determined by his intent to kill Mayor Gaynor, but that such intent is not to determine his guilt of an assault with such intent. There is no reason for making this arbitrary distinction; on the contrary, there is every reason why the paramount effect given to intention throughout the criminal law should be consistently adhered to; for it cannot have escaped attention that it is with respect to this essential element of guilt that punishment is meted out to the convicted criminal, even to the extent of depriving him of his life if his intention to kill was characterized by premeditation and deliberation.

As was said in *State v. Bectsa*: "The determining factor is the reprobated state of mind in the murderer, and not the measure of success that attended its accomplishment." And in *Brown v. State*, 62 N. J. Law, 666, 42 Atl. 811, it was pointed out by Mr. Justice Depue that: "The grade of the offense in our Criminal Code is determined by the character and degree of the punishment prescribed." Whether the imprisonment that is prescribed as the punishment for all serious crimes, including murder of the second degree, be regarded as punitive, reformatory, or protective to society, equally and in either case the length of such imprisonment has reference to the state of mind evinced by the criminal. If, to take the present case as an illustration, society is entitled to be protected for 12 years by the imprisonment of one who has committed an assault with intent to kill, the reason such protection is needed is because such an intent existed and was put in execution, and upon this point neither the success of its execution nor the identity of its victim is of the essence of the crime.

[2] Whether in drawing an indictment under the statute in question the pleader should set out the circumstances and charge their legal consequences or should state the facts according to their legal effect, as was done in this indictment, is a question of pleading with respect to which no issue has been rais-

ed, and no harm has come to the plaintiff in error.

Even if the indictment was defectively drawn, although I am not suggesting that it was, the judgment could not be reversed, unless the defendant had been thereby prejudiced in making his defense upon the merits. *Crim. Proc. Act*, § 136.

In *Jackson v. State*, 49 N. J. Law, 252, 9 Atl. 740, Mr. Justice Depue speaking of assault with intent to murder, which was the statutory description, says: "The offense was a misdemeanor at common law and retains that character in this state." I am unable to see how the substitution of "intent to kill" for "intent to murder" affects the character of the statute in this respect. It remains as declaratory of a common-law offense, not as a statutory addition to the list of crimes. The significance of this characteristic of the statute is perfectly apparent.

There can be no reversal upon the ground we have been discussing. *Connors v. State*, 45 N. J. Law, 211.

[3] The next point is that it was error to admit in evidence a statement made by the defendant upon the ground that it was evidence of another and distinct offense. It was evidence of another offense, but not of a distinct one, for the two ran into each other, so that the facts constituting the one were admissible to prove the other.

The statement concluded with a declaration that bore directly upon the offense for which the defendant was on trial, viz., "that shot was intended for Mayor Gaynor and Edwards must have got in the road." This made the whole statement relevant. *State v. Raymond*, 53 N. J. Law, 260, 21 Atl. 328; *State v. Deliso*, 75 N. J. Law, 808, 69 Atl. 218.

The third and last point argued, that it was improper for the state to prove the facts connected with the shooting of Mayor Gaynor, is covered by what has just been said.

No error in the conduct of the trial appearing, the judgment of the Hudson oyer is affirmed.

STATE v. KWIATKOWSKI.

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1912.)

(Syllabus by the Court.)

1. WITNESSES (§ 255*) — EXAMINATION — REFRESHING MEMORY.

A witness is always at liberty to refresh his memory before testifying. He may even do so in court, while upon the witness stand, by reading from memoranda made by himself at or near the time of the events recorded. Instead of doing this, a witness may, if he chooses, refresh his memory out of court by reading a memorandum made by himself, of and concerning the incident to which he is about to speak on the witness stand; and the testimony thus given will be unimpeachable, so

far as the manner of refreshing his recollection is concerned.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 874-890; Dec. Dig. § 255.*]

2. WITNESSES (§ 260*) — EXAMINATION — TESTIMONY AT FORMER TRIAL.

The prosecutor of the pleas interrogated one of the witnesses as to what he testified to upon a former trial of the defendant, and whose testimony on the trial under review apparently showed considerable lapse of memory during the interval between the two trials. This was not an attempt by the party offering the witness to impeach his character for truth and veracity, but to revive his recollection as to matters to which he had testified before, and concerning which his memory appeared to have lapsed, and so was clearly admissible upon the theory that the prosecutor was surprised. Counsel, in thus exploring the mind of a witness who has surprised him, is at liberty to go only so far as the trial court, in the exercise of a sound discretion, may deem proper.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 897, 898; Dec. Dig. § 260.*]

3. CRIMINAL LAW (§ 1158*) — WRIT OF ERROR — REVIEW — QUESTIONS OF FACT.

The finding of the trial court that a defendant's confession was voluntarily made will not be reversed if there be any legal evidence to support it.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074; Dec. Dig. § 1158.*]

4. CRIMINAL LAW (§ 538*) — EVIDENCE — CONFESSIONS — EFFECT.

The provision of section 107 of the crimes act (2 Comp. Stat. 1910, p. 1780), that in no case shall the plea of guilty to murder be received upon any indictment, and if upon arraignment such plea should be offered it shall be disregarded and the plea of not guilty entered, and the jury, if they find the accused guilty, shall designate by their verdict the degree of guilt, concerns alone the practice upon a prisoner's arraignment and trial on an indictment for murder, and does not operate to prevent the conviction of the prisoner upon a voluntary confession made by him, even if there be no corroborating evidence, provided the corpus delicti be proved.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1227-1229; Dec. Dig. § 538.*]

5. CRIMINAL LAW (§ 538*) — EVIDENCE — CONFESSIONS — EFFECT.

The only limitation upon the use as evidence against him of a prisoner's confession of murder, voluntarily made, is the want of proof of the corpus delicti. If death, through criminal agency, be proved, and a man confesses to having caused that death, he may be convicted of murder on his confession.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1227-1229; Dec. Dig. § 538.*]

Bergen, Kallach, and Bogert, JJ., dissenting.

Error to Court of Oyer and Terminer, Hudson County.

Joseph Kwiatkowski was convicted of murder in the first degree, and he brings error. Affirmed.

John Milton and Charles M. Egan, both of Jersey City, for plaintiff in error. Pierre P. Garven, prosecutor of the pleas, for the State.

WALKER, Ch. Upon an indictment for murder, the plaintiff in error was found guilty of murder in the first degree by a jury in the court of oyer and terminer of the county of Hudson, and brings a writ of error to this court. The entire record of the proceedings had upon the trial in the court below was returned into this court by the plaintiff in error under section 136 of the criminal procedure act (P. L. 1898, p. 915), and under section 137, Id., the plaintiff in error has specified certain causes in the record upon which he relies for relief and reversal. Those which challenge the attention of the court are Nos. 4, 5, 12, and 13.

[1] Specification 4 is directed to the refusal of the trial court to strike out the testimony of Dr. A. P. Haskins, the assistant county physician of Hudson, who made the autopsy on the body of the deceased, upon the ground that, while the witness testified apparently from unaided recollection of the facts, nevertheless, prior to going on the stand, he had refreshed his memory by reading a memorandum which he had made. The fact that he had made notes and had refreshed his recollection from them was brought out on cross-examination. The doctor was asked, on cross-examination, if he made notes at the time of the autopsy, and he replied that he did. Also if he had referred to those notes then recently, and he replied that he had on that day; that is, the day he testified. There was no error in this.

The Court of Errors and Appeals, in *Myers v. Weger*, 62 N. J. Law, 432, at page 441, 42 Atl. 280, at page 283, said: "Nor is there any substance in the objection that the witness should not have been allowed to read to the jury the above-mentioned extract. It is said that a memorandum is for mere reference, and can be used only to excite the recollection. This is too narrow a statement of the rule. So strict a limitation would make memoranda unavailable in many cases where they are of value. The use by a witness of his own memorandum, made at or near the time of the events recorded, is not merely to refresh the memory by reviving faint impressions, but also to supplement the memory by preserving details that would otherwise be forgotten. In a case of the latter class the witness is able to prove the details, not by remembering the particulars that compose them, but because the circumstances under which the memorandum was made afford satisfactory assurance that at the time of the entry its contents were known by the witness to be true. It follows that a witness, in using his own memorandum, may not merely refer to it, but may also testify from it. It may be added that the use of a memorandum rests very much in judicial discretion."

A witness is always at liberty to refresh his memory before testifying. He may even do so in court, while upon the witness stand,

by reading from memoranda made by himself at or near the time of the events recorded. Instead of doing this, a witness may, if he chooses, refresh his memory out of court by reading a memorandum, made by himself, of and concerning the incident to which he is about to speak on the witness stand; and the testimony thus given will be unimpeachable, so far as the manner of refreshing his recollection is concerned. It is quite safe to say that almost every witness, before going upon the stand, refreshes his memory concerning the things about which he is called to testify; and if he is without data made by himself he is apt to ruminate upon the subject and recall to his mind the details of the occurrence to which he is about to speak.

[2] Specification 5 relates to the interrogation by the prosecutor of the pleas of one of the witnesses as to what he testified to upon a former trial of the defendant, and whose testimony on the trial now under review apparently showed a considerable lapse of memory during the interval between the two trials. In our opinion, there was no error committed by the trial judge in admitting the questions under consideration. The precise point was passed upon by the Supreme Court, in *State v. Johnson*, 73 N. J. Law, 190, where, at page 201, 63 Atl. 12, at page 13, it was said: "Another ground of error alleged is that the court below admitted illegal evidence. A witness for the state, under examination, had failed to identify the liquor drank in the booth as beer. The witness was then asked 'if he had not testified before the grand jury that it was beer that was in one or the other of the bottles.' The witness was permitted to answer, over objections, affirmatively that he did. The objections were that a party could not thus interrogate his own witness, and that the question was leading. The learned trial judge regarded the situation as one of surprise, and on that ground admitted the question, as we think, rightly. 3 Jones, B. W. Ev. 858. The allowance of a leading question was a matter in the discretion of the court. There was no error in the admission of the question objected to."

The prisoner's counsel relies upon *Ingersoll v. English*, 66 N. J. Law, 463, 49 Atl. 737. But that case does not apply. It was there decided that a party offering a witness will not be permitted to impeach his character for truth and veracity; but that the rule does not preclude proving the truth of any particular fact by other competent testimony in direct contradiction to what the witness may have said. In the case at bar we find no attempt to impeach the particular witness' character for truth and veracity, but an attempt to revive his recollection as to matters which he had testified to before, and concerning which his memory appeared to have lapsed. The prosecutor was surprised at the testimony given on the trial

of the case, and clearly had the right to probe the witness as he did. Counsel, in thus exploring the mind of a witness who has surprised him, is at liberty to go only so far as the trial court, in the exercise of a sound discretion, may deem proper.

[3] The principal reason relied upon for relief and reversal is the admission of a signed confession of guilt, made by the prisoner to Detective Sergeant Curry of the Jersey City police department. The precise objection is that the confession was made by the defendant through hope held out to him in a promise made by the interpreter called in by the police, and that it therefore was not a voluntary confession.

Let us see now what are the facts regarding the making of the confession to which the law must be applied. It was obtained through interrogatories put to the defendant by a Polish interpreter. The interpreter, on the witness stand, was asked, on cross-examination, whether the prisoner did not tell him something before he told him that he had killed his wife, and he answered "Yes," saying that the prisoner asked him if he could bail him out, to which he (the interpreter) replied that he would if he could. He told the defendant that the police captain had told him (the interpreter) that he (the prisoner) was charged with murder. The witness was further asked if at that time (just before the confession) the prisoner had asked him if he would get him bailed, and he said it was the same time. He was further asked if it was in answer to that question (as to bail) that he said he would help him (prisoner) as much as he could, and he answered "Yes." The interpreter then proceeded to ask the questions and interpret the answers as they appear in the written confession.

It is not necessary to review at length the law regarding the admissibility in evidence of confessions made by persons charged with crime. That was very thoroughly done by Mr. Justice (afterwards Chief Justice) Depue in *Roesel v. State*, 62 N. J. Law, 216, 41 Atl. 408. In that case it was held that the burden of proof is on the state to show that a confession is voluntary, and that this preliminary examination is for the court, and comprises a mixed question of law and fact; that if the conduct of the officer obtaining the confession be reprehensible by reason of threats or promises used such conduct may be used before the jury to affect his credibility or the truthfulness of the confession, and that if there be a conflict of evidence as to whether the confession was or was not voluntary, if the court decide that it was voluntary and admissible, the question may still be left to the jury, with the direction that they should reject it if, upon the whole evidence, they are satisfied that it was not the voluntary act of the defendant.

The observation of Mr. Justice Depue, that after the court has passed upon the pre-

liminary question concerning the voluntariness of a confession, and has admitted it in evidence, it may still be left to the jury to reject the confession if they think it was involuntary, is regarded as dictum, and was expressly overruled in *State v. Monich*, 74 N. J. Law, 522, 528, 529, 64 Atl. 1016, 1018, where Mr. Justice Pitney, afterwards Chancellor, speaking for this court, said: "The determination of the question whether a declaration that is offered as a dying declaration was in truth made under a sense of impending death, like the determination of the cognate question whether a defendant's confession was made voluntarily, is for the trial court, and not for the jury. The question relates to the admissibility of evidence, and like all similar questions is not reviewable by the jury. Whether the deceased spoke the truth when she declared that the defendant had shot her was for the jury's determination. Whether the witnesses who testified that she made such a declaration testified truthfully was likewise for the jury to decide."

Mr. Justice Garrison, speaking for this court in *State v. Hernia*, 68 N. J. Law, 299, at page 301, 53 Atl. 85, at page 86, says: "The general rule that incriminating statements made by a defendant are admissible on behalf of the state is qualified by another rule, which makes it the duty of the trial court to ascertain that such statements, when they amount to admissions of guilt, were made by the defendant of his free will, and not because of threats that were held over him, or of hopes that were held out to him. Inasmuch as ordinarily the officers of the law alone are in a position to make good such threats or promises, this subsidiary rule finds application chiefly in cases where the defendant is a prisoner in their custody. The fact of custody, however, standing alone, raises no presumption that illicit methods had been employed. Such an inference arises, if at all, from the circumstances of each case, among which the fact of custody is to be included and considered. To repel such an inference the state may, among other things, show that the prisoner, before making the statement sought to be proved against him, had been informed that he was not under any compulsion to speak, and that if he chose to speak he did so without any inducement being offered to him. Such preliminary information, which is usually referred to as cautioning or warning a prisoner, is not, however, an essential step in the orderly adduction of testimony of this sort, although it sometimes seems to be so regarded. The qualifying rule, in its nature and reason, is limited to those cases in which the circumstances raise, or are capable of raising, the inference which such a warning would tend to rebut. Where no ground exists for the inference, no reason ex-

ists for the warning, and the prisoner's statement is admissible because of its evident spontaneity."

Now, as already seen, the court of oyer and terminer was confronted with the preliminary question concerning the voluntariness of the prisoner's confession, and admitted it in evidence. If there were any evidence tending to support the judges' finding, it will not be disturbed.

The prisoner was first asked the questions which he answered, and which are written in his confession, and then it was read to him, being translated by the interpreter, and the prisoner made his mark to it. It commenced in this wise: "I am lieutenant of police of the Jersey City police department. I am going to ask you some questions in reference to the crime for which you are arrested. You may answer them or not, just as you choose; but what you do say must be of your own free will a voluntary statement, as it will be taken down in writing and used at your trial."

If the defendant had felt himself constrained before, he should have availed himself of the offer to keep silent when the confession was read over to him, should have refused to sign it, and should have repudiated his declaration. Instead of doing so, he signed the confession with his mark. As cautioning a prisoner is not an essential preliminary to obtaining from him a confession, and must necessarily be present only where there are circumstances raising, or capable of raising, inferences which such a warning would in turn tend to rebut, the prisoner was treated to all the consideration which the law, in any aspect of the case, would afford him. There is no dispute but that he in fact made the confession imputed to him. He was warned that he did not have to talk, but that what he said would be used on his trial; and this before he committed himself to the written confession, which was the only confession of guilt put in evidence on the trial.

Now, as to the hope held out to the defendant, and which is alleged to have induced the confession, as in *Roesel v. State*, the interpreter may be considered a person in authority, within the meaning of the rule relating to the admissibility of confessions. 62 N. J. Law, 225, 41 Atl. 408. As was said in that case (62 N. J. Law, at page 227, 41 Atl. at page 412): "The promise or hope excited must relate to some benefit to be derived by the prisoner in the criminal prosecution. Though it is necessary to the admissibility of a confession that it should have been voluntarily made—that is, that it should have been made without the presence of hope or fear from persons in authority—yet it is not necessary that it should have been the prisoner's own spontaneous act. It would be received, though it were induced by a promise of some collateral benefit or boon, no hope or favor being held out in respect to the

criminal charge against him, or by any deception practiced on the prisoner, or false representation made to him for the purpose, provided there is no reason to suppose that the inducement held out was calculated to produce any untrue confession, or lead the prisoner to suppose that it would be better for him to admit himself guilty of an offense which he had not committed."

Assuming that the help which the prisoner expected from the interpreter was not alone the procuring of bail for him, which was certainly a collateral benefit, but was some benefit, vague or specific, which the defendant hoped and expected the interpreter could and would obtain for him, nevertheless it does not appear that the interpreter's offer of help to the defendant was held out to him in consideration of his making a statement or confession—that is, the prisoner was not told that if he would make a statement or confession he would be helped—nor did he say he would make a statement if he were helped. He simply asked the interpreter if he would help him, and the interpreter replied that he would if he could. This flattery of hope, if such it were, could not have operated to induce a confession. The confession appears to have been made entirely aside and apart from that. And there is no evidence that illicit methods were employed to obtain the confession, and none from which it could be inferred.

The finding of the trial court that a defendant's confession was voluntarily made will not be reversed if there be any legal evidence to support it. *State v. Monich*, ubi supra. Our conclusion upon this head is that the confession was entirely voluntary, was so shown to be, and was therefore properly admitted by the trial court.

One other question remains to be considered. It resides in specification 13 of the causes assigned for reversal. It becomes available to the defendant, if at all, under the beneficent provisions of section 136 of the criminal procedure act (Comp. Stat. p. 1863), which enables him to return with the writ of error the entire record of the proceedings had upon the trial, and to get the benefit of any error, either in the admission or rejection of testimony, or in the charge of the court, or in the denial of any matter which was matter of discretion.

[4] The objection is that the only evidence of the defendant's guilt arose out of his confession, which was in no wise corroborated, and that a jury cannot be permitted to find a verdict of guilty of murder upon the uncorroborated confession of the defendant. There was no request made of the trial court in respect to this matter, and consequently it does not reside in any bill of exceptions. It could only have arisen in the oyer by a request to the judge to give a binding instruction to the jury. This was not done. Nevertheless it is sought to be made a cause for

relief and reversal, as permitted by section 137 of the criminal procedure act when the entire record is brought up under section 138. The particular matter complained of on this score may not be within the provisions of the latter section. It does not arise because of the admission of illegal testimony, nor by the rejection of any legal testimony. The court made no charge respecting it, and it is in no wise connected with any matter of discretion which was denied. Assuming, however, that the objection is one which may be availed of by the defendant, it will now be considered. In section 107 of the crimes act (Comp. Stat. p. 1780) it is provided that in no case shall the plea of guilty to murder be received upon any indictment, and if upon arraignment such plea should be offered it shall be disregarded and the plea of not guilty be entered; and the jury, if they find the accused guilty, shall designate by their verdict the degree of guilt.

The provision that a prisoner charged with murder should not be permitted to plead guilty was first enacted in 1893. P. L. p. 82. Prior to that time, the plea was admitted, and if the offender were convicted on confession in open court the court proceeded by examination of witnesses to determine the degree of guilt and give sentence accordingly. Rev. p. 239, § 68.

Neither the act found in the Revised Statutes, nor the amendment passed in 1893, altered any rule of the common law with reference to the force and effect of confessions to the crime of murder. Those acts only provided for matter of practice on the trial of prisoners charged with murder.

Although the plea of guilty to murder, if made, is to be disregarded, and the accused put upon trial, still, if the defendant pleads guilty upon arraignment, no duty appears to rest upon the presiding judge to inform the jury that there is no confession before them; certainly not unless such request is made by defendant's counsel. *State v. Valentina*, 71 N. J. Law, 552, 556, 60 Atl. 177.

[5] The only limitation upon the use as evidence against him of a prisoner's confession of murder, voluntarily made, is the want of proof of the corpus delicti. If death, through criminal agency, be proved, and a man confesses to having caused that death, he may be convicted of murder on his confession. *State v. Guild*, 10 N. J. Law, 163, 18 Am. Dec. 404. See, also, *State v. Strong*, 83 Atl. 506, 510. However, in this case there was corroboration of the fact that the prisoner killed the deceased in this: There was evidence from which the fact of guilt could be inferred, at least when considered in connection with the other facts of the case, namely: He was seen in the hall outside of his apartment about 8 o'clock in the morning of the day when his wife was found in bed murdered with a blunt instrument. He said that he threw the axe

under the rear stoop of the house which was in front of his, and the axe was found where he said he had thrown it, having previously said he struck his wife with it.

Other matters alleged as error and assigned as causes for reversal we find without substance.

The judgment under review must be affirmed.

BERGEN, KALISCH, and BOGERT, JJ., dissent.

VINELAND GRAPE JUICE CO. v. CHANDLER et al.

(Court of Errors and Appeals of New Jersey. Nov. 18, 1912.)

1. CORPORATIONS (§ 99*)—STOCK ISSUED—CONSIDERATION.

Stock of a corporation may be issued in payment for work and labor performed.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 444-446; Dec. Dig. § 99.*]

2. CORPORATIONS (§ 110*) — ISSUANCE OF STOCK — CONSIDERATION — FUTURE LABOR—PERFORMANCE.

Where the promoters of a corporation issued treasury stock to themselves in payment for future services, and actually rendered valuable services to the corporation for which they were not otherwise paid, which were worth at least the value of the stock, the corporation was not entitled to attack the transaction in a court of equity without offering to reimburse the stockholders to the full value of their services.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 461; Dec. Dig. § 110.*]

Appeal from Court of Chancery.

Action by the Vineland Grape Juice Company against D. Harry Chandler and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Henry S. Alvord, of Vineland, for appellant. Lewis Starr, of Camden, for respondents.

GUMMERE, C. J. The bill in this case was filed March 30, 1910. It alleges that the defendants, D. Harry Chandler and Frank H. Walls, together with Edward M. Wallington, Lewis W. Gould, and Charles H. Anderson, organized the complainant corporation in the year 1897, for the purpose of manufacturing unfermented wine, or grape juice; that these gentlemen were the original stockholders and directors of the corporation; that they each originally subscribed and paid for 20 shares of the stock of the corporation, the par value of which was \$10 per share; that shortly after their election as directors they secretly and fraudulently issued to themselves 900 shares of the treasury stock of the corporation (180 shares to each) for 2 per cent. of the par value of the stock, and that no further payment has at any time since been made upon it; that Gould,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Anderson, and Wallington are dead, and that their stock has passed into the hands of other holders, who took it with notice of the illegality of its issue; and that Chandler and Walls have each of them assigned their stock to parties who took it with the same notice. On these alleged facts the prayer of the bill is that Chandler and Walls and the executors of Anderson and Wallington be decreed to be jointly and severally liable to pay and make good to the corporation all loss and damage sustained by it in consequence of the issuing of the said 900 shares of stock, and that the present holders thereof be decreed to surrender it for cancellation.

Upon final hearing a decree dismissing the bill was advised by the Vice Chancellor, for the reason that the allegation that the 900 shares of stock were issued fraudulently and without consideration, except as to 2 per cent. of its value, was not supported by the proofs; and for the further reason that, regardless of the meritorious question involved, the right to maintain the suit was barred by the supplement to the corporation act of April 8, 1903 (P. L. p. 362), which prohibits any action, either at law or in equity, from being brought against any officer or director of a corporation to recover any bonus, profit, or reward of any kind secretly made out of any transaction with the corporation, and without disclosure of the fact, unless such action be brought within four years after the transaction has taken place.

We doubt the applicability of the statute (which was repealed in 1907) to such a state of facts as that disclosed by the pleadings and proofs in this case; but we are of opinion that the decree should be affirmed for the first of the reasons which led the Vice Chancellor to the conclusion reached by him. At the time of the issuing of the stock to the five gentlemen named in the bill, the corporation had been in existence only for a few weeks, and they were its only stockholders. It was their purpose to devote so much of their time and energy as might be necessary for the successful building up and carrying on of the business for which the corporation was organized, without any immediate compensation being paid to them out of its assets or earnings, but, nevertheless, not gratuitously. With this purpose in mind, they consulted counsel, and, being advised that corporate stock might be issued and paid for for services rendered to and work done for the corporation, they acted upon this advice, and, honestly believing that they had a right to do so, issued the stock to themselves in anticipation of rendering to the corporation services, and of doing work for it, without any other compensation, until the value of such services and work should equal the unpaid 98 per cent. of the par value of the stock. So successful were they in the building up of the business of the

corporation and the management of its affairs that in the year 1901, five years after its organization, it was earning and paying a dividend of 6 per cent. on its capital stock, which had by that time been increased to over 4,000 shares, and up to and even later than that date they gave their time and services to the business without pay, excepting Mr. Gould, who had died in 1899. No attempt was made to show, either by the complainant or the defendant, just what was the value of these services; but \$1,800 for the three years of work done by Gould, and the like sum for the five years during which each of the others served the company, can hardly be claimed to be an overpayment to either of them. Unless it was, it follows that the stock has, in fact, been fully paid for, although such payment was not made at the time of its issue.

[1, 2] It is settled in this state that stock may be issued in payment for work and labor done. *Wetherbee v. Baker*, 35 N. J. Eq. 501, 512, and cases cited. Whether it may be legally issued in anticipation of work and labor afterward to be performed, or services afterward to be rendered, is, at least, doubtful; but, conceding that the law does not permit, nevertheless, when it is issued, and the work and labor are subsequently performed, or the services rendered, and they are equal in value to the par of the stock which has been issued in prepayment therefor, it does not lie in the mouth of the corporation to attack the transaction in a court of equity, without at the same time rendering itself ready to pay to the parties to whom the stock was issued, or to their assigns, the full value of the work done or services rendered for its benefit. No such tender having been made by the bill in the present case, it was properly dismissed.

The decree under review will be affirmed.

In re JAEGLER et al.

(Supreme Court of New Jersey. Dec. 11, 1912.)

STATUTES (§ 26*)—VALIDITY—APPROVAL BY GOVERNOR.

Since Act May 1, 1911 (P. L. p. 690), authorizing municipal light, heat, and power plants, though passed by both houses, was never approved by the Governor in its present amended form, but was approved by him in its original form in which it failed of passage, it will be decreed void both in its amended and original form, under authority given the Supreme Court by Act March 3, 1873 (4 Comp. St. 1910, p. 4978).

[Ed. Note.—For other cases, see Statutes. Cent. Dig. §§ 28, 34; Dec. Dig. § 26.*]

Petition by George W. Jaegle and another under Act March 3, 1873 (4 Comp. St. 1910, p. 4978), praying that Act May 1, 1911 (P. L. p. 690), be decreed null and void. Petition granted.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Argued June term, 1912, before GUMMERE, C. J., and GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, and KALISCH, JJ.

Chauncey G. Parker, of Newark, for petitioners.

GUMMERE, C. J. The act of March 3, 1873 (Comp. Stat. p. 4978), entitled, "An act providing for decreeing and making known that certain laws and joint resolutions have become inoperative and void," provides that, at any time within one year after any law or joint resolution shall have been filed by the Secretary of State, the Attorney General, at the direction of the Governor, when the latter shall have reason to believe that any such law or joint resolution was not duly passed by both Houses of the Legislature, or duly approved, as required by the Constitution of the state (section 1), or any two or more citizens of the state who shall have reason for so believing (section 3), may present a petition to the Supreme Court setting forth the facts and circumstances, and praying that such law or resolution may be decreed to be null and void. The constitutionality of this statute was the subject of consideration in Re "An act to amend an act entitled 'An act concerning public utilities,'" 84 Atl. 708, and was there declared to be valid legislation. Under its authority, George W. Jaegle and Ross M. Wickham, two residents of the county of Essex and citizens of this state, presented to this court on the 29th day of April, 1912, a petition in which, after reciting that there was filed in the office of the Secretary of State on the 1st day of May, 1911, what purported to be an act of the Legislature entitled "An act to authorize and empower any municipality to acquire or construct, to maintain and to operate a plant or plants for the production and distribution (or either) of light, heat and power for its own public purposes and for the purpose of selling and supplying the same to its own inhabitants or to any other municipality (or both), and to acquire all necessary real estate and works and machinery for supplying light, heat and power for such purposes, and to purchase light, heat and power produced by any other municipality," and that this act had been published by the Secretary of State in the compilation of the statutes of that year as chapter 325 thereof, the petitioners declare that they have reason to believe that such purported law was not duly passed by both Houses of the Legislature and duly approved as required by the Constitution of this state, and set forth the facts and circumstances which formed the basis for their belief, as directed by the statute.

The second section of the act of 1873 provides that, when such a petition has been presented, this court shall have jurisdiction and power to proceed in a summary way and inquire into the facts and circumstances al-

leged, and may order witnesses to be sworn or affirmed and their depositions taken, and, after a full hearing and consideration of the facts and circumstances proved, may either dismiss the petition, or, if satisfied that the law or joint resolution mentioned therein was not duly and constitutionally passed by both Houses of the Legislature, or duly approved, decree the same, or any part thereof, to be null and void.

The petitioners, for the purpose of proving the facts and circumstances set forth in their petition as the basis of their averment that the statute in question was not constitutionally passed, called the clerk of the House of Assembly of that year, and on his examination as a witness proved by him that the act under scrutiny originated in the House of Assembly; that upon its introduction it was marked "Assembly Bill 558"; that on the 18th day of April, 1911, it came up in the Assembly upon its final passage, and was lost; that on the same day it was reconsidered and laid upon the table; and that on the 19th day of April it finally passed the House of Assembly. The petitioners then caused to be produced by the state librarian the original "Assembly Bill 558" which had been delivered to him by the clerk of the House after it was lost on April 18th, in accordance with the requirement of section 10 of "An act to regulate the state library." Pamph. Laws 1878, p. 228. They also submitted from the files of the office of the Secretary of State the statute itself (chapter 325), together with two Senate amendments thereto, which were filed with it. Neither of the amendments was annexed or in any way attached to the bill, nor do they contain anything by way of indorsement or otherwise to indicate that they were ever submitted to the Governor or received consideration from him. Upon the statute are indorsed the following certificates:

"House of Assembly No. 558. House of Assembly, 4/19/1911. This bill having been three times read in the House of Assembly resolved that the same be passed. By order of the House of Assembly. [Signed] Edward Kenny, Speaker of the House of Assembly."

"Senate, April 21, 1911. This bill having been three times read and compared in the Senate resolved that the same be passed as amended. By order of the Senate. [Signed] Ernest R. Ackerman, President of the Senate."

"House of Assembly, 4/21/1911. This bill having been three times read in the House of Assembly resolved that the same be passed as amended. By order of the House of Assembly. [Signed] Edward Kenny, Speaker of the House of Assembly."

At its foot appears this indorsement: "Approved May 1, 1911, Woodrow Wilson, Governor."

Upon each of the Senate amendments, which were multiple in character, appears the certificate of the President of the Sen-

ate reading as follows: "Senate amendments to Assembly No. 558 April 21, 1911. These amendments having been three times read in the Senate resolved that the same be passed. By order of the Senate. [Signed] Ernest R. Ackerman, President of the Senate." In addition to this certificate there is found upon each Senate amendment, and upon the same page with the certificate, the stamp of the Speaker of the House of Assembly, but no other indication of its adoption by that body. The clerk of the House, however, testified that, with regard to amendments coming from the Senate, the legislative rule was that the "jurat" (certificate) should be signed only by the presiding officer of the Senate, and that the stamp of the Speaker of the House upon the page upon which appears the jurat of the President of the Senate was an indication that the House of Assembly had adopted the amendment of the Senate. Each of these Senate amendments makes material alterations in the bill. Neither of them was approved by the governor, nor is either of them embodied in the bill which was so approved. More than this, a comparison of chapter 325 of the Laws of 1911 with "Assembly Bill 558," filed with the state librarian on April 18, 1911, shows the one to be an exact duplicate of the other.

The above recited proofs conclusively demonstrate that the bill approved by the Governor was that which originally passed the House of Assembly, and not that which was amended by the Senate, and which was afterward passed by that body and then returned to the Assembly and passed by that House in its amended form. This being so, it follows, as was said by this court in *Pangborn v. Young*, 32 N. J. Law, 31, that, as the amended bill adopted by both Houses has never received the approval of the Governor and the bill to which the Governor's signature is annexed was not the act which, in point of fact, was passed into a law by the Legislature, neither the one nor the other can be regarded as a legislative act which is enforceable by the courts.

We therefore, in compliance with the requirement of the act of March 3, 1873, decree that chapter 325 of the Laws of 1911, entitled, "An act to authorize and empower any municipality to acquire or construct, to maintain and to operate a plant or plants for the production and distribution (or either) of light, heat and power for its own public purposes and for the purpose of selling and supplying the same to its own inhabitants or to any other municipality (or both), and to acquire all necessary real estate and works and machinery for supplying light, heat and power for such purposes, and to purchase light, heat and power produced by any other municipality," was not duly and constitutionally passed by both Houses of the Legislature, or duly approved by the Governor, and is null and void.

STATE v. POTTER.

(Supreme Court of New Jersey. Nov. 27, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1149*)—CERTIORARI—REVIEW—DISCRETION OF TRIAL COURT.

An order of the quarter sessions quashing indictments is of a discretionary nature in the trial court, and is not the subject of review by writ of certiorari in this court, where it is not apparent the judicial discretion has been abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3039-3043, 3058; Dec. Dig. § 1149.*]

Certiorari to review indictments against Leo Potter, and an order quashing them. Dismissed.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Michael Dunn, of Paterson, for the State. William I. Lewis, of Paterson, for defendant.

MINTURN, J. Two indictments against the defendant are brought up by this writ, both of which were on motion of defendant, quashed by the court of quarter sessions of Passaic county. In one case the indictment charged a violation of section 207 of the general election law of 1898 (Comp. S. p. 2140). In the other the indictment charged a violation of section 36 of the corrupt practice act (P. L. 1911, p. 344). For the purpose of the present inquiry, we are not concerned with the nature or details of the offenses charged, since the only question presented here is the insistence of the state that the action of the sessions in quashing the indictments was without warrant in law. Whatever view we may entertain regarding the merits of the legal inquiry thus presented can be of no consequence unless it is clear that we possess the power under this method of procedure to review the entire case as upon writ of error. Our examination of the question has led us to conclude that this court has not, in any case brought before it, assumed to review a discretionary order of the sessions such as that under review.

In *State v. Dayton*, 23 N. J. Law, 52, 53 Am. Dec. 270, Chief Justice Green intimates that the action of the court in considering the regularity of a motion to quash was based upon the consent of both parties to the review, and concluded his opinion upon the subject with the significant remark: "The suggestion is necessary to guard against the action of the court being drawn into precedent." In *State v. Webster*, 10 N. J. Law, 293, this court, in reviewing the order quashing an indictment in the sessions, said: "We express no opinion as to the manner in which the indictment comes before us as no objection has been made to bringing it here by certiorari on the part of the state, after having been quashed in the court of

quarter sessions." The reason underlying this consensus of doubt was manifestly based upon the fundamental principle that the writ of certiorari will not go to review a discretionary order. *Wright v. Green*, 11 N. J. Law, 334; 1 Tidd, 400. That such an order as that, sub judice, was of this discretionary character, is settled by unanimous consent of courts and text-writers. *Parks v. State*, 62 N. J. Law, 664, 43 Atl. 52 and cases cited; 1 Bishop's Crim. Prac. 761; *Clark's Crim. Prac.* 365. Upon that ground the general trend of authority in this and other jurisdictions is opposed to the review of such an order upon certiorari. In *State v. Black*, 20 Atl. 255, Chief Justice Beasley, speaking upon the subject, said: "The granting of such a motion is a matter of discretion, and does not form any ground for a writ of error." This adjudication was affirmed by the Court of Errors in 53 N. J. Law, 462, 23 Atl. 1081. In the federal jurisdiction such is the rule: *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709. In New York a similar rule prevails: *People v. Petrea*, 92 N. Y. 128; *Wood v. People*, 1 Hun, 381; *People v. Davis*, 56 N. Y. 95. Also in Massachusetts, *Commonwealth v. Eastman*, 1 Cush. 189. The cases upon the subject in the various jurisdictions are collected in a note in 22 Cyc. 412.

It matters not whether we view the determination of the sessions as a discretionary order, or a final judgment. In either event, it is not reviewable here upon certiorari, unless in the language of this court in *State v. Vandervere*, 25 N. J. Law, 669, it is manifest that the judicial discretion was used "capriciously in violation of settled legal principles of equity or of law." 1 Bishop, Cr. Proc. 362; *State v. Black*, ubi supra.

The writ in this case will therefore be dismissed.

**BOARD OF HEALTH OF CRANFORD TP.
IN UNION COUNTY v. COURT OF COM-
MON PLEAS IN AND FOR UNION
COUNTY et al.**

(Supreme Court of New Jersey. Nov. 27,
1912.)

(Syllabus by the Court.)

**1. MUNICIPAL CORPORATIONS (§ 642*)—POLICE
REGULATIONS—PROSECUTION FOR VIOLATION
—REVIEW.**

The common pleas is without jurisdiction to try de novo an appeal from the small cause court adjudging a defendant guilty of a violation of the provisions of the sanitary code of a municipality, ordained under the provisions of the act creating local boards of health. 2 Comp. St. 1910, p. 2666, § 16.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.*]

**2. MUNICIPAL CORPORATIONS (§ 642*)—POLICE
REGULATIONS—PROSECUTION FOR VIOLATION—REVIEW.**

If such a right of appeal exist, it confers no power upon the common pleas to adjudicate upon the reasonableness of the regulation of the local board of health, since such an issue can be determined only by this court upon certiorari.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.*]

**3. HEALTH (§ 24*)—LOCAL BOARDS—REVIEW
OF REGULATIONS.**

It was not within the legislative intent, in enacting legislation conferring upon the local boards of health the power to prescribe, quarantine regulations, in a district or locality, infected with a contagious disease, to subject the discretion of such boards to the review of the local court for the purpose of substituting the judgment of such tribunal for that of the boards to which the power is specifically committed.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 27; Dec. Dig. § 24.*]

**4. HEALTH (§ 18*)—LOCAL BOARDS—REVIEW
OF REGULATIONS.**

If the boards of health so constituted transcend their authority in a given case, the act itself provides a remedy to the party aggrieved.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 16; Dec. Dig. § 18.*]

Certiorari to Court of Common Pleas, Union County.

Certiorari prosecuted by the Board of Health of the Township of Cranford in the County of Union to the Court of Common Pleas for the County of Union. Judgment of Common Pleas reversed.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Lindabury, Depue & Faulks, of Newark, for prosecutor. Collins & Corbin, of Jersey City, for defendant.

MINTURN, J. The Legislature (Compiled Statutes, vol. 2, p. 2662) empowered all local boards of health to pass, alter, or amend ordinances, and make rules and regulations in regard to the public health within their several jurisdictions, for the following purposes, inter alia: Section 12: "To prevent the spreading of dangerous epidemics or contagious diseases, and to declare that the same has become epidemic, and to maintain and enforce proper and sufficient quarantine whenever deemed necessary." Section 50: "That any local board of health may prescribe a penalty for the violation of any ordinance, section of code or amendment thereof, heretofore or hereafter passed by such board, not to exceed one hundred dollars, and not less than two dollars." The local board of health of Cranford in the county of Union, pursuant to this authority, adopted a sanitary code which provides:

"Sec. 11. Whenever there shall occur in the township of Cranford a case of scarlet fever, the board of health or its authorized

agent shall place on the house in which said case or cases are confined, one or more placards stating that a case of contagious disease exists within the house.

"Sec. 12. Whenever a placard shall be placed on a house as provided in section 11 of this article, no person or persons except the medical attendant and nurses shall enter therein or depart therefrom, without permission of the board of health or its authorized agent."

"Sec. 18. Any person violating any of the provisions of this article shall upon conviction thereof forfeit and pay a penalty of fifty dollars."

The home of Edward Montencourt, a resident of Cranford, was placed under quarantine, by order of the board of health, upon the ground of the existence therein of the disease of scarlet fever. The house was duly placarded continuously from December 20th to the 29th, inclusive. Mr. Montencourt, who it is conceded was neither a medical attendant nor a nurse, during this interval departed from the house without the permission of the board, or its agent, and consequently subjected himself to the charge of having violated the provision of the sanitary code referred to. The board of health thereafter instituted suit in the small cause court against him to recover the prescribed penalty, and after a hearing that court found him guilty and imposed a penalty and costs.

[1] Thereafter an appeal was taken to the common pleas, where the case was tried *de novo*, and testimony presented in behalf of Mr. Montencourt as to the reasonableness of the board's order as to him, upon which the court reversed the judgment below, and rendered judgment against the board of health, which judgment is before us for review upon this writ. The reversal was based upon testimony taken before the pleas, designed to show that the necessity for the quarantine did not exist as to Mr. Montencourt. We think the common pleas was without jurisdiction to determine this case upon appeal. We assume that the appeal was taken under the provisions of the eighteenth section of the health act (2 Comp. Stat. p. 2666). But that section substantially in its present form was before this court in *Holzworth v. Newark*, 50 N. J. Law, 85, 11 Atl. 131, and it was there held that the words, "unless an appeal be granted," did not confer the right of appeal upon the pleas if such right did not exist without this language. We deem that case controlling there. But, upon the general merits of the controversy, we are unable to perceive anything in the legislation referred to conferring upon the common pleas the right to review the conditions and the emergency in the locality which prompted the board of health to impose the restrictions and quarantine complained of in this case. We are unable to perceive any authority in the legis-

lation itself, or in the public policy upon which it is based, which can be said to contemplate the submission to a legal tribunal of the public necessity, which requires in an emergency the prompt and expeditious intervention of a board to which the Legislature for the protection of life and health in a community has especially committed the determination of the facts.

[2] No question is made in the case at bar as to the conceded power of a proper reviewing tribunal to pass upon the reasonableness of an ordinance or a resolution passed under general laws, or the manner of the exercise of the powers therein conferred. That question has long been settled in the affirmative by repeated adjudications. *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; *Haynes v. Cape May*, 50 N. J. Law, 55, 13 Atl. 231. But the insistence is that a tribunal to which an appeal is presumably given may, by its review of conditions and exigencies in a trial *de novo*, determine adversely to the board to whom the power has been specifically committed, by legislative act, that its exercise in any given case was unwarranted, and that its discretion was improperly exercised. We find no authority in the act for such a claim, and it is proper to assume that, if the Legislature intended to confer such power, it would have found expression in the act. The statute makes provision for the interposition of the Court of Chancery under certain conditions, and it defines the liability which may be imposed upon the members of the board by reason of an excessive or illegal use of power conferred. *Valentine v. Englewood*, 76 N. J. Law, 509, 71 Atl. 344, 19 L. R. A. (N. S.) 262, 16 Ann. Cas. 731.

[4] The legislative recital of these remedies carries with it a presumption of the exclusion of other and additional remedies. *Expressio unius est exclusio alterius*. *Regnia v. Bell*, 7 T. R. 600; *Paul v. Gloucester*, 50 N. J. Law, 588, 15 Atl. 272, 1 L. R. A. 86.

[3] To assume that the Legislature intended to confer a review of a discretionary power of this character, vested in a statutory board, charged with its exercise in critical situations, involving detriment to the life and health of a community, is tantamount to a declaration that the police power of the state is moribund and useless. It will not be assumed, therefore, in the construction of such a statute, that the Legislature intended to defeat its own will or to create absurd results such as would ensue under such conditions. *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278. Aside from these considerations, the rule of construction of such statutes as that, *sub judice*, has been settled by many adjudications in this state.

In *Haynes v. Cape May*, 50 N. J. Law, 55, 13 Atl. 231, it was held by Mr. Justice De-

pue, speaking for this court, that: "When the Legislature has defined the delegated powers, and prescribed with precision the penalties that may be imposed, an ordinance within the delegated limit cannot be set aside as unreasonable." This case was cited with approval by Mr. Justice Van Syckel in his opinion in *Paul v. Gloucester*, supra. In *Kennelly v. Jersey City*, 57 N. J. Law, 296, 30 Atl. 532, 26 L. R. A. 281, Mr. Justice Dixon, speaking for this court, says: "The act of 1859 expressly empowers the city authorities to designate the number of tracks that shall be laid in any street, lane, or avenue of the city. This delegation of power is too specific to permit the court to overturn this ordinance on the ground stated" (i. e., that it was unreasonable). In *Trenton Horse R. R. Co. v. Trenton*, 53 N. J. Law, 136, 20 Atl. 1077, 11 L. R. A. 410, Mr. Justice Reed, speaking for this court said: "Had the Legislature given the option to prescribe specific modes of using streets, or to make specific regulations for stages and vehicles, no objection could be raised in respect to the reasonableness of the ordinance passed in strict conformity with the power. The presumption in favor of their validity would be conclusive." Chief Justice Gummere in *Raffetto v. Mott*, 60 N. J. Law, 415, 38 Atl. 857, declared: "When an ordinance has been passed by a municipal body under a legislative power, which is granted in definite and precise terms, such ordinance cannot be set aside as unreasonable." In *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 160, Mr. Justice Day enunciated the public policy underlying such enactments and said: "Every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases to interfere with the exercise of the power reposed by law in municipal corporations, for the protection of local rights and the health and welfare of the people in the community." In *Valentine v. Englewood*, ubi supra, Mr. Justice Swayze, construing the act, sub judice, said: "In the present case the Legislature has itself undertaken in effect to make a nuisance of what the board of health shall, upon reasonable and probable cause, determine to be a cause of disease." In 21 Cyc. 403, the rule is enunciated upon a review of the authorities that: "Prompt and vigorous action in cases affecting the health of the community is frequently of the highest importance, and statutes intended to promote the public health and safety will be generally so construed, if possible, as to make them immediately effective; and, in the absence of a statute permitting it, there is no right of appeal from the orders of the boards of health, either to higher administrative authorities or to the courts"—citing

Brown v. Narragansett, 21 R. I. 503, 44 Atl. 932.

The refusal of this court to interfere upon its prerogative writ for the purpose of declaring void as unreasonable such an administrative act authorized by specific enactment, where no constitutional right is involved, clearly manifests the absolute absence of jurisdiction in a lower tribunal to adjudicate the unreasonableness of such regulation upon trial de novo or otherwise. The only issue before the small cause court was whether or not the defendants in the proceeding had violated the code provision and thereby incurred the prescribed penalty. Assuming the jurisdiction of the pleas to exist, the issue upon the appeal was in no wise liberalized or enlarged. The reasonableness of the regulation involved did not enter into the issue upon that appeal.

Such an issue, if presented, was a subject for determination by this court upon certiorari. It was clearly coram non iudice before the pleas, and for that reason, if for no other, the judgment of the common pleas must be reversed.

HORWITZ v. AMERICAN SURETY CO. OF NEW YORK et al.

(Supreme Court of New Jersey. Nov. 27, 1912.)

(Syllabus by the Court.)

PLEADING (§ 217*)—DEMURRER TO REPLICATION.

Upon a demurrer to a replication to a plea, where an examination of the latter pleading discloses that it is bad, in substance, for duplicity, judgment upon the demurrer will go against the defendant, even though the replication be bad.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 537, 540-548; Dec. Dig. § 217.*]

Action by Portia Horwitz against the American Surety Company of New York and others. Demurrer to third plea sustained.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Louis H. Miller, of Millville, for the plaintiff. James S. Ware, of Bridgeton, for Surety Co. Walter H. Bacon, of Bridgeton, for M. A. Gethany.

MINTURN, J. A demurrer was filed to a replication, which in turn was filed to a plea. The declaration was on a bond given by defendant company to secure the faithful performance of a building contract, by the defendant Melvin A. Gethany, of the plaintiff's house. The declaration alleged failure to perform the contract by Gethany, and the performance of all the conditions precedent to recovery on the bond by plaintiff.

The Surety Company pleaded non est fac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tum and performance of his contract by Gethany, the builder. Its third and final plea presents the basis for the contention raised in this case by the demurrer. It alleges: (1) That the plaintiff failed to comply with certain conditions precedent to his right to recover on the bond. The first of these was his failure to deliver a written statement of the facts showing default on the part of Gethany, by registered mail, within 10 days after plaintiff or the architect in charge had learned of the default; (2) that the plaintiff failed to accord to defendant the right, within 30 days after receipt of such statement, to procure others to complete the work; and (3) that the plaintiff has, since the execution of the bond, made changes in the plans and specifications which increase the amount to be paid to Gethany, without the written consent of the surety.

It may be observed that these allegations of nonperformance by the plaintiff are based upon provisions and requirements in the surety bond to that effect.

The only new matter alleged by the defendant, Gethany, in his plea, was that he was induced to execute a supplementary contract set out in the declaration by fraudulent and false representations of the plaintiff, which fraud, he alleges, avoids the said contract.

The plaintiff replied: (1) Reiterating generally performance, and that she did deliver the written statement of default as required by the contract. (2) That the Surety Company had abandoned and waived the right it possessed under the contract within 30 days to procure others to proceed with the contract, and (3) that the said claim of right to perform no longer existed, because it is repugnant to a stipulation contained in the supplementary contract between the parties, and is therefore void. (4) She denies that she made any changes in the plans or specifications increasing the amount payable to Gethany, without the Surety Company's consent. The pleas of defendant Gethany are met with a general denial.

It will be observed that the legal contention raised by these pleas and the replication are based upon the third allegation in the replication, directed to the third plea, which latter pleading alleges three distinct matters of defense in bar to the action, which the replication attempts to meet by alleging that the provision in the supplementary contract changed the situation under the original contract, so as to make the original provision upon which defendant's plea is based repugnant to the terms of the last-mentioned contract, and therefore illegal and void. If this plea be bad, we are not concerned with the vice contained in the third count of the replication, which, it is manifest, tenders an issue of law; for the rule of pleading is fundamental, that upon

demurrer to pleadings judgment will go against the party whose pleading is first defective in substance. 1 Ch. Pl. 648.

In *Brehen v. O'Donnell*, 84 N. J. Law, 408, this court held: "A demurrer opens all errors in the pleadings, and judgment therein goes against the first bad pleader." To the same effect is *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. Law, 52. Therefore the inquiry that results is whether the third plea, to which the replication is directed, is itself defective; and our examination of it leads us to conclude that it is bad for duplicity.

"The defendant cannot," says Chitty, "in answer to a single claim, rely upon several distinct answers. Thus, in a plea of outlawry, the defendant cannot state several outlawries, because one would not be sufficient to defeat the action." 1 Ch. Pl. 227.

Among the qualities and conditions of pleas recited by Tidd is that of singleness, "consisting," he says, "only of one fact, or of several facts making together one point; for if a plea contain duplicity, or allege several distinct matters, which require several distinct answers to the same thing, it is bad." 1 Tidd, Pr. 712. We find this to be the inherent vice of the third plea, and consequently upon this demurrer judgment should be awarded to the plaintiff as against the Surety Company.

The judgment entered will be in favor of the plaintiff on the demurrer, reserving the issues of fact presented by the pleadings for disposition at the circuit.

LONDA v. KLING et al.

(Supreme Court of New Jersey. Nov. 27, 1912.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 59*)—LICENSES—PROCEEDINGS OF EXCISE COMMISSIONERS.

The excise commissioners passed a general resolution purporting to deny new licenses for the sale of intoxicating liquors until January 1, 1913. Before the expiration of that period, they granted a license to the owner of a place which had been previously licensed, but whose application for a renewal for the previous year had been refused. In the interim the owner had not abandoned the place, but had altered and repaired it with a view to the continuance of the business when licensed. *Held*, that the place was not a new place, and that the resolution in question did not include it.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 59; Dec. Dig. § 59.*]

Certiorari, prosecuted by Samuel Londa, to review the action of Peter M. Kling and others, Excise Commissioners, in granting a license to sell liquors. Writ dismissed.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

William F. Wolfskell, of Elizabeth, for prosecutor. James C. Connolly, of Elizabeth, for commissioners. Foster M. Voorhees, of Elizabeth, for licensee.

MINTURN, J. The excise commissioners of Elizabeth, on July 11, 1911, adopted the following resolution: "Whereas, the number of licensed liquor places in this city is more than sufficient for the present needs of the city; and whereas, there is a predominant sentiment prevailing among our citizens which is strongly against the granting of any more new licenses to sell liquors of any kind: Therefore, be it resolved that no new licenses be granted for the term of office of the present board, which expires January 1, 1913."

On the 26th of March, 1912, they granted a license to one Thomas B. Fitzgibbons, permitting him to sell intoxicating liquors at 27 Elizabeth avenue, in that city. The place thus licensed had not been licensed during the year 1911, but had been licensed up to November, 1910, after which time a renewal was refused, until granted by this board under the circumstances stated. During the interim between the refusal of the license and the granting of the present license, the property was put to no other or inconsistent use; but the owner, after making alterations and repairs therein looking to a continuance of the business, presented his application and received the license which is the subject of controversy here.

It is contended that the application was for a new place, and that under the terms of the resolution of July 11th the board had refused licenses to all new places, and that under the decision of this court in Warren, etc., v. Excise Commissioners, 56 N. J. Law, 412, 29 Atl. 150, the board could not legally grant a license while the resolution remained operative and unrescinded.

We think that the place was not a new place, within the meaning of the act of 1906 (P. L. p. 199). Under substantially similar conditions such has been the construction placed upon the language of that act by this court. *Eckersly v. Abbott*, 79 N. J. Law, 157, 74 Atl. 313; *Parnes v. Commissioners of Elizabeth*, 82 Atl. 313.

We are not called upon, in view of this conclusion, to determine the remaining question presented in the briefs of counsel, i. e., whether it was within the power of the board, after the passage of the resolution of July 11th, to rescind the resolution pro tanto by granting a license, without notice to the public by means of a rescinding resolution equally general in its terms, and intended to afford the public a reasonable opportunity to be heard.

If the place in question were a new place, within the construction put upon the act by this court, the inquiry thus presented would

be pertinent; but, in view of the conclusion we have reached concerning the character of the license granted, manifestly the latter question is not before us.

The writ will be dismissed.

HOFFMEIER et al. v. TROST.

(Supreme Court of New Jersey. Dec. 4, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 584*)—"RES ADJUDICATA."

A matter is not *res adjudicata* unless there be identity of the thing sued for, of the cause of action, of the persons and parties, the quality of the persons for and against whom the claim is made, and the judgment in the former action be so in point as to control the issue in the pending one.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063-1065, 1067, 1079, 1081, 1083, 1086, 1087, 1096, 1097, 1123, 1125, 1137; Dec. Dig. § 584.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6126-6130; vol. 8, pp. 7780-7787.]

2. JUDGMENT (§ 585*)—"RES JUDICATA."

A proper test in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first; if so, the prior judgment is a bar. But if the evidence offered in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiff in the first suit is no bar to his recovery in the other suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1064, 1067, 1073, 1084, 1085, 1092-1095, 1097, 1132; Dec. Dig. § 585.*]

Appeal from District Court of Jersey City.

Action by Conrad C. Hoffmeier and Eugene Hoffmeier, trading as C. O. Hoffmeier & Son, against Henry Trost. Judgment for defendant, and plaintiffs appeal. Reversed.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

George D. Hendrickson, of Jersey City, for appellants. J. Emil Walschied, of Town of Union, for appellee.

TRENCHARD, J. This suit was brought in the district court to recover \$475 claimed to be due the plaintiffs below under a stop notice given pursuant to section 3 of the mechanics' lien act (C. S. p. 3294), and was tried before the judge without a jury. On March 5, 1910, the defendant entered into a written contract with one Waldons for the construction of a building. The contract was filed in the county clerk's office. On March 18, 1910, Waldons entered into a subcontract with the plaintiffs for the plumbing and heating work. There became due the plaintiffs on such subcontract the sum of \$1,375. After demand upon Waldons, and his refusal to pay, the plaintiffs on October 10, 1910, served a notice in writing on the defendant, as owner, of the amount due them, and for

the retention thereof; under section 3 of the mechanics' lien act (C. S. p. 3294), from any moneys due to Waldons from the defendant. On December 17, 1910, the defendant paid the plaintiffs \$900 on account of their claim, leaving a balance of \$475 for which this suit is brought. The trial judge gave judgment for the defendant upon the ground that the matter was *res adjudicata*. We think that action erroneous.

It is true it appeared at the trial that the plaintiffs had previously brought suit in another district court based upon a contract alleged to have been made on July 29, 1910, to pay for the same labor and materials, and that judgment in that suit was rendered for the defendant.

[1] But a matter is not *res adjudicata* unless there be identity of the thing sued for, of the cause of action, of the persons and parties, the quality of the persons for and against whom the claim is made, and the judgment in the former action be so in point as to control the issue in the pending one. *Mereshon v. Williams*, 63 N. J. Law, 398, 44 Atl. 211.

[2] A proper test in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first; if so, the prior judgment is a bar. But if the evidence offered in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiff in the first suit is no bar to his recovery in the other suit. 23 Cyc. 1158. Applying that test to the case in hand, it is plain that the former judgment for the defendant is not a bar. As we have pointed out, that suit appears to have been based upon a contract alleged to have been made on July 29, 1910, to pay for the labor and materials bestowed upon the building. That alleged contract had no relation to any rights which may have accrued to the plaintiffs under the mechanics' lien act. In the present action recovery is sought by reason of a stop notice given under the mechanics' lien act, not under the alleged contract upon which the first suit was based. Obviously the proofs which justified (nothing else appearing) a recovery by force of section 3 of the mechanics' lien act would not have authorized a recovery for the plaintiffs in the first suit. It follows, therefore, that the judgment under review cannot be sustained upon the ground stated by the trial judge. Nor does the record disclose any other ground upon which it can be sustained.

Whether the plaintiffs may recover on a new trial will, it seems likely, depend upon a proper determination of several questions,

among others the question of blended law and fact respecting whether the plaintiffs, as is contended, made a valid agreement on December 17, 1910, to prorate their claim, and, if they did, its effect upon their claim.

The judgment below will be reversed, and a new trial awarded.

BOARD OF CHOSEN FREEHOLDERS OF CAMDEN COUNTY v. SHARPLESS

et al.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

1. EJECTMENT (§ 115*)—PARTIAL DEFENSE—STATUTES.

Ejectment Act (2 Comp. St. 1910, p. 2057) § 19, provides that if a plea be filed limiting the defense to a part only of the premises sued for plaintiff is entitled to judgment that he recover possession of the part not defended for. *Held* that, where defendants by their plea only defended for a part of the locus in quo, they could not object to so much of the judgment as related to the part of the locus in quo which was not embraced in the plea.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 373; Dec. Dig. § 115.*]

2. ADVERSE POSSESSION (§ 8*)—HIGHWAY—OCCUPATION.

The fact that defendants had been in possession of a part of a public highway to the exclusion of the public did not destroy the public easement therein, under the rule that the public's right to appropriate the unused portion of a highway to the public use is a continuing right, to be exercised when the judgment of the public authorities may deem it advisable to do so.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 14, 27, 43-57; Dec. Dig. § 8.*]

3. EJECTMENT (§ 9*) — SCOPE OF ACTION — EASEMENT—PUBLIC HIGHWAY.

Ejectment will lie against the owner of the fee of a public highway who deprives the public of the free and exclusive use thereof.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

Error to Supreme Court.

Ejectment by the Board of Chosen Freeholders of Camden County against Jesse Sharpless and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Joseph Kaighn and French & Richards, all of Camden, for plaintiffs in error. George J. Bergen, of Camden, for defendant in error.

GUMMERE, C. J. This is an action of ejectment, brought by the board of freeholders of Camden county against Jesse Sharpless and Allen R. Sharpless, to recover possession of a strip of land in the city and county of Camden.

The declaration is in the general form prescribed by the statute. The plea is not guilty, except as to a portion of the locus in quo which was conveyed by the defendants to the county by a deed between the parties, dated May 15, 1908; and excepting, further, "the easement and right of the public to use [the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

locus in quo] for the ordinary purposes of travel and such other uses, if any, as the public acquire in a county road, where part of such county road is a sidewalk;" and also excepting "such estate and easement, if any, as the public and the plaintiff, or either of them, have acquired in and to that part of the locus in quo now used for the purpose of a bridge over Cooper's creek."

The case was tried before the court without a jury, by consent of counsel, upon an agreed state of facts, and resulted in a finding that the right of possession was in the plaintiff. Judgment was thereupon entered accordingly, and the validity of that judgment is now questioned by the defendants.

[1] The defendants, by their plea, only defend for that part of the locus in quo which is not included in the conveyance from them to the county; and, as to that part, so counsel states in his brief, "only that which remains after the public easement is taken out." By the nineteenth section of the ejectment act (Comp. Stat. p. 2057), if a plea be filed limiting the defense to a part only of the premises, the plaintiff is entitled to a judgment that he recover possession of the part not defended for. So far, therefore, as the judgment relates to that part of the locus in quo which is not embraced in the plea, the claim that it is invalid is clearly unsubstantial. It is only necessary to consider whether the whole of the locus in quo is subject to the public easement of way; for, if it is, then the plea admits the right of the plaintiffs to its possession.

By the agreed state of facts, it appears that the locus in quo is a strip of land 33 feet in width extending eastwardly from the low-water mark of Cooper's creek, and lying entirely within the lines of a public highway known as Federal street; that most of the strip has been in actual use by the public as a part of that highway, but that a portion of it immediately adjacent to Cooper's creek has not been so used, and, on the contrary, has been in the sole and exclusive possession and use of the defendants and their grantors; that Federal street crosses Cooper's creek upon a bridge constructed by the county board of freeholders, the width of which is much less than that of the highway; that the portion of the locus in quo which has not been actually used by the public lies between the southerly line of the highway and what would be the southerly line of the bridge if that line was projected; and that the board of freeholders now proposes to widen the bridge over Cooper's creek, and requires the whole width of the highway for the construction of necessary abutments and approaches.

[2] The fact that the defendants have been in possession of a part of a public highway to the exclusion of the public does not destroy the public easement therein. The right

of the public to appropriate the unused portion of a highway to public use whenever their wants or convenience may require it is a continuing right, to be exercised when the judgment of the public authorities may deem it advisable to do so; and the lapse of time will not impair that right. *South Amboy v. New York & Long Branch R. R. Co.*, 66 N. J. Law, 623, 50 Atl. 368. Under the pleadings in the case, therefore, the judgment under review was entirely justified by the facts agreed upon.

[3] It would seem from the brief of counsel for defendants that it was intended to raise by the plea the question whether a judgment in ejectment could be obtained by the public authorities having charge of highways against a defendant who was the owner of the fee in the land upon which a public easement of way had been imposed. The plea, as drawn, does not raise the question, but, as the case was tried upon the merits, we consider it not improper to state that since the decision of *Dummer v. Den. ex dem. Selectmen of Jersey City*, 20 N. J. Law, 86, 40 Am. Dec. 213, decided in the year 1843, it has been the settled law of this state that ejectment will lie against the owner of the fee of a public highway who deprives the public from the free and exclusive use thereof.

The judgment under review will be affirmed.

BOARD OF EDUCATION OF CITY OF MILLVILLE v. EMPIRE STATE SURETY CO. OF NEW YORK et al.

(Supreme Court of New Jersey. Dec. 11, 1912.)

1. PLEADING (§ 217*)—DEMURRER—OPENING RECORD.

On demurrer, the court will, notwithstanding the defect in the pleading demurred to, give judgment against the party whose pleading was first defective in substance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 540-548; Dec. Dig. § 217.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 81*)—ACTION ON BUILDING CONTRACTOR'S BOND—DEFENSE OF ULTRA VIRES.

Where, in an action by the Board of Education of a city on a building contractor's bond, it appeared that the plaintiff had fully performed its contract in good faith, the defendant could not object that the contract was beyond the legitimate powers of plaintiff.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196, 340; Dec. Dig. § 81.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 85*)—BUILDING CONTRACTS.

The fact that a school building called for by the plans and specifications is wholly unsubstantial will not relieve the contractor of complying with his agreement.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 202; Dec. Dig. § 85.*]

Action by the Board of Education of the City of Millville against the Empire State

Surety Company of New York and others on a contractor's bond. Defendants demur to the declaration. Judgment for plaintiff on the demurrer.

Argued June term, 1912, before GUMMERE, C. J., and GARRISON and BERGEN, JJ.

Joseph F. Smith and Louis H. Miller, both of Millville, for plaintiff. Bedle & Kellogg, of Jersey City, for defendants.

GUMMERE, C. J. The plaintiff sues upon a bond given to it by Joseph Steelman as principal, and the Empire State Surety Company of New York as surety, on the 8th day of June, 1909, to secure the faithful performance by Steelman of a contract made on the same day by him and the plaintiff for the erection of a school building in the city of Millville, in accordance with certain plans and specifications which, by express provision therein, were made a part of the contract. The declaration contains, among others, an averment of full and complete performance on the part of the plaintiff of all things required by the contract to be done or performed by it, and also an averment of failure by Steelman to perform on his part. The defendants pleaded specially, in bar of the action, that the plaintiff did not, prior to the making of the contract with Steelman, or the execution of the bond sued upon, submit the plans and specifications for the school building to the State Board of Education for suggestions and criticism, in accordance with the requirement of section 129 of the School Law of 1903 (Laws 1903, 2d Sp. Sess. p. 49). They further pleaded in bar that Steelman, when he made the contract for the erection of the schoolhouse, supposed and believed that a building such as was required by the plans and specifications could be put up that would not fall "during the erection thereof, or within a reasonable time thereafter"; whereas, the contrary was the fact. To each of these special pleas the plaintiff filed replications, and to these replications the defendants demurred.

[1] Whether the replications are objectionable for the reasons specified in the demurrer we find it unnecessary to determine. It is an established rule of pleading that, upon the argument of a demurrer, the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in substance (1 Chitty, Plead. *668); and upon a consideration of the whole record we find the pleas themselves to be fatally deficient.

[2] The first of these pleas attempts to avoid liability upon the ground that the plaintiff, by entering into the contract with Steelman for the erection of the school building without first submitting the plans and specifications to the State Board of Education, exceeded the power conferred upon it in that regard by the Legislature. Conced-

ing this to be the fact, it constitutes no defense to the plaintiff's action. It is averred in the declaration, and not denied in the plea, that the plaintiff has fully performed the contract on its part. It is settled in this state that a corporation cannot avail itself of the defense of ultra vires when the contract has been in good faith fully performed by the other party and the corporation has had the full benefit of the performance. *Camden & Atlantic R. R. Co. v. May's Landing & Egg Harbor City R. R. Co.*, 48 N. J. Law, 530, 7 Atl. 523. The same rule holds e converso. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation. *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Rutland & Burlington R. R. Co. v. Proctor*, 29 Vt. 93; *Union National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Parish v. Wheeler*, 22 N. Y. 494; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504. And this is true with relation to municipal as well as to private corporations. *Mayor, etc., of New York v. Sonneborn*, 113 N. Y. 423, 426, 21 N. E. 121; *City of Buffalo v. Balcom*, 134 N. Y. 532, 32 N. E. 7.

[3] Taking up the consideration of the other pleas: The theory that the defendant Steelman was absolved from the performance of his contract by reason of the fact that the building called for by the plans and specifications was so unsubstantial that it would fall during the work of construction, or soon afterward, is equally untenable. *School Trustees of Trenton v. Bennett*, 27 N. J. Law, 513, 72 Am. Dec. 373. In that case the trustees sued Bennett, and one Carlisle, as guarantors for Evernham and Hill, who had entered into a contract with the trustees to build and complete a schoolhouse in accordance with specifications annexed to the contract, and which designated the particular location of the building. When the schoolhouse was nearly completed, it collapsed and fell, solely on account of the fact that the soil on which it stood was soft and miry and unable to support the weight of the building. Evernham and Hill thereupon abandoned further work under the contract. In the suit brought against the guarantor it was contended by them that, because of this condition of the soil which rendered it impossible to erect a building which would not fall, the contractors were excused from performance. This contention was held to be without merit; the court saying: "No rule of law is more firmly established by a long train of decisions than this: That where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." This case was quoted with approv-

al, and the rule laid down by it upheld, by the Court of Errors and Appeals in *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. Law, 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. Rep. 467, where many of the decisions upon this subject are referred to and commented upon.

The plaintiff is entitled to judgment on the demurrer.

UPTON v. SLATER et al.

(Supreme Court of New Jersey. Dec. 4, 1912.)

(Syllabus by the Court.)

1. REGISTERS OF DEEDS (§ 7*) — INDEXING RECORDS—LIABILITIES.

Liability of a county clerk for a breach of his official duty in respect to indexing a mortgage delivered to him to be recorded inures only in favor of one who was prejudiced by the breach of such duty.

[Ed. Note.—For other cases, see *Registers of Deeds*, Cent. Dig. §§ 15, 16; Dec. Dig. § 7.*]

2. REGISTERS OF DEEDS (§ 7*) — INDEXING RECORDS—LIABILITIES.

One who has actual knowledge of the existence of a mortgage covering property, and with such knowledge buys such property, is not damaged by the fact that the county clerk failed to index the mortgage when it was delivered to him for record.

[Ed. Note.—For other cases, see *Registers of Deeds*, Cent. Dig. §§ 15, 16; Dec. Dig. § 7.*]

3. APPEAL AND ERROR (§ 1010*)—REVIEW—PRESUMPTIONS—FINDINGS.

On appeal from a judgment of the district court rendered by the judge sitting without a jury, where opposite conclusions might have been drawn from the testimony, that conclusion which is essential to support the judgment will be taken as found.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

4. APPEAL AND ERROR (§ 1010*)—REVIEW—QUESTIONS OF FACT—SUFFICIENCY OF EVIDENCE.

A determination of a question of fact by the judge of the district court sitting without a jury is final between the parties when there is legal evidence to support it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Appeal from District Court of Paterson.

Action by Francis R. Upton against John J. Slater and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Hunziker & Randall, of Paterson, for appellant. William I. Lewis, of Paterson, for appellees.

TRENCHARD, J. This suit was brought in the district court by the plaintiff to recover damages against John J. Slater, the county clerk of Passaic county, and his sureties, on the theory that the clerk had negligently failed to properly index a mortgage

delivered to him to be recorded, and that the plaintiff, relying upon the index, had in good faith purchased property covered by the mortgage, and was afterward compelled to pay such mortgage.

The appeal brings up for review the judgment rendered by the judge, sitting without a jury, in favor of the defendants. We see no reason for disturbing this judgment.

[1] We assume for the purpose of this case that failure of the county clerk to index the mortgage was a breach of his official duty. But liability for such a breach of official duty inures only in favor of one who was prejudiced by the breach thereof. 34 Cyc. 1022. See, also, *Appleby v. State*, 45 N. J. Law, 161.

[2] The implication arising from the record before us is that the plaintiff had actual notice of the mortgage when he purchased the property. He therefore was not damaged by the failure to index the mortgage.

[3] We have pointed out that the case was tried before the judge, without a jury. The state of the case was not agreed on by the parties or their attorneys, nor was it settled by the judge, as is permitted by P. L. 1902, p. 566; but rather the transcript of the proceedings and testimony at the trial is certified to this court by the judge as the state of the case pursuant to P. L. 1905, p. 256. The judge made no finding of fact with respect to actual notice of the existence of the mortgage.

[4] From the testimony of the plaintiff himself at the trial, it was clearly open to the judge to conclude that before and at the time the plaintiff purchased the property he had actual notice of the existence of the mortgage thereon.

It is true that there was other testimony from which a contrary conclusion might have been reached. But on appeal, where opposite conclusions might have been drawn from the testimony, that conclusion which is essential to support the judgment will be taken as found. Such a determination of a question of fact is final between the parties when there is legal evidence to support it. *Backes v. Movsoyich*, 81 Atl. 497.

The judgment of the court will be affirmed.

CAMPBELL v. WEBER et al.

(Court of Errors and Appeals of New Jersey. Nov. 18, 1912.)

DOWER (§ 49*)—HOW LOST—FRAUDULENT CONVEYANCES.

When a husband conveyed land to his wife through an intermediary, and the wife joined in the deed to the intermediary, she lost her inchoate right of dower and took an estate in fee simple, subject to the right of a judgment creditor to have the conveyance treated as void as against his debt.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 154-175; Dec. Dig. § 49.*]

Appeal from Court of Chancery.

Bill by William O. Campbell against Charles O. Weber and others. Decree by the Court of Chancery (79 N. J. Eq. 519, 81 Atl. 732) for plaintiff, and defendants appeal. Affirmed.

Edwin C. McKeag, of New Brunswick, for appellants. George S. Silzer, of New Brunswick, for respondent.

PER CURIAM. The decree brought up by this appeal is affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Walker.

One expression in that opinion is liable to misconstruction, viz., that the present estate of the wife "must be swept away from her, because it rests upon the conveyances made to defraud the complainant, a creditor; so much, at least, as is necessary must be swept away, but the balance, if any, will be hers." We prefer to say that she took an estate in fee simple, subject to the right of the judgment creditor to have the conveyance treated as void as against his debt.

SMITH v. SMITH.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(*Syllabus by the Court.*)

1. CONTEMPT (§ 21*)—DISOBEDIENCE TO INVALID ORDER.

The orphans' court has no authority, under the statute (3 Comp. St. 1910, p. 3870, § 152), to attach for contempt an executor because he refuses to obey an order requiring him to turn over the assets of an estate in his hands to his coexecutor, if such order be made while he is still in office. That power comes into existence only after removal from office of such executor.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 63-66; Dec. Dig. § 21.*]

2. EXECUTORS AND ADMINISTRATORS (§ 507*)—ACCOUNTING—REFERENCE TO MASTER.

Nor has such court power to refer to a master in chancery the matter of stating the accounts of an executor until he has filed his account and exception made thereto by some interested party; for its right to take this procedure is limited by statute to this situation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2004, 2005, 2178-2191; Dec. Dig. § 507.*]

Appeal from Prerogative Court.

Order of the orphans' court to require Rita B. Smith and Sarah Smith, executrices, to file an account. The orphans' court made a decree settling the amounts, and allowed exceptions filed by Sarah Smith, but refused those filed by Rita B. Smith, and ordered that she be removed as executrix. From affirmance of the decree in the prerogative court, Rita B. Smith appeals. Reversed and remanded.

The facts necessary for the consideration and determination of this appeal are: That John Smith died leaving a last will, in

which he appointed his wife, Sarah Smith, and his niece, Rita B. Smith, to be the executrices thereof, who probated the will July 26, 1905, and were duly appointed to the offices to which they were therein nominated. That September 5, 1907, a paper purporting to cite the executrices to account, signed by one of the judges of the orphans' court, was served on the two executrices. That on the return day Sarah Smith appeared and represented to the court that she was willing to account, but could not, because all the books and data concerning the administration were in the possession of her coexecutrix, who refused her access to them, and thereupon the orphans' court made an order requiring Rita B. Smith to turn over to Sarah Smith all such books and data, in order that she might prepare and file an account of the administration. That December 6, 1907, Sarah Smith filed her petition in the orphans' court setting up, among other things, that her coexecutrix had refused to return to her the books and papers, but informed her that they were in the possession of her counsel, who, application being made to him, refused to allow them to go out of his possession, but was willing that they be seen in his office. The petitioner then prayed for a rule requiring Rita B. Smith to show cause why she should not be removed from her office and also attached for contempt for not delivering the books and papers. That the orphans' court allowed a rule to show cause as prayed, and referred the matter of accounting to a master to state an account of the administration of the estate, and restrained Rita B. Smith from making any account until the further order of the court. That the master reported the amount of commission due the executrices, the amount of counsel fees to be allowed to counsel for Rita B. Smith, and that the balance in hand was \$641.19. To this report both parties filed exceptions, and on the 19th day of August, 1909, the orphans' court made a decree settling the amounts collected and disbursed by the executrices, and also allowed the exceptions filed by Sarah Smith, but refused those filed by Rita B. Smith. The decree further adjudges Rita B. Smith to be in contempt "for failure to obey the citation of this court to account, dated September fifth, nineteen hundred and seven, and the order of this court made herein on September twentieth in the same year, directing her to deliver to said Sarah Smith the books, papers, vouchers, and writings connected with the said estate of said John Smith, deceased, and to cooperate with the said Sarah Smith in the filing of an account relating to said estate." The decree further ordered that Rita B. Smith be removed from her office as executrix. This decree was affirmed in the prerogative court, from which this appeal was taken.

Roe & Runyon, of Jersey City, for appellant. James S. Erwin, of Jersey City, for respondent.

BERGEN, J. (after stating the facts as above). We are not able to perceive any legal ground upon which this decree can be supported. As to that part of it which adjudges Rita B. Smith to be guilty of a contempt in disobeying the citation to account, it appears that a paper writing, signed by one of the judges of the orphans' court, was served upon her; but this was not the citation to account prescribed by the 123d section of the orphans' court act (3 Comp. St. 1910, p. 3856), which can only be issued by the surrogate. The utmost efficacy that can be given this paper would be that of an order to show cause; and a neglect to comply would not subject a party to attachment for "failure to obey the citation of this court to account." No attempt was made by the orphans' court to proceed as if this paper was a rule to show cause under section 179 of the orphans' court act. In addition to what has been said, the court ordered an accounting before a master, and restrained the executrix from proceeding to account in the orphans' court.

[1] The second ground upon which the order for attachment is based is the failure to deliver to her coexecutrix the books and vouchers "connected with said estate." As the order to deliver them was made before the executrix was removed from office, and while she was still one of the executrices of the estate, the orphans' court had no power to make such order.

The authority of the orphans' court to require an executor to turn over assets of the estate to a coexecutor is limited by section 152 of the orphans' court act to cases where the executor has been removed; and, as the coexecutor in this case had not been removed when the order was made, the orphans' court had no jurisdiction to make it. Therefore, as the court had made an order without warrant in law, the executrix was not bound to obey it. It was as if no such order had been made; and the party could not be in contempt of an order nonexistent in law.

[2] The other point raised assails the power of the orphans' court to order an accounting by a master, and to make decree thereon under the circumstances existing. The orphans' court act prescribes how accounts of this character shall be stated and confirmed; and by section 122 it is declared that they shall not be allowed, except on at least one month's notice by advertisements set up in five or more public places in the county where the settlement is to be made, and by due advertisement in one or more newspapers. It is not pretended that in this case any such procedure was followed.

The power of the orphans' court to refer an account to a master is to be found in

section 126 of the same act; but that power is limited to cases where notice has been duly given, a final account exhibited, and exceptions to the account made by persons interested, in which case the court may hear the contest, or refer it to the surrogate, an auditor, or master to hear the parties and their witnesses and thereupon restate the account. The proceedings in this case show that no account was filed; and therefore the foundation of the right to refer to a master did not exist, and the action of the court was not justified by any statute.

The course to be pursued in cases where an executor refuses to account is to remove him and appoint another in his stead, who will account, according to the requirements of the statute, upon due notice and advertisement, and when removed to require the disqualified executor to turn over to the new appointee the assets of the estate. When the account is properly before the court, if exceptions are filed to it, they may then be disposed of by the court, or a restatement ordered to be made by one of the statutory officers.

In the present case none of the statutory requirements were observed, and the order of the orphans' court cannot be sustained, and should be set aside.

The decree of the prerogative court will be reversed and the record remitted to that court, in order that the views here expressed may be carried out.

STATE v. STRASSER.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

EMBEZZLEMENT (§ 39*)—EVIDENCE — ADMISSIBILITY.

An attorney at law agreed to prepare and file a certificate extending the corporate existence of a company at a total expense to the company of \$75, including filing fees. The company's check for \$30 was paid to the attorney for the state filing fee, deposited by him, and his own check for \$30, which he sent to the Secretary of State, was protested. The company obtained its certificate by the payment to the Secretary of State of \$30. Upon his trial for the fraudulent conversion of the \$30 that had been paid to him, the defendant offered evidence to show that the company had not paid him the \$75 it had agreed to pay for its certificate. *Held*, that the exclusion of this evidence was error, as it was competent and material upon the question whether any fraudulent conversion of the company's money had resulted or could have resulted unless the company paid more for its certificate than it had agreed to pay, and hence was relevant upon the question of a fraudulent intent.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 62; Dec. Dig. § 39.*]

Walker, Ch., dissenting.

Error to Supreme Court.

Otto J. Strasser was convicted of the fraudulent conversion of money intrusted to

him as agent, and brings error. Reversed, and venire de novo granted.

Addison Ely, of Rutherford, for plaintiff in error. Wendell J. Wright, of Hackensack, for the State.

GARRISON, J. The plaintiff in error, Otto J. Strasser, was indicted for the fraudulent conversion of \$30 intrusted to him by a certain corporation as its agent. He was convicted as charged, and brings this writ of error upon a bill of exceptions sealed at the trial. The facts were these: Strasser was an attorney at law employed as such by Claus Ahrens & Co., a corporation of this state that was originally incorporated for five years. In January, 1911, Strasser was engaged by this company to prepare and file a certificate extending the term of its corporate existence which he agreed to do at a cost to the company of \$75, which was to include all expenses. The payment to Strasser of a part of this sum, which is the basis of the criminal charge against him, is best given in the exact language of the only witness who testified upon the subject. This witness was Eleanor Frye who, after stating that she was secretary and treasurer of Claus Ahrens & Co., was asked to state a conversation she had with Mr. Strasser on February 9, 1911, to which her reply was: "Mr. Strasser called me up over the phone and asked me for two checks, one for \$30 and one for \$5, for filing the extension papers with the Secretary of State, and the recorder's office, I believe, in Hackensack, respectively. Q. What did you say to him, if anything? A. Well, I told him I would let him have the checks." She further testified that she took the checks herself to Mr. Strasser, but had no further conversation with him; and this was the entire testimony upon the subject. The subsequent history of the transaction was that Strasser deposited the checks, mailed to the Secretary of State his own check for \$30, which was protested, and that the certificate was filed by the Secretary of State upon receiving from the company its check for \$31.40 to cover the filing fee and cost of protest. This was the state's case.

In his defense, Strasser, not denying any of these facts, took the stand and sought to prove the additional fact that Claus Ahrens & Co. had not paid him the \$75, i. e., the sum the company agreed to pay for its certificate of extension. The question was objected to by the prosecutor as incompetent and immaterial, which objection was sustained by the court and an exception allowed, upon which error has been duly assigned.

The rejection of this testimony was in our opinion erroneous. It was relevant to the fraudulent conversion with which the defendant was charged. The case of the state rested essentially upon an intent to defraud

this corporation of its property, i. e., of the \$30 which was part of the stipulated cost of obtaining the certificate. The corporation had agreed to pay this sum as the total expense to it of the certificate extending its corporate life. As long, therefore, as it got all that it bargained for, without being obliged to expend more than the agreed price, it could not be defrauded. The state's case showed that, after paying the \$35 to Strasser, the company got its certificate of extension by the payment of the additional sum of \$31.40. At this juncture Strasser had done all he agreed to for the \$72, with the exception of paying this filing fee; and, if the two checks for \$35 were all it had paid to Strasser, the company had still remaining in its hands \$40 with which to pay the filing fee of \$30, and hence was not defrauded, and could not be as long as it had not paid for its certificate more than it agreed to pay.

Unless and until the defendant's conduct compelled or induced the company to part with more than \$75 in order to obtain its certificate, no fraud resulting in a criminal conversion of its money could be effected, and, where no fraud could be effected, the presumption is that no fraud could be intended. *State v. Redstrake*, 39 N. J. Law, 365.

It is the fraudulent intent that is essential in cases brought under this statute. Section 184 of the Crimes Act (Act June 14, 1893 [P. L. p. 824]). As was said in *Burnett v. State*, 62 N. J. Law, 510, 41 Atl. 719: "To warrant a conviction under a statute like that sub judice (this same statute), a fraudulent intent is essential." To the same effect are *State v. Temple*, 63 N. J. Law, 375, 43 Atl. 697, *State v. Deutsch*, 77 N. J. Law, 292, 72 Atl. 5, and in one aspect *Fitzgerald v. State*, 50 N. J. Law, 475, 14 Atl. 746.

The material element of fraudulent intent, as was pointed out by Mr. Justice Reed in *State v. Redstrake*, is a design to affect the rights of another, to get the property of another, in the present case to get more of the money of Claus Ahrens & Co. than it had agreed to pay. If this was no part of the defendant's design, it had a direct, indeed a controlling, effect upon the question of his fraudulent intent.

The defendant had a right to argue that, unless the intent existed to get more of the money of Claus Ahrens & Co. than they had agreed to pay, the intent to defraud them did not exist. They had agreed to pay \$75, hence it was essential to the validity of this argument to show that they had not paid that sum. Whether or not an intent to defraud Claus Ahrens & Co. existed was for the jury, hence the weight to be given to this argument was for them; but the argument could not be made unless the necessary facts were permitted to be proved.

The fact that the proffered testimony was

no extenuation of the attorney's conduct from the professional standpoint is aside from the case. The defendant was not being tried for unprofessional conduct, or even for a breach of a civil contract, but for the criminal conversion of another's money. Upon this charge he had a right to show, if he could, that the transaction, instead of being a criminal conversion, was one in which each party had got what the other party agreed he should have.

The error in excluding the defendant's testimony was therefore prejudicial to him in making his defense on the merits.

The judgment of the Supreme Court is reversed to the end that a venire de novo may be awarded.

WALKER, C., dissents.

BOWLBY v. BOARD OF CHOSEN FREEHOLDERS OF MORRIS COUNTY et al.

(Supreme Court of New Jersey. Nov. 23, 1912.)

(Syllabus by the Court.)

1. WEIGHTS AND MEASURES (§ 8*)—OFFICERS—REMOVAL.

One holding the office of county superintendent of weights and measures in the county of Morris, being a "person who holds office in subordination to or by appointment from" the board of chosen freeholders of that county, and whose term of office is "not fixed by any statute of this state," is subject to peremptory removal from such office by such board, without making or sustaining charges or granting hearing, unless it appears that such person belongs to a class of persons protected by statute from such removal.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 10; Dec. Dig. § 8.*]

2. OFFICERS (§ 69*)—PREFERENCES—FIRE DEPARTMENTS—EXEMPT FIREMEN.

In the absence of provision by local ordinance or by-law, no person can be an exempt fireman of the Dover Fire Department unless the same is provided for by statute.

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 69.*]

3. OFFICERS (§ 69*)—SUBJECTS AND TITLES—EXEMPT FIREMEN.

The provision of section 14 of P. L. 1889, p. 19, as amended by P. L. 1890, p. 44 (2 Gen. St. 1895, p. 1513, § 198), that, where there is no local law or ordinance fixing the period of service required to entitle one to become an exempt fireman, a service of seven years as an active fireman, etc., shall, "for the purpose of this act," be taken to constitute said fireman an exempt fireman, must be restricted to the one object of the act as evidenced by its title, "An act authorizing and providing for the incorporation of associations of exempt firemen, and the formation of a state association of exempt firemen," as supplemented and defined by the declaration of section 6 of the act that the object of such corporations "shall be to establish, provide for and maintain a fund for the relief, support or burial" of members, their widows and orphans.

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 69.*]

4. OFFICERS (§ 69*)—REMOVAL — "EXEMPT FIREMAN."

The character of "exempt fireman" established by section 14 of P. L. 1889, p. 19, as amended by P. L. 1890, p. 44 (2 Gen. St. 1895, p. 1513, § 198), has no other force or office than the fixing of the necessary qualifications for membership in associations formed under the act, and cannot of itself be relied upon, by a person having that character, to bring him within the protection of chapter 212 of Laws of 1911 (P. L. p. 444).

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 69.*]

Certiorari prosecuted by Charles W. Bowlby to review a resolution of the Board of Chosen Freeholders of the County of Morris and others removing the prosecutor from the office of county superintendent of weights and measures. Resolution affirmed.

Argued February term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Veeland, King, Wilson & Lindabury, of Newark, for prosecutor. George G. Runyon, of Morristown, for defendants.

TRENCHARD, J. On December 13, 1911, the board of chosen freeholders of the county of Morris elected the prosecutor of this writ, Charles W. Bowlby, "superintendent of weights and measures for a term of three years, at a salary of \$1,500 per year."

[1] On January 1, 1912, the new board, by a majority vote of all its members, passed a resolution as follows: "Resolved, that the office of superintendent of weights and measures in this county be vacated, and the present incumbent, Charles W. Bowlby, be and he hereby is removed from said office, and that a copy of this resolution be delivered to him by the clerk of this board." By this writ the prosecutor, Bowlby, challenges the validity of the latter resolution. We think it was a valid exercise of power. It will be noticed that the resolution in question did not attempt to abolish the office, but merely vacated the office, and, so far as appears from the record no successor has as yet been designated. The office of county superintendent of weights and measures was created by chapter 201 of P. L. 1911, p. 414. Section 9 of that act provides that "the department of weights and measures shall consist of a state superintendent, of assistant state superintendents, of county superintendents," etc. Section 10 provides that "the governing bodies of the respective counties shall designate the county superintendent." It appears, therefore, that the office of county superintendent of weights and measures is a public office, and an examination discloses that the term of such office is not fixed by the statute creating it.

By section 5 of P. L. 1885, p. 135 (Gen. Stat. p. 437, § 159), the board of chosen freeholders has power, by a majority vote of all the members of such board, to remove from office any person who holds office, in subordination

to or by appointment from such board, in all cases where the term of such office is not fixed by any statute of this state. The board, in the absence of statutory requirement is not obliged to make or sustain charges or grant a hearing. *Sweeney v. Stevens*, 46 N. J. Law, 344. We hereinafter point out that we find no such statutory requirement applicable to the prosecutor, and we remark at this point that it is not contended nor suggested that a consideration of the effect of the civil service act is involved in this case. So far as appears, the county of Morris has not adopted the act.

We are thus brought to the question whether the prosecutor is protected from removal by reason of being an exempt fireman. The act upon which the prosecutor rests his contention is chapter 212 of P. L. 1911, p. 444, the first section of which reads as follows: "1. No person now holding a position or office under the government of this state, or the government of any county, city, town, township or other municipality of this state, or who may hereafter be appointed to any such position, whose term of office is not now fixed by law, and receiving a salary from such state, county, city, town, township or other municipality, who is an exempt fireman of any volunteer fire department, volunteer fire engine, hook and ladder, hose or supply company or salvage corps of any city, town, township, borough or fire district of this state, holding an exemption certificate issued to him as such exempt member of any such volunteer fire department, company or corps, shall be removed from such position or office except for good cause shown after a fair and impartial hearing, but such exempt fireman shall hold his position or office during good behavior and shall not be removed for political reasons."

[2] The prosecutor claims to be an exempt fireman of a volunteer fire department of the town of Dover, holding an exemption certificate issued to him as such member. To be entitled to the benefit of the act, the prosecutor must "hold" an exemption certificate. The evidence of this is very unsatisfactory. We do not stand on the want of physical possession. The fact, if it be a fact, that the certificate had been lost is inconsequential, if it were fairly proved to have been lawfully issued to him. But the difficulty lies deeper. We fail to find evidence that he is an exempt fireman within the meaning of chapter 212 of Laws of 1911, and the burden of proof rests upon him. It appears that in 1889 the prosecutor was elected a member of the board of fire wardens of Dover, and that in 1903 his resignation was accepted. It is admitted that he has not caused his name to be filed in the office of the county clerk, with the title and location of the fire company in which he claims to be enrolled. It is admitted that his name does not appear in the fireman's register in the county clerk's office. It is also admitted that he has never filed a cer-

tificate of his service as a member of any fire department or any fire company for seven years, signed by the chief of the Dover fire department and the town clerk of Dover, or either of them, or by the presiding officer of any fire company of Dover, in the county clerk's office; and that his name is not filed or registered in the county clerk's office as that of an exempt fireman.

The town of Dover was incorporated under an act entitled "An act to incorporate Dover," approved April 1, 1869 (P. L. 1869, p. 1161), paragraph 20 of section 13 of which act provides that the common council of Dover shall have power within the town to make, establish and modify, amend, or repeal ordinances "to establish, regulate and control a fire department, and define the manner of the appointment and removal of the officers and members of the fire department, their duties and their compensation; to provide fire engines and other apparatus, and engine houses and other places for keeping and preserving the same, and to provide for extinguishing fires." On February 11, 1874, Dover enacted an ordinance entitled, "An ordinance to establish and regulate the fire department and for the prevention and extinguishment of fires," which (with two amendments increasing the number of fire wardens from 9 to 25, passed in 1884 and 1885) remained in force, and under which the fire department of Dover was established and regulated until June 9, 1899, on which last-mentioned date it was superseded by an ordinance entitled, "An ordinance to provide for, establish, regulate and control the fire department, and to establish rules for the government thereof," which is still in force. These ordinances are the only rules and regulations of the Dover Fire Department so far as appears. Neither of them contain provision for, or a reference to, exempt firemen. In the absence of provision by local ordinance or by-law, no person can be an exempt fireman of the Dover Fire Department unless the same is provided for by statute. We are of opinion that there is no statutory provision applicable to the prosecutor.

[3] Gen. St. p. 1852, § 44 (Revision of 1874), provides that no fireman shall be entitled to claim exemption from jury duty unless he shall file his name in the county clerk's office, with title and location of fire company in which he is enrolled. This, it is admitted, the prosecutor has never done. Gen. Stat. p. 1857, § 70 (P. L. 1880, p. 168), provides that seven years' service in fire departments of any city shall exempt from jury duty on filing certificate of such service in county clerk's office, made by the chief of the fire department or the city clerk. Dover is not a city, and the prosecutor has not filed such certificate. Gen. Stat. p. 1479, § 18 (P. L. 1876, p. 286), is an act entitled, "An act for the incorporation of fire companies," and provides for the incorporation of not less than

10 persons as a fire company by such name as they shall assume and choose, and the filing of a certificate of incorporation in the county clerk's office. By a supplement thereto, passed March 9, 1877 (P. L. 1877, p. 220), it was provided that any person serving seven years as a member of any fire company, organized under the act of 1876, should be thereafter exempt from serving in militia in time of peace or as a juror, in which latter case he was required to file in the county clerk's office a certificate of such service made by the presiding officer of such company. By an amendment of the last-mentioned supplement, passed March 25, 1890 (P. L. 1890, p. 118; Gen. Stat. p. 1480, § 23), it was provided that any person who had, or might thereafter have, served as a member of any fire company or companies, organized under the act of 1876, for a period of seven years, or separate periods amounting in all to seven years, should be thereafter exempt from militia service in time of peace or as a juror, in which latter case he was required to file in the county clerk's office a certificate of such service made by the presiding officer of such company.

Neither the Dover Fire Department, nor any fire company of Dover, was or is organized under "An act for the incorporation of fire companies," above mentioned, and the supplement thereto, and amendment thereof. Moreover, the certificates provided for in such supplement and amendment have not been filed by the prosecutor. Gen. Stat. p. 1492, § 85 (P. L. 1884, p. 265), is an act entitled, "An act to give certain active and exempt firemen the same advantages in respect to taxes and jury duty as now are or hereafter may be allowed to members of the national guard of this state." This act has been declared unconstitutional. *Christie v. Bayonne*, 48 N. J. Law, 407, 5 Atl. 805.

P. L. 1890, p. 117, and P. L. 1902, p. 279, are acts providing for the exemption of members of disbanded fire companies or departments. P. L. 1903, p. 114, is an act providing for the exemption of firemen in any township or borough who shall have served as active fireman for seven years upon filing a certificate of such service, made by the presiding officer of the company, with the county clerk. None of these statutes apply to the prosecutor. He was not a member of any disbanded company, nor had he filed any such certificate.

Gen. Stat. p. 1511, § 184 et seq. (P. L. 1880, p. 19), is an act entitled, "An act authorizing and providing for the incorporation of associations of exempt firemen, and the formation of a state association of exempt firemen," and is the act upon which the prosecutor relies as constituting him an exempt fireman.

Section 1 thereof provides as follows: "That it shall and may be lawful for any number of firemen, not less than ten, in any

of the cities, towns, boroughs, townships, or fire districts, of this state, who may be exempt firemen pursuant to any general or special law of this state, or any charter or act of incorporation or supplement thereto, of any municipality of this state, to associate themselves together and become and be incorporated, in the manner hereinafter provided, under and by the name of the association of exempt firemen of the city, town, borough, township, or fire district, of ———; using the name of the city, town, borough, township, or fire district, as the case may be, in which said association may be located."

Section 6 of the act reads as follows: "That the object of corporations formed under this act shall be to establish, provide for and maintain a fund for the relief, support or burial of the members thereof, and of their widows and orphan children, under such rules and regulations as each corporation may respectively provide and adopt."

Section 13 of the act provides as follows: "That any exempt fireman of this state, upon production of a certificate under the hand and seal of the clerk of any county in this state, setting forth that the exemption certificate of such exempt fireman is duly filed in the office of such clerk, shall be entitled in any and all the counties, cities, towns, boroughs, townships, and fire districts of the state, to demand, have and receive all the rights, privileges, benefits and exemptions of whatsoever kind provided for exempt firemen by any law of this state now or hereafter existing."

Section 14 of the act (as amended by P. L. 1890, p. 44; Gen. Stat. p. 1513, § 198) reads as follows: "That for the purpose of this act where there is no local law or ordinance fixing the time that it shall be necessary for active firemen to serve to be entitled to become exempt firemen, and receive their certificates thereof, a service of seven years as an active fireman in any fire engine, hook and ladder, hose or supply company, or salvage corps, the members of which corps shall have been enlisted from among the active firemen, or in any other association or fire department, or board of fire wardens, or as chief of any fire department, heretofore or hereafter rendered in any of the several cities, towns, boroughs, townships and fire districts in this state, such companies being under the supervision or control of the common council, township committee, board of fire commissioners, or other governing board or body whatsoever, shall be taken to constitute said fireman as an exempt fireman, and to entitle him to all the rights, benefits and privileges whatsoever to which any exempt firemen now or hereafter may become entitled."

In this act the term "exempt firemen" is used as a term, the significance of which is to be found in some "general or special law of this state, or any charter or act of incorporation or supplement thereto, of any mu-

nicipality of this state," and by its first section is confined to such exempt firemen. It is not the purpose of the act to establish what shall constitute an exempt fireman, or the rights of an exempt fireman, but to establish the qualifications which entitle a fireman to membership in its associations and to the enjoyment of the benefits thereof.

The provision of the fourteenth section of the act that, where there is no local law or ordinance fixing the period of service required to entitle one to become an exempt fireman, a service of seven years as an active fireman, etc., shall, "for the purpose of this act," be taken to constitute said fireman an exempt fireman, must be restricted to the one object of the act evidenced by its title, "An act authorizing and providing for the incorporation of associations of exempt firemen, and the formation of a state association of exempt firemen," as supplemented and defined by the declaration of the sixth section of the act, that the object of such corporations "shall be to establish, provide for and maintain a fund for the relief, support or burial" of members, their widows and orphans. It is not the purpose of the thirteenth and fourteenth sections of the act to extend to firemen of towns, not having regulations defining and providing for exempt firemen, benefits other than its own, provided and defined by other acts for classes of exempt firemen by those other acts defined. To so construe these sections would be to make them unconstitutional as within the prohibitions of paragraph 4, § 7, of article 4, of the Constitution of this state, which provides that "every law shall embrace but one object, and that shall be expressed in the title," and "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of the act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act." *Hendrickson v. Fries*, 45 N. J. Law, 555; *Christie v. Bayonne*, 48 N. J. Law, 407, 5 Atl. 805. A construction which leads to declaring sections of an act unconstitutional ought not to be adopted if it can be avoided. It is the duty of the courts to adopt such a construction as will sustain the constitutionality of an act of the Legislature, if it can be done without violence to the language of the act.

[4] We therefore hold that the character of "exempt fireman" established by section 14 of the act has no other force or office than the fixing of the necessary qualifications for membership in associations formed under the act. It is expressly stated as being made for the purposes of the act, and is thereby restricted to the proper purposes of the act as expressed in its title and the body of the act, and cannot of itself be relied upon, by a person having that character, to bring him within the protection of chapter 212 of Laws

of 1911. We have not been referred to any other statute, and in our examination we have not found any statute by which, or in pursuance of which, under the proofs in this case, the prosecutor is constituted an exempt fireman of the Dover Volunteer Fire Department. We have pointed out that there was no local ordinance or by-law in pursuance of which he can claim to be such exempt fireman. It follows, therefore, that he is not entitled to the protection of chapter 212 of the Laws of 1911.

The resolution under review will be affirmed, with costs.

FRANCOIS v. ATLANTIC CITY GAS CO.
(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—ACTIONS FOR INJURIES.

In an action by a child eight years of age for personal injuries caused by a motorcycle striking her, the judge charged that if the jury found that the plaintiff had started to cross the street, had stopped, and then started back on a walk and was struck, they had a right to infer that the cyclist was negligent; that it was the duty of the cyclist to be on the lookout so that in the event that any one crossed in front of his path, and that person had secured the right of way, he might be in a position to stop the motorcycle; that by securing the right of way was meant that if the child starting across from the sidewalk had gotten into the street, and, if she saw the motorcycle, thought she could get across in advance of it, she had a right to suppose that the cyclist would govern his conduct and stop the motorcycle before it ran her down. *Held*, that this instruction was erroneous because it permitted an inference of negligence from the mere fact of collision, no matter how negligent the child may have been, and because it made the right of way depend on whether the child thought she could get across in advance of the motorcycle without regard to negligence of either party, and permitted the cyclist to be held responsible, although she ran suddenly and carelessly in front of his wheel.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

Error to Circuit Court, Atlantic County.

Action by Lorna Francis against the Atlantic City Gas Company. Judgment for plaintiff, and defendant brings error. Reversed, and venire de novo awarded.

Bourgeois & Coulomb, of Atlantic City, for plaintiff in error. Chandler & Robertson, of Atlantic City, for defendant in error.

SWAYZE, J. This is an action for an injury to the plaintiff, a child about eight years of age, by a motorcycle controlled by a servant of the defendant company which struck her in the public street. We think there was evidence requiring the case to be submitted to the jury, but we find error in the trial. The learned trial judge charged the jury that if they found it to be a fact

that the plaintiff had started across the street, and had stopped, and then started back on a walk, and was struck by the cyclist, they had a right to infer from that that he was not exercising ordinary care, and that he was negligent. He afterward told them that it was the duty of the cyclist to be on the lookout, so that in the event that any one crossed in front of his path, and that person crossing his path had secured the right of way, he might be in a position to stop the motorcycle. He then added these words: "And, when I say had secured the right of way, I mean that if this child, starting across from the sidewalk onto the street, had gotten into the street, and if you find that the child, if it saw this motorcycle, thought it could get across in advance of the motorcycle, she had a right to suppose that the motorcyclist would govern his conduct, and stop the motorcycle before it ran her down." The effect of this charge was to permit the jury to infer negligence from the mere fact of the collision, no matter how negligent the child herself may have been. That the child was of such an age that she might perhaps be charged with negligence is sufficiently shown by the judge leaving to the jury the question whether she had sufficient intelligence to grasp the whole situation that confronted her, and whether having grasped it, and exercised the care of her age, she could have avoided the accident by getting out of the way of the motorcycle. It is obvious that, in the case of any one old enough to be chargeable with negligence, a collision with another person or a vehicle may be due to the fault of either party or to the fault of both, and it was error to charge the defendant with negligence from the mere fact of collision. This error was emphasized by the attempt of the judge to define what he meant by the plaintiff securing the right of way, for he made that depend not, as our cases do, upon whether the child in the exercise of reasonable care reached the point of collision before the cyclist if in the exercise of the like reasonable care would have reached it, but, instead, he made the right of way depend upon whether the child thought it could get across in advance of the motorcycle. This would permit her to hold the cyclist responsible, even though she ran suddenly and carelessly in front of his wheel, provided only she supposed she could get across in advance of it.

These errors make it necessary to reverse this judgment. The only other assignment that we need notice is that part of the charge which permitted the jury to consider the possibility of permanent injury. The word "possibility" is unfortunate. It is the probability of permanent injury that is to be considered.

The brief of the plaintiff in error contends that the court erred in failing to state

to the jury that in awarding damages they must take into consideration the age of the child, and to capitalize the verdict they render. The rule appealed to is that of *Baker v. Public Service*, 79 N. J. Law, 249, 75 Atl. 441, but this does not require capitalizing the verdict, but an allowance on account of the accumulations of interest until the child attains its majority. The point, however, cannot be considered in this case, first, because it is not assigned for error; and, second, because it was not made at the trial. A trial judge is entitled to have his attention called to his omission of any legal proposition which it is his duty to charge.

For the reasons stated, the judgment must be reversed, and a venire de novo awarded.

PIERSON v. NEW YORK, S. & W. R. CO.
(Court of Errors and Appeals of New Jersey.
Nov. 21, 1912.)

1. APPEAL AND ERROR (§ 856*) — REVIEW — GROUNDS OF DECISION.

An order directing a verdict for defendant will be affirmed, if sustainable on any ground advanced in support of it, without reference to the soundness of the reason given by the trial court therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3406-3434; Dec. Dig. § 856.*]

2. MASTER AND SERVANT (§ 180*)—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT.

Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), applies only to railroad companies while engaged in interstate commerce at the time of the happening of the accident which produces the injury to the employé, and then does not impose a liability, unless the person injured is, at the time of the accident, himself employed by the carrier in such commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. § 180.*]

3. COMMERCE (§ 27*)—INTERSTATE—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT.

Defendant, a common carrier engaged in interstate commerce, having purchased certain rails, after their arrival at destination caused them to be moved to the place where they were to be laid, and employed plaintiff and other servants to unload them from the cars. Plaintiff was injured by the dropping of one of the rails on his foot, due to the negligence of his fellow servants. *Held*, that such service was not work done in interstate commerce; and hence plaintiff could not recover under federal Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

Error to Supreme Court.

Action by James I. Pierson against the New York, Susquehanna & Western Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Coult & Dolan, of Newton, for plaintiff in error. George S. Hobart, of Jersey City, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

GUMMERE, C. J. This action was brought to recover damages for injuries received by the plaintiff while engaged in the service of the defendant company. The latter's liability is rested entirely upon the federal Employer's Liability Act of April 22, 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]).

The material facts in the case (and they are undisputed) are as follows: The defendant corporation is the owner and operator of a railroad that, to some extent, is used in interstate commerce, and a portion of which is located in Sussex county, in this state. At the time of the happening of the accident to the plaintiff, the company was engaged in removing old rails from its track, and replacing them with new ones, at a point between Beaver Lake and Ogdensburg, both of which places are located in that county. These new rails had been purchased by the defendant from the Buffalo Steel Company of Buffalo, N. Y., and were shipped from the latter place to Beaver Lake, part of the distance over the line of the Erie Railroad Company, and the rest of the way over that of the defendant. They remained at Beaver Lake some three or four days after their arrival there, and upon the cars on which they had been carried from Buffalo. At the expiration of that time these cars were attached to an engine and hauled down to the place where the new rails were to be put in. Upon reaching that place the rails were unloaded from the cars and laid on the track edge by a gang of men, 14 in number, of which the plaintiff was a member. While one of the rails was being lifted out of the car by these 14 men, and while it was being held in the hands of all of them, the end of it furthest from where the plaintiff was standing was dropped. His hold upon the other end was thereby broken, and the rail fell upon his foot, crushing it so badly that it became necessary to amputate one of his toes.

Upon the case thus made the direction of a verdict in favor of the defendant was asked upon two grounds: First, because there was no proof of the circumstances under which the men having hold of the end of the rail furthest from the plaintiff dropped it, and, consequently, nothing upon which an inference of negligence on their part could be predicated; and, second, because, even if the dropping of the rail raised a presumption of negligence on the part of the plaintiff's fellow employes, the facts did not bring the case within the purview of the federal Employer's Liability Act, which imposes liability, under the conditions therein specified, upon a master for injuries received by a servant through the carelessness of a fellow servant. The motion was granted; the ruling being put upon the ground that no negligence on the part of the plaintiff's fellow

servants was shown. On this ruling the plaintiff now assigns error.

[1] The question to be determined is whether the motion to direct a verdict for the defendant was properly allowed upon either of the grounds advanced in support of it; for, if it was, the fact that one of the grounds was untenable, and that this ground was the one upon which the ruling was rested, is immaterial. It is the judicial action, and not the soundness of the reason which prompted it, that is under review.

Without determining whether the facts recited made the question of the negligence of plaintiff's fellow servants one for the jury, in case it became material—a matter upon which the members of the court are not agreed—we take up the consideration of the applicability of the federal statute to these facts.

[2] On June 11, 1906, Congress passed "An act relating to liability of common carriers in the District of Columbia and territories, and common carriers engaged in commerce between the states, and between the states and foreign nations, to their employes." Act June 11, 1906, c. 3073, 34 Stat. 232 (U. S. Comp. St. Supp. 1911, p. 1316). By the first section of this statute, it was enacted that "every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between one territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states, or foreign nations, shall be liable to any of its employes, or in case of his death to his personal representative, * * * for all damages which may result from the negligence of any of its officers, agents or employes," etc. The following year the validity of this statute was before the United States Supreme Court for its consideration in the *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. That court held that the statute deals with all the concerns of the individuals or corporations to which it relates, if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons; that, stated in another form, the statute is addressed to the individual or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which such persons may do—that is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce. So holding, it considered that the act, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them

in favor of any of their employes, without qualification or restriction as to the business in which the carriers or their employes may be engaged at the time of the injury, included subjects wholly outside of the power of Congress to regulate commerce, and that, as it depended for its sanction wholly upon that authority, it was repugnant to the Constitution, and could not be enforced.

With this judicial declaration in mind, Congress passed the act upon which the plaintiff bases his right of recovery. Its title is "An act relating to liability of common carriers by railroad to their employes in certain cases." By its first section it is enacted "that every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative," etc. In passing this act Congress manifestly intended to, and did in fact, eliminate those features of the earlier statute which, in the judgment of the United States Supreme Court, rendered it unconstitutional. By it liability is imposed upon a common carrier by railroad, in case it is engaged in the business of interstate commerce, but only *while engaging* in such business at the time of the happening of an accident which produces injury to an employe. And it does not impose such liability, even when the carrier is so engaged, unless the person injured is, at the time of the occurrence of the accident, himself employed by the carrier in such commerce. In other words, the purpose of the statute is "to secure the safety of interstate transportation, and of those who are employed therein." *Mondou v. New York, New Haven & Hartford R. R. Co.*, 233 U. S. 1, 51, 32 Sup. Ct. 169, 176 (56 L. Ed. 327, 38 L. R. A. [N. S.] 44). As was said by *Buffington, J.*, in *Pedersen v. Del., Lack. & West. R. R. Co.* (C. C. A.) 197 Fed. 537, speaking for the United States Circuit Court of Appeals (Third Circuit): "Interstate transportation by the carrier is the act which constitutes the engaging of the statute; and the persons for whose benefit the liability is created are those employes who have a real and substantial part in effecting such transportation. The final test is the relation of the employe's work to interstate transportation at the time of the injury."

[3] Applying this test, the direction of a verdict for the defendant was proper. The transportation of the rails from Buffalo to Beaver Lake was interstate commerce, at

least until they were turned over to the defendant company en route for further carriage; but when they reached their destination at Beaver Lake they ceased to be an object of such commerce. In afterward transporting them from Beaver Lake to the point where they were to be used in replacement of the old rails, the defendant company was not engaged in commerce at all, we think—certainly not in interstate commerce. Nor was the work of installing the new rails in the track an engaging in interstate commerce. The repairing of an instrument of commerce, which is used sometimes in interstate and sometimes in intrastate transportation, whether it be the roadbed of a railroad or a car or an engine which is run over it, is not an *engaging* in commerce, but a preparation for engaging therein in the future. *Pedersen v. Del., Lack. & West. R. R. Co.*, *supra*. This being so, it is clear that the plaintiff did not receive his injury while he was employed by the defendant in such commerce.

The judgment under review must be affirmed.

LINBARGER v. BOARD OF EDUCATION OF WEST NEW YORK.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)— SCHOOL BONDS—EXECUTION.

Where a board of education, with authority to issue bonds at a regularly called meeting, resolved that the president and clerk be authorized and directed to execute the bonds, such resolution conferred complete authority on the president and clerk, and bonds issued by them pursuant to such authority were validly executed.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 224-232; Dec. Dig. § 97.*]

2. MUNICIPAL CORPORATIONS (§ 938*)— MUNICIPAL BONDS — "NEGOTIABLE INSTRUMENTS."

Municipal bonds payable to bearer are negotiable instruments, and the rights and liabilities of the makers and holders of such of them as have come into existence since the passage of the negotiable instruments act (3 Comp. St. 1910, p. 3732) are determinable by the provisions of that act.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1965-1967; Dec. Dig. § 938.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4767-4770; vol. 8, p. 7731.]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)— SCHOOL BONDS—DELIVERY.

Negotiable Instruments Law (3 Comp. St. 1910, p. 3737) § 18, provides that every negotiable instrument is incomplete and revocable until delivery; as between the immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the drawer, acceptor, or indorser, and in such case delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of trans-

ferring the property in the instrument; but, where it is in the hands of a holder in due course, a valid delivery by all prior parties, so as to make them liable to him, is conclusively presumed. *Held* that, where bonds issued by a board of education were delivered to the purchaser without requiring him to make payment, the fact that they were never paid for did not affect the validity of the delivery of the bonds as against a subsequent bona fide holder in due course.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 224-232; Dec. Dig. § 97.*]

Error to Supreme Court.

Action by Harvey R. Linbarger against the Board of Education of West New York. From a judgment for plaintiff, defendant brings error. Affirmed.

Herbert Boggs, of Newark, and Mark A. Sullivan, of Jersey City, for plaintiff in error. Thomas Mills Day, of New York City, for defendant in error.

GUMMERE, C. J. This suit was brought by the holder of certain interest coupons which had been cut from a part of a series of 105 bonds of \$1,000 each, payable to bearer, purporting to have been issued by the board of education of the town of West New York under date of November 1, 1907, and maturing as follows: Two of them on the 1st of January, 1912, and two of them on the 1st of January in each year thereafter. The bonds were complete and regular on their face, and were sold to certain banking institutions and individuals by the firm of W. J. Hayes & Son at various times ranging from three to six months after their date; the purchasers paying full value for them, and taking them without notice of any infirmity in them, or of any lack of authority in Hayes & Son to negotiate them.

The defendant corporation was duly authorized by a vote of the people of the school district to issue 105 bonds of \$1,000 each, and pursuant to that authorization the board, at a regular meeting held July 31, 1907, resolved to purchase a tract of land for school purposes, to erect thereon a school building, and, in order to secure the money necessary therefor, to issue bonds of the number and denomination authorized so conditioned that two of said bonds should mature on January 1, 1912, and two in each year thereafter until the whole should have been paid. The board then adjourned to meet August 12th next following to take such further action as might be necessary to carry into effect such resolution. At the adjourned meeting the clerk was authorized to publish an advertisement offering the bonds for sale. At a subsequent regular meeting of the board held September 8, 1907, it was reported that no bids had been received, and it was then resolved to sell the bonds at private sale. At a regular meeting held September 30, 1907, it was resolved that the printing committee

be authorized to cause the issue of bonds and coupons to be printed as speedily as possible. At a regular meeting of the board held October 28, 1907, it was resolved that the president and clerk be authorized and directed to properly execute the 105 bonds. At a regular meeting November 25, 1907, W. J. Hayes & Son having offered par for the bonds, a resolution was adopted that it was deemed expedient and advisable that the board accept the terms of the offer of W. J. Hayes & Son for the purchase of the bonds, and the president and clerk were authorized to enter into all necessary contracts for the better carrying out of the terms of the offer. On December 19, 1907, a special meeting of the board was held, and a resolution was then adopted which, after reciting that the issue of the bonds had been awarded to the firm of W. J. Hayes & Son, and that the firm had requested that the money secured from the sale of the bonds be left with them on deposit, subject to the order of the board of education, resolved that the moneys secured through the sale of the bonds be placed in the banking house of W. J. Hayes & Son, subject to the order of the board, to be drawn at such times and in such amounts as in the judgment of the board would be for the best interest of the school district, and that the president and clerk be authorized and instructed to enter into a contract with W. J. Hayes & Son in accordance with the resolution. Subsequently, and without any order from, or knowledge by, the board, the bonds with the coupons attached thereto were prepared by W. J. Hayes & Son, and afterwards signed by the president and clerk of the board, the seal of the corporation attached, and immediately thereafter taken possession of by W. J. Hayes & Son. The execution and delivery of the bonds were done without the knowledge of the board, and no information with regard thereto came to the board until after Hayes & Son had disposed of the bonds. Hayes & Son defaulted in their payment of the purchase price of the bonds, and the defendant board has never received any consideration for them. The case was tried before Justice Bergen without a jury, by consent of counsel; and, upon a finding of the above recited facts, a judgment in favor of the plaintiff was directed. The defendant now contends that, upon the facts found, judgment should have been entered in its favor. The rights of the parties to this litigation depend upon the proper solution of two questions: (1) Were the bonds executed by authority of the board of education; and (2) Was there a valid delivery of them by the board?

[1] The resolution of October 28th is conclusive as to the legality of the execution of these instruments, for it expressly directs it to be done by its president and clerk. Did the surrender of the bonds by the president and clerk to Hayes & Son, without requiring

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a compliance by them with the condition upon which they were entitled to receive them, constitute a valid delivery of them so far as the plaintiff is concerned?

[2] Municipal bonds payable to bearer are negotiable instruments, and the rights and liabilities of the makers and holders of such of them as have come into existence since the passage of our negotiable instruments act (and that is the fact in the present case) are determined by the provisions of that act. *Borough of Montvale v. People's Bank*, 74 N. J. Law, 464, 67 Atl. 67.

[3] The sixteenth section of that act (Comp. Stat. p. 3737) provides as follows: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto; as between immediate parties, and as regards a remote party other than a holder in due course, the delivery in order to be effectual must be made either by or under the authority of the party making, drawing, accepting and indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in that instrument; but where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed." In the case cited it was held by this court that certain bonds of the borough of Montvale, which it had authorized to be issued, and which after execution had been left in the custody of its mayor for safe-keeping pending negotiations for their sale, and which had been wrongfully appropriated by that officer to his own use, and pledged by him to the plaintiff bank as collateral security for the payment of a loan made by it to him, constituted a valid obligation against the municipality in the hands of the bank which was "a holder in due course"; the reason being that, as to such a holder, the statute required a valid delivery by the borough to be conclusively presumed.

The assignors of the present plaintiff were each of them "holders in due course" of the bonds from which the coupons were cut, within the meaning of that description as defined by section 52 of the negotiable instruments act. The coupons, being promises to pay the interest accruing from time to time on the original obligations, are entitled to the same immunity in the hands of a holder in due course as are the bonds of which they were originally a part. The assignment of the coupons by the original purchasers to the plaintiff transferred to him all the rights which they, as holders in due course, were entitled to assert against the maker. *Daniel*, on Neg. Instr. § 803, and cases cited.

The case of *Borough of Montvale v. People's Bank*, *supra*, therefore, controls that

now under consideration so far as the question of delivery is concerned, and the judgment under review must be affirmed.

LINBARGER v. BOARD OF EDUCATION OF WEST NEW YORK.

(Court of Errors and Appeals of New Jersey. Nov. 18, 1912.)

Error to Supreme Court.

Action by Harvey R. Linbarger against the Board of Education of West New York. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 85 Atl. 235.

Herbert Boggs, of Newark, and Mark A. Sullivan, of Jersey City, for plaintiff in error. Thomas Mills Day, of New York City, for defendant in error.

PER CURIAM. The above case was consolidated, for the purposes of trial, with another one pending between the same parties, and involving like issues. They were argued together in this court. We have affirmed the judgment under review in the case with which the present one was consolidated, and have expressed the reasons which led us to take that course in an opinion already on file.

For the same reasons we affirm the judgment now before us.

STATE v. ZELLER.

(Court of Errors and Appeals of New Jersey. Nov. 18, 1912.)

1. INDICTMENT AND INFORMATION (§ 137*)—MOTION TO QUASH—GROUNDS—GRAND JURY.

It was not ground for quashing an indictment that a prior grand jury had been unlawfully discharged.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

2. GRAND JURY (§ 7*)—SUMMONING.

Under 3 Comp. St. 1910, p. 2066, § 8, providing that grand jurors "shall be summoned by the sheriff or his deputy or by one of the coroners or elisors when the venire shall be awarded to the coroners or elisors," the court of oyer and terminer may appoint elisors to select and summon grand jurors, when both the sheriff and coroners are disqualified.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 2, 16, 21; Dec. Dig. § 7.*]

3. INDICTMENT AND INFORMATION (§ 137*)—MOTION TO QUASH—SUMMONING GRAND JURY.

An indictment found by a grand jury legally constituted and composed of impartial members will not be quashed because the venire was directed to elisors, upon disqualification of the sheriff, and not to a coroner; the title of such officers not being subject to collateral attack.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

4. OFFICERS (§ 104*)—DE FACTO OFFICER—VALIDITY OF ACTS.

The validity of an officer's act does not depend upon the perfectness of his title, but it is enough that his title be colorable.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 173; Dec. Dig. § 104.*]

Garrison and Minturn, JJ., dissenting.

Error to Supreme Court.

John Zeller was convicted of criminal conspiracy. Judgment of the Supreme Court affirming such conviction, and Zeller brings error. Affirmed.

Robert S. Hudspeth, Marshall Van Winkle, and Gilbert Collins, all of Jersey City, for plaintiff in error. Pierre P. Garven, Prosecutor of the Pleas, of Jersey City, and Robert H. McCarter, of Newark, for the State.

GUMMERE, C. J. The plaintiff in error was convicted in the Hudson oyer on an indictment charging a criminal conspiracy. On a writ of error to the Supreme Court that tribunal affirmed the conviction, and the present writ removes to this court the judgment of affirmance.

At the opening of the September term, 1911, of the Hudson oyer, the prosecutor of the pleas challenged the array of grand jurors returned by the sheriff, upon the ground that a criminal charge against that officer would be required to be considered and acted upon by the grand jury of that term, and that, by reason thereof, the sheriff was disqualified to summon them. The court sustained the challenge, discharged the whole panel of grand jurors, and then issued its venire to two elisors selected by the court, commanding those officers to summon a new grand jury for that term, and this was done; the elisors having first been duly sworn into office. Among the indictments presented by this new body was the one upon which the present plaintiff in error was convicted. When he was arraigned before the court, he moved to quash the indictment found against him upon the ground that the court of oyer and terminer had no power to disqualify the sheriff for the offense alleged to have been committed by him, and that the challenge of the prosecutor of the pleas, therefore, should not have been sustained, and upon the further ground that upon the sustaining of the challenge the venire for a new grand jury should have gone to the coroners, or to a coroner, and not to elisors appointed by the court. The motion to quash was denied, and this refusal was made one of the grounds upon which the plaintiff in error sought in the Supreme Court a reversal of the conviction against him. The review was had under the 136th section of the Criminal Procedure Act (Act June 14, 1898 [P. L. p. 915]), and under that statutory provision the refusal of the motion to quash, although a matter of discretion, constituted good ground for setting aside the conviction if the judicial discretion was improperly exercised.

[1] The grounds upon which the motion to quash was rested were each of them urged before the Supreme Court as requiring a reversal of the conviction. That court held as to the first ground (viz., that the oyer erred in sustaining the challenge to the grand jury drawn by the sheriff) that the discharge

of that body, whether justifiable or not, was a matter of no concern to the plaintiff in error, for the reason that he had no right to have the charge laid against him investigated by that particular grand jury. We concur with the Supreme Court upon this point. The extent of the right of a person charged with crime, in this regard, is that such charge shall be investigated by a grand jury legally constituted, and composed of impartial members. When an indictment is presented against him by such a body, its validity is not affected by the fact that the charge was not considered by, or was ignored by, a prior grand jury.

[2] As to the second ground upon which the motion to quash was rested (i. e., that upon the sustaining of the challenge the venire for a new grand jury should have gone to the coroners, or a coroner, instead of to elisors), the Supreme Court held that by virtue of section 8 of our act concerning juries (Comp. Stat. p. 2966), the oyer was vested with discretionary power to issue a venire for the summoning of a grand jury either to coroners or to elisors as it should deem advisable, whenever the sheriff of the county was disqualified from the performance of that duty, and that, therefore, this ground also was without merit.

The statutory provision appealed to is in the following words: "That every grand and petit juror shall be summoned by the sheriff or his deputy, or by one of the coroners or elisors when the venire shall be awarded to the coroners or elisors, by notice in writing, under his or their hands, and served either personally, or left at the dwelling house of such juror, six days at least before the day on which such juror is required to appear." It is argued before us that the Supreme Court erred in considering that this statute conferred upon the oyer the power of determining by what officers a grand jury should be selected in case of the disqualification of the sheriff; the suggestion of counsel being that it only deals with the summoning of the members of that body after its membership has been ascertained by a prior selection from among the body of the qualified citizens of the county. It is true that the statute speaks of summoning, not of selecting, grand jurors, but by necessary implication it contains a legislative recognition of the fact that there may be conditions which would render it improper to commit the selection of grand jurors to either the sheriff or the coroners of the county, and deals with those conditions; for it cannot be supposed that the Legislature contemplated the existence of a situation which would render it improper to permit those officers to perform the mere manual labor of leaving written notices with persons who had been selected as members of a grand jury, and yet which would not render it improper for such officers to select such

members. That power exists in the oyer to appoint elisors to select and summon grand jurors in a proper case, certainly when both the sheriff and the coroners are disqualified to perform such services, we have no doubt. The fact that no case can be found in the books in which the existence of such a power has been declared (if such be the fact, as counsel for plaintiff in error assert) is unimportant; the probable reason for such absence of decision being that no one up to the present time has ever thought of challenging its existence.

[3] Whether the statute confers power upon the court to issue its precept to elisors, rather than to coroners, in case of the disqualification of the sheriff, is a much more doubtful question, and one upon which we are not all agreed. But, assuming that the construction put upon the statute by the Supreme Court is erroneous, what is the situation? The original grand jury drawn by the sheriff having been discharged from service, the sheriff being disqualified to act in selecting and summoning a new one, and the oyer having power to cause such new grand jury to be selected and summoned, the question was presented to that court, By what officer or officers shall that duty be performed? The determination of that question involved the construction of the eighth section of the act concerning juries. Construing it as the Supreme Court did afterward, the oyer, considering that it would make for the better administration of justice not to have the grand jury selected by coroners, thereupon appointed elisors, and issued its venire to those officers who, in obedience to the command of the writ, caused the members of the grand jury which presented the indictment against the plaintiff in error to come before the court. That these members were properly sworn as grand jurors, that they were good and lawful men duly qualified to serve as such, and that they were wholly impartial as between the state and the plaintiff in error is not denied.

The case then resolves itself into this: Can a person under indictment successfully challenge a grand jury so constituted upon the ground that the title of the officers by whom it was selected and summoned is invalid? It has never been suggested, so far as I know, that a person against whom an indictment has been presented by a grand jury may defeat a prosecution under it by showing that the sheriff who selected and summoned the grand jury by which it was found was not entitled to hold the office of which he was the incumbent because he was not eligible thereto, or had not been duly elected to it, or for any other reason. And yet, if the invalidity of the title of the elisors in this case to the office to which they were appointed by the oyer can be made the basis of overthrowing an indictment found by a grand jury summoned by them, it must be

equally true that the same result must follow in the case of an indictment found by a grand jury summoned by a sheriff who was not legally entitled to hold the office which he filled. That the title of the incumbent to an office cannot be attacked in this collateral way we think entirely settled.

[4] The validity of his acts, so far as they affect the public or individuals, does not at all depend upon the perfectness of his title thereto. It is enough if that title be a colorable one. As was said by Magle, C. J., speaking for this court in *Erwin v. Jersey City*, 60 N. J. Law, 141, 37 Atl. 732, 64 Am. St. Rep. 584: "When an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters upon and performs the duties of such office, his acts will be held valid in respect to the public, whom he represents, and to third persons with whom he deals officially, notwithstanding there was a want of power to appoint him in the person or body which professed to do so." In using this language the learned jurist exploited no novel doctrine, but merely gave expression to a legal principle which has been universally adopted by courts which administer the law under common-law rules. Its application to the present case demonstrates that the legality of the existence of the grand jury which presented the indictment against the plaintiff in error did not depend at all upon the validity, or invalidity, of the title of the officers by whom that body was selected and summoned, and that acts done by it in the performance of the duty imposed upon it of presenting for trial all violators of the criminal law are as impregnable against attack as if they had been selected and summoned by an officer whose authority to do so was beyond question. For this reason, we think the second ground upon which the motion to quash was rested was without substance.

None of the other assignments of error having been considered worthy of discussion by counsel, either in the oral argument had before us, or in the briefs submitted, we have treated them as being abandoned, and for this reason have not taken them under consideration.

The judgment under review will be affirmed.

GARRISON, J. (dissenting). If our courts of oyer and terminer have the inherent authority to call into being grand juries selected by court appointees, which is the major premise of the conclusion that has been reached, I could probably concur in the minor propositions discussed in the opinion.

As it is, I have given them scant consideration for the reason that I have been unable to discover a vestige of such authority real or apparent in the criminal courts of this state, or in those of the mother country.

The absence of such authority in the courts of this state is accounted for by its absence in the courts of England, but the absence of any indication of such an authority in the courts of England cannot be accounted for upon the supposition that such authority was so universally conceded that no one ever thought of challenging its existence or of noting its exercise. Such a supposition ignores alike the history of the English Constitution and the fullness and fidelity of her legal literature. Rather is it that the existence of such authority was so plainly repugnant to the Bill of Rights that no court in England since Magna Charta has ever thought of exercising it; for the significance of the historic pledge of the English king that no subject should be put to criminal trial unless upon presentment by the grand inquest lay in the fact that the grand inquest was selected by the sheriff of the county or the coroners, whereas the "inquests for the hundreds" which had persisted since Bracton's time were, oftener than not, selected by the appointees of the king's judges. It was precisely at this practice that the paramount provision of Magna Charta was directly aimed. To say that the desired result was not attained is to rewrite history. To say that it was attained, but that the reprobated practice was suffered to be resumed by the king's judges, not only without challenge, but without ever attracting the attention of legal historians, is at once to misconceive the temper of the English people, and to undervalue the historians of their law. If such had been the fact, some case, one at the very least, would have been recorded, and, what is more, would have figured large in the history of English constitutional law.

The selection of a grand jury by *elisors* is a subject upon which the literature of the English law is silent, and there is no other source of information as to the law except its literature. The reason why the term "*elisor*" and the notion conveyed by it are confined in the literature of the law to trial juries is explained by this paramount provision of the Bill of Rights which did not admit of the resumption by the courts of the power that had been taken from them; i. e., the selection of the grand inquest by appointees of the judges of assize. The term "*elisor*" means in the law an officer appointed by a trial court to select a trial jury.

To pursue this matter to a demonstration is, however, no part of the purpose of this memorandum, the sole object of which is to point out that my vote is based, not upon any dissent from the minor propositions discussed in the opinion of the court, but upon the erroneous premise to which such propositions are applied, viz., that the court of oyer and terminer has authority to appoint *elisors* to select grand jurors.

An *elisor*-drawn grand jury is therefore a legal anomaly that results in the violation of the provision of section 9 of article 1 of our Constitution, which says, "No person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury"; for a body of citizens got together by persons occupying no office known to the law and whom the court had no power to appoint to the performance of that official duty is not a grand jury. Whether a conviction under an indictment presented by such a body is "due process of law" is within the discussion although not within the decision in *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232.

I vote to reverse the judgment in this case.

Mr. Justice MINTURN requests me to say that he concurs in the foregoing view, which is the ground upon which he also votes to reverse.

CARPENTER v. CORNISH et al.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 68*)—DISTRIBUTION OF GOVERNMENTAL POWERS—JUDICIAL POWER.

The courts do not undertake to determine so fundamental a political question as the existence of the government they serve. *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581, followed. *Rott v. Secretary of State*, 63 N. J. Law, 289, 43 Atl. 744, 881, 45 L. R. A. 231 distinguished.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 125-127; Dec. Dig. § 68.*]

2. UNITED STATES (§ 11*)—REPRESENTATIVES IN CONGRESS—QUALIFICATION OF VOTERS.

The several states have the power to change the qualifications for electors of Representatives in Congress by changing the qualification for electors of the most numerous branch of the state Legislature.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 7; Dec. Dig. § 11.*]

3. ELECTIONS (§ 63*)—ASSEMBLY—QUALIFICATIONS OF VOTERS—"LEGAL VOTERS."

Article 4, §§ 2 and 3, of the state Constitution, provides that senators and members of assembly shall be elected by the legal voters. "Legal voters" are the male citizens who, by article 2, are given a vote for officers elected by the people.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 60; Dec. Dig. § 63.*]

For other definitions, see Words and Phrases, vol. 5, p. 4082.]

4. ELECTIONS (§ 1*)—NATURE OF RIGHT TO VOTE.

The right to vote is not a natural inherent right, but is the creation of constitutions and statutes. *Ransom v. Black*, 54 N. J. Law, 446, 24 Atl. 489, 1021, 16 L. R. A. 769, followed.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. ELECTIONS (§ 63*)—QUALIFICATIONS OF VOTERS—SEX.

Women, under our existing law, are not entitled to vote for officers, delegates, presi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dential electors, or upon questions referred to the people.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 60; Dec. Dig. § 63.*]

Error to Supreme Court.

Action by Harriet F. Carpenter against Charles A. Cornish and others. Judgment for defendants (83 Atl. 81), and plaintiff brings error. Affirmed.

Mary Philbrook, of Newark, for plaintiff in error.

SWAYZE, J. [1] The Supreme Court held that the main contention of the plaintiff in error was untenable, because women had not been authorized to vote, under the Constitution of 1776. Without expressing our opinion upon this point, we prefer to decide the case by a somewhat different line of reasoning. It must be conceded that the Constitution of 1844 limited the right to vote for officers elective by the people to male citizens of the United States. The contention is that this limitation must be disregarded, because the Constitution of 1844 was improperly adopted, for the reason that only male citizens were allowed to vote thereon. This contention has the distinction of being as courageous as it is novel. This court exists only under the Constitution of 1844, and if that Constitution is not the law of the state we and our predecessors for nearly 70 years have been usurping powers that do not belong to us. The very writ of error issued by the plaintiff out of this court would, if her contention is correct, be entirely nugatory, since her right of appeal from the decision of the Supreme Court would be to the Governor and Council, under the Constitution of 1776; and, inasmuch as no Council has been in existence since 1844, the plaintiff in error would be unable to correct any error that the Supreme Court might have made. Her difficulties, indeed, would be even greater; for upon her contention no member of the Supreme Court for the last 68 years has been properly appointed, and the best that could be said for that tribunal would be that it had a de facto existence. If she is right now, we have been without legally constituted judicial tribunals. Results so startling suggest that the argument is defective. Counsel for the plaintiff seems to have realized the difficulty; for at the very close of her brief she suggests that it is only the suffrage clause that is under attack, and she adds: "We cannot say the Constitution was not adopted by the majority of the people. We presume that it was. But emphasis is laid upon the fact that the suffrage clause is the only part of the Constitution which deprives people of former constitutional rights." The obvious answer to this suggestion is that if the Constitution of 1844 was adopted by a majority of the people, as the counsel presumes it was, the

suffrage clause was adopted by the same vote; and if the majority of the people chose to deprive people of their former constitutional rights we cannot alter the situation. Every change in the Constitution of 1776 deprived some one of some previously existing right. The Constitution of 1844 has been assumed to be the organic law since its adoption, and no question has heretofore been raised as to its validity. The courts do not undertake to determine so fundamental a political question as the existence of the government they serve. Each member of this court has more than once taken an oath of allegiance to the government established in this state under the authority of the people. The only state government any of us has known is that established by the Constitution of 1844, and it would be the height of absurdity for us now to declare that the government to which we have sworn allegiance has no legal existence. As was said by the Supreme Court of the United States, in *Luther v. Borden*, 7 How. 1, at page 40, 12 L. Ed. 581: "Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown the powers of its courts and other officers are annulled with it. And if a state court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence of authority of the government under which it is exercising judicial power." It is true that in *Bott v. Secretary of State*, 63 N. J. Law, 289, 43 Atl. 744, 881, 45 L. R. A. 251, we passed upon the question whether the lottery amendment of 1897 had been legally adopted; but Justice Dixon called attention to the difference between a court's investigation into the legality of the government of which the court is a branch and its investigation into the legality of the procedure, which in no way involves the legality of the government itself. That difference, he said, was too plain to require elucidation. The Supreme Court of the United States has in two recent cases refused to consider similar questions, upon the ground that they were political and not judicial in their character. *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187, which involved the governorship of Kentucky. The *Pacific Telephone Co. v.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 85 A.—16

Oregon, 228 U. S. 118, 32 Sup. Ct. 224, 58 L. Ed. 377, which involved the validity of the initiative and referendum in the Constitution of Oregon.

[2] The plaintiff in error, however, claims that, even if our view is correct, she is entitled to vote for members of Congress, since that is a right secured to her by the Constitution of the United States. It is, we think, settled by the decision in *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274, that the federal Congress may legislate for the protection of the right to vote for members of Congress. This decision, however, did not overrule the earlier case of *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627. In that case, upon application of a woman for the right to vote, the court held that the Constitution of the United States does not confer the right of suffrage upon any one. This is explained in *Ex parte Yarbrough* as meaning that the right was not definitely conferred on any person by the federal Constitution alone, because under the terms of that Constitution itself it was necessary to look to the law of the state to ascertain the qualifications for voters, under the clause of the federal Constitution which prescribes as the qualification for electors of the House of Representatives that they shall have the qualifications requisite for electors of the most numerous branch of the state Legislature. The point now made is that those qualifications were fixed in 1787, when the federal Constitution was adopted, and are not subject to change by subsequent action of the states. It is argued that the Constitution constituted a contract with the electors, which it was beyond the power of the state to impair after the federal Constitution had been adopted. The argument proves too much; for if the state could not deprive a class of voters of the suffrage it could not deprive them of the influence which that suffrage gave them by admitting others to the right on less onerous terms, and the property qualification prescribed by the Constitution of 1776 could never have been altered. The fact that the right of suffrage has been constantly extended without objections, not only in New Jersey, but in the other 13 original colonies, shows the fanciful character of this argument. The contemporaneous construction has been persistently adverse to this contention of the plaintiff in error. The consequences, if that contention should prevail, would be serious. From the beginning of the government, there has been a constant tendency to consolidate state and national elections, to hold them upon the same day, and to vote for national and state officers upon the same ballot. This would be impossible if the qualifications for electors or members of Congress must necessarily remain as they were originally, while the qualifications for electors of the most numerous branch of the

state Legislature are subject to change by the several states. This objection would be as forcible in the 35 states that have been admitted since the federal Constitution was adopted as in the original 13 states. We need not, however, resort to the argument from contemporaneous construction and the argument from the consequences of the opposite construction. The language of the federal Constitution itself, as now amended, demonstrates that the several states have the power to change the qualifications of electors for Representatives in Congress. Section 2 of the fourteenth amendment provides that when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state being 21 years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of male citizens shall bear to the whole number of male citizens 21 years of age in such state. It is impossible to avoid two inferences from this language, one that the federal Constitution contemplates that the right of suffrage for presidential electors and Representatives in Congress shall be limited to males; second, that the states may, if they choose, abridge this right of suffrage and be subject to no other penalty than the loss of representation. It is almost equally difficult to avoid the inference that the federal Constitution contemplates that the qualification of electors for presidential electors and Representatives in Congress shall be the same as the qualifications of electors for executive and judicial officers of the state, or members of the Legislature. A similar result must be reached if we examine the fifteenth amendment. That provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude. The necessary implication is that the right to vote may be denied or abridged for other reasons than race, color, or previous condition of servitude, and so the courts have in effect held. In *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563, it was held that the act intended to protect the right of suffrage in the negro race was beyond the power of Congress, because not confined in its operation to unlawful discrimination on account of race, color, or previous condition of servitude, but broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, and it could not be limited by judicial construction so as to operate only on that which Congress might rightfully prohibit and punish. The court said:

"The fifteenth amendment does not confer the right of suffrage upon any one. It prevents the states, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise, on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by appropriate legislation."

It may be that the people ought to insert the word "sex" in the fifteenth amendment along with "race, color, or previous condition of servitude"; but until they do so the right to vote for Representatives in Congress or for presidential electors stands on no firmer base than the right to vote for members of the state Legislature, under the state Constitution. These views are sustained by the cases of *Stone v. Smith*, 159 Mass. 413, 34 N. E. 521; *Gougar v. Timberlake*, 148 Ind. 38, 46 N. E. 339, 37 L. R. A. 644, 62 Am. St. Rep. 487; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136; *Pope v. Williams*, 193 U. S. 621, 24 Sup. Ct. 573, 48 L. Ed. 817.

[3-5] The plaintiff in error argues that, even if the Constitution of 1844 is adopted as our guide, that Constitution does not fix the qualification of voters for members of the Senate and Assembly, municipal officers, questions referred to the people, presidential electors, primary elections, and election of delegates to national and state conventions. It is said that in the absence of any qualifications fixed by the Constitution the right to vote at such election belongs to the people, women as well as men. With respect to members of the Senate and Assembly, the argument is that they are not officers, and that article 2 of the state Constitution, as to the right of suffrage, relates only to votes for officers that may be elected by the people. Section 2 and section 3 of article 4 provide that the Senate and Assembly shall be compos-

ed of senators and members elected by the legal voters of the counties. Unless the qualifications of legal voters are prescribed by article 2, there is no constitutional definition of their qualifications, and it is open to the Legislature to confer or withhold the right. The Legislature has tacitly, if not expressly, adopted the qualifications of article 2 of the Constitution, except so far as it has permitted women to vote at school meetings, which right, by construction, is limited, so as to avoid conflict with the provision limiting to male citizens the right of voting for officers. *Landis v. School District No. 44*, 57 N. J. Law, 509, 31 Atl. 1017; *Chamberlain v. Cranbury*, 57 N. J. Law, 606, 31 Atl. 1033. The objection made by the plaintiff in error is that there is a natural and inherent right in all of the people male and female, to vote. If this were so, the limitation of the right to those over 21 years of age would be without justification. It is, however, well settled that the right to vote is not a natural inherent right, but is the creation of constitutions and statutes. *Ransom v. Black*, 54 N. J. Law, 446, 448, 449, 24 Atl. 489, 1021, 16 L. R. A. 769. The opinion is that of a majority of the Supreme Court, but was approved by Justice Dixon (54 N. J. Law, 459, 24 Atl. 1121, 16 L. R. A. 769), and we affirmed on his opinion. 65 N. J. Law, 688, 51 Atl. 1109. It is supported by cases in other jurisdictions. *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627. *U. S. v. Reese*, 92 U. S. 214, 23 L. Ed. 563; *U. S. v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *Pope v. Williams*, 193 U. S. 621, 24 Sup. Ct. 573, 48 L. Ed. 817; *Stone v. Smith*, 159 Mass. 413, 34 N. E. 521; *Gougar v. Timberlake*, 148 Ind. 38, 46 N. E. 339, 37 L. R. A. 644, 62 Am. St. Rep. 487; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136. As was said in *Gougar v. Timberlake*, if women have a natural inherent right to vote, they are not subject to the limitations as to age, residence, and naturalization. Those limitations are imposed on males only. This disposes also of the contention that women have the right to vote for municipal offices, upon questions referred to the people, and at primary elections and election of delegates. They have no such right unless they can show a statute or constitutional provision giving it to them. There is no such statute and the implication, if not the express language, of the Constitution is adverse to the right claimed. The contention of the plaintiff in error fails. We have only to add that, as to the right claimed to vote for presidential electors, the matter is wholly within the control of the state. *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869 (the Michigan electors case).

The judgment of the Supreme Court is affirmed, with costs.

ROBERTS v. JAMES.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

*(Syllabus by the Court.)***1. CONTRACTS (§ 265*)—RESCISSION—RESTORATION OF STATUS QUO.**

The rule requiring one who seeks to rescind a contract on the ground of fraud to restore his adversary to the position he was in at the time of the contract is applicable only to a contract that has been partly executed, and not to a contract that still remains wholly executory on the part of the alleged fraud doer. All the party rescinding can do is to deny his obligation under the contract, and, if he does so in a reasonable time, he has rescinded.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1187; Dec. Dig. § 265.*]

2. CONTRACTS (§ 270*)—RESCISSION—TIME FOR RESCISSION.

What is a reasonable time within which to rescind a contract depends on the circumstances of each particular case. Unless the situation of the other party has changed to his detriment, the party rescinding may keep the question open as long as he does nothing to affirm the contract, and may even wait until action is brought against him.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1189, 1200; Dec. Dig. § 270.*]

3. CONTRACTS (§ 270*)—RESCISSION—EFFECT OF DELAY.

Delay in rescinding a contract is evidence of an election to treat the sale as valid, of more or less weight, according to the circumstances of the case, but of itself does not operate as an estoppel, unless in the meantime superior rights of third persons have intervened.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1189, 1200; Dec. Dig. § 270.*]

4. VENDOR AND PURCHASER (§ 306*)—RESCISSION OF CONTRACT—RIGHT TO RESCIND.

Where there is a written contract for the sale of land wholly executory on the part of the vendor, and the vendee has the right to rescind by denying his obligation under the contract and defending a suit thereon, the vendor is sufficiently protected against future claim under the contract by the record of the suit. Upon the judgment, the contract will be either established as valid or annulled as void, and the question of liability thereon will become res adjudicata.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 873-876; Dec. Dig. § 306.*]

5. VENDOR AND PURCHASER (§ 33*)—ELEMENTS—FALSITY OF REPRESENTATIONS.

An agent of a vendor sold vacant lots upon the representation that they intended to build a railway station and cement walks. Held that, if the representation was false, the vendee might avoid a contract induced thereby.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 38, 40-43, 66; Dec. Dig. § 33.*]

Error to Circuit Court, Gloucester County.

Action by William T. B. Roberts against Benjamin F. James. Judgment for plaintiff, and defendant brings error. Reversed, and venire de novo awarded.

Action by vendor against purchaser to recover purchase price of lots. The written agreement of sale requires the payment of

the purchase price in monthly installments, and provides that, upon default in payment, the vendor may treat the whole purchase money remaining unpaid as immediately due and payable. The deed is to be delivered upon payment of the whole purchase money, and the purchaser, it is provided, shall have no right of possession until the deed is delivered. No installment of purchase money has been paid. The defendant (the purchaser) has never had possession. He defended upon the ground that the contract was induced by fraudulent representations of the plaintiff's agent, Sands, by whom alone the contract on the part of the plaintiff was made. The lots were in a great field, and there was evidence that Sands represented that there was going to be a hotel near by at a spot pointed out by him, and that there was to be a railway station, cement walks, a park with swings; that Roberts was back of the enterprise; that he was going to build 100 houses; that 25 were then contracted for; that, when there were 50, they would get a railway station. The houses had not been built. There seems to be no railway station. The hotel was partly built, but sold by the sheriff, torn down, and the lumber sold at auction. There was no proof of rescission of the contract by the defendant, other than the fact that he defended this suit on the ground of fraud. A verdict was directed in favor of the plaintiff for the balance due upon the ground as stated by the trial judge that there was no proof to go to the jury of a legal rescission, and that the alleged representations were mere promises.

John Boyd Avis and David O. Watkins, both of Woodbury, for plaintiff in error. Joseph J. Summerill, of Woodbury, for defendant in error.

SWAYZE, J. (after stating the facts as above). [1] It is settled that, where a party seeks to be relieved from a contract upon the ground that it was induced by fraud, he must, except so far as he has some legal excuse for failure, restore his adversary to the position he was in at the time of the contract, and that there can be no rescission as long as he retains anything received under the contract, which he might have returned, and the withholding of which might be injurious to the other party. This statement of the rule is taken from the opinion of the Supreme Court in *Byard v. Holmes*, 33 N. J. Law, 119, 127. It has been approved by this court. *Crosby v. Wells*, 73 N. J. Law, 790, 801, 67 Atl. 295. The reason upon which it rests is the injustice of permitting a man to retain a benefit under a contract which he on his part repudiates. By its terms the rule requires only the return of what has been received. It is applicable only to a contract that has been partly executed, and not to a contract that still re-

mains wholly executory on the part of the alleged fraud doer. In such a case the party who undertakes to rescind has received no advantage, he has nothing to return, and all he can do is to deny his obligation under the contract. If he does so in a reasonable time, he has rescinded the contract. Even where he has in fact received something under the contract, he is not always bound to return it. The rule, "like other rules of justice, must be so applied in the practical administration of justice as shall best subserve, in each particular case, the undoing of wrong, and the vindication of the right." *Pidcock v. Swift*, 51 N. J. Eq. 405, 408, 27 Atl. 470; *Guild, Ex'r, v. Parker, Receiver*, 43 N. J. Law, 430; *Doughten v. Camden Building & Loan Ass'n*, 41 N. J. Eq. 556, 7 Atl. 479.

[2-4] It is also settled that one who desires to rescind a contract must act within a reasonable time. *Dennis v. Jones*, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899; *Clampitt v. Doyle*, 73 N. J. Eq. 678, 70 Atl. 129. What is a reasonable time necessarily depends on the circumstances of each particular case. It is settled in the English courts that, unless the situation of the other party has changed to his detriment, the contract continues until the party defrauded elects to avoid it, and he may keep the question open as long as he does nothing to affirm the contract. *Clough v. London & Northwestern Railway* (1871) L. R. 7 Ex. 26, 41 L. J. Exch. 17; *Morrison v. Universal Marine Ins. Co.* (1873) L. R. 8 Ex. 205, 42 L. J. Exch. 115; *United Shoe Machinery Co. of Canada v. Brunet* (1909) A. C. 330. He may even wait until action is brought against him (*Clough v. London & Northwestern Railway*, *ubi supra*), and a plea setting up the fraud amounts to a rescission of the contract (*Lawton v. Elmore*, 27 L. J. Ex. 141; *Dawes v. Harness*, L. R. 10 C. P. 166, 44 L. J. C. P. 194; *Aaron's Reefs v. Twiss* [1896] A. C. 273, 65 L. J. P. C. 54). The case last cited was an action by a company against a shareholder for calls upon his stock. In such cases the right of creditors and other stockholders to have the stock paid for requires a prompt disaffirmance of the subscription to stock; but, inasmuch as in the case before the court the rights of creditors and other stockholders were not involved, it was held enough to set up the fraud by way of defense when action was brought. Lord Watson put the case very neatly. He said: "The respondent is not seeking to rescind the contract. He is merely resisting its enforcement by the party guilty of the fraud." We have approved the same principle in a case where the vendor of chattels sought to rescind and reclaim his property because of the fraud of the vendee. *Williamson v. N. J. Southern R. Co.*, 29 N. J. Eq. 311, 319. We there said: "The vendor may rescind the contract of sale and reclaim the property until, with a knowledge

of the fraud, he elects to ratify and confirm the sale, or third persons, acting on the apparent ownership of the property by the fraudulent vendee, acquire rights therein bona fide and for a valuable consideration. Delay in exercising the power of rescission is evidence of an election to treat the sale as valid, of more or less weight, according to the circumstances of the case, but of itself does not operate as an estoppel, unless in the meantime superior rights of third persons have intervened." In a case like that then before us, rescission strictly so called is required, since the contract has been executed by a delivery of the property. In the case of an executory contract a refusal to perform any obligation thereunder and the defense of an action brought thereon are all that the defrauded party can do by way of asserting his right to disaffirm the contract, and, unless his silence or delay has operated to the prejudice of the other party, he may first assert his right when his adversary first asserts his claim by action. The failure of the vendee to disaffirm the contract might sometimes prevent the vendor from selling to another and a different question would arise from that now before us. Here there is no proof that the plaintiff, the vendor, was in any way prejudiced, except by his failure to receive the purchase money, and to that he was not entitled, if the contract was induced by fraud. The defendant repudiated his obligation at the very start by failing to pay any installment of the price, and, if the plaintiff did not know the position taken by the defendant, he could easily have ascertained it. The existence of the written contract, however, is an important circumstance, since the plaintiff is entitled to be rid of his obligation thereunder if he cannot enforce that of the defendant. Whether the contract is recorded does not appear, but, whether recorded or not, it may possibly affect the plaintiff's title. A recent illustration of the difficulty that may arise is afforded by the case of *Cornwall v. Henson* (1900) 2 Ch. 298. We think, however, that the record of this suit, in which the defendant disaffirms the contract, is sufficient to protect the plaintiff against future claim. Upon the judgment herein, the contract will be either established as valid or annulled as void, and the question of liability thereon will become *res adjudicata*. It is upon this basis that the vendee is allowed to rescind at law by setting up fraud as a defense to an action for the purchase price without being compelled to go into equity—a right so well recognized that it is hardly necessary to cite authority. Cases are collected in 39 Cyc. 1417, and 1916, note 59. We think, therefore, that the defendant was entitled to defend on the ground that the contract was induced by fraud.

[5] We are unable to agree with the learned trial judge that there was no evidence

of fraud to go to the jury, because the false representations relied on by the defendant were mere promises. The representations that there were 25 houses contracted, and that the plaintiff was back of the enterprise, were representations that such were the existing facts. The representation as to the intention to build a railway station and cement walks stands on a somewhat different footing. It is, however, settled that a representation of an intention as existing may if false avoid a contract induced thereby. Where directors of a company procured a loan by representing that its object was to buy property and develop the business, when, in fact, the object was to pay off pressing liabilities, they were held in an action for deceit. "There must be," said Lord Bowen, "a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It may be difficult to prove the state of a man's mind at a particular time, but, if it can be ascertained, it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is therefore a misstatement of fact." *Edgington v. Fitzmaurice*, L. R. 29 C. D. 483, 55 L. J. Ch. 650. The most familiar illustration perhaps is the fraudulent purchase of goods by one who does not intend to pay for them—a case in which there is usually no express representation of intention, but merely the representation of an intent to pay implied from the fact of purchase. *Leake on Contracts*, 294, 295. The New York Court of Appeals has recently held that a statement by the grantee that he intends to erect a dwelling house on the tract conveyed while in fact he intends to erect a garage is a statement of a material existing fact justifying the setting aside of the deed. *Adams v. Gillig*, 190 N. Y. 314, 92 N. E. 670, 32 L. R. A. (N. S.) 127, 20 Ann. Cas. 910. The note in 20 Ann. Cas. 914, refers to *Chicago, etc., R. Co., v. Titterton*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39, where the alleged fraud was a promise to erect a depot on the land. Where a vendor induced a sale by representation of his intention to make a new street, and did not make the improvement or prove what had prevented it, specific performance was refused. *Beaumont v. Dukes, Jacob*, 422. In *Myers v. Watson*, 1 Sim. N. S. 523, the purchasers were induced to enter into the contract by representations made to them by the vendor's agent that the vendor intended to lay out the whole estate in streets, to build houses upon it, and to erect a church. None of those acts had been done. Specific performance was refused. It must be admitted that cases of specific performance stand on a basis peculiar to themselves, since the decree is not a matter of strict right. A distinction is necessary also between cases where the representation of an intention is in fact a mere promise col-

lateral to the contract, and where it amounts to an affirmation of a present state of mind. In this case the man who made the representation undertook to state the intent of other persons, and did not assume to make it a term of the contract. We think a jury might find that he stated it as an existing fact.

There was evidence that the representations were in fact made. There was also evidence from which the jury might infer that the representations or some of them were false. Whether in fact 25 houses were under contract, and whether there was a then present intention to build a station and cement walks, were matters within the knowledge of the plaintiff. His failure to prove that such contracts ever existed, coupled with the fact that no houses have ever been built, justifies an inference adverse to the plaintiff both as to his representation of an existing fact and as to his intention to develop the property. That the representation was a material one inducing the contract by the purchaser is obvious. That in such a case the party defrauded by the misrepresentation of an agent may rescind the contract or defend an action brought thereon is settled in this court. *Reitman v. Florillo*, 78 N. J. Law, 815, 72 Atl. 74.

We do not think it necessary to consider whether the special pleas properly raise the defense or not. As we understand from the colloquy between court and counsel when the verdict was directed, the case was decided upon the broad ground that there was no defense regardless of any question of pleading. It was error to direct a verdict for the plaintiff, and the judgment must be reversed, and a venire de novo awarded.

IN RE BUCKMAN'S WILL.

(Court of Errors and Appeals of New Jersey.
Nov. 27, 1912.)

1. WILLS (§ 55*)—TESTAMENTARY CAPACITY—EVIDENCE.

Evidence on an application for probate of the will of a man 94 years of age held to show testamentary capacity in testator.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 137-161; Dec. Dig. § 55.*]

2. WILLS (§ 21*)—TESTAMENTARY CAPACITY—EVIDENCE.

The point of time at which the testamentary capacity is tested is that of the execution of the will; the antecedent and subsequent condition of a testator being chiefly important as bearing upon that epoch, and of no importance where the evidence of capacity at such time is convincing.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 48, 49; Dec. Dig. § 21.*]

3. WILLS (§ 55*)—TESTAMENTARY CAPACITY—EVIDENCE.

The fact that a will is natural and reasonable corroborates the correctness of the opinions of the subscribing witnesses that the testator possessed testamentary capacity.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 137-161; Dec. Dig. § 55.*]

4. WILLS (§ 166*)—UNDUE INFLUENCE—EVIDENCE.

Evidence on an application for probate of the will of a feeble and aged man, living with a daughter at the time of its execution, which will differed in the disposition made of his property from that made in a former will, in that it left all to his children and none to his grandchildren, particularly none to the son of deceased daughter, *held* not to show that the will was the result of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

5. WILLS (§ 155*)—"UNDUE INFLUENCE."

The influence which is undue and will vitiate a will must amount to moral or physical coercion which destroys free agency and constrains its subject to do that which, but for it, he would not have done.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172.]

Appeal from Prerogative Court.

Application for the probate of the alleged last will and testament of Spencer W. Buckman, deceased. Appeal from a decree affirming a decree of the Mercer county orphans' court admitting the will to probate. Decree affirmed.

This is an appeal from a decree of the prerogative court affirming a decree of the Mercer county orphans' court admitting to probate the last will and testament of Spencer W. Buckman, deceased. The reasons which led the orphans' court to admit the will to probate are set forth in the following opinion of Gnichtel, J.:

"This is an application to have admitted to probate a paper dated January 22, 1909, alleged to have been executed by Spencer W. Buckman, then and at the time of his death residing in Trenton, N. J., as his last will and testament.

"The application is made by Wallace Buckman and Mary Parsons, two of the executors named in the alleged will, and to the application a caveat has been filed by Owen Moon, Jr., and Caroline and Albert B. Wharton, grandchildren of the deceased.

"The paper was executed in conformity with the statutory requirements. The grounds urged against the validity of the instrument are, first, want of testamentary capacity in the testator; and, second, that its execution was unduly influenced by the proponents, who are, by its terms, beneficiaries to the extent of two-thirds of the estate. At the time of the execution of the alleged will, and at the date of his death, Mr. Buckman had three children living, namely, Mary B. Parsons, Wallace Buckman, and Charles Buckman. Sarah B. Wharton, a daughter, died many years ago, leaving two children, Albert B. Wharton and Caroline Wharton. Mrs. Elizabeth Moon, another daughter, died a few days before the execution of the will, leaving one son, Owen Moon, Jr.

[1] "The caveators, to establish their claim of mental incapacity, have produced testi-

mony to show that until three or five years ago the testator was a man of vigorous mentality; that he then began to fail, and that he steadily declined until the change became marked, both mentally and physically, in the spring of 1908; that he was hard of hearing; his eyesight was quite defective; he was careless about his dress; was untidy; his memory was poor, and at times he was unable to control the functions of nature; he remained in his room most of the time, and, when he took a short walk, the coachman usually accompanied him; he would spend considerable time in counting and recounting his pocket money and his fingers, would move his lips, and utter no sounds, would sit by, handling bits of cord, and slept considerably during the daytime; at times he was childish; he failed to comprehend that the food he was eating was the same he was then asking for; to make him understand a remark, it had to be repeated two or three times; in 1908 he did not know that Christmas was a holiday; wore his overcoat in the house for the purpose of getting wear out of it; went to bed in the middle of the day under the belief that he had had his supper; at times talked irrationally, and forgot where some of his children lived; could not distinguish between checks and notes; on one occasion failed to recognize his son Wallace, was incoherent at times in his speech; had difficulty in fixing his mind on a subject; during the fall of 1908 there were occasions when it took considerable effort to attract his attention; he was dull, and there was an apparent lack of comprehension. Basing their opinions on such facts as these, a number of the witnesses testified that the testator did not understand the business he was transacting, when he signed the will on January 22, 1909. The majority of these instances can readily be accounted for by the fact that age had undoubtedly impaired the testator's hearing, sight, and memory, and it is undoubtedly true that this apparent mental decline was not at all constant. During this same period witnesses, with equal opportunity to observe the testator and converse with him, found entirely different conditions. They testified in substance that he was a remarkably bright man for his age; that to an extent he kept in touch with current events; that he remembered people and events both prior to and subsequent to January 22, 1909; that on April 7, 1908, he executed a power of attorney to Owen Moon, Sr., which has never been questioned. On October 29th of the same year he executed and acknowledged another power of attorney to Owen Moon, Sr. Mr. Stephen Cook, who took the acknowledgment, found Mr. Buckman in good condition. They conversed about his health, and Mr. Buckman stated that it was because of his defective eyesight that he was con-

fined to his room. Apparently Mr. Cook and Mr. Moon were both satisfied that Mr. Buckman at that time fully comprehended the business he was transacting. On Christmas day, when one of the witnesses declared he did not comprehend that it was a holiday, the testator conversed sensibly and intelligently with a number of people. On January 22d he asked Mr. Moon to prepare a list of his mortgages. He spoke to a number of people about the fire on the Comfort farm and about some horse thieves. In the forepart of April, 1909, about two weeks before his death, he had an extended conversation with his grandson, who had assisted in the capture of the thieves. He inquired after all the details—the place where they were captured, their trial and sentence, and particularly the reward his grandson received for his share in capturing the thieves. The matter seemed to be of great interest, and he expressed regret that the thieves did not get a longer sentence. They conversed about jury duty; that he had been a juror a number of times; and that it was good education for a farmer's son. He spoke about the Comfort fire, and he asked about the insurance, the stock that had been consumed and damaged, and discussed other topics gleaned from the county paper.

"It would seem from the testimony that Mr. Buckman's condition varied; that it was affected by his surroundings and circumstances; that at certain periods he was dull and somewhat slow of comprehension, and at others his faculties were brighter and more alert. Mr. Moon, Sr., who looked after his investments, states that 'there were times when he seemed to be a little dull right at the start, but he would directly understand the conversation.' Some of the witnesses were impressed with his capacity to transact business, while others received a different impression. This is illustrated by the testimony of Vice Chancellor Walker and Mr. Linton Satterthwait, who had interviews with the testator at different times in December, 1904, about a claim against a real estate agent in Trenton. Vice Chancellor Walker testified that when he met Mr. Buckman 'he seemed very much agitated, his hands trembled, and he drooled at the mouth;' that his conversation was 'disjointed, disconnected and rather incoherent,' though out of it all there could be evolved an idea of what was wanted; that the testator's condition was such that he did not understand or could not intelligently and understandingly transact business, and he found it necessary to turn to Mr. Moon to get a detailed explanation.

"Mr. Satterthwait's experience was entirely different. He had known the testator since 1895, and states that in the interviews concerning the matter referred to by Vice Chancellor Walker, and at about the same time, there was nothing noticeable about the

testator that would distinguish him from any other old person, that he was a remarkably bright man for a man of 90, and his conversation was not essentially different from any one going over the details of a claim; that his statements were intelligent and coherent, and nothing transpired that was at all out of the ordinary; that he had a peculiar manner of speech, always spoke in a high key, and had a little mannerism of working his lips as seeming to expel something, a spitting motion without actually spitting.

"These witnesses had been in the active practice of law for many years, and had had extended experience with men and affairs, and the result of their observation of the testator are radically different. This is also true of other witnesses. In view of this conflicting and contradictory testimony, the occurrences at the time of and immediately surrounding the execution of the will become extremely important.

[2] "The point of time at which the testamentary competency is to be tested is that of the execution of the will. The antecedent and subsequent condition of a testator is chiefly important as bearing upon that epoch. *O'Brien v. Dwyer*, 45 N. J. Eq. 689, 17 Atl. 777.

"The will was executed on January 22, 1909. On January 22d Mr. Frank S. Katzenbach, Jr., a lawyer of large practice and experience, was sent for. After describing what occurred upon reaching the house, he says he was ushered into a bedroom, and found 'a very elderly man,' and, after some conversation, the old gentleman said he was an old man, 94 years old; that he had lived to see all his children, except three, buried, and on that day a daughter, Mrs. Moon, was buried; that about 20 years ago he had made a will in which he had left all his property to his four children, except that he remembered his grandchildren in the will. He wanted now to change his will. Upon being informed that Mrs. Moon's share would go to her son, he said he knew that, and that was what he did not want; that the young man had more money now than he could properly take care of, and he would now get more; that his grandchildren had more money than his children, and he wanted his property divided among his two sons, Wallace and Charles, and his daughter, Mary Parsons. In response to questions, he informed Mr. Katzenbach that his property consisted 'mostly of money and mortgages.' He told him the amount he had in cash and where it was deposited, and, when asked how much he had in mortgages, he replied that it was not necessary for the lawyer to know that in order to draw his will, and Mr. Katzenbach then stopped asking questions. He said he wanted as executors his son Wallace, Owen Moon, Sr., and his daughter, Mary Parsons. Mr. Katzenbach called his attention to the fact that he was

ignoring his grandson, Owen Moon, Jr., and asked why he wanted the father as executor. His reply was that he was one of the executors of the other will, that Owen had asked him, and, if he did not make him an executor, 'he would kick up his heels and make a fuss.' He also said that Owen Moon, Sr., had been attending to his business. He then asked Mr. Katzenbach to call his son, Wallace Buckman, and, when he appeared, he directed him to deliver to Mr. Katzenbach the old will. He said he wanted the will like his old one, except he wanted his property divided equally among his three children. Mr. Katzenbach called the next day for the purpose of having the will signed. When he read the clause containing the bequests to the grandchildren, the old gentleman stopped him, said that it was wrong, that he did not want to leave anything to his grandchildren. The balance of the will was read, and the testator said it was satisfactory, except that he did not want to leave anything to his grandchildren.

"The will was redrawn, and about an hour afterwards Mr. Katzenbach was again at the house, and, before the will was produced, the testator conversed with Mr. Katzenbach, and referred to a case he had had against him which cost him (the testator) about \$1,000. The will was again read to him, and Mr. Katzenbach testified that, 'after this will had been read to Mr. Buckman by myself, I told him that it would be necessary for him to execute the same in the presence of two witnesses, who must be present at the same time and subscribe their names in the presence of the testator, and see him sign his name. Mr. Buckman then said he would have to have his hand held, as it was unsteady. Pen and ink were then called for, and Mr. Buckman, who was sitting in the chair by the desk, raised partially, and his chair was moved over to the desk. A pen was placed in his hand, and he asked me to start him a good ways over on the paper, which I did. He then wrote the letter "S," pronouncing the letter "S," then "p," pronouncing the letter "p," then "e" pronouncing the letter "e," and so on with each one of the letters in his signature. After that signature had been completed, I then asked Mr. Buckman if he signed, sealed, and published and declared that to be his last will and testament, in the presence of Mr. Geraghty and myself, and asked Mr. Geraghty and myself, in his presence, and in the presence of each other, to subscribe our names thereto, as witnesses. He said, "I do." Thereupon Mr. Geraghty signed his name, and, after he had completed his signature, I took the pen and signed my name, and he told me to keep it, and I said, "Good afternoon," and Mr. Geraghty and I walked out.'

"This testimony, which is corroborated by Mr. Geraghty, standing by itself would seem to establish quite satisfactorily the testa-

tor's competency at the time of the execution. There was nothing in what he said at any of these interviews which indicated any failure of mind, memory, or understanding, and what he said was sensible and appropriate to the occasion. His manner was direct and positive. That he heard and understood the will as it was read to him is apparent from the fact that he instantly detected an error which had been made in the draft. Evidence of previous weakness and inability, if credited, is admissible and important. But, if evidence of capacity during the period while the business was in hand is convincing and sufficient, the evidence of previous incapacity has no weight. *Armstrong v. Armstrong*, 69 N. J. Eq. 817-820, 66 Atl. 399. The paper under consideration divides his property among his living children, and, so far as the disposition of his estate is concerned, is practically in harmony with the will made by the testator in 1892, except in that will he left small legacies to two children of a deceased daughter. In the will of 1909 he omitted all reference to his grandchildren. There was some reason for this. The children and grandchildren were all beneficiaries under the will of Isaiah Williamson of Philadelphia. The generation to which the grandchildren belonged had received about \$175,000 each, while the generation to which the children of Spencer W. Buckman belonged had each received a life interest in \$60,000, which, at death, was to be divided among their children. Isaiah Williamson died in 1888 or 1889. The first will of Spencer W. Buckman was made on June 2, 1892, the second one January 22, 1909, and both papers seem to have been made with a view of dividing his estate among his children and ignoring his grandchildren. In view of the disposition made of the Williamson estate, this was perfectly natural. The testator in both instruments showed a preference for his children, who were nearer to him, and had received considerable less money from the Williamson estate.

[3] "The fact that the will is in itself natural and reasonable is a fact corroborative of the correctness of the opinions of the subscribing witnesses that the testator possessed testamentary capacity at the time of the execution of the will. *Clifton v. Clifton*, 2 Dick. Ch. Rep. 227.

[4] "The other contention raised by the caveators is that the alleged will was the result of undue influence exerted upon the testator by the proponents, Mary Parsons and Wallace Buckman. From 1900 down to June, 1908, the testator resided with his daughter, Mrs. Moon, at which time, because of the daughter's health, the family went to the seashore, and the testator was brought to Mrs. Parsons' house. He returned to Mrs. Moon's house in October, and remained there until December 30th, when, on account of the serious illness of Mrs. Moon, he was

again brought to Mrs. Parsons' house, and continued to live there until he died, April 25, 1909. The change on both occasions was made at the suggestion of the Moons. There is no evidence that he contemplated making any change in his will during the lifetime of Mrs. Moon. The first intimation of such intention was given by the testator himself, who, shortly after Mrs. Moon's death, said to Mrs. Parsons, 'I am sorry Lib's gone, and I will have to make some change in my affairs;' and he added, 'I would like you to get a lawyer.' On the day of Mrs. Moon's funeral, January 21, 1909, Mrs. Parsons consulted with Mr. and Mrs. Tyson, her daughter and son-in-law, concerning the request of her father, and Mr. Tyson suggested Mr. F. S. Katzenbach, who accordingly was sent for. Counsel for the caveators admit that there is absolutely no direct testimony in the case to show any undue influence, but claim that the circumstances surrounding the execution of the will, in connection with the testator's mental condition, proved that the will was not the product of the free will of the testator. I have carefully considered the testimony, and cannot agree with this view. I am satisfied that the testator had sufficient testamentary capacity to make a will, and there is nothing in the testimony which would tend to show that he had not the freest opportunity to make up his mind as to the disposition of his property. His general purpose, according to his own statements to Mr. Katzenbach, was to divide his property equally among his living children. This was not a newly conceived purpose, nor does the testimony show that it was prompted by the suggestions or influence of others. The same purpose is shown by the will of 1892. Evidently he had this purpose in mind through all these years, and, when by the death of Mrs. Moon the conditions were changed, he realized that, if he desired to adhere to the testamentary disposition made by the will of 1892, a change would be necessary, and he said to Mrs. Parsons, 'I am sorry Lib's gone, and I will have to make some change in my affairs. * * * I would like you to get a lawyer.' Stress is laid upon the fact that at this time he turned to Mrs. Parsons for aid, and asked her to get a lawyer. There was nothing unnatural about this. She was his only living daughter. He was living at her house, and he had a perfect right, as incident to the right of testamentary disposition, when he desired to put his testamentary wishes in legal form, to the aid of any person he thought proper to select.

[§] "The influence which is said by law to be undue, and therefore to vitiate a will, must amount to moral or physical coercion which destroys free agency and constrains its subject to do that, which, but for it, he would not have done. The testimony does

not show any such influence. His manner in giving directions for the drafting of his will and the occurrences at and immediately surrounding its execution would indicate that the testator was able to, and did, exercise his judgment and will freely, without any undue influence, and, after a careful examination of the whole case, my conclusion is that the paper offered is the last will and testament of Spencer W. Buckman, and should be admitted to probate."

Malcolm G. Buchanan and John H. Backes, both of Trenton, for appellant. Edward L. Katzenbach and Frank S. Katzenbach, Jr., both of Trenton, for respondents.

PER CURIAM. The decree of the prerogative court will be affirmed for the reasons stated in the foregoing opinion delivered in the orphans' court.

PETERSON v. REID et al.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

1. COVENANTS (§ 73*)—MORTGAGES (§ 274*)—PERSONS BOUND BY COVENANT—FORECLOSURE OF MORTGAGE—AMOUNT OF RECOVERY.

A mortgage recited that it was given to secure part of the purchase money and the conditions in the deed. By the deed the vendor mortgagee had covenanted to fill the land conveyed. After a partial breach, but before the time for full performance had arrived, the mortgage, which then had three years to run, was assigned to complainant. After the time for full performance and breach of the covenant, and before the mortgage was due, the vendor and the owner of the equity of redemption who claimed through two mesne conveyances agreed to a waiver of damages for the breach and an extension of the time for performance. The mesne conveyances both recited that the land was conveyed subject to a mortgage amounting to \$10,000, meaning thereby the complainant's mortgage. *Held*, (1) that the complainant was not bound by the covenant; (2) that the mortgage was not subject to a deduction for damages caused by breach of the covenant.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 74; Dec. Dig. § 78; * *Mortgages*, Cent. Dig. §§ 718-724, 728; Dec. Dig. § 274.*]

2. MORTGAGES (§ 274*)—TRANSFER OF EQUITY OF REDEMPTION—EFFECT.

Where land is conveyed subject to a mortgage, and the circumstances show that only the definite and ascertained equity above the mortgage is meant to be conveyed, the grantee cannot claim a deduction from the mortgage by reason of an antecedent equity in favor of his grantor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 718-724, 728; Dec. Dig. § 274.*]

Appeal from Chancery Court.

Bill in equity by Ida A. Peterson against Cyrus D. Reid and others. From a decree for defendants, complainant appeals. Reversed, with directions.

See, also, 76 N. J. Eq. 377, 74 Atl. 662.

Bill to foreclose a purchase-money mortgage by the assignee of the mortgagee

against subsequent owners claiming under the mortgagor. The defense is that the mortgagee covenanted with the mortgagor to fill in the land, and failed to do so. The Vice Chancellor sustained this defense. The land was conveyed by the Carteret Realty Company to Cyrus D. Reid by deed dated May 5, 1905. The Realty Company covenanted that it would on or before the ensuing 1st day of June fill in a certain portion of the land, and within six months thereafter fill the whole premises to a height of three feet above the surface. Reid executed a mortgage of even date to the Carteret Realty Company for \$10,365 upon which \$10,000 remains unpaid. The mortgage was payable May 5, 1908, and contained the usual clause making it due upon default in payment of interest. It recited that it was given to secure part of the purchase price "and the conditions named in said deed." No deed is referred to in the mortgage, but there is no doubt the deed above recited is meant. Reid conveyed to Frank T. Morrill by deed dated May 6, 1905, recorded October 16, 1905; and Morrill conveyed to Frank T. Morrill & Co., a corporation, by deed dated October 11, 1905, recorded October 16, 1905. Meantime the mortgage had been assigned by the Realty Company and reassigned to it, and then assigned to the complainant by assignment dated July 13, 1905, recorded July 21, 1905. Reid in his deed to Morrill covenanted to fill in the same language as the Realty Company had covenanted with him; in fact, the covenant seems to have been copied from the earlier deed. Morrill in his deed covenanted with Frank T. Morrill & Co. to fill the whole premises to a height of three feet above the surface on or before December 1, 1905, and he assigned to the corporation any claim or cause of action he might have against Reid by reason of the nonfulfillment of Reid's contract to fill a portion of the premises on or before June first. Both Reid and Morrill recited in their deeds that the property was subject to a mortgage amounting to \$10,000 at 5 per cent. interest. It is not questioned that this refers to the complainant's mortgage. The land was not filled at the time fixed. The first interest payment became due November 5, 1905, but was not paid. At that time the only default in performance of the covenant to fill was for the portion that was to be filled by June 1st. The defendant corporation waited until December 6th, and then paid the interest, but called the complainant's attention to the breach of the covenant, and gave notice that it did not waive any claim for damages which it had against the mortgagee and the complainant as assignee. It called attention to the clause in the mortgage reciting that it was given to secure the conditions in the deed, and to the covenant therein. It added: "By virtue of the aforesaid clause in the mortgage you are held to have notice of this condition. I now expect that the filling

will be put in very shortly, and that this will cause us no further trouble, but I wish you to know that, should this not be done, a sufficient amount to pay for doing it ourselves will be deducted from your mortgage or interest thereof." The defendant corporation had been in correspondence since November 11th with Savage, an officer of the Realty Company, with reference to the failure to fill. Thereafter, on June 26, 1906, a written agreement was made between Frank T. Morrill & Co. and the Carteret Realty Company, which recited the covenant in the deed of May 5, 1905, and the failure of the Realty Company to perform. Frank T. Morrill & Co. agreed that upon condition, and, in consideration of the performance of this agreement, it would waive all damages which it had suffered or might suffer up to October 1, 1906, by reason of the failure of the Realty Company to perform its agreement with Reid. The Realty Company agreed to fill the whole tract on or before October 1, 1906, and to give Frank T. Morrill & Co. the use of its dock to February 1, 1907, without charge and to make no charge for its previous use. The use of the dock was subject to a sale by the Realty Company after October 1, 1906. On September 10, 1907, the Realty Company notified the Morrill Company that prospective purchasers of adjoining property would require the dock within two weeks. Interest on the mortgage was paid up to that time, although not promptly. Frank T. Morrill & Co. offered the failure of the Realty Company to fill as its excuse for failure to pay promptly, and efforts to get that company to perform its covenant seem to have been constant, but met with only partial success. Frank T. Morrill & Co. defaulted in the interest due November 5, 1907, and the bill was filed. The defendants answered and filed cross-bills, which upon demurrer were sustained. 76 N. J. Eq. 377, 74 Atl. 662. Upon final hearing there was a failure to prove the charge of the cross-bills that the complainant was a mere volunteer without interest acting for the benefit of the Realty Company. As far as the case shows, she paid the full amount of the mortgage.

Robert H. McCarter, of Newark, and Francis V. Dobbins, of Rahway (Arthur F. Egner, of Newark, on the brief), for appellant. Thomas G. Haight, of Jersey City, for respondents.

SWAYZE, J. (after stating the facts as above). [1] The defendants claim the right to have deducted from the amount of a purchase-money mortgage unliquidated damages for breach of an executory covenant. The covenant was made not by the present holder of the mortgage, but by her assignor, and not with the present owner of the equity of redemption, but with a predecessor in title. There is no privity of contract. The defendants seem to rest their claim either on the

theory that the present holder of the mortgage is bound by a covenant made by her assignor, or the theory that she acquired the mortgage subject to an equity of the defendants to have the deduction.

(1) We think the first theory is untenable. Even if the case were one where the burden of a covenant could run with the land, the complainant's interest is, in equity, a mere security for her debt. The suggestion that the burden of a covenant made by a mortgagee with the mortgagor runs with the mortgage and binds the assignee is novel. Plain language would be necessary. In the present case, the mortgage merely recites that it is given to secure the conditions in the deed. It does not purport to bind assignees. The language is inapt to impose an obligation upon the mortgagee in favor of the mortgagor, since by its terms it "secures" the conditions by a conveyance of the mortgagor's land to the mortgagee. The complainant could not have been bound to perform the covenant, since she had no right of entry on the land for the purpose, and the owners persistently treated the Realty Company as the party bound. The case differs from cases of restrictive covenants where equity charges upon subsequent owners the duty to observe the restrictions. The covenant in this case involves labor and expenditure as well as the right of entry on the land. The burden of such covenants does not run with the land even in equity. *Haywood v. Brunswick Building Society*, 8 Q. B. Div. 403, 51 L. J. Q. B. 73; *Ansterberry v. Corporation of Oldham*, 29 Ch. Div. 750, 55 L. J. Ch. 633, cases which were cited with approval in *De Gray v. Monmouth Beach Clubhouse Co.*, 50 N. J. Law, 329, 24 Atl. 388 (affirmed on the Vice Chancellor's opinion by this court, see 67 N. J. Eq. 731, 63 Atl. 1118). Even if we disregard the curious use of language which makes the mortgagor give a mortgage on his land to secure performance of a covenant for his benefit, and calls the covenant a condition, and if we assume that the intent was to secure performance of the covenant to fill contained in the Realty Company's deed to Reid, the defense is not helped. That covenant was a covenant of the Carteret Realty Company to fill on or before December 1, 1905. It was subsequently abandoned by mutual agreement between the Realty Company and Frank T. Morrill & Co., the agreement of June 26, 1906, substituted therefor, and all damages were waived. By means of this new agreement, Frank T. Morrill & Co. secured the use of the dock, and this consideration probably led them to abandon the original covenant. The covenant in the deed was thereby abrogated by novation, and neither the realty company nor Mrs. Peterson are liable thereon.

(2) The defense must rest on the theory that the complainant took the assignment

subject to an equity in favor of the mortgagor against the original mortgagee, the complainant's assignor. We assume that she took with notice of the existing facts. One reason that courts allow a deduction from the amount of a purchase-money mortgage aside from cases where fraud justifies rescission and cancellation is that thereby circuity of action is avoided. *Shannon v. Marsellis*, 1 N. J. Eq. 413. Before such a defense can prevail, there must be a right of action in the mortgagee and damages must have been sustained. This right of action depends as counsel for the defendants argue upon a failure of consideration, and it is because the abatement from the face of the mortgage, in a case like the present, depends upon a failure of the consideration therefor, that the right is limited to purchase money mortgages, where there are covenants against incumbrances, of warranty, or the like, or cases of fraud or mistake.

[2] An examination of the facts of the present case shows that the only failure of consideration alleged is the breach of the executory covenant. That, however, is not strictly speaking a failure of consideration for the mortgage, since it was the promise itself, and not the performance of that promise, that constituted the consideration. The mortgagor might have stipulated that the mortgage should become due only upon the performance of the agreement by filling the land. He was content to rely upon the mere promise to fill. The mortgage was valid for the full amount on the day it was given because the whole consideration—the land and the promise to fill—had passed. When the contract is already executed on one side, as it was in this case by giving the mortgage, and performance of a promise by the other party is to take place in the future, it necessarily is the promise, and not the performance thereof, that constitutes the consideration. There is no equity to a deduction from the face of the mortgage until the mortgagor has a right of action and has been in fact damaged, since it would be manifestly unjust to make a deduction where there might eventually be no loss. Even where there were paramount liens for taxes at the time of the deed and mortgage, but no covenant against incumbrances, we held that the deduction from the mortgage claimed on account of the tax liens could not be permitted by reason of the covenants for quiet enjoyment and general warranty. There had been no eviction; there was no right of action and no damage. *Baudendistel v. Zabriakie's Executors*, 50 N. J. Eq. 453, 26 Atl. 455. The argument is stronger in a case like the present, where at the time of the conveyance there was a complete consideration in accordance with the intent of the parties, and the damages are claimed for a subsequent breach of an executory covenant, which could not have been even anticipated at the time. The

learned Vice Chancellor, however, was in error even if we could hold that the subsequent breach amounted to a failure of consideration. The only equity against the complainant is the equity that existed when the mortgage was assigned to her on July 13, 1905. At that time there had been at most only a partial breach by failure to do the work required to be done by June 1; for the subsequent breach the defendant had a right of action against the Carteret Realty Company, but this could not affect the complainant. She was not bound to perform the covenant of the Carteret Realty Company for reasons already stated. The extent to which the defendants could claim an equity as against an assignee of the mortgage, if they could claim any, would be the amount of damages for the partial breach prior to the assignment. Even that cannot be allowed to the present owner of the equity, Frank T. Morrill & Co. The covenant to fill was not made with it, but with Reid. If we concede that the benefit of the covenant ran with the land, it did not pass, unless such was the intent of the parties effectuated by the conveyance. Whether the benefit of the covenant has passed to Frank T. Morrill & Co. depends on what Reid conveyed to Morrill and Morrill to the company. Each deed conveyed an equity of redemption, but the extent of that equity depended on the amount to be paid on the mortgage. If Reid conveyed to Morrill no more than the equity beyond \$10,000, and the Morrill Company were now allowed to redeem for less, they would obtain more than Reid conveyed, and thus would secure Reid's property without paying for it. It is for this reason that it is held that, where land is conveyed subject to a certain mortgage, the grantee cannot ask to have the mortgage abated. He does not stand in the shoes of the mortgagor. The latter owned the whole estate; the grantee only an equity of redemption. The mortgagor may convey the whole estate, or he may convey only the definite equity, and waive his defense to the mortgage in favor of the mortgagee. This was the view of Chief Justice Green speaking for this court in *Brolasky v. Miller*, 9 N. J. Eq. 807, at page 813. In *Warwick v. Dawes*, 26 N. J. Eq. 548, 555, 556, Chief Justice Beasley rested his decision upon the injustice of allowing a purchaser to profit at the expense of the mortgagee, when the mortgagor, who, if any one, was the injured party, abandoned his right. In *Hacksack Water Co. v. De Kay*, 36 N. J. Eq. 548, Mr. Justice Depue said that the theory on which cases of this class are founded is that, the mortgagor having elected to affirm the mortgage by selling the mortgaged premises subject thereto, the purchaser, by his contract as expressed in his deed, takes an equity of redemption only, and therefore cannot dispute the validity of the mortgage, and thus obtain an interest

in the land which the mortgagor never intended to transfer to him. In *Trusdell v. Dowden*, 47 N. J. Eq. 398, 20 Atl. 972, Vice Chancellor Van Fleet, speaking of a case of a usurious mortgage, says that the doctrine that the purchaser of the equity of redemption, who takes title subject to such mortgage, cannot set up the defense of usury, does not rest on the theory that the taint has as between the original parties been purged from the mortgage, but upon the foundation that the purchaser by taking title subject to the mortgage and retaining out of the price he agreed to pay sufficient money to pay the mortgage places himself in a position where he cannot allege usury without attempting to keep back part of the money which he agreed to pay for the mortgaged lands. Having retained enough of the purchase money to pay the mortgage, under a promise that he would apply the money to the payment of the mortgage, he would, if he could successfully make the defense, defraud both his grantor and the mortgagee. The rule has recently been reasserted and applied by this court to a case where land was bought of a receiver of an insolvent corporation subject to the mortgage in suit, and one of the defenses was that the mortgage was ultra vires, and therefore invalid and void. *Camden Safe Dep., etc., Co. v. Citizens' Ice, etc., Co.*, 71 N. J. Eq. 221, 65 Atl. 980. These cases present two theories, one that of "unjust enrichment" (to use the nomenclature now coming into vogue) on which the action for money had and received, and what are now called "quasi contracts," rest; the other that the intent of the parties was to convey only a definite and ascertained equity of redemption, the right to redeem by paying the specified amount of the mortgage. The theories are not inconsistent. Where only the definite and ascertained equity is conveyed, it is an almost irresistible conclusion that allowance has been made by deducting the amount of the mortgage from the value of the land if unincumbered, and quite irresistible that, if the grantee of the equity is allowed to claim a deduction from the amount of the mortgage, he gets something which he never bought, and was never conveyed to him. Where the amount of the mortgage is not deducted from the purchase money, and the grantee does not purchase subject to the mortgage, the principle is not applicable (*Van Winkle v. Earl*, 28 N. J. Eq. 242), and so it is where the reference to the mortgage is only by way of excepting it from the operation of the covenants for title, or the conveyance is for part only of the mortgaged premises, so that the presumption arises that the land retained is to answer for the whole or part of the debt (*Magie v. Reynolds*, 51 N. J. Eq. 113, 26 Atl. 150). An examination of the facts in the present case convinces us that the intent of the parties was to convey only the definite and ascer-

tained equity of redemption that would remain after paying \$10,000 on the mortgage. The equity in the whole mortgaged premises was conveyed. The language of Reid's deed to Morrill does not evince merely an intent to except the mortgage from the covenants of title. It is, "subject however to a mortgage amounting to the sum of ten thousand dollars," and the language in Morrill's deed to the Morrill Company is the same with the omission of the words "the sum of." The object of stating the amount could have been only to fix and determine the extent of the equity intended to be conveyed. If the object had been to except the mortgage from the operation of the covenants for title, it would have been quite unnecessary to mention the amount. Moreover, when the deed from Morrill to the Morrill Company was made, there had already been a partial breach of the covenant to fill, and, if the present contention of the company is sustained, the mortgage did not then amount to \$10,000. This fact was known to the grantor, and the grantee is chargeable with notice. The covenant to fill was in a deed in its chain of title, and the fact that the filling had not been done was visible upon the ground. Under these circumstances, the deed was made and accepted subject to a \$10,000 mortgage. The necessary inference is that, knowing of the breach of the covenant to fill, the grantor chose to convey and the grantee to accept what equity remained above the amount fixed. This view is confirmed by the fact that in Morrill's deed to the company, made after the partial breach on June 1st, he assigns his claim against Reid by reason of the nonfulfillment of Reid's contract. If the parties had meant to convey to Frank T. Morrill & Co. a right to claim a deduction as against Mrs. Peterson, it is inexplicable that the grantor assigned and the grantee accepted a claim against Reid, mentioned no claim as against the mortgagee, and at the same time acknowledged that Mrs. Peterson's mortgage amounted to \$10,000. That neither party to the last-mentioned deed supposed that more was conveyed than the definite and ascertained equity over \$10,000 appears further from the fact that instead of assigning the benefit of the original covenant of the Carteret Realty Company, or any right of action against that company for the existing partial breach, Morrill entered in a personal covenant himself to fill in to the depth of three feet before the ensuing December 1st. If that covenant had been merely collateral to the original covenant of the Carteret Realty Company, he would not in the immediately succeeding clause have referred to the mortgage as amounting to \$10,000, without reference to any equity to a reduction of amount. The parties throughout treated the covenant to fill as a personal covenant not running with

the land, either by way of burden or benefit, and on each conveyance a new personal covenant was made by grantor with grantee. The case resembles *Davis v. Clark*, 33 N. J. Eq. 579, where it was held that there could be no deduction from the mortgage because there was no privity of contract between the holder of the mortgage and the owner of the equity of redemption. The Carteret Realty Company was liable for breach of its original covenant, and there was a novation of its liability by the agreement of June 26, 1906. By this agreement Frank T. Morrill & Co. waived all damages up to October 1, 1906, in effect extending the time for performance to that date, and the Carteret Realty Company agreed to fill in by October 1st. During the period between June 26th and October 1st even the Carteret Realty Company was not in default. If any equity ever had attached to the mortgage in Mrs. Peterson's hands by reason of the partial default on June 1, 1906, that must have ceased when the owner of the equity waived its claim for damages. The only breach now existing for which Frank T. Morrill & Co. can claim damages is the breach of the agreement of June 26, 1906. Mrs. Peterson cannot be charged with any liability for that breach. She was not a party to the agreement, and had acquired her mortgage a year before the agreement was made.

For these reasons, we think the decree below is erroneous, and must be reversed. The record should be remitted, and a decree of foreclosure entered. The complainant is entitled to costs in both courts.

IN RE JOHNSON'S WILL.

(Court of Errors and Appeals of New Jersey.
Nov. 27, 1912.)

1. WILLS (§ 114*)—EXECUTION—EVIDENCE—SUFFICIENCY.

Where an attesting witness to a will, when coming into the room of testator, was informed, either by testator or by the other attesting witness, that he was wanted to witness a paper, and the execution of the will was forthwith proceeded with, and the will was published in his presence, and he and the other attesting witness saw testator sign, and both attesting witnesses immediately signed in his presence and in the presence of each other, the will was sufficiently executed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 277-279; Dec. Dig. § 114.*]

2. WILLS (§ 302*)—PROBATE—CHARACTER OF INSTRUMENT.

Evidence held to show that a will presented for probate, consisting of four sheets not fastened together, only one of which was signed by testator, was the same four sheets before the testator at the time of execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 575, 581, 700-710; Dec. Dig. § 302.*]

3. WILLS (§ 55*)—PROBATE—TESTAMENTARY CAPACITY.

Evidence held to show that testator possessed testamentary capacity because capable of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

recollecting what his property consisted of, and who, considering the ties of blood and friendship, should be the objects of his bounty, and possessing a mind sufficiently sound to enable him to know and understand the disposition he desired made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 187-161; Dec. Dig. § 55.*]

4. WILLS (§ 163*)—UNDUE INFLUENCE—BURDEN OF PROOF.

The party alleging that a will was procured by undue influence has the burden of proving it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.*]

5. WILLS (§ 155*) — "UNDUE INFLUENCE" — WHAT IS.

The "undue influence" which vitiates a will is such influence, whether slight or powerful, as is sufficient to destroy free agency, so that the act is the result of the domination of the mind of another rather than the expression of the will and mind of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172.]

6. WILLS (§ 166*)—PROBATE—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

Evidence held to show that a will was not procured by undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

Appeal from Prerogative Court.

Proceedings for the probate of the will of George F. Johnson, deceased. From a decree of the Prerogative Court affirming a decree of the Orphans' Court admitting the will to probate, Kate Cabaniss and others appeal. Affirmed.

See, also, 85 Atl. 260.

This is an appeal from a decree of the Prerogative Court affirming a decree of the Union county orphans' court, admitting to probate the last will and testament of George F. Johnson, deceased. The reasons which led the orphans' court to admit the will to probate are set forth in the following opinion of Atwater, Probate Judge:

"George F. Johnson died at Mountainside, Union county, N. J., June 1, 1910, in the seventy-eighth year of his age. He was a widower, without children, and had lived at Mountainside on a farm since the year 1905. He called his farm 'Place Villa Johnson.' There was a dwelling house on the farm which he occupied alone since the death of his wife in 1907; his attendants being a Frenchman named Henri and his wife. Mr. Johnson had a foreman or manager for the farm, named Stewart M. Hazlett, who lived with his wife in a small dwelling on the premises. Hazlett had occupied the position since November, 1909, succeeding some other foreman. Mrs. A. Josephine Smith, a cousin of Mr. Johnson's wife, frequently visited the home of Mr. Johnson. She testified that she had known Mr. Johnson since she was seven years of age, but that she did not visit at Mountainside until after Mrs. Johnson's death owing to her occupation and absence

from the country, and that she was there infrequently until Mr. Johnson's illness, which began in September, 1909, and then she devoted as much time as she could possibly give him. Her visits were generally made on Wednesday and Saturday; she spending Wednesday night and Saturday and Sunday there. Letters were produced written in 1904, 1905, and 1906, from Mr. Johnson's wife to Mrs. Smith, showing that their relations were of the friendliest kind. Letters were also produced from Mr. Johnson to Mrs. Smith, which show that their relations were also friendly; the latest bearing date September 16, 1909. Mr. Johnson had spent the greater part of his business life in New York City, where he was engaged in the produce commission business, and during the last 25 or 30 years of his life he was a general agent of the Equitable Life Assurance Society. Mr. Johnson's relatives living at the time of his decease were his sister, Jennie, wife of Judge Morris Winfield, a lawyer practicing in Logansport, Ind., a brother, and nephews and nieces. I think the weight of the evidence is that Mr. Johnson had no special affection for these relatives. He was hospitable and was frequently visited by his neighbors. A paper (or rather four sheets of paper not fastened together) purporting to be his last will and testament, bearing date December 23, 1909, was produced in the surrogate's office by Mrs. A. Josephine Smith, the executrix named therein. Caveats have been filed by Mr. Johnson's sister, Mrs. Jennie Winfield, wife of Judge Morris Winfield, and heirs and next of kin. Mr. Johnson was taken ill in September, 1909, and from that time on was confined to his house. He suffered from a complication of diseases which affected his breathing to such an extent that he was obliged to remain in a sitting posture and could not lie down to sleep. His feet and legs became swollen and locomotion was very difficult for him. At the time of executing the document in question, he was confined to the second floor of his house and hardly able to move from one room to another. It appears from the admission of counsel that the estate is valued at about \$75,000 subject to a deduction of \$10,000 for indebtedness.

[1] "Execution of the Will.

"The evidence seems to be decisive that the document was executed in Mr. Johnson's bedroom between 9 and 10 a. m. on December 23, 1909. This is the date written on the will in Mr. Johnson's handwriting. Stewart M. Hazlett, one of the witnesses to the will, says it was executed on Christmas day, December 25, 1909. I think he is mistaken. Dr. Wright, the other subscribing witness, testifies that he called on the morning of December 23d, and that Mr. Johnson asked him to witness his will. He further testifies that Mr. Johnson spoke of having a Mr.

Badgley, a neighbor, as the other witness, but that Mr. Badgley was not available at the time. Then the doctor suggested that Mr. Hazlett, the foreman on the farm, be called, and that he was summoned. When Mr. Hazlett came into the room, Dr. Wright testifies that he told him in testator's presence that Mr. Johnson wished him to witness his will. Mrs. Smith testifies, referring to Hazlett coming into the room of Mr. Johnson just before the will was signed: 'Q. He bid him good morning? A. As I recall it, it is as Mr. Hazlett came into the room with a look of inquiry on his face, Mr. Johnson said to him, "I want you to witness my signature to a paper." Q. Mr. Johnson said that? A. Yes, sir.' When the paper was executed, there were present Mr. Johnson, Dr. Wright, Mr. Hazlett, and Mrs. Smith. Mrs. Smith produced the four sheets, and then Mr. Johnson signed the last one; the sheets being all together but not fastened. Dr. Wright testifies that Mr. Johnson signed the will and dated it. He wrote as follows: 'George F. Johnson, Place Villa Johnson, Dec. 23rd, 1909.' Dr. Wright also testifies that he and Hazlett were standing in front of or at the angle of testator's table, and that they both saw him sign it.

"I quote from Dr. Wright's testimony as to what next occurred: 'Q. You stepped forward, you said? A. Yes, sir; I stepped forward as he lay back exhausted, after he had signed his name, and as I did so he gave me to understand that I was there to witness his signature. Q. What did you say? A. Then I took the pen, and in doing that I said, before signing my name to the paper, I said, to Mr. Johnson, "Mr. Johnson, you acknowledge this to be your last will and testament," and I said, "I want to know what I am signing," and he said he did. By Mr. Voorhees: Q. He said he did what? A. He said, "I do." By Mr. Gilhooly: Q. Was there anything said about the witness? A. And then I said, "And this, I understand, I am witnessing, and you acknowledge this to be, your last will and testament, and I am to sign as a witness." Q. Was there anything said about Mr. Hazlett signing it? A. No, nothing was said about Mr. Hazlett signing it, only I stepped back and handed the pen to Mr. Hazlett, or he took the pen, I don't know which, and then Mr. Hazlett signed his name to the paper as a witness.'

"Hazlett testifies that Mrs. Smith produced the four sheets and that he saw Mr. Johnson sign one of them. I quote from Hazlett's testimony: 'Q. After Mr. Johnson signed that paper, did not Dr. Wright say to Mr. Johnson, "Do you acknowledge this to be your last will and testament?" A. He did; yes, sir. Q. You heard Dr. Wright say that? A. Yes, sir. Q. And what did Mr. Johnson do then? A. Mr. Johnson made no reply, but hung his head on his little table like that (illustrating). Q. Didn't he nod his head? A. No, sir; he did not. Q. Dr. Wright said

Mr. Johnson replied, "Yes, I do"? A. No, sir; he never made any reply. Q. You do not agree with Dr. Wright in that then? A. No, sir; decidedly not. Q. And Dr. Wright says that Mr. Johnson said, "I ask you to be my witnesses"? A. No, sir. Q. You didn't hear him say that? A. No, sir. Q. After Mr. Johnson signed, who signed next? A. Dr. Wright. Q. Did you see Dr. Wright sign? A. Yes, sir. Q. After he signed, who signed next? A. I signed. Q. And you signed in the presence of Dr. Wright and Mr. Johnson, didn't you? A. Yes, sir.'

"The counsel for the caveators admitted on the argument that the paper writings offered as the last will of George F. Johnson have been executed and published in accordance with law. After the witnesses for the proponents had given their testimony on that phase of the case, I permitted the said paper writings to be offered in evidence. A further consideration of the evidence confirms my opinion that the document was duly executed in conformity with the provisions of the New Jersey statute relating to wills. The only testimony which militates against this conclusion is that of Hazlett. I am satisfied that, when he came into Mr. Johnson's room on the morning of the execution of the will, he was informed either by Dr. Wright or Mr. Johnson, the testator, that he was wanted to witness a paper; that the execution of the will was forthwith proceeded with; that sufficient publication was made in his presence and hearing; that he saw testator sign and also Dr. Wright, and that he (Hazlett) immediately signed in their presence. See *Ayres v. Ayres*, 43 N. J. Eq. 565-571, 572, 12 Atl. 621, and cases cited. It will be seen from the testimony that Hazlett immediately took a position antagonistic to the will; that is, he forthwith expressed the opinion that it was not a valid document.

[2] "Document in Four Sheets.

"As this document consists of four sheets, which were not fastened together, and only one of which was signed by the testator, a question arose as to whether these four sheets were in fact before the testator and constituted the document which he published as his will. As the four sheets offered in evidence are in the handwriting of Mrs. A. Josephine Smith, she became a very important witness on the subject, and she was examined and cross-examined at length. She testifies that they are the same four sheets of paper, and it is to be said that there is no evidence to the contrary. Joseph M. Wright, one of the subscribing witnesses, is quite positive that the papers are the same which he witnessed. He did not read them. Stewart M. Hazlett, the other subscribing witness, says there were four sheets. When asked whether the sheets offered were the same sheets he saw that day, he said: 'I can

only vouch for the one; that is, the one I signed.' He says he didn't see the writing.

"After hearing the witnesses I was satisfied as to the identity of the papers. The contents of the papers sustained this conclusion. The evidence shows that Mr. Johnson had long had in mind to erect a hospital in Logansport, Ind., in memory of his parents. This was his birthplace and the place where the early part of his life was spent. The will is crudely drawn, but the purport of it is that the bulk of his property shall go to the establishment of a hospital in Logansport in memory of his parents.

"A paper was offered in evidence which the testimony shows was in the handwriting of Mr. Johnson. It was written with lead pencil. It was found among his papers. It was an incomplete draft of a will, in which he is named as testator. This paper contains a provision for the erection of a hospital in Logansport and deals with the subject in much the same way as the will in question. It also contains a provision for the benefit of Mrs. George W. Miles similar to that of the will in question. There is also a provision for an annuity for Mrs. George W. Miles, a sister of his wife, who was in destitute circumstances. Mr. Johnson had for a number of years prior to his death contributed \$33 per month to her support. Abner T. Bowen is one of the executors named. From Mr. Bowen's testimony it appears that Mr. Johnson had asked him to be his executor some five or six years before. They had been acquainted since 1892, and their relations appear to have been of a very friendly nature.

"It will be seen therefore that in the respects named, viz., hospital, Mrs. Miles, Bowen as executor, the will is consistent with previously expressed views of the testator. Mrs. Smith is made executrix of the will. This clause is not on the signed sheet, but on this sheet reference is made to 'the executor and executrix.' The jewelry, clothing, and other personal effects of testator's wife, who died in 1907, are given to Mrs. Smith. Testator also gives to her such part of his furniture and personal effects 'as she may wish to retain.' A reference is made in the will to some indebtedness of 'The Mrs. Smith Co.,' which is the name under which Mrs. Smith was doing business in New York. The amount of the indebtedness is \$700 or \$800. The reference to this indebtedness does not discharge it, but appears to have the effect of allowing some extension of time in payment. An examination of the document and a consideration of its contents, in the light of testator's previously expressed views and purposes, seem to me to make the supposition that any change had been made in it after its execution or any sheet or sheets substituted incredible. My conclusion in regard to this part of the case can be expressed in the language of the court in the

case of *Ela v. Edwards*, 82 Mass. (16 Gray) 91, as follows: 'In the present case the different papers are obviously connected in their provisions, and are sufficiently shown to have composed a connected series and the same that are shown to have been attested by the witnesses.'

"It was not contended that a will might not be lawfully executed, although written on detached pieces of paper; but it was contended that a document so composed affords opportunities for fraud and the evidence should be very carefully considered and great caution exercised before admitting such a document to probate. This proposition is indisputable. There is nothing in the law of New Jersey requiring each sheet to be signed, however wise a precaution it might be. In *Schouler on Wills* (3d Ed.) § 284, the author says: 'A will may, of course, be written on several sheets of paper incorporated together in sense as one instrument. And, unless the local statute provides differently, the will is well signed and attested on the last sheet alone, provided the execution was bona fide and meant to recover the whole.'

[3] "Mental Capacity.

"It is claimed by caveators that testator had not sufficient mental capacity to make a will, at the time of the execution of the document in question.

"He was in very feeble health at the time, suffering from very serious physical infirmities, the results of disease. Mr. Johnson had been an active business man up to the time of his last illness. He was a man of unusual mental vigor and force of character. It is claimed, however, that his faculties had failed to such an extent that he was disqualified on that account from executing a will.

"The witnesses produced on this point are Judge Winfield, the Hazletts, Miss May B. Lewis, who was stenographer for the testator the last two years of his life, and Mr. Zopher D. Hawkins.

"Judge Winfield is the husband of the sister of Mr. Johnson, a lawyer by profession and at one time a judge in the state of Indiana and a man of ability and discrimination. He expresses the opinion that Mr. Johnson was incompetent to make a will. He had not seen Mr. Johnson since 1906. He made a visit to him in January, 1910. He refers to the physical condition of Mr. Johnson; to the change in his mode of dress, he having formerly been a man fastidious in this respect, and at the time he saw him he was quite the reverse. He also refers to certain statements made by Mr. Johnson in regard to the value of his farm, in regard to the prospects of realizing from the peach crop, in regard to the prospects of the candy business in which Mr. Johnson had an interest, and other matters going to show that Mr. Johnson had exaggerated ideas on these sub-

jects. I think, however, a careful reading of Judge Winfield's testimony will show that, in his conversation with Mr. Johnson, the latter manifested mental capacity; ability to reason and powers of memory. It seems to me that in these conversations Mr. Johnson showed ability to carry on conversations; to talk reasonably on the matters which formed the subject of the conversations. While it may well be said that he did not manage his business affairs with all the skill and care that he would have shown a few years previous, yet, nevertheless, he showed capacity to understand Judge Winfield's criticisms. According to the judge's own testimony, Mr. Johnson resented what he called prying into his affairs by Judge Winfield. Judge Winfield testifies as to a conversation with Mr. Johnson on one of the judge's visits in 1910. He testifies to the effect that he explained to Mr. Johnson why it would be inexpedient to erect a hospital in Logansport, Ind.; one reason being that he did not think the city of Logansport would take upon itself the burden of supporting the hospital. He further testifies that Mr. Johnson said, 'I have given up the idea of the hospital.' According to Judge Winfield's testimony, Mr. Johnson comprehended the reasoning of Judge Winfield and adopted it. From Judge Winfield's testimony it seems quite clear that Mr. Johnson understood Judge Winfield's point of view in regard to the hospital and treated it as a man of intelligence naturally would. I think the same may be said of the testimony of the Hazletts and Miss Lewis.

"Zopher D. Hawkins had known Mr. Johnson for 29 years, was employed by him in 1881 and 1882, and had kept up his acquaintance. He testifies that in the summer of 1909 Mr. Johnson asked him to be his executor, but did not say anything about the nature of his will, or how he proposed to dispose of his estate. He testifies that he saw Mr. Johnson in the early part of December, 1909. His description of Mr. Johnson's physical condition corresponds with that of the other witnesses. He says: 'He (Mr. Johnson) was, I should say, in his dotage. I thought he was erratic in everything.' Mr. Hawkins testifies to being with Mr. Johnson some two hours and conversing with him on various subjects.

"Alfred E. Pearsall, a man 65 years old, living at Mountainside, had been somewhat intimate with Mr. Johnson after the latter came to Mountainside. He saw him in the early part of 1910. He testifies in detail and gives strong testimony as to Mr. Johnson's mental capacity. To a like effect is the testimony of Mrs. Alfred E. Pearsall.

"James A. Buck, who resides at Mountainside and who is connected with the Equitable Life Assurance Society and who had known Mr. Johnson for about 16 years, gives testimony as to calling on Mr. Johnson at his

home in Mountainside some few times. The last time he saw him was about a month prior to his death. He refers to conversations that he carried on with him then and testifies that he did not notice any impairment of his faculties. He says he noticed difficulty of speaking. He thinks he saw him between Christmas and New Year's, and testifies that he had conversation with him then and that he did not notice any impairment of his faculties.

"Henry Hale, who lives at Orange, N. J., and who had known Mr. Johnson in connection with the life insurance business, testifies to two interviews with Mr. Johnson. One visit was about Thanksgiving, 1909, and the other in February, 1910. And he refers to conversations had with him on those occasions, and to his talking about different matters. He testifies that he could sustain a conversation.

"Dr. Wright, his medical adviser, testifies that he saw Mr. Johnson every day from the latter part of September, 1909, until the 15th or 16th of March, 1910. He is very positive as to Mr. Johnson's mental capacity; that his mind was clear and that he did not show any lack of mental vigor up to the time of the making of the will.

"Louis Rath, 54 years old, residing at 309 Seventh avenue, New York, testifies as to a conversation with Mr. Johnson before he died. He testifies as to his ability to keep up conversation and his understanding of the conversation. The conversation related to the sale of some property by Mr. Johnson to Mr. Rath. He testifies to seeing him in May just before he died, also the previous 4th of January, also on February 16th and 24th. While he found Mr. Johnson in very bad condition physically, he found him able to discuss matters of business and did not observe any impairment of his mental faculties.

"Paul Q. Oliver, 37 years old and a counselor at law of this state, residing at Westfield, N. J., testifies that he saw him in his last illness and had a little business matter for him. He saw Mr. Johnson in the winter of 1910. He fixes it as after the time of Mr. Pearsall's return from Florida. He observed him particularly with reference to his capacity for making a will, and he testifies that he certainly would have felt warranted in making a will for him if he had been asked to do so. The evidence shows that Mr. Pearsall returned from Florida after the opening of the year 1910.

"Edward J. West, age 35, residing in Long Island, a counselor at law, became acquainted with Mr. Johnson in May or June, 1907, and acted as counsel for Mr. Johnson. He testifies that in the fall of 1907 or early in 1908 he talked with Mr. Johnson about his will, and Mr. Johnson then stated he wanted to leave all his property to establish a hospital in Logansport, Ind. Mr. West had frequent interviews with Mr. Johnson. He

saw Mr. Johnson in September, 1909, after he was taken sick. Mr. West testifies that he wanted to talk over his will and plans for the hospital with him and Mrs. Smith, and that he wanted Mrs. Smith to have the furniture or whatever there was in the house and he wanted her to have Mrs. Johnson's personal effects. He testifies to an interview October 10th in which the subject of the candy factory was discussed. He testifies to seeing him December 8th, when the subject of the claim of a Dr. Godson was discussed. He also saw him on February 13, 1910, and discussed certain matters of business with him. He testifies as follows: 'Q. What was Mr. Johnson's condition on the visit of February? A. He seemed perfectly clear; I think, if anything, a little better than he had been when I saw him in December. He seemed quite vigorous and took hold of things, and I was a little surprised at the way he kept up with things. He told me about his plans for the farm.' Mr. West, in his visits to Mr. Johnson during the time of the latter's illness, discussed business matters with him, and matters of business were decided upon.

"My conclusion is that, under the rules laid down in this state, Mr. Johnson at the time he executed the paper in question had sufficient capacity to make a will.

"In *Re Carter's Will* [60 N. J. Eq. 338] 51 Atl. page 65, it appeared that the testatrix was about 81 years of age, and from an injury to her hip was somewhat of an invalid and was unable to read or write. It was, however, shown that she was thoroughly conversant with her own affairs and with the kind and value of her property, and with a full knowledge of the number and degree of kinship of her relations, and it was held that she had mental capacity to make a will.

"In the case of *Bennett v. Bennett*, 50 N. J. Eq., on page 446, 28 Atl. 575, it is said that: 'If he (the testator) is capable of recollecting of what his property consists, and who, either in consequence of ties of blood or friendship, should be the objects of his bounty, and has a mind sufficiently sound to enable him to know and to understand what disposition he wants made of his property after his death, he is competent to make a valid will.'

"In my opinion Mr. Johnson was competent within the meaning of the definition given in the *Bennett Case*. The presumption of the law is in favor of capacity, and the burden of proof is upon those who assert to the contrary. See *McCoon v. Allen*, 45 N. J. Eq. 708, 719, 17 Atl. 820; *Elkinton v. Brick*, 44 N. J. Eq. 154-158, 15 Atl. 391, 1 L. R. A. 161. I think in this case the caveators have not shown a lack of capacity in Mr. Johnson.

[4-6] "Undue Influence.

"It is quite plain from a study of the testimony that, if any undue influence was

exercised upon Mr. Johnson, which resulted in the execution of the document in question, such influence was brought to bear by Mrs. A. Josephine Smith. I have already referred to the acquaintance and relations which existed between Mrs. Smith and Mr. Johnson. These relations appear to have been of a most friendly nature. Her visits to him were largely after the time that he was taken ill, although her acquaintance with him and his wife prior to the wife's death appear to have been rather intimate. It can properly be said that Mr. Johnson liked Mrs. Smith and it was agreeable to him to have her at his house and that he trusted her with the performance of various services for him in connection with his business, and he had loaned her money in connection with her business. It is plain that she wanted him to make a will, and she gives the reason for it that she wanted him to provide for Mrs. Miles, a cousin of his wife, who was in destitute circumstances and to whose support he had been contributing for a number of years.

"In *Bennett v. Bennett*, already referred to, it was said: 'No matter if the will is drawn by the principal or even sole legatee, if it is made by a testator possessing adequate capacity, and it is shown that he knew its contents when he published it, and it appears to have been executed in the manner prescribed by the statute, the court must, in obedience to the law of the land, uphold it as the will of the testator and admit it to probate, unless satisfactory evidence is produced showing that it is the product of fraud.' Here again it is necessary for the party alleging undue influence to prove it. See *Dumont v. Dumont*, 46 N. J. Eq. 223, 230, 19 Atl. 467; also, *Schuchardt v. Schuchardt*, 62 N. J. Eq. 710-713, 49 Atl. 485.

"In the case of *Haydock v. Haydock*, 33 N. J. Eq. 494-496, Vice Chancellor Van Fleet said: 'The extent or the degree of influence is quite immaterial, for the test always is: Was the influence, whether slight or powerful, sufficient to destroy free agency, so that the act put in judgment was the result of the domination of the mind of another rather than the expression of the will and mind of the actor?'

"Now as to the contents of the will, it appears clearly that Mr. Johnson had already expressed the purpose of establishing a hospital in Logansport. I think it also quite clearly appears that he had indicated the purpose of providing for Mrs. Miles. The provision for her is no greater than the amount he had been contributing for her support during his lifetime. As to the provision for Mrs. Smith, it appears from the testimony of Mr. West that he had indicated to him his desire that she should have as much of his furniture as she wanted and that she should have his wife's clothing and other personal effects. There is nothing unreasonable in his making the provision in re-

which county the Crosswicks property is situate.

The defendant Wilson is an unmarried colored man, who lived with and worked for Mrs. Hendrickson, with some intervals, for a period of nearly 40 years. The defendant Mrs. Richardson is an Englishwoman, who resided with Mrs. Hendrickson in the capacity of housekeeper and companion for about 14 years. The defendant John Meirs is an attorney at law of this state, and is related to Mrs. Hendrickson, being her grandnephew. The complainants are contending for the recovery of an ancestral estate which has been in the family for some 200 years, and which by the deed in question was conveyed to a colored servant, as they allege, without consideration and in fraud of their rights. Those rights, however, are to be tested and determined, not upon any sentimental ground, but by the fact whether or not Mrs. Hendrickson was indebted to Wilson and Mrs. Richardson; in other words, whether the conveyance was founded on sufficient consideration.

It may be appropriately observed that the property in question is not extremely valuable. True it consists of a farm of 170 acres and a mansion house with outbuildings, and a gristmill. The testimony shows this property to be valued as low as \$8,500 and as high as \$10,000. For present purposes I will hold it to be worth \$10,000. It is subject to a mortgage of \$6,500. That leaves an equity of \$3,500. Personal property conveyed by the deed, and which is the subject of another suit (one brought by Mrs. Hendrickson's administrator against the same defendants), which personal property was conveyed by the deed now being considered, is valued as high as \$4,000. That makes \$7,500 of value passing to Wilson. The actual consideration mentioned in the deed is an indebtedness of Mrs. Hendrickson to Wilson of \$8,000, and her indebtedness to Mrs. Richardson in addition.

It will be seen, therefore, that the estate is not a particularly valuable one, at least not intrinsically, and that its value to the relatives of Mrs. Hendrickson consists principally in its being an ancestral estate. There would be less likelihood of Mrs. Hendrickson's having conveyed this estate to Wilson, and more likelihood of her having left him to his remedy at law, if she had been upon terms of anything like intimacy with the relatives who are the complainants in this cause, or if she held them in anything like the regard with which relatives usually and ordinarily hold each other. As a matter of fact, she was more or less, and I think I may say decidedly, estranged from these relatives by reason of litigation in the Wain family which resulted adversely to her some twenty-odd years prior to her death. These relatives were not frequent, some of them only occasional, visitors to her; while some of them

visited her not at all. She lived in practical isolation from the world during the last years of her life—certainly since a severe illness in 1899, through which Mrs. Richardson nursed her, and during which time, as at all other times, John Wilson was her devoted servant.

The complainants assert, and adduced testimony tending to show, that the once proud, strong-willed, and imperious Mrs. Hendrickson, at the time she made the deed in question, through weakness of mind and body, lacked sufficient capacity to understand the transaction in which she was engaged, and that she was fraudulently imposed upon, unduly influenced, and that consequently the deed is void. Upon this issue my judgment is that the proof is the other way, and that the witnesses sworn for the defense have clearly established that Mrs. Hendrickson, at the time of the making of the conveyance, possessed abundant capacity to understand the transaction in which she was engaged—in fact, that she did understand it—and that volitionally, and without imposition, fraud, or undue influence, she made the conveyance under review as her voluntary act and deed. I do not pretend to say that at this time she possessed the same vigor of mind and body that she enjoyed in earlier life. She rambled at times in her conversation, was more or less repetitional, and, perhaps, was the occasional victim of delusion, though on the question of not recognizing certain relatives and making rather incongruous remarks of and to them I think she acted more with design than by mistake. Some of the things that she said and did, especially some of the things which she wrote, appeared to be somewhat irrational, yet they are to be explained, I think, upon the theory that she took herself very seriously, and missed no opportunity of exploiting herself in a sort of mock heroic way, attributing to herself more intellect and more importance than in reality she possessed.

The wills and deeds of innumerable persons against whom accusations of mental aberration have been leveled and proved to exist in far greater degree than can be argued to have existed in the case of Mrs. Hendrickson have been upheld; the supreme test being the capacity of the deviser or grantor at the time the conveyance was made.

Let us look, now, to the execution of the particular deed in question, and examine it in the light of the law on the subject.

Dr. Allen, who became Mrs. Hendrickson's physician during her illness of 1899, and continued as such until her death, March 15, 1907, said he treated her for erysipelas in November and December, 1905, and did not notice any change in her mental condition; that in December, 1905, it was good, fair for her age; and that she was not a person easily influenced. She then told him she was going to deed her property to Wilson. The

deed was made December 22d of that year. She did not die of senile dementia. Ordinarily a physician treating a patient is in a better position to know of that patient's condition, as to integrity or infirmity of mind and body, than any one else, and I see no reason to think otherwise in the case in hand. And the doctor, as is usual, has no interest in this controversy whatever.

The deed in question was prepared by the defendant John Meirs at the request and by the direction of Mrs. Hendrickson. The terms of the deed were arranged at an interview between Mrs. Hendrickson and Mr. Meirs, and a tentative draft of the instrument was submitted to Mrs. Hendrickson and approved by her. Mr. Meirs then wrote the document, and Mrs. Hendrickson had it in her possession for several days before its execution and read it over several times, and was thoroughly familiar with its contents.

William Quicksall, assessor of the township and the commissioner who took her acknowledgment, says that she recognized him when he went to the house on that occasion, as well as the previous spring when he went to make the assessment; that he always considered her pretty strong and not easily influenced. That was his judgment from his dealings with her; that she talked entirely rationally, made direct and proper answers to every remark he made, and led the conversation; that she may have rambled a little, but certainly knew what she was talking about that day.

In my judgment it is extremely significant that the deed from Mrs. Hendrickson to Wilson was speedily recorded after its execution. It was made on December 22, 1903, and recorded five days afterwards in the Monmouth county clerk's office, in which county the bulk of her property is situate, and between three and four weeks thereafter in the Burlington county clerk's office, in which county the remaining portion of the property lies. Mrs. Hendrickson survived more than a year after this transfer and its recording, during which time she, or another on her behalf acting as next friend, could have attacked the conveyance, with the benefit of her examination as a witness, or of an examination into her sanity on notice to her. I do not recall whether the testimony discloses that the complainants, or any of those in interest with them, actually knew of the conveyance; but beyond any doubt they did. The recording of this extraordinary deed at Freehold and Mt. Holly must have caused comment which reached and spread over the countryside at Walnford. Whether so or not, the defendants proceeded in the open and practically published the transaction to the world. I am unwilling to believe that they did it upon the theory that they would take the risk that a nefarious and fraudulent transaction would not be discovered in the lifetime of the victim, so that they might

have the advantage, in the defense of their ill-gotten gains after her death, by asserting that they concealed nothing, but, on the contrary, laid bare the transaction, thus making discovery practically certain at a time when it undoubtedly would have meant ruin to their plans. It is significant, not of the dishonesty, but of the honesty of the transaction, that this conveyance should have been forthwith recorded, instead of being withheld until after the death of the grantor, as is usual in cases of fraud such as is here imputed to the defendants.

Let me now briefly advert to the question as to whether or not Mrs. Hendrickson was indebted to Wilson. He had, as already remarked, worked for her for many years, and he had, in my judgment, made her his banker and the custodian of his money during practically the entire time of his employment by her. There have been other incidences of the same kind, although they are rare. In her early days, when she was entertaining rather lavishly, and people of affluence visited her quite frequently, Wilson was the recipient of liberal tips, which he turned over to Mrs. Hendrickson to keep for him, as well as leaving his wages with her. Of course, he had his clothes and had spending money, and doubtless he had more money than he thinks he had or states, and doubtless left less money with Mrs. Hendrickson than he thinks he did or states; but out of all the testimony on this subject I am persuaded that Mrs. Hendrickson was heavily indebted to Wilson, and that she took him to Camden to the office of the late Attorney General Grey, who represented her, and that in Mr. Grey's office an accounting was arrived at between Mrs. Hendrickson and Wilson, as a result of which Mr. Grey drew and Mrs. Hendrickson signed a note of hand to John Wilson, in which she promised to pay him the sum of \$8,000, which was money she owed him. This was in December, 1902.

As to Mrs. Richardson, Mrs. Hendrickson's housekeeper and companion, the testimony, to my mind, shows that Mrs. Hendrickson was indebted to her, and that she therefore made it a condition in the deed that John Wilson should pay her out of the estate granted. Mrs. Richardson is quite a remarkable woman. Born and reared in England, she afterwards traveled about the world occupying various positions, and had a remarkable, not to say romantic, career. My impression of her is that she is entirely honorable and entirely truthful. She is now an old woman. It was suggested, though not pointedly charged, that she was unduly intimate with Wilson. I acquit her of that charge. She was friendly with him, more so, doubtless, than most women are with colored men, but that is to be accounted for, as it is notorious that there is little or no prejudice against colored people in England, whence Mrs. Richardson came.

The complainants insist that as Wilson and Mrs. Richardson were Mrs. Hendrickson's servants and Meirs her attorney (the latter of whom they claim has received and is to receive portions of the estate), and occupied a dominant position toward her, that therefore the deed is not *prima facie* evidence in favor of its validity, but, on the contrary, that the burden of proof is cast upon the defendants to show that the transaction was founded upon sufficient consideration, is untainted and entirely fair.

I will grant that the defendants occupy this position of disadvantage in this case; and I hold, upon this score, that they have discharged that burden. The deed in terms certainly indicates that the grantor, Mrs. Hendrickson, took the precautions in her own interest which are so frequently wanting in voluntary conveyances which are set aside in behalf of heirs and devisees, namely, she reserved a life estate, and imposed conditions upon the grantee for her support and the payment of her debts. The conveyance was drawn by an attorney of her choice and selection, and from him she had competent, independent legal advice as to the nature of the transaction and her rights thereunder.

This case was tried at great length, the witnesses were numerous and their testimony voluminous. It was argued on both sides with exhaustiveness and ability rarely equalled. I listened with undivided attention through the many days of the trial, observed critically the character of the witnesses and their manner of testifying, and have, since the conclusion of the evidence and the arguments, reviewed the evidence and the exhaustive briefs submitted by counsel, and upon most careful consideration have reached the conclusion that the defendants have established the title of Wilson to the land in question (for that only is drawn in question in this suit); and therefore the complainant's bill must be dismissed, with costs.

Waln, Adm'r, v. Meirs et al.

This bill is filed by the administrator of the late Mrs. Sarah Waln Hendrickson, of Walnford, in the county of Monmouth, who died intestate on March 15, 1907, aged 91 years. She left her surviving certain nephews and nieces as her next of kin, who would inherit any personal property of which she died possessed. These next of kin are also her heirs at law. In another suit commenced three days before the bill in this cause was filed, the complainant herein, as an heir at law of Mrs. Hendrickson, filed a bill on behalf of himself and such other of her heirs at law as might become parties and contribute to the expenses of that suit. In my conclusions in that cause, filed simultaneously with this memorandum, I deal with the issues, which are identical in both suits. The deed in question, which was made December 22, 1905, by Mrs. Hendrickson to the defendant Wilson, conveyed both real and personal

property. The other suit was to recover the real estate from the grantee, on the ground of want of capacity of the grantor and fraud and undue influence inducing the conveyance, and this suit is to set aside the same conveyance as to the personal property. The only difference between this suit and the other one lies in a question of evidence. It is here objected that the testimony of the defendants which was received in the other cause is not evidence for the defendants in this suit, because the complainant here sues in a representative capacity. The cases were tried together by consent, and it was agreed by counsel that the testimony of the defendants should be taken subject to being excluded in this case, if I should be of opinion that it was not admissible under the statute. At the conclusion of the complainant's case, the defendants moved to dismiss the bill as to the defendant Meirs, asserting that nothing had been proved against him, and that such a decree should be made in order that the other defendants could have the benefit of his testimony. I cannot say that nothing was proved against Mr. Meirs at the conclusion of the complainant's case. When the complainant rested, there was testimony tending to show, and from which it might be inferred, that the three defendants had, pursuant to a conspiracy, cozened Mrs. Hendrickson out of her property; and, while Mr. Meirs might not have been the recipient of any but a small portion for value, as the defendants contend, nevertheless, if a conspiracy were established, he would have to account to the complainant, as administrator, along with the other defendants, and they would all be jointly and severally liable. Therefore, in my judgment, the defendants' motion should be denied, and the testimony of the three defendants, which was received in the other case, must be rejected in this case.

Now, when the defendants rested and the whole case was presented in the cause concerning the land, the controversy wore quite a different aspect, and that which, unanswered and unexplained, appeared, at least with some degree of probity force, to indicate guilt on the part of the defendants was explained; and it was made affirmatively to appear that Mrs. Hendrickson understood the transaction in which she was engaged, and that the deed in question was made by her without any undue influence, fraud, or imposition, and as her voluntary act and deed. This, to my mind, abundantly appears in the other case in which the defendants are given the benefit of their own testimony; and I incline to the opinion that in this case, even without their testimony, the same result is to be reached.

It would be an anomaly in the law if in two cases, one concerning the real estate and the other the personal property of the deceased, between the same identical parties in interest, and depending upon the same identical

facts, a diametrically opposite result should be reached as to each class of property; but this would be so if, in excluding the evidence of the defendants in this case, as required by the statute, the other evidence was insufficient to affirmatively establish the defense, for the burden of proof in this case, as in the other, is cast upon the defendants. Now, without deciding whether or not the testimony, other than that of the defendants, in this case has affirmatively established the title of Wilson to the personal property, the decision of the other case would be given controlling effect in this case, under the doctrine of *res judicata*.

The complainant, as administrator, represents the real parties to this suit, who are the next of kin (and creditors, if any) of the deceased. They are the real parties in interest, and the next of kin in this suit are bound by the decision of the other suit, in which their interests as heirs at law were tried and determined, as against the same defendants, upon identically the same issues. And it makes no difference that the property which is the subject of the separate suits is different. See the case of *City of Paterson v. Baker*, 51 N. J. Eq. 49, 26 Atl. 324. See, also, *In re Walsh* (N. J.) 74 Atl. 563; *Seeley v. Adams* (N. J. Ch.) 76 Atl. 462.

Suppose the suit of the heirs had been tried and determined with a decree dismissing the bill already entered, when this suit commenced. Certainly the defendants would have a perfect defense in the record of the former suit, which could be interposed by way of plea in bar. If, on the contrary, the administrator's suit had been first tried and determined, and a decree in favor of the defendants were already entered, a similar plea in the suit of the heirs for the real estate, setting up the defeat of the same heirs as next of kin in an attempt, through their representative, the administrator, to recover the personal property, would be a perfect bar. I repeat no such anomaly and injustice should be permitted as two different results in these two suits, simply because they are tried simultaneously. I think it makes no difference that the bill for the heirs was filed prior to the bill by the administrator. It is the priority of decree settling the issues in the one case which would be efficacious in the other.

Let the decree be entered in the other suit first, and then let the decree in this case contain a recital of the other suit and the decree therein, and that the court is of opinion that the matters there adjudicated are dispositive of the issue in this case *res judicata*. The bill in this case will also be dismissed, with costs.

Wescott & Wescott, of Camden, for appellant. Thomas B. French and Lewis Starr, both of Camden, for respondents.

VOORHEES, J. These appeals are from two decrees dismissing two bills of complaint.

One of the bills was filed by Richard C. Waln, one of the heirs at law of Sarah W. Hendrickson, deceased, on his own behalf, and in behalf of such other heirs at law of said Sarah W. Hendrickson as should come in and become parties thereto. The other bill was filed by the said Richard C. Waln, as administrator of said Sarah W. Hendrickson, deceased. They each attack a deed, dated December 22, 1905, made by Mrs. Hendrickson to the defendant Wilson, transferring both real estate and personal property, and to have this instrument set aside and declared void. The first bill by the heirs at law is directed against that part of the deed that conveys a tract of land known as the Walnford Farm. The second bill filed by the administrator is to set aside the same deed, so far as it conveys personal property. By stipulation entered into between the parties, the two suits were tried together, and by consent the testimony in the one case is to be used in the other case, subject, however, to its exclusion in the administrator's case, if inadmissible by reason of the statute. The facts have been carefully set out in the opinions filed by the learned Vice Chancellor.

In the bill brought by the heirs at law to avoid the transfer of the real estate, we think the decree should be affirmed for the reasons stated by the Vice Chancellor in his opinion.

If the learned Vice Chancellor, however, meant to express it as his opinion that the defendants Wilson and Richardson occupied dominant positions towards Mrs. Hendrickson, this court does not wish to be understood as agreeing to that conclusion. We are of opinion that the testimony shows that the defendants have borne the burden which the law has placed upon them as to the bona fides of the transaction. But we do not agree that Mrs. Hendrickson held a servient position as to them. Wilson was a mere servant in the family, and had occupied that position for 40 years, and in it had considered whatever he made the property of his mistress.

It clearly appears that the grantor had independent advice of her own choosing, and that the bargain evidenced by the deed was not only not improvident on her part, but a most favorable one for her. The testimony shows that Mrs. Hendrickson herself said it was a hard bargain for Wilson, and that he should be made fully acquainted with its nature before entering into it. He was apprised of it and acknowledged that its terms did bear heavily upon him, but that he would not think of leaving the old lady, but expected to take care of her in any event. This view adds strength to the position taken for the affirmance.

In the administrator's case we agree with the result reached by the learned Vice Chancellor, but by a different course of reasoning.

The learned Vice Chancellor, we think,

correctly ruled that the testimony of the three defendants in this suit should be rejected, for the reason that the complainant was suing in a representative capacity.

We think it unnecessary to apply in this suit the doctrine of *res judicata*, if it arise from the decree in the real estate case. Although it may seem to be illogical that any different result could be reached, as to the status of the same instrument, merely by its being subjected to different suits, yet that might have been the result if there had been separate conveyances, with different evidence in each suit.

The opinion goes upon the idea that the administrator represents the next of kin, who are said to be the real parties in interest to this suit, and that the next of kin are bound by the decision in the real estate suit, in which their interest as heirs at law had been determined upon identically the same issue. All the cases hold that litigation invoked to this effect must have been between the identical parties or their privies in law or estate. *Bigelow, Estoppel* (5th Ed.) p. 146, says: "The relationship of privity does not exist at common law between administrator or executor, and heir or devisee, so as to make a judgment against the decedent's representative binding upon the lands of the heir or devisee." And see opinion of Marshall, C. J., in *Garnett v. Macon*, 2 Brock. 185, 6 Call, 308, reported as Fed. Cas. No. 5,245.

The Vice Chancellor apparently anticipated difficulty which possibly might arise if the decree in favor of the administrator should be entered first. He was careful to order that the decree in the suit brought by the heirs at law should first be entered, and that the decree in this suit should contain a recital of the former decree. If there be a lack of mutuality in the estoppel, the order of entry would not obviate the difficulty.

Though the testimony of the defendants must be rejected, yet there are other proofs ample to show that Mrs. Hendrickson was, at the time, of sufficient mentality; that she had long before become estranged from her family; that she was indebted to Wilson, who held her note; that she had announced her intention to make the transfers to him, in order that she might provide for him for all his days, and her subsequent statement to another witness that she had "fixed everything over to him, so that everything shall be his," and that she had provided for her future support and maintenance with considerable forethought and prudence by the instrument sought to be annulled.

In our view the complainant's evidence falls to disclose in this case that Mrs. Hendrickson was dominated by the defendants; and therefore the burden has not shifted. The complainant thus stands upon the ground of no greater vantage than would the gran-

tor, if she were making the attack. Under such circumstances, even if a gift, it would have been irrevocable. *James v. Aller*, 68 N. J. Eq. 666, 62 Atl. 427, 2 L. R. A. (N. S.) 285, 111 Am. St. Rep. 654, 6 Ann. Cas. 430. A fortiori if upon sufficient consideration.

Since there is abundant evidence to justify an affirmance of the decree in the administrator's suit, without regard to the effect of the adjudication in the other case, a point which we do not decide, we base our decree upon the force of such evidence.

The decree will be affirmed.

In re CHADWICK'S WILL.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

WILLS (§ 249*)—PROBATE—JURISDICTION.

Neither the prerogative court, nor any of the surrogates, of this state have general jurisdiction to admit to probate the last will and testament of a nonresident having a domicile at the date of his death in another state, although decedent leave property in this state, except as ancillary to a probate by the courts of the locality of such domicile.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 586; Dec. Dig. § 249.*]

Kalisch, J., dissenting.

Appeal from Prerogative Court.

In the matter of the purported will and codicil of Julia H. Chadwick. From a decree denying probate, an appeal is taken. Affirmed.

See, also, 82 Atl. 918.

Richard Boardman, of Jersey City, and Robert H. McCarter, of Newark, for appellants. Gilbert Collins, of Jersey City, for respondents.

BERGEN, J. The substantial question on this appeal is whether the surrogates of our several counties, or the prerogative court, have jurisdiction to grant original probate of a will of a nonresident testator domiciled in a sister state at the time of his death.

While the precise question raised by the record relates to the power of a surrogate to admit such will to probate, the jurisdiction of the prerogative court in a like case is so connected with the principles of law involved that it was, of necessity, argued, and should be disposed of in limitation of further litigation of substantially the same matter; for if it should be decided that the surrogate is without jurisdiction, leaving undecided the other question, the proponents could present this will to the ordinary or surrogate general, and thus relitigate a question as to which they have had their day in court, because the real question argued and to be disposed of is the effect of a testator's domicile upon the jurisdictional right of a

foreign court to grant original probate of his will.

The facts are within a narrow compass, and for the purposes of this case all that need be recited is that Julia H. Chadwick died leaving a last will; that her domicile was East Hampton, in the state of New York; that the executors who offered the will for probate resided in the state of New Jersey, having in their possession, in the county of Hudson, personal property belonging to testatrix; that two of the executors named, the third having renounced, caused the will and codicil to be admitted to probate by the surrogate of the county of Hudson, from which the daughter of testatrix appealed to the orphans' court of Hudson county, where the order of the surrogate was sustained. The decree was reviewed on appeal to the prerogative court, where it was decided, upon the advice of the vice ordinary, that the surrogate was without jurisdiction, and from that decree the proponents have appealed to this court.

The real purpose of the probate is to ascertain whether the deceased left a will, and, if so, the appointment and qualification of the person who may be entitled to manage the estate and execute the testamentary directions, which is, generally speaking, the province of the courts of the domicile of the testator, and before that right be exercised by the courts of this state it should at least appear that the law authorizes it; for it may be fairly assumed that such a course of procedure was not within the expectation of the testator, who ordinarily prepares and executes his will according to the law of his domicile, where he may fairly presume it will be admitted to probate, and where all disputes concerning its due execution will be heard.

Again, the heirs and next of kin are not presumed to know in which of many jurisdictions the testator has left property, and if personal property in any location is sufficient to give jurisdiction to probate they would in most cases be deprived of the opportunity to dispute the due execution of the will, or to raise any legal objection to its probate; for a caveat filed at the domicile would have no effect in a foreign jurisdiction.

We think that upon general principles the due administration of justice demands that last wills should be first probated at the domicile of a testator, and that this rule should prevail in this state, unless the law expressly confers on the ordinary or surrogates probate jurisdiction over wills of non-residents. In disposing of this matter we will first consider the statutory authority of a surrogate relating to the probate of last wills and testaments.

It may be conceded that prior to the Constitution of 1844 the surrogates of the different counties of the state were but deputies of the ordinary or surrogate general; but even then their power and authority

was limited by statutes to the county for which they were appointed. This the ordinary held, in the matter of Abraham Cour- sen's Will, decided in 1843, 4 N. J. Eq. 408, permitted a surrogate to probate foreign wills, and that the limitation of power had relation to the locality within which he might exercise his power, although operating upon a subject-matter arising out of his county; and therefore the surrogate might admit a foreign will to probate, and if he should do so for one executor the ordinary might also grant probate for another upon his separate application. The learned ordinary did not express any opinion as to what the situation would be if he took a different view from the surrogate and refused probate to the second applicant; the surrogate, his subordinate, having already allowed it for the other.

The reasoning leading to the result declared is so illogical that we cannot concede its soundness; for if the statute limiting the power of the surrogate to the county for which he was appointed was not a limitation to matters arising in his county, but gave general jurisdiction over such matters arising anywhere in the state, or in the United States, provided he was within the confines of his own county when he acted, he would have power to probate every will of every decedent, without regard to domicile in or out of the state, and once having taken jurisdiction, the ordinary being thereby deprived of all power, except to review on appeal, the office of the surrogate might become of greater magnitude than that of an ordinary. This situation cannot be reached, except by pursuing an inaccurate line of reasoning inconsistent with the purpose of the statute limiting his powers to the county for which he was appointed.

But in 1844 the surrogate was made a constitutional officer, and the method of his selection provided for, which was thereafter to be election by popular vote. This divorced him from his former status as deputy and made him an independent officer, whose duties were fixed by the Legislature in the Revision of 1846, which, among other things, provided that there should be but one surrogate elected in each county, "and the power and authority of the surrogate shall be limited to the county in which he is or shall be elected" (Rev. 1846, p. 827); and this act has never been repealed. C. S. p. 5056. We have no doubt that this statute was intended to and does limit the jurisdiction of the surrogate to matters arising in his particular county, and does not grant a general jurisdiction to admit to probate the wills of non-residents of state or county. As to wills of residents of this state, his jurisdiction is now, by statute, expressly limited to cases where the testator resides in his county at the time of death. Section 14 of the act relating to orphans' court (P. L. 1898, p. 715).

Certainly since the Constitution of 1844, the surrogate has no implied or derivative

powers, and can only exercise those granted by the Legislature; and it has not conferred on surrogates the power to probate wills of nonresidents. Therefore, without regard to the question of the primary right of the courts of the locality of the domicile of a nonresident testator to probate his will, our statute does not empower a surrogate to assume jurisdiction in such cases; and therefore the power does not exist, and the action of the surrogate in this proceeding was without lawful warrant.

There are statutes providing that the surrogate may record wills, where they have been admitted to probate in a foreign jurisdiction, and also in aid of creditors, and, perhaps, for other purposes; but they have no bearing on the question now under consideration. We are therefore of opinion that the learned vice ordinary correctly decided that a surrogate had no authority to grant original probate of foreign wills. The learned vice ordinary, however, constrained by cases not having the approval of this court on the question at issue, but which he felt bound reluctantly to follow, held that if a decedent leave property in this state, original probate of his will may be allowed here. As he denied the right of the surrogate to probate a foreign will in the first instance, it follows that when he said that such will could be proven in this state, if decedent left property in this state, he must have had in mind the ordinary as the seat of such power. If this be so, we do not agree with the conclusion, and are of opinion that the prerogative court has no such power, and that its original jurisdiction over the probating of wills is confined to those of decedents domiciled in this state at the time of death; and this notwithstanding there may be property of the nonresident in this state. The comity which should be observed between states would seem to require that the courts of the state of the domicile of a testator should be first permitted to pass upon the question whether its citizen has made a will according to the law of his domicile.

The power to regulate the jurisdiction of the ordinary was assumed by the Legislature in 1784 by an act passed December 16th (Paterson's Laws, p. 59), which recited that: "Whereas it is necessary that the power and authority of the ordinary of the state, and his surrogate, should be defined, the jurisdiction of the prerogative court regulated, and an orphans' court established in the several counties of this state: therefore, 1. Be it enacted by the Council and General Assembly of this state, and it is hereby enacted by the authority of the same, that, from and after the passing of this act, the authority of the ordinary shall extend only to the granting of probates of wills, letters of administration, letters of guardianship, and marriage licenses, and to the hearing

and finally determining of all disputes that may arise thereon."

On June 13, 1820 (Rev. Laws, p. 776), this was re-enacted, except that the words "marriage licenses" were omitted. This and other statutes regulating the jurisdiction of the ordinary remained in force until, by the adoption of the Constitution in 1844, the powers of the ordinary were conferred on the Chancellor, and it must be assumed that they were so transferred subject to the right of regulation, which the Legislature had exercised for 60 years; and that such was the contemporaneous construction is manifested by the act of the Legislature in enacting the statute of 1846 (Rev. p. 203), the first section of which is in the precise form of the act of 1820, while the second section forbids the ordinary granting probate until "proof be made to his satisfaction that no caveat against proving such will hath been filed in the office of the surrogate of the county where the testator resided at the time of his death, or that notice had been given to all persons concerned of the application to the ordinary for such probate."

The right of the Legislature to regulate the jurisdiction of the ordinary has been exercised unchallenged for over a century, and has thereby become a fixture in our jurisprudence. An examination of our statutes shows that in the act of 1713 (Rev. Laws, p. 7) provision was made for the reception in evidence of a duly certified copy of wills duly proven in the kingdom of Great Britain or any of its colonies, and that such provision has been continued by the same or different methods to the present time, so that from ancient times no necessity required that the ordinary should be vested with the power to probate the wills of nonresidents. It is equally clear that no such express power has been given by statute, and wherever assumed it had been upon the alleged ground of a prerogative power, a claim which has no legal foundation in this state; for it cannot be assumed that when the Legislature undertook to limit the power of the ordinary and confined it, among other things, to the probating of wills they were dealing with subject-matters arising outside of their jurisdiction.

The plain common sense meaning to be given to the act is that the ordinary was limited to the probating of wills of those domiciled within the state, which was the limit of his jurisdiction. If this be not so, his power is unlimited; for the statute does not make his right dependent upon property. It confines his power to the granting of probate of wills, and if this does not limit it to persons domiciled in the state it becomes universal, irrespective of property rights.

No good reason can be advanced why any other course than that indicated should be observed; for after a will is proved at the place of domicile a copy, properly certified,

may be recorded in most, if not all, states, and the rights of creditors in all property located in another jurisdiction can be, and usually are, protected by statute.

The appellants have cited numerous cases, all of which have been examined. Those principally relied on in this state are the Coursen Will Case, *supra*, which has been discussed, and which decides nothing but that once a surrogate has taken jurisdiction the ordinary is deprived of all jurisdiction, except on appeal, and Gordon's Case, 50 N. J. Eq. 397, 26 Atl. 268, in which it was held that if the testator left personal property in this state his will might be proved here, even if his domicile was elsewhere. The court, refusing to determine the question of domicile, which was one of the issues, set the will aside as a forgery. This court affirmed the finding of forgery; but the domiciliary effect on the question of jurisdiction was not argued or decided, and we are not concluded on that point.

The other New Jersey cases cited on this question are all based upon the Gordon Case, *supra*, and must fall with it; for we are of opinion that it was not correctly decided, so far as the present question is concerned, and that if the expression of the court be more than a dictum it is not supported by all the cases cited, and as to those having a contrary tendency we do not approve the reasoning.

As to the other cases cited, and they are numerous, it is sufficient to say that most of them do not run counter to the views expressed in this opinion, and do not weaken our opinion that a due regard for state comity favors the correctness of the principle that the courts of the state of the domicile of a testator have the primary right to pass upon the questions incident to the probate of his will, even if some of his personal property be found in a foreign jurisdiction, and that there is no statute of this state which vests in our probate courts a power inconsistent with this view.

If the present proceeding be sustained and the will retained and filed with the Secretary of State, as required by our law, this will can never be probated at the place of testator's domicile, except as ancillary to the probate in this state—a proceeding of doubtful right and expressly contrary to the law of this state wherever provision is made for recording a certified copy of a foreign will. *Wallace v. Wallace*, 3 N. J. Eq. 616.

There is some evidence that the respondent consented to the probate in this state. The inference to be drawn from the evidence is not free from doubt; but, granting that she did consent, that would not confer a jurisdiction on the surrogate which he did not possess, for his jurisdiction depends upon legislative endowment, and not upon the act of a party contesting the probate.

This decree will be affirmed upon the ground that neither the prerogative court nor the surrogate of any of the counties of this state has general jurisdiction to admit to probate the last will and testament of a nonresident having a domicile at the date of his death in another state, although such nonresident leave property in this state, except as ancillary to a probate by the courts of the locality of such domicile.

KALISCH, J., dissents.

VAN VALKENBURGH v. BOROUGH OF BERGENFIELD et al.

(Supreme Court of New Jersey. Nov. 21, 1912.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 756*)—DEFECTS IN STREETS—ACTIONS FOR INJURIES.

The twentieth section of the road act of 1859 (P. L. p. 633; 4 Comp. St. 1910, § 66a19, p. 4451) does not apply to boroughs; and section 84 of the road act does not apply to the section cited.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1588; Dec. Dig. § 756.*]

Action by Elizabeth A. Van Valkenburgh against the Borough of Bergenfield and others. On demurrer to a declaration in which the Borough is impleaded as a defendant with three individuals. Judgment for demurrant.

Argued June term, 1912, before GUMMERE, C. J., and GARRISON and BERGEN, JJ.

Mackay & Mackay, of Hackensack, for plaintiff. E. Howard Foster, of Bergenfield, for defendants.

GARRISON, J. This is a demurrer by the borough of Bergenfield to a declaration in which the borough is impleaded as a defendant with three individuals. The only charges in the declaration that in any way affect the borough are contained in two counts; the other counts being aimed solely at the individual defendants. In the first of the two counts referred to the borough is charged with negligence in permitting certain holes to be made in a public street of the borough, and with permitting said holes to remain, with knowledge of their existence. The other count charges that the holes were unlawfully made by the borough. The plaintiff sues as a user of the highway, whose automobile was injured by the defective condition of the street.

The demurrer must be sustained on the ground that the section of the road act authorizing suits for damages for injuries so received applies to township only. 3 Gen. Statutes, § 192, p. 2844; 4 Comp. Statutes, § 66a19, p. 4451.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It does not apply to boroughs, and is not extended to boroughs by the eighty-fourth section of the road act. *Carter v. Rahway*, 57 N. J. Law, 196, 30 Atl. 863.

The case of *South v. West Windsor Township*, 82 Atl. 852, applies only where a public statute gives the right of action, which is not the case here, where the demurrer is sustained, not because the declaration did not set out the statute, but because there was no statute to be set out.

The plaintiff contends that the demurrer should not be sustained, because, while going to the whole declaration, it challenges two counts only. This point would be well taken if the counts not challenged affected the demurrant. They do not; and when a defendant in fact challenges all of a declaration that affects him the rule invoked has no proper application.

Judgment on demurrer may be entered for the demurrant, with costs.

REED et al. v. INHABITANTS OF CITY OF TRENTON.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 12*)—FRANCHISES—CHARGES—CONSTRUCTION.

Where a traction company, organized under the statute of this state, contracted with a municipal body in the form of an acceptance of an ordinance, passed by a municipal body, granting permission to such company to maintain and operate its railroad, conditioned that certain specified rates of fare should be charged for transportation of passengers, *held*, that where there were no express words in the ordinance, indicating that the parties were contracting for any other corporation, the inference is that the parties intended to bind themselves only, and not other parties, and that the obligation of the company was to carry passengers over its own lines, for the stipulated fare, and not over the lines of another company.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

2. CORPORATIONS (§ 398*) — CONTRACT OF STOCKHOLDER—EFFECT.

The contract of a stockholder, made in his own name, is not binding upon a corporation, the stock of which he owns and controls.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1592-1594; Dec. Dig. § 398.*]

3. CONTRACTS (§ 170*)—CONSTRUCTION—PRACTICAL CONSTRUCTION BY PARTIES.

A practical construction of a contract becomes evidential only when the writing is ambiguous, and where it appears that the acts done under it were those of the very parties thereto, and were done in pursuance of and by reason of it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. § 170.*]

(Additional Syllabus by Editorial Staff.)

4. CARRIERS (§ 12*)—CHARGES—FRANCHISES—CONSTRUCTION—"CONTINUOUS RIDE IN THE SAME GENERAL DIRECTION."

In an ordinance providing that the rate of fare charged by a traction company within

the limits of a city for each passenger should be three cents, and outside the city limits within a radius of five miles five cents, and payment of such fares shall entitle the passengers to one continuous ride in the same general direction, the words "continuous ride in the same general direction" mean a journey over the traction company's own tracks.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

Trenchard, Kalisch, and White, JJ., dissenting.

Appeal from Chancery Court.

Bill in equity by Aldred Reed and another, receivers of the New Jersey & Pennsylvania Traction Company, against the Inhabitants of the City of Trenton. From a decree for defendant, plaintiffs appeal. Reversed, bill restored to files, and preliminary injunction continued.

On appeal from a decree advised by Vice Chancellor Walker, whose conclusions are as follows:

"The bill is filed to restrain the mayor of the city of Trenton from revoking the license of car No. 7 of the New Jersey & Pennsylvania Traction Company, and from stopping the operation of that car upon the company's line of railway, within the limits of the city of Trenton. The pertinent facts underlying the controversy are these: The common council of Trenton passed an ordinance, which was approved on December 31, 1902, authorizing the Traction Company to construct and operate a street railway on Calhoun and West Hanover streets, in Trenton. This ordinance, conferring certain rights and imposing certain limitations upon the company, required that as a condition precedent to the enjoyment of the privileges granted the company should file with the city clerk of Trenton a contract, wherein it would covenant with the city to abide by and fully perform all the matters and things in the ordinance contained on its part to be observed, kept, and performed. Such contract was duly executed and filed.

"The sixth section of the ordinance under consideration is as follows: 'The rate of fare within the present limits of the city of Trenton for each passenger shall be three cents, and outside of the city limits, within a radius of five miles, five cents, and shall entitle the passengers to one continuous ride in the same general direction, and each passenger shall be entitled to one transfer ticket for passage to another line of said company at all points of intersection of other routes, if such transfer be necessary to enable him to continue to his destination; any child under five years of age, accompanied by a parent, guardian or other person paying fare, shall be carried free; the mayor is hereby empowered to revoke the license of any car which is not run in accordance with this section.'

"The line of the Traction Company extends

from its terminus, on West Hanover street, in the city of Trenton, westwardly, to the raceway of the Trenton Water Power Company's canal. At that point the Traction Company connects with a track laid by the Trenton City Bridge Company across the bridge over the Delaware River between Trenton and Morrisville in the state of Pennsylvania. This track in turn goes to the tracks of the Yardley, Morrisville & Trenton Street Railway Company, which run from Morrisville to Yardley, in the state of Pennsylvania. These companies are and always have been owned and controlled by the same interests.

"When continuous traffic from Trenton to Yardley by the same car running from one terminus to the other was established, the rate of a single fare for the whole distance was fixed by the three companies at five cents, and was so continued for years and until February, 1909, when the rate was increased to ten cents. Yardley is within a radius of five miles from the Traction Company's terminus on West Hanover street, in Trenton, and the claim of the city is that the raising of the fare to ten cents was a plain violation of the limitation in that behalf contained in the ordinance which was accepted by the Traction Company in the agreement executed with the city, and that, therefore, the mayor had a right to revoke the license of the car on which the excessive fare was charged, and that no injunction should be allowed. It may be, as was said upon the argument, that the Traction Company cannot afford to carry passengers from Trenton to Yardley for five cents; that that rate of fare heretofore charged has proved well nigh ruinous to the company; and that it cannot continue to exist under such hard conditions. But this, in the language of Justice Swayne, in *Stockley v. Perry*, 26 N. J. Law, J. p. 8, may be a very good reason why a man should not make such a contract, but it is no reason why the courts should refuse to enforce the contract when made; and, as I said in *Poole v. Supreme Circle*, 85 Atl. 821 (memorandum recently filed), 'the plea of necessity is never, as I understand it, a valid defense against the performance of a contract.'

"The power of the city to impose the terms and conditions in the ordinance contained is undoubted, and the issue, therefore, narrows itself to one of construction only, and the question is: Does the ordinance permit the charge of a fare of three cents within the city limits, namely, from the terminus, on West Hanover street, to the raceway of the Water Power Company's canal, and an additional five cents within a radius of five miles from the last-named point or city limits, or does it mean that the distance of five miles is to be measured from the terminus in Trenton to a point outside of the city limits? In my judgment the question

propounded should be answered in favor of the city's contention. In aid of this construction comes the clause immediately succeeding that limiting the rate of fare, which says that each passenger shall be entitled to one transfer ticket for passage to another line of the company at all points of intersection of other routes if such transfer be necessary to enable him to continue to his destination. Although it is a fact that at the time when the ordinance was approved the Traction Company's railway did not connect with the line running over the Delaware River Bridge, as the line was not then built, nevertheless, the building of that railway was in contemplation, else the language, 'shall entitle the passenger to one continuous ride in the same general direction and each passenger shall be entitled to one transfer ticket for passage to another line of said company at all points of intersection of other routes, if such transfer be necessary to enable him to continue to his destination,' would have been meaningless. These provisions are all in the same section, and are in the conjunctive. Besides, the construction contended for by the city is one that the company itself adopted and acted upon for years, and the court may lay hold of this practical construction given to the ordinance and contract by the parties in deciding this question. The court is willing to believe that the words mean what the Traction Company, by its actions, has said they mean.

"The views above expressed lead to the dismissal of the bill and consequent dissolution of the injunction."

Frank S. Katzenbach, Jr., of Trenton, for appellants. Charles E. Bird and Charles H. English, both of Trenton, for respondent.

VOORHEES, J. (after stating the facts as above). This appeal reviews a decree of the Court of Chancery dismissing an injunction bill, thereby terminating the preliminary injunction which had issued thereon. The facts are fully and accurately set out in the conclusions written for the Court of Chancery by the present Chancellor. That a municipality as a condition precedent to granting permission to a Traction Company to construct and operate a street railway within its corporate limits has power to impose lawful restrictions, in the interest of the public, that regulations of rates of fare are properly classed among such restrictions and come within the terms of the statute, and that the acceptance of such an ordinance by the company, constitutes a contract, are too well settled to require discussion. The contract thus entered into is evidenced by the terms of the ordinance, and is to be construed by the ordinary rules of law, applicable to that subject.

[1] The contract before us for construction is found in the sixth section of the ordinance, and is set out in full in the opinion written

for the Court of Chancery. The Traction Company was a New Jersey corporation, whose operations were confined by law to this state. It could have no lines without this state. There is no expression, even intimating that the parties were contracting for any other corporation. The inference is that they lawfully contracted, and, in the absence of express words to the contrary, that they intended to bind themselves only, and not other parties. The obligation of the Traction Company was to carry passengers over its own lines for the stipulated fare, not over the lines of another company. The rates were clearly expressed to be three cents within the city of Trenton, and five cents outside of the city limits, within a five-mile radius. If the city had intended to bind the New Jersey corporation to pay toll across a bridge of another corporation, which is quite distinct from a rate of fare, and to bear the charge of a foreign corporation for transportation over its lines, it should have used apt words to express that meaning. The contract, upon its face, does not so state, and the presumption is to the contrary.

[2] The Traction Company subsequently to the passage of the ordinance became the owner of the stock of the Pennsylvania corporation and of the Bridge Company. The ownership of the stock of the other companies by the New Jersey corporation does not alter this presumption, even if such control had been vested in the New Jersey corporation at the time of entering into the contract. A fortiori, it must be without significance or bearing when such control had not then been acquired. The contract of a stockholder made in his own name is not binding upon a corporation, the stock of which he owns and controls. *Clement v. Young-McShea Amusement Co.*, 70 N. J. Eq. 677, 67 Atl. 82, 118 Am. St. Rep. 747; *Thompson on Corporations* (2d Ed.) § 1386.

[4] The transfers which the company obligated itself to give are in express terms limited "for passage to another line of said company," and the words "continuous ride in the same general direction" must be construed to mean a journey upon and over the company's own tracks.

[3] It has not been shown that the fixing of fare between Trenton and Yardley by the joint action of the three corporations was by reason of the language of the contract, and because that agreement was binding upon all the companies. Hence the effect of this joint action would not amount to a practical construction of the ordinance. A practical construction of a contract becomes evidential only when the writing is ambiguous, and where it appears that the acts done under it were those of the very parties thereto, and were done in pursuance and by reason of it. *Rogers v. Colt*, 21 N. J. Law, 704; *Lehigh Valley R. Co. v. Stewart*, 37 N. J. Law, 53; *United Boxboard & Paper Co. v. McEwan Bros. Co.*, 76 Atl. 550; *McMillin v. Titus*, 222 Pa. 500, 72 Atl. 240; *Sternbergh v. Brock*, 225 Pa. 279, 74 Atl. 166, 133 Am. St. Rep. 877.

We therefore conclude that the contract was wholly between the New Jersey corporation and the city, that it had reference to the lines of that company only, and did not obligate the New Jersey Company to procure transportation over the lines or property of either of the other companies, and that the action of the mayor in revoking and annulling the car licenses, under the power for that purpose, conferred upon him by the ordinance, because, to quote the language used by him in his order or revocation, "the rate of fare charged by said company for the transportation of passengers on said cars between the city of Trenton and the borough of Yardley aforesaid (the said borough of Yardley lying and being outside of the city limits, within a radius of five miles) is the sum of ten cents, being an amount in excess of the fare which by the terms of said section of said ordinance of said company is authorized and permitted to charge for the transportation of passengers for a continuous ride within said radius," was not warranted.

The order appealed from will be reversed, and the bill restored to the files, and the preliminary injunction continued.

TRENCHARD, KALISCH, and WHITE, JJ., dissenting.

RIDDELL v. ROCHESTER GERMAN INS. CO. OF NEW YORK.

(Supreme Court of Rhode Island. Dec. 20, 1912.)

1. CORPORATIONS (§ 640*)—FOREIGN CORPORATIONS—POWERS.

A foreign corporation can exercise in this state no powers not conferred upon it by its charter or the laws of the state of its creation; and only such of those powers as are not repugnant to the laws of this state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2532, 2533; Dec. Dig. § 640.*]

2. INSURANCE (§ 47*)—INSURANCE COMPANIES—CONSOLIDATION—EFFECT OF PENDING ACTIONS.

Under New York Insurance Law (Consol. Laws 1909, c. 28) § 129, authorizing the merger or consolidation of insurance corporations, and providing that no action or proceeding pending at the time of the consolidation in which any or all of the old corporations are parties shall abate or discontinue by reason thereof, but that the same may be prosecuted to final judgment as if the merger or consolidation had not taken place, such companies upon consolidation do not cease to exist absolutely, but still retain sufficient existence to enable them to maintain or defend existing suits wherever pending.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 49; Dec. Dig. § 47.*]

3. CORPORATIONS (§ 691*)—ACTIONS BY OR AGAINST—DISSOLUTION.

Gen. Laws 1909, c. 213, § 9, providing that corporations whose charters or articles of association shall expire by their own limitation or be annulled by forfeiture or otherwise shall notwithstanding continue bodies corporate for three years thereafter for the purpose of prosecuting and defending suits, has no application to foreign corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2673-2677; Dec. Dig. § 691.*]

4. CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—POWERS.

The Legislature may limit and restrict the operation in this state of foreign corporations, but cannot confer upon them powers not conferred by the state of their domicile.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505-2509; Dec. Dig. § 636.*]

5. INSURANCE (§ 47*)—INSURANCE COMPANIES—CONSOLIDATION—EFFECT OF PENDING ACTIONS.

An action against a New York insurance corporation was not abated by the consolidation of that corporation with another under New York Insurance Law (Consol. Laws 1909, c. 28) § 129, in view of the provision of that section that actions or proceedings pending at the time of the consolidation shall not abate or discontinue by reason thereof; there being nothing to indicate that it was intended to limit the operation of that provision to suits pending in New York state.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 49; Dec. Dig. § 47.*]

6. COURTS (§ 8*)—JURISDICTION—EXTRATERRITORIAL FORCE OF STATUTE.

New York Insurance Law (Consol. Laws 1909, c. 28) § 129, providing that actions or proceedings pending at the time of the consolidation thereunder of insurance corporations shall not abate or discontinue by reason thereof, construed to apply to actions and proceedings pending outside New York state, is not an attempt to legislate with respect to the procedure in courts of other states, nor to impose

liabilities on persons and property outside of its jurisdiction, but is intended to protect those having dealings with the consolidated companies either in that state or a foreign state, and hence is valid.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 18, 19; Dec. Dig. § 8.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by Hugo Riddell against the Rochester German Insurance Company of New York. The suit was dismissed, and plaintiff brings exceptions. Exceptions sustained, decision reversed, and case remitted.

Page & Cushing, of Providence, for plaintiff. Cyrus M. Van Slyck, of Providence, amicus curiæ.

VINCENT, J. This is an action commenced by Hugo Riddell, the mortgagee of insured personal property, against the Rochester German Insurance Company, incorporated under the laws of the state of New York, to recover the amount of a loss sustained by fire; the same being covered by a policy of said company. The action was begun on February 20, 1908. During the pendency of the suit, to wit, on May 9, 1911, the Rochester German Insurance Company and the German American Insurance Company, the latter also a New York corporation, became merged and consolidated, under the provisions of section 129 of the Insurance Law of New York (Consol. Laws N. Y. 1909, c. 28), and since that date the business of both corporations has been carried on by the consolidated corporation under the name of "the German American Insurance Company." Subsequent to the merger, counsel who had before appeared in the case for the Rochester German Insurance Company suggested, in writing, to the superior court that his client the Rochester German Insurance Company had ceased to exist, appending to such written suggestion a copy of the law under which the merger had been effected, together with a copy of the agreement of consolidation, a copy of the charter of said German American Insurance Company, and copies of certain certificates which were incidental to the merger proceedings.

The provision in section 129 of the Insurance Law of New York, under which the merger was accomplished, is as follows: "Upon such merger or consolidation all the rights, franchises and interests of the corporations so merging or consolidating in and to every species of property and things in action belonging to them or either of them shall be deemed to be transferred to and vested in the new corporation without any other deed or transfer, and the new corporation shall hold and enjoy the same to the same extent as if the old corporations or either of them should have continued to retain their titles and transact business. The

new corporation shall succeed to all the obligations and liabilities of the old corporations or any of them, and shall be held liable to pay and discharge such debts and liabilities in the same manner as if they had been incurred or contracted by it. * * * No action or proceeding pending at the time of the consolidation in which any or all of the old corporations may be a party shall abate or discontinue by reason of the merger or consolidation, but the same may be prosecuted to final judgment in the same manner as if the merger or consolidation had not taken place, or the new corporation may be substituted in place of any corporation so merged or consolidated by order of the court in which the action or proceeding may be pending." The superior court dismissed the suit, and to such dismissal the plaintiff took an exception. As stated in the brief for the defendant: "The question in the cause is whether or not, by the merger of the Rochester German Insurance Company with the German American Insurance Company under the provisions of the New York statute, an action pending in this state against the Rochester German Insurance Company abated."

The defendant claims that the suit abated (1) because the Rochester German Insurance Company ceased to exist after the consolidation; (2) because courts have no jurisdiction of a defendant corporation after it is dissolved; (3) that the provision in the statute of New York providing for the continuation of pending suits against the constituent companies has no extraterritorial force; (4) that the provisions of our statute (Gen. Laws, c. 213, § 9) relating to the continuance of a corporation for the period of three years after expiration or annulment of its charter has no application to the present case; and (5) that, while it is not claimed that the merger has deprived the plaintiff of any right to recover upon his policy of insurance, the defendant is not now a corporation with either a general, limited, or special existence against which a court can render a judgment.

[1] Insurance companies duly created under the laws of other states are permitted to transact business in this state upon compliance with the provisions of our statute. Chapter 220, Gen. Laws. A foreign insurance company, or other foreign corporation, in the exercise of its powers within this state, is subject to two limitations: (1) It can only exercise such powers as have been conferred upon it by its charter or by the laws of the state of its creation; and (2) as to those powers it can only exercise such of them as are not repugnant to our laws. The law in this regard seems to be well summarized in 3 Clark & Marshall on Private Corp. §§ 840, 841, as follows:

"Sec. 840. A corporation clearly cannot properly exercise in another state or country any powers which are not conferred upon it, either expressly or impliedly, by its charter.

And, as a general rule, it is subject in other states to general legislation of the state of its creation.

"Sec. 841. When a corporation goes into another state than that by which it was created, with its consent, express or implied, it does so subject to its laws. It cannot exercise powers or do acts in such other state which are contrary to its laws, although they may be authorized by its charter and by the laws of its own state."

Continuing, the authors quote from the language of Chief Justice Waite in *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527, 3 Sup. Ct. 36, 27 L. Ed. 1020, as follows: "Wherever a corporation goes for business it carries its charter, as that is the law of its existence, * * * and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere."

In *Pierce v. Crompton*, 13 R. I. 312, this court held that an assignment by a corporation created under the laws of New York and doing business here was void and of no effect, and could not have the effect of suspending or dissolving a previous attachment or levy on the ground that the corporation had not power under the laws of New York to make such an assignment, and that a foreign corporation has only such powers as have been conferred upon it by its charter or the laws of the state to which it owes its existence.

In the case of *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527, 3 Sup. Ct. 362, 27 L. Ed. 1020, the court also said: "A corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, though it may do business in all places where its charter allows and the local laws do not forbid. * * * A corporation of one country may be excluded from business in another country, but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation."

In the case of *Harris-Woodbury Lumber Co. v. Coffin et al.* (C. C.) 179 Fed. 257, the Circuit Court for the Western District of North Carolina said: "A corporation doing business in a state other than the one wherein it is created can only exercise such powers and functions as may be conferred upon it by its charter, and the transaction of its affairs is limited strictly to the authority granted by the state of its creation. It is only by the rule of comity that it is permitted to do business in this state at all, and, when it does so, it necessarily carries with it all the powers granted in its charter.

Moreover, when a question of power in a given instance is involved, such question must be determined by the laws of its domicile, and those who may have transactions with such corporation are subject to the limitations and powers contained in its charter."

In *Michigan State Bank v. Gardner*, 15 Gray (Mass.) 362, the court after stating that the laws of Michigan provided that all corporations expiring by their own limitation should continue to be bodies corporate for three years, for the purpose of prosecuting and defending suits, and that any suit pending at the time of dissolution should not be abated thereby, held that "a suit commenced in this state before the expiration of the charter might be prosecuted to judgment after the end of the three years, in the name of the corporation, by the assignee."

In *Scott v. Stockholders' Oil Co. et al.*, 142 Fed. 287 (Cir. Ct. Pa.), the court said: "The motion to abate the suit is made upon the ground that both the defendant corporations were dissolved on January 9, 1905, by a proclamation of the Governor of Delaware for nonpayment of taxes. It is needless to inquire what force the fact of dissolution might have if the defendants were corporations of this state. They are Delaware corporations, however, and section 36 of an act of that state, passed on March 10, 1899 [21 Del. Laws, c. 273], expressly provides: 'All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which said corporation shall have been established.' " And the opinion continues: "This section is not confined to suits brought against them in the state of their origin, but is general in its terms, and applies to all suits by or against them, wheresoever brought or defended."

In *L. Buckl, etc., Co. v. Atlantic, etc., Co.*, 128 Fed. 332, 63 C. C. A. 62 (Florida), it was held that under the corporation laws of New Jersey, which provide that corporations after their dissolution shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, the dissolution of a corporation does not abate an action brought by such corporation in Florida to recover damages to its estate, business, and credit by reason of an alleged wrongful attachment of its property.

Many other authorities might be cited to the same effect, but we think that the foregoing sufficiently state the law as to the powers and limitations of foreign corporations doing business in this state.

The defendant in support of its contention that after the consolidation the Rochester

German Insurance Company ceased to exist cites *Gladding v. Saint Matthew's Church*, 25 R. I. 628, 57 Atl. 860, 65 L. R. A. 225, 105 Am. St. Rep. 904, 1 Ann. Cas. 537. In that case the testatrix, having been a member of and much interested in St. Ann's Church for Deaf Mutes, in the city of New York, made a will leaving a fund thereto. Prior to her decease St. Ann's Church became consolidated, under the laws of New York, with St. Matthew's Church. The new statute provided for the transfer to the new corporation of the membership, property, rights, and obligations of the former corporations. The court says: "We do not see how a corporation can be held to exist in law after the power which has created it has taken from it all its membership, property, and powers—everything which constituted its legal personality."

[2] We do not dispute the principle thus laid down. But the question arises in the case at bar as to whether the power which created these two insurance companies has, through the merger, stripped them altogether of their individuality. The New York Insurance Law, from which quotation has already been made, expressly provides that proceedings instituted against either of these companies shall not abate by reason of such consolidation, but that such suits may be continued until final judgment in the same manner as if such consolidation had not been effected. The force of the provision in the New York statute is fully recognized by our court in the *Gladding Case*, before mentioned, when it cites with approval the case of *People v. N. Y., C. & S. L. R. R. Co.*, 129 N. N. 474, 29 N. E. 959, 15 L. R. A. 82, including in such citation the following words of Judge Andrews: "This decision accords with the general current of authority to the effect that the statutes for the consolidation of domestic corporations are to be treated as acts of incorporation, and that on consolidation being effected under their provisions the constituent companies *unless such an intention is excluded by the language of the statute*, are deemed to be dissolved, and their powers and faculties to the extent authorized become vested in the consolidated company as a new corporation created by the act of consolidation." It seems to us that in the case at bar it was not the intention of the Legislature of New York that these individual insurance companies should, on consolidation, cease to exist absolutely but that they should still retain a sufficient existence to enable them to maintain or defend existing suits wherever the same might be pending.

[3] We agree with the contention of the defendant that section 9, c. 213, of our General Laws, has no application to the present case. The right to maintain this action unabated does not, and cannot, come from any legislation in our own state, but such right must be found in the charter of these insur-

ance companies or in the laws of the state of New York.

[4] Our Legislature cannot give additional powers to a foreign corporation. They may limit and restrict its operations in this state, but that is a very different matter from conferring upon it powers which are not conferred by the state of its domicile.

[5] The defendant further claims that, upon the cessation of the existence of the Rochester German Insurance Company, the plaintiff's suit abated, and in support of this the defendant cites a number of cases, and quotes from section 1031 of Morawetz on Corporations, as follows: "The dissolution of a corporation, at common law, not only means that the company has lost its franchises and can no longer act in a corporate capacity, but it implies that the corporation has wholly ceased to exist, in legal contemplation, and will not be recognized as a corporate body for any purpose. It follows that suits brought by or against a corporation are abated by its dissolution; and a judgment purporting to be rendered against a corporation which is not in existence is a nullity." We are unable to give to this language the full force and meaning which the defendant appears to claim for it in its application to the present case. It would undoubtedly be conclusive of the present case, except for the provision of the New York statute that no action or proceeding pending at the time of the consolidation shall abate by reason thereof, but that the same may be prosecuted to final judgment in the same manner as if such consolidation had not taken place. We do not think that section 1031 was intended to apply to the case of a corporation which was continued for certain purposes because we find it clearly laid down in Morawetz, § 998, that if a corporation is considered in existence for the purpose of suing and being sued and winding up its affairs, after having been dissolved and prohibited from further prosecuting its business in the state where it was created, it will also be considered in existence for that purpose in foreign states. Some of the decisions relied upon by the defendant do not seem to us to support its contention.

In the case of *Rodgers v. Adriatic Fire Insurance Company*, 148 N. Y. 34, 42 N. E. 515, the court held that the state of New York was not required by comity to give to a foreign judgment the effect of reaching the corporate assets held by the receiver in that state as a fund for distribution after the dissolution of the corporation when the receiver has not been made a party to the foreign suit so to be bound by the judgment therein.

In *Howe v. N. Y., N. H. & H. R. R. Co.*, 142 App. Div. 451, 126 N. Y. Supp. 1090, the court would not entertain jurisdiction of a representative action by resident stockholders of a foreign corporation, where the foreign corporation has ceased to exist and is

defunct under the laws of its domicile, for the devolution of the property of a foreign corporation is governed by the laws of its domicile, and the courts of another state should not undertake to administer the assets of such a corporation any more than they would in the case of a natural person.

In *Gulledge Bros. Lumber Co. v. Wenatchee Land Company*, 115 Minn. 491, 132 N. W. 992, the corporation was dissolved by operation of the laws of Washington under which all its property became vested in trustees to be administered by them for the benefit of its stockholders and creditors subsequent to the commencement of the plaintiff's suit to recover damages for breach of contract. After dissolution, appellants, by order of the court below, were appointed receivers of the corporation, and they applied to be substituted as parties plaintiff in the action. The court held that, on the dissolution of the corporation, the property became vested in trustees under the laws of Washington, and that the action, therefore, could not be revived and continued by the receivers, but that, if revived at all, it must be at the instance of the trustees.

In *Pendleton v. Russell*, 114 U. S. 640, 12 Sup. Ct. 743, 36 L. Ed. 574, a judgment was recovered in the United States Circuit Court for the Western District of Tennessee against a life insurance company, a corporation of New York. Prior to such judgment the insurance company had gone into the hands of a receiver, through proceedings taken in New York under the direction of the Attorney General of that state. The receiver was not made a party to the suit in Tennessee. This judgment was filed in New York as a claim against the assets of the company in the hands of the receiver, and it was held by the Court of Appeals of New York that the Circuit Court of Tennessee had no jurisdiction over the case, after the dissolution of the corporation, which could bind the property of the company in the hands of the receiver. So far as appears, there was no statutory provision in New York that under such conditions pending suits might proceed to judgment, as in the case at bar, or that the dissolved company should in any degree or for any purpose retain its entity or even a partial existence. The company in that case had apparently gone entirely out of existence, and its assets had passed to a receiver whose duty it was to administer them under the direction of the court appointing him.

Without a further detailed discussion of the cases cited by the defendant, we think it will readily appear upon examination that they fail to cover the point of the defendant's contention that the suit of the Rochester German Insurance Company abated through the consolidation which was effected in New York under the statute of that state saving to plaintiffs the right to prosecute to final judgment their suits against either of the

merged companies in the same manner as if such merger had not taken place.

[8] The defendant also contends that the statute of New York has no extraterritorial force at the same time admitting that there is a line of decisions, in which it is held that, in case of dissolution, where a statute continues the corporate existence for the purpose of winding up its business, permitting it to sue and be sued in connection therewith, that such existence of the corporation for such purpose is continued outside as well as inside the state of its creation and domicile, and that such doctrine is a correct statement of a sound principle. But the defendant further claims, however, that such doctrine is not applicable to the case at bar, and that the provision of the New York statute regarding the abatement of suits, etc., only refers to suits pending in the state of New York, and relates to the remedy for enforcing the rights and claims against the new corporation without affecting the suits of the constituent corporations. We do not think that such a limitation can be inferred from the language of the statute referred to, nor is there anything therein which would warrant us in assuming that it was the intention of the Legislature of New York to so limit the operation of such statute. On the contrary, it seems to us to have been the clear intention that all parties wherever situated should be equally benefited. The defendant cites, as follows, from Black on Interpretation of Laws (2d Ed.) § 108: "Although the Legislature may provide remedies within the state for the collection of claims or enforcement of liabilities arising out of the state, it is not within the competency of the legislative power to create personal liabilities and impose them on persons and property out of the jurisdiction of the state, and on account of transactions beyond its territorial limits." The two insurance companies in question came into existence by virtue of the powers and through the enactment of the Legislature of the state of New York, and were subject to the laws of that state. Their power to do business in states other than the state of their creation was wholly derived from the charters granted to them by the state of New York and the laws of New York governing insurance corporations, and they were not, and could not be, invested with any other or further powers. In the matter of consolidation these companies proceeded under the laws of New York which contained an express provision to the effect that such consolidation should not abate any pending suit against either of the constituent companies. It was within the province of the Legislature of the state of New York, through its statute, to say to the two companies which it had created that they might consolidate, but that they must do so in such manner and under such conditions as would preserve the rights of litigants in

all pending cases against either of them. This provision of the New York statute does not indicate any attempt to legislate with respect to the procedure to be followed by the courts in other states, nor can it be construed as intending to create liabilities and impose them upon persons and property outside of its jurisdiction, but it is more in the nature of a statute intended to protect those who might have dealings with these companies either in the state of their creation or in any foreign state where they had transacted business. We think it is competent for such Legislature to say, under the conditions of the case at bar, whether or not the corporations which it has created shall, upon consolidation, be individually responsible to those having claims against them prior to such consolidation. It is not necessary in our opinion that the statute of New York should distinctly refer to suits in other states in order that their abatement might be avoided. The language of the statute is general, and the intention seems to be clear. As this statute provides for the continuation of pending suits against these corporations, it cannot be presumed that they were to be absolutely wiped out through consolidation, but rather that they should survive to a limited extent—to an extent sufficient to give the statute effect wherever either of said corporations had conducted business prior to the consolidation.

The plaintiff's exception is sustained, the decision of the superior court is reversed, and the case is remitted to that court for further proceedings.

POCASSET ICE CO. v. BURTON, Town Treasurer.

(Supreme Court of Rhode Island. Dec. 20, 1912.)

TOWNS (§ 39*)—CONTRACTS—EXECUTED CONTRACTS.

Where a town was authorized to contract for the construction of portions of state roads within its limits, the town council having the power to fix the rate of compensation to be paid for the use of machinery needed, it is liable in assumpsit for the reasonable value of machinery used under an executed contract, which was made by an officer who was not authorized by financial meeting or vote of the city council to enter into the contract.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 73, 74; Dec. Dig. § 39.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Assumpsit by the Pocasset Ice Company against William E. Burton, Town Treasurer of the Town of Johnston. Demurrers were sustained to the declaration, and plaintiff excepted. Exceptions sustained, and demurrer reversed.

John P. Beagan, of Providence, for plaintiff. Tillinghast & Collins, of Providence (James C. Collins, of Providence, of counsel), for defendant.

PARKHURST, J. This is an action of assumpsit, brought by the plaintiff to recover compensation from the town of Johnston for the use of a stone crusher and engine belonging to the plaintiff, under the circumstances set forth in the declaration and bill of particulars, for 18 weeks and 8 days, between June 23 and November 24, 1906, and between September 24 and November 8, 1907. The plaintiff's second amended declaration, upon which the case is now before this court, originally contained five counts, of which the fourth and fifth were withdrawn by agreement of both parties filed in this court, after the case reached here upon the plaintiff's exception.

This declaration in the first count sets forth that the town of Johnston, a municipal corporation in the county of Providence, did by John Walch, a committee duly authorized by the town council of said town, make a bid to the state of Rhode Island for the construction of a certain section of highway in said town, which bid, in behalf of said town, was made after due advertisement by the state board of public roads had been published inviting proposals, etc., was for the construction of 8,500 feet in length and 14 feet in width of said road, for the sum of \$5,950.80, and was accepted by said state board April 25, 1906, and that a contract in accordance therewith was executed May 2, 1906, between the state board of public roads and the said town, acting through John Walch, its duly authorized committee for that purpose; that said town, by said Walch, its committee, etc., entered upon the performance of said contract, and that, in doing said work, certain roadmaking machinery, including a stone crusher and engine, was necessary and required; and that said town, by its said committee, in June, 1906, bargained and agreed with the plaintiff for the use of its stone crusher and engine at the rate of \$10 per day, or \$60 per week, upon which agreement the plaintiff delivered to said committee its said stone crusher and engine, and the said town had the use of the same in the performance of the work under said contract from June 23 to November 24, 1906, for 18 weeks, amounting to \$1,080—concluding in *indebitatus assumpsit* in common form. The second count by reference includes the inducement alleged in the first count, and sets forth a claim for the use of the same stone crusher and engine for 8 days between September 24, and November 8, 1907, in the sum of \$80, and concludes in *indebitatus assumpsit* as before. The third count by reference includes the same inducement alleged in the first count, and claims for the use of said stone crusher and engine for 116 days, at \$10 per day, amounting to \$1,160, and con-

cludes as follows: "And said town has received from said state of Rhode Island compensation for the doing and performing of its aforesaid contract with the state for the construction of said highway according to the terms of its contract to the amount of fifty-nine hundred fifty dollars and eighty cents (\$5,950.80). Whereby said town, having made use of the appliances aforesaid furnished by the plaintiff, and thereby obtaining compensation therefor, became justly indebted to the plaintiff for a fair compensation for the use of said appliances, and, being so indebted, in consideration thereof, assumed on [itself] and to the plaintiff promised to pay the same upon request." This third count, while claiming, as in the other counts, that a contract was made for a definite sum, nevertheless concludes with a claim for a fair compensation, and is to be regarded as a count on a quantum valebat. The remaining counts, including the common counts, are withdrawn by agreement of parties. The declaration further contains allegations of the due presentment of the claim to the town council, and no satisfaction thereof within 40 days, etc.

The defendant demurred upon five grounds, as follows: (1) The declaration does not set forth a good cause of action against the town of Johnston. (2) The declaration fails to allege that a financial town meeting gave authority to John Walch in its behalf to enter into a contract with the state of Rhode Island for the construction of a section of the state road. (3) The declaration fails to allege any vote of the town council authorizing the said John Walch to act as a committee to enter into a contract with the state for the construction of a state road. (4) The declaration fails to allege any vote vesting authority in any officer or agent of the town of Johnston to contract for the use of road machinery in connection with the construction of a section of a state road. (5) The declaration fails to set forth any facts to support the common counts which are set forth in the complainant's declaration. This demurrer was sustained by decision of the superior court, and the plaintiff duly noted exception to said decision. The case is before this court upon said exception.

The fifth ground of demurrer, as applying to the common counts, has become immaterial, on account of the withdrawal of the counts to which it applies.

Certain statutory provisions relating to highways may be summarized here, as a preliminary to the discussion of the questions raised upon demurrer. Town councils of the several towns may order highways to be laid out, so far and through such part of their respective towns as they may judge necessary. General Laws 1909, c. 82, § 1. Town councils may lay out, alter, or abandon highways and driftways. General Laws 1909, c. 82, § 28. Town councils shall have like control of any highway or driftway laid out

by the General Assembly, and the town in which the same lies shall be subject to like duties and liabilities in relation thereto, as they respectively have or are subject to in case of highways laid out by a town council. General Laws 1909, c. 82, § 29. Highways, etc., lying within the bounds of any town, shall be kept in repair and amended, so that the same may be safe and convenient for travelers, etc., at the proper charge and expense of such town, under the care and direction of the town council of such town. General Laws 1909, c. 83, § 1. The town is required to make an annual appropriation of such sums of money as the electors deem necessary for the maintenance and repairs of its highways, etc. In case any town shall fail to make such appropriation, the town council thereof shall make such expenditures upon the highways and bridges of said town as may be necessary to comply with the provisions of section 1 of this chapter. General Laws 1909, c. 83, § 3. Appropriations for highway work shall be proportioned and expended under the direction of the town council, or a committee of their own members appointed for the purpose. They shall also fix the rate of compensation to be paid for men, teams, road-making machinery, and materials to be employed or used in their respective towns. General Laws 1909, c. 83, § 4. The money allotted for highway work may be expended by contract, if the council so determine. General Laws 1909, c. 83, § 5. The surveyors of highways are to execute the direction of the town council and have general oversight of the highways. General Laws 1909, c. 83, § 7.

It is thus seen that by statute the town council is vested with full authority in the matter of laying out, altering, repairing, and maintaining highways. Execution of this authority may be by committee of the town council or highway surveyor. As to state roads, chapter 84 of Gen. Laws 1909, "of the construction, improvement, and maintenance of state roads," at section 5, gives to towns a preference over other persons in the matter of construction of state roads, as follows: "Provided, that the proposal of any town or city possessing or having the use of adequate road machinery, made in answer to the aforesaid advertisements, not exceeding the minimum sum named in any other proposal made as aforesaid for performing said construction or improvements, shall have the preference for such main highway or portion of such main highway lying within the limits of such town or city, over the proposal of any other person." The General Assembly, therefore, has expressly recognized the capacity of a town to do and perform road construction on the state roads. It is to be noted, also, that the provisions of chapter 83, § 4, above referred to, expressly authorized the town council "to fix the rate of compensation to be paid for * * * road-making machinery and materials" to be

used, etc., and that chapter 84, § 5, above quoted, makes necessary the possession or use of adequate road machinery on the part of a town or city as a condition precedent to the preference to be given to such town or city in the matter of construction of state roads.

From all these considerations it is manifest that the town of Johnston had, by legislative authority, the power to make a bid and to contract for the construction of a portion of state road within the town, and that for the purpose of carrying out the work it needed adequate road machinery. It is also apparent that the town council had the power to fix the rate of compensation to be paid for the use of road-making machinery. Two questions are sought to be raised by the demurrer: First, that the plaintiff has no right of action, because it does not appear that authority to make the contract with the state was given by a financial town meeting; second, because it does not appear that there was any vote of the town council authorizing Walch as committee to enter into the contract with the state for the construction of a state road, or that there was any vote authorizing the contract for the use of road machinery.

Upon the state of facts set forth in the declaration, this court is of the opinion that both these questions are immaterial. Granting, for the sake of argument, that there was no lawful preliminary action on the part of the town, through its financial town meeting or its town council, whereby a valid and enforceable contract for the construction of a state road or for the hire of road-making machinery could lawfully be made, as it was made, on behalf of the town, as set forth in the declaration, we have here a case where the actual contract which was made has been fully executed, the road built, the road-making machinery used, and the contract price paid to and received by the town, and where the power of the town to make such a contract, and of the town council to fix the rate of compensation for the use of road-making machinery, is expressly conferred by statute. The case comes within the well-recognized rule of liability which is well stated and supported by authority in 27 L. R. A. (N. S.) 1117, note: "A municipality or other public corporation, having general power to contract with reference to the subject-matter of an express contract, invalid for some irregularity in the execution thereof, is liable upon an implied contract for any benefit received thereunder, where the form or manner of letting or execution does not violate any statutory restriction upon the power of such corporation to contract, and it is not otherwise violative of public policy." See cases generally as cited under said note. See, also, 1 Dill. Mun. Corp. (4th Ed.) § 459; San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Argenti v. San Francisco, 16 Cal. 255; Higgins v. San Diego, 118

Cal. 524, 45 Pac. 824, 50 Pac. 670; *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 Pac. 189; *Brush E. Lt. & P. Co. v. Montgomery*, 114 Ala. 433, 445, 446, 21 Pac. 960; *Lincoln Land Co. v. Grant*, 57 Neb. 70, 77, 77 N. W. 349; *Nebraska Bitulithic Co. v. Omaha*, 84 Neb. 375, 121 N. W. 443; *Port Jervis W. Co. v. Vill. of Port Jervis*, 151 N. Y. 111, 45 N. E. 388.

In *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, *supra*, where it appeared that the plaintiff had a valid contract for the supply of certain quantities of gas to the defendant, and that at the same time it furnished other gas for various public buildings and departments without any express contract, it was held after mature consideration that the plaintiff was entitled to recover for the value of gas so furnished without express contract. In the course of a very clear and convincing discussion of the principles involved, Field, J., after a reargument upon certain questions of pleading, makes the following remarks (page 469): "Upon these facts, the appellant asserts a right to recover against the defendant for the gas furnished. The respondent denies the right upon the sole ground that there was no evidence of any ordinance of the common council authorizing the furnishing of the gas. The proposition of the respondent is that a municipal corporation can incur no liabilities otherwise than by ordinance. The position, in its full extent, is not tenable. Under some circumstances, a municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases, and the implication extends equally against corporations. This is as well established by the authorities as any principle of law can be." And after a discussion of several authorities in support of the above-quoted statements, the opinion further says (page 471): "The reasoning of the court, in this case, is applicable to the facts of the case at bar. The defendant has received the benefit of the plaintiff's labor and materials for over a year and a half, and it ill comports with fair dealing that it should now seek to exonerate itself from liability, and the law will fail to effect its true end, if the defense interposed can prevail. The position contended for by the respondent, it is believed, is asserted in this state for the first time. The reports in other states are full of adjudged cases where actions upon implied contracts have been sustained against municipal corporations. They have been argued by able and distinguished counsel, and decided by eminent judges, and the distinction has never been made between the liability of a private corporation and a municipal corporation, under circumstances

analogous to those presented in the case at bar." And again, after further citation of authority, the opinion says (page 472): "Where the contract is executory, the corporation cannot be held bound, unless the contract is made in pursuance of the provisions of its charter; but where the contract has been executed, and the corporation has enjoyed the benefit of the consideration, an implied assumpsit arises against it. It will be presumed, for the purposes of justice, that the authority exercised by the officers of the corporation was properly delegated to them, and that contracts made by them without authority have been ratified."

In *Argenti v. San Francisco*, 16 Cal. 255 (*supra*), where a contract for street improvements had been fully executed, it was held that the plaintiff could recover, although it did not appear that the officer signing the contracts had express authority, where it did appear that the work was beneficial to the city, had been duly accepted and approved by the city officers, and that the assessments levied upon the owners of adjacent real estate to pay for the improvement had been collected by the defendant. See, also, under a somewhat similar state of facts, *Moore v. Mayor, etc., of N. Y.*, 73 N. Y. 238, 250, 29 Am. Rep. 134.

We are not unmindful of the fact that the cases of *San Francisco Gas Co. v. San Francisco*, *supra*, and *Argenti v. San Francisco*, *supra*, produced on certain points some division of opinion, and that some attempt to limit the scope of those decisions was made in later cases (see *Zottman v. San Francisco*, 20 Cal. 96, 108, 81 Am. Dec. 96); but it seems to this court that the latter opinion very hastily and somewhat inadequately deals with the former opinions, in the endeavor to show that they do not apply to the *Zottman Case*, and that the general principles of the *Gas Co. Case*, and of the *Argenti Case* were correctly laid down, in view of the general consensus of opinion of the other cases cited.

In view of the foregoing principles, this court is of the opinion that, as the declaration in the case at bar, as admitted by the demurrer, shows a contract completely executed for the construction of the road, and the payment of the contract price to the town, and that, although it does not show clearly an express authority on the part of Walch to make an express contract with the plaintiff for a definite price for the compensation to be paid to the plaintiff for the use of the road-making machinery so as to bind the town for such definite price of \$10 per day, yet the plaintiff has stated in its third count a cause of action whereon it is entitled to recover a fair compensation for the use of such machinery for such time as the town actually used the same in carrying out the contract and earning the money which it has received, that the third count is upon a quantum valebat for such fair compensation.

We hold, therefore, that the third count sets forth a good cause of action, upon which the plaintiff, upon proper proof thereof, is entitled to recover; and the demurrer should have been overruled as to that count.

The plaintiff's exception is sustained, the decision of the superior court in sustaining the demurrer is reversed, and the case is remitted to the superior court sitting in the county of Providence, with direction to overrule the demurrer, and for further proceedings upon the third count of the declaration.

STATE v. GRILLS.

(Supreme Court of Rhode Island. Dec. 13, 1912.)

1. EMBEZZLEMENT (§ 41*) — EVIDENCE—RECEIPT.

Where, on a trial for embezzlement of \$600 intrusted by prosecutor to accused for transmission to a bank in a foreign country, prosecutor testified that he directed accused to send the money to the foreign bank, and his passbook contained an entry of the withdrawal of \$600 from his deposit with accused, which entry was made as a part of the transaction, a receipt given to prosecutor by accused at the same time, which recited the receipt of the money from prosecutor's son, instead of from prosecutor, was admissible against the objection that the receipt did not correspond with the indictment; especially where accused testified that he made a mistake in writing the receipt.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 63; Dec. Dig. § 41.*]

2. EMBEZZLEMENT (§ 38*)—EVIDENCE.

On a trial for the embezzlement of money intrusted by prosecutor to accused for transmission to a bank in a foreign country, the overruling of an objection to a question asked prosecutor as to whether he knew whether accused ever sent the money to the foreign bank was not erroneous.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 61, 65, 66; Dec. Dig. § 38.*]

3. CRIMINAL LAW (§ 1170½*) — APPEAL — HARMLESS ERROR — EXAMINATION OF WITNESS.

Alleged error in overruling an objection to a question propounded to prosecutor while testifying as a witness was not prejudicial, where the witness apparently did not understand the question and gave a meaningless answer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

4. CRIMINAL LAW (§§ 419, 420*) — EVIDENCE — HEARSAY EVIDENCE.

The testimony of a witness as to statements made by a person not a witness in the case is properly excluded as hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

5. CRIMINAL LAW (§ 834*) — INSTRUCTIONS — APPLICATION TO FACTS.

A requested instruction is properly modified by calling the attention of the jury to the testimony which must be considered in making application of the principle of law contained in the instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.*]

6. EMBEZZLEMENT (§ 9*) — ACTS CONSTITUTING OFFENSE.

A depositor in a bank directed the banker to set aside \$600 of the deposit for transmission by the banker to a bank in a foreign country. The banker entered in the passbook the withdrawal of \$600 from the deposit, and made an entry of the amount of the balance, and gave the depositor a receipt for \$600 for transmission to the foreign bank. He did not transmit the money, nor give any explanation for his failure so to do. *Held*, that the general deposit was converted into a special deposit to the amount of \$600, and became a fund in the hands of the banker, and he was guilty of embezzlement, when he fraudulently converted the same to his own use.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 7; Dec. Dig. § 9.*]

7. BANKS AND BANKING (§§ 119, 153*) — RELATION OF BANKER AND DEPOSITOR.

The ordinary relation of a banker and a depositor is that of debtor and creditor arising on a general deposit; but, without actual delivery to the depositor and a redeposit by him for a special purpose, the general deposit may by agreement be converted into a special deposit, and become a fund in the hands of the banker for the specific purpose of creating a special deposit, and such fund is impressed with a trust, a violation of which is a fraud.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 289-292, 356, 483-501; Dec. Dig. §§ 119, 153.*]

Exceptions from Superior Court, Washington County; George T. Brown, Judge.

Joseph S. Grills was convicted of embezzlement, and he brings exceptions. Overruled, and cause remitted for further proceedings.

Harry P. Cross, Asst. Atty. Gen., for the State. John W. Sweeney, of Westerly, for defendant.

SWEETLAND, J. This is an indictment charging embezzlement. The indictment is in seven counts, and with slight variations in language the several counts substantially charge that at Westerly, on the 1st day of July, 1908, the respondent was intrusted with money to the amount of \$600 by one Giacchino Spennato for the specific purpose of sending, transmitting, and remitting said money to the Postal Savings Bank, of the city of Rome, in the kingdom of Italy, and that the respondent, contrary to such specific purpose, did embezzle said money and did fraudulently convert the same to his own use. To this indictment the respondent pleaded not guilty, and the same was tried in the superior court for the county of Washington before Mr. Justice Brown sitting with a jury. The jury returned a verdict of guilty. The defendant's motion for a new trial was denied by said justice. The case is before us upon exceptions to certain rulings made by said justice during the trial, and to the decision of said justice denying said motion for a new trial.

At said trial the respondent, as a witness, contradicted, in certain particulars, the testimony of said Giacchino Spennato as to the

transaction upon which the counts of the indictment are based. However from all the evidence, the jury were warranted in finding the essential facts to be as follows: The respondent, an Italian by birth, conducted a banking business in said Westerly. The said Spennato, also an Italian by birth, made deposits of money with the respondent as banker, and received from the respondent a passbook, the printed parts of which were in the Italian language, and in which the deposits and withdrawals were entered also in Italian. On August 3, 1908, the said Spennato had on deposit with the respondent as such banker the sum of \$644. On said day, the same being within six months after the date of the embezzlement alleged in said indictment, the said Spennato directed the respondent to send \$600 of said sum on deposit with the respondent to a bank in Rome known as the Postal Savings Bank, there to be deposited in the name of said Spennato, and to obtain for said Spennato from said bank at Rome a book showing said deposit in the name of Spennato. This the said respondent undertook to do, and set apart the sum of \$600 from the deposit of said Spennato for that purpose. As a part of the transaction the respondent wrote in said passbook, on a page designated for withdrawals, words in Italian which, translated into English are, "August 3, 1908, sent to Rome \$600.00;" and at the same time he delivered to said Spennato a paper, partly printed and partly written in the Italian language. The written portions were written by the respondent. The contents of this paper, which are essential, translated into English, are: "Westerly, R. I., August 3, 1908. Received from Mr. Michael Angelo Spennato, son of Giacchino, three thousand Italian lire, to be remitted to the Postal Savings Bank, Post Office of Rome. [Signed] Joseph S. Grills." The words "Michael Angelo Spennato, son of Giacchino," appearing in this receipt, were written by mistake for "Giacchino Spennato, son of Michael Angelo." Three thousand lire are the equivalent in Italian money of \$600 American money. On two occasions the said Spennato asked the respondent for the book that was to come from Rome, and the respondent replied that it had not come, but that it would arrive later. The respondent has not forwarded said \$600 to Rome, and has not repaid said sum to said Spennato.

[1] The respondent urges his exception taken at the trial to the admission in evidence of the above-described receipt, on the ground that the respondent is charged in the indictment with embezzling \$600 from Giacchino Spennato, and the receipt by its terms is for 3,000 Italian lire received from Michael Angelo Spennato, son of Giacchino. The respondent excepted, on the ground that said receipt did not correspond with the allegations of the indictment, and should have

been excluded because of the variance. The exception is without merit. The witness Spennato testified that he directed the respondent to send to Rome \$600, and the entry upon the passbook made as a part of the transaction is of the withdrawal of \$600 from the deposits. The receipt was properly admitted in evidence as a writing delivered as part of the transaction. It may also be said that in his testimony, given later at the trial, the respondent testified that he was requested to forward \$600 to Rome, and also that the name "Michael Angelo Spennato" was written in the receipt through his mistake.

[2, 3] The respondent also excepted to the ruling of said justice permitting the Attorney General to ask the witness Giacchino Spennato, "Do you know whether Joseph S. Grills ever sent your \$600 to the Postal Savings Bank in Rome?" This exception is without merit. Also its admission was not prejudicial to the respondent, for the witness, apparently not understanding the question, replied, "For my money." The question was not further pressed by the state.

[4] The respondent excepted to the ruling of said justice excluding testimony as to statements made to a third person by one Rosario Spennato, a brother of said Giacchino. The said Rosario was not a witness in the case. Such testimony would have been of hearsay, and was properly excluded.

[5] The respondent takes nothing by his exception to the modification by said justice of the respondent's third request to charge. The justice instructed the jury, in substance, as requested; but in connection with said charge he properly called the attention of the jury to the testimony which should be considered by them in making application of the legal principles contained in the charge.

[6] The respondent's exceptions to the refusal of the justice to direct a verdict for the respondent at the close of the testimony, to his refusal to charge the jury in accordance with the respondent's first and fourth requests to charge, and to his denial of the respondent's motion for a new trial, are all based upon the same contention of the respondent, and will be considered together. The respondent claims that, as the evidence discloses that the said Giacchino Spennato did not on said August 3, 1908, deliver \$600 to the respondent, and the respondent did not on that day actually receive \$600 in cash from Spennato for the specific purpose of forwarding the same to Rome, the respondent should not have been found guilty of embezzling \$600 from said Spennato as charged in the indictment. As we have said, the jury were warranted in finding from the testimony that on said August 3, 1908, the respondent upon the order of Spennato separated and set aside the sum of \$600 from the rest of the deposit of said Spennato, and held that sum as a special deposit for the

specific purpose named in the indictment. The respondent entered in said passbook that on August 3, 1908, \$600 was withdrawn from the deposit. On the other side of the passbook, on a page designated for deposits, the respondent, after allowing Spennato the amount in his favor on exchange, made an entry of the amount of the balance of the deposits after said withdrawal; and in his testimony he said that Spennato after that date was entitled to the interest of 4 per cent., which the respondent allowed on deposits, only on said balance. Furthermore, he gave to Spennato the receipt before mentioned. This evidence, showing the separation of \$600 from the other deposits, was uncontradicted. The respondent at the trial made no explanation, consistent with good faith on his part, as to why he had not forwarded said sum to Rome or returned it to Spennato. The justice carefully instructed the jury that they should not find the respondent guilty unless they found from the testimony that at the request of Spennato the respondent had set apart the sum of \$600 and held that sum as a special deposit for the specific purpose of forwarding it to Rome, and also that he failed to so forward it in consequence of some fraudulent use or conversion on his part of said \$600.

[7] The ordinary relation of a banker and his customer is that of debtor and creditor as to the deposits made by the customer with the banker. This relation, arising upon a general deposit, may be changed as to the whole or a part of such general deposit. Without actual delivery to the customer, and a redeposit by him for a special purpose, such general deposit by agreement may be converted into a special deposit and become a fund in the hands of the banker with which he is intrusted for the specific purpose named in the agreement creating the special deposit. Such fund is impressed with a trust, the violation of which is a fraud. *People v. City Bank*, 96 N. Y. 32. The use of such fund by the banker contrary to the provisions of the trust would amount to a fraudulent conversion of such fund, and would render the banker guilty of embezzlement under the provisions of the statute, unless such act of the banker was satisfactorily explained as being consistent with good faith. This was the view of the law taken by Mr. Justice Brown, and was the basis of his rulings and decision, to which the exceptions now under consideration were taken. In our opinion, said rulings and decision were without error.

All of the respondent's exceptions are overruled, and the case is remitted to the superior court for further proceedings upon the verdict.

HAYDEN v. HASBROUCK.

(Supreme Court of Rhode Island. Dec. 20, 1912.)

LIBEL AND SLANDER (§ 101*)—PRIVILEGED COMMUNICATIONS—MALICE.

In an action for slander, alleged to have been uttered by defendant on a privileged occasion, the fact that witnesses, in detailing the alleged slander, attempted to portray defendant's action in speaking the slanderous words, and uttered them in a contemptuous and sneering tone, was insufficient to justify an inference that defendant was actuated by express malice.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 273-280; Dec. Dig. § 101.*]

Action by Katherine A. Hayden against Gertrude S. Hasbrouck. Verdict having been rendered for plaintiff, defendant brought exception to the court's refusal to direct a verdict for defendant, which was sustained (84 Atl. 1087), and plaintiff given an opportunity to show cause why judgment should not be entered for defendant. Case remitted to superior court, with directions to enter judgment for defendant.

Gardner, Pirce & Thornley and Thomas F. Cooney, all of Providence (William H. Camfield, of Providence, of counsel), for plaintiff. P. H. Quinn, Waterman & Greenlaw, and Charles E. Tilley, all of Providence, for defendant.

PER CURIAM. The plaintiff has been heard to show cause why judgment should not be ordered for the defendant. In addition to the argument upon questions of law and fact, which were fully considered by the court before rendering its opinion in the case, the plaintiff's counsel has urged to us that the tone and manner in which the witnesses, Mrs. Lake and Mrs. Grieve, repeated before the jury the alleged slanderous words of the defendant, and the appearance of the defendant herself upon the witness stand, warranted the jury in finding that upon the privileged occasion in question the defendant was actuated by ill will towards the plaintiff. The argument of counsel appears to be that, from the contemptuous and sneering tone employed by Mrs. Lake and Mrs. Grieve, the jury were warranted in conjecturing that these witnesses were attempting to give an imitation of the tone used by the defendant in her interview with them, although they did not so state; that the jury were justified in believing that this attempted imitation was accurate; and that the jury might conclude, from the defendant's tone and manner thus portrayed, that she was moved by hatred and ill will toward the plaintiff. Such conjecture and conclusion by the jury would have been unwarranted. Admitting that the testimony of the plaintiff's witnesses was given at the trial with all the vindictiveness of tone and manner which the plaintiff claims for it, the evidence is entirely insuf-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sufficient to justify the submission of the case to the jury upon the question of express malice on the part of the defendant.

The case is remitted to the superior court, with direction to enter judgment for the defendant for costs.

BENSON v. NEW YORK, N. H. & H. R. CO.
(Supreme Court of Rhode Island. Dec. 20, 1912.)

Action by James H. Benson against the New York, New Haven & Hartford Railroad Company. There was a directed verdict for defendant. On motion by plaintiff to amend his motion to the appellate division to annul the order directing the verdict. Granted.

John W. Hogan, of Providence, for plaintiff. Joseph C. Sweeney, Clifford Whipple, and G. Frederick Frost, all of Providence, for defendant.

PER CURIAM. Plaintiff's motion to amend his "motion to appellate division to annul order directing verdict because unconstitutional," filed October 1, 1904, granted.

MARCOTTE v. MAYNARD SHOE CO.

(Supreme Court of New Hampshire. Sullivan. Nov. 6, 1912.)

1. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—ASSUMED RISK.

Plaintiff's hand was drawn between the rolls of a machine, and seriously injured as he was feeding certain friction cloth into it. He received his injury within a minute after he had been sent to the rear of the machine. He had never worked there before, and was not instructed as to the safe method of doing the work, nor warned of the dangers he was liable to encounter. The work called for quick action and a thorough knowledge of conditions. The place was insufficiently lighted, and light was necessary to enable one to judge accurately of the progress of the friction toward the rolls and the distance from the rolls at which the operative should remove his hand to avoid injury. The heat of the rolls gave some warning of the approach of danger, but was inadequate owing to the added peril of the sticky condition of the friction. *Held*, that the danger was not so obvious that plaintiff would be held to have known and appreciated it and assumed the risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

2. MASTER AND SERVANT (§ 153*)—INJURIES TO SERVANT—NEGLIGENCE—DUTY TO INSTRUCT.

Where defendant, in the manufacture of rubber cloth, knew or ought to have known of the sticky character of friction which was passed through heated rolls in the process of manufacture, the absence of adequate light near the rolls, their speed, and the consequent danger an inexperienced employé was liable to encounter in guiding the friction through the rolls, such knowledge imposed a duty to warn and instruct.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

3. TRIAL (§ 267*)—REQUEST TO CHARGE—MODIFICATION.

Defendant cannot complain of the refusal of a request to charge, which was given so far as it was applicable to the conclusions of fact which might be drawn from the evidence; additional instructions being given to the extent that the evidence warranted a finding of other facts rendering the previous conclusion immaterial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.*]

4. TRIAL (§ 267*)—REQUEST TO CHARGE—MODIFICATION OF LANGUAGE.

Where a request is given in substance, it is not material that the language is changed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

Where, in an action for injury to a servant by getting his hand caught between the rolls of a machine, there was some evidence that the absence of sufficient light contributed to cause the accident, and the court charged that, unless the absence of light No. 2 or any of the lights helped to cause the injury, then the question of the absence of light was immaterial, it was not error to refuse to charge that the jury must find that the absence of light No. 2 was not a contributing cause of the accident if they believed plaintiff's testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

Where a servant was injured by getting his hand caught between the rolls of a machine, alleged to have been due in part to insufficient light, the court properly charged that it was the master's duty to provide a reasonably safe place for the servant to work, to use ordinary care when putting an employé to work about a dangerous machine with which he was not acquainted, to instruct him as to his duties and warn him as to the dangers, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.*]

7. MASTER AND SERVANT (§ 270*)—EVIDENCE—OTHER ACCIDENTS—SIMILAR CONDITIONS.

In an action for injuries to a servant by getting his hand caught between the rolls of a machine, defendant's counsel asked a witness working on the same machine opposite to plaintiff if his hand got hurt that night in the same machine. *Held*, that the conditions under which the witness was working being similar to those under which plaintiff was injured, the question was competent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

8. APPEAL AND ERROR (§ 1060*)—STATEMENTS OF COUNSEL—INVITED REMARKS.

Defendant's counsel having asked a witness with reference to a similar accident, defendant was not prejudiced by the suggestion of plaintiff's counsel that plaintiff would expect the right to offer similar testimony as to other accidents if the question was allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

Exceptions from Superior Court, Sullivan County; Wallace, Judge.

Action by Alfred Marcotte against the Maynard Shoe Company for personal injuries to plaintiff while employed in the rubber shop of defendant's shoe factory. Ver-

diet for plaintiff, and defendant brings exceptions. Overruled.

The plaintiff was injured while working upon a machine known as a calender, which consisted in part of three hollow metal cylinders set one over another in an iron frame, and here designated as C, D, and E, from above downward. The cylinders were about six feet in circumference, and could be heated by steam. They were adjustable, and could be brought into close contact or separated several inches. Cylinders C and E revolved in the same direction, and D in the opposite direction. At high speed they made a complete revolution in about 14 seconds. The function of the machine was to press material which was run through it and at the same time apply heat. The bottom of the lowest cylinder (E) was a few inches above the floor, and the top of the highest one (C) was about six feet above the floor. In front of the machine, at a height opposite the point of contact between C and D and from two to three feet therefrom, was a small roll (A), upon which the cloth which was to be run through the machine was placed. From A the cloth passed between C and D; thence over roll, F, situated at the back of the machine at about the same height as A, and distant about 15 inches from the point of contact between C and D; thence downward around roll G, situated directly beneath F, and a little below the point of contact between D and E; thence between D and E, to be wound around roll B, situated 15 inches above the floor and almost directly beneath roll A. In the operation of the machine for frictioning, a substance known as "friction gum" or composition was put upon C on the front of the machine until it covered the surface of D to a depth of about an eighth of an inch. Then the cloth on A was fed between C and D and took the course above described. As the cloth passed between the cylinders, the gummy substance was pressed into it by C and D; the latter being heated. The cloth sometimes was torn or wrinkled in passing between C and D; and in that case it was necessary that an employé should grasp the edge of the fabric and guide it around F and G, and between D and E. This was what the plaintiff was doing at the time of his injury. While so engaged at the back of the machine, in a place which he alleged was insufficiently lighted, his left hand adhered to the sticky fabric, and was drawn between the cylinders; the injuries thus sustained resulting in the loss of his arm. The plaintiff's evidence tended to prove that he was ignorant of the peculiar danger incident to the work of guiding the cloth between the hot cylinders, and that he had received no warning or instruction concerning it.

The defendants excepted to the denial of their motions for a nonsuit, and the direc-

tion of a verdict in their favor, and to the refusal of the court to give the following instructions:

"(1) If the master had provided sufficient lamps on the premises for use of the employes, so that they could readily obtain them by asking for them, it had done its duty as to lighting; and, if the foreman of the shop had neglected to have a light put on under the circumstances, still the master would not be liable.

"(2) Unless the absence of light No. 2 helped to cause the injury, then the question of the absence of that light is immaterial and you need not consider it, and it is to have no effect upon your verdict.

"(3) If you believe the plaintiff's testimony, then the absence of light No. 2 is immaterial and you need not consider it."

The court charged the jury in part as follows: "If all the conditions of this machine upon which the plaintiff was working were known to him, and he appreciated the danger therefrom, he assumed the risk of being injured, and cannot recover. If the plaintiff had knowledge of the facts sufficient to charge him with knowledge of the danger, he assumed the risk of injury. On the other hand, if he did not know of the danger, or as a person of ordinary prudence ought not to have known of it or appreciated it, then he has not assumed the risk, and is not barred from recovery on that account. If he did know and appreciate the danger from the rolls and the sticky cloth on the rolls, in the situation in which he was placed, then he cannot recover because it was a risk which he assumed. If he did not understand and appreciate, then he is not precluded from recovering on this ground. It is the duty of the master to provide the servant with a reasonably safe place in which to perform the work required to be done, and to use ordinary care, when putting an employé at work about dangerous machinery with which he is not acquainted and where he cannot reasonably be expected to know about the dangers of his work, to instruct him as to his duties and warn him as to the dangers incident to his employment. As the case stands here, these are the only matters in which the plaintiff complains the defendants have been remiss in their duty to him, namely, failure to supply him with a proper place in which to work—that is, a well lighted place, because that is the only complaint he makes—and failure to instruct and warn him in regard to the dangers of the business. The plaintiff complains that the defendants were remiss in their duty of lighting the place of work in two respects: First, the plaintiff says that the defendants did not furnish sufficient lights whereby the place of the accident could be properly lighted; that is, he says that generally they had not made arrangements for a sufficient number of lamps

whereby this place would be properly illuminated, if all were lighted. Second, he says that one of the lamps placed nearest the work was not lighted at the time of the accident. As to the first complaint, it was the duty of the defendants to exercise ordinary care to furnish suitable lamps or lights at the place of work; and, if they failed to do so, they were remiss in their duty. As to the second complaint, if the defendants furnished sufficient and suitable lights or lamps for the work, to be used by the servant as needed in the course of the work, they performed their full duty in this respect and are not liable for the negligence or failure of their servants to light these lamps, except in one contingency to which I will now call your attention. If the lamp in question—that is, No. 2 at the back of the machine—was not lighted for so long a time that the defendants ought to have discovered this neglect by ordinary care, and this light was essential to the proper lighting of the place, then, if the defendants did not see that it was lighted, their failure to do so would be negligence on their part. If the defendants installed that light and furnished for the servants sufficient lamps to be used whenever it was necessary, they are not to blame because a fellow servant of the plaintiff failed to light that lamp, unless it had been unlighted and unused for such a long time that they ought, in the exercise of ordinary care, to have known that it was habitually unlighted. In that case they would be liable. The bulb was actually gone for two weeks. There is some evidence you will consider whether they furnished enough of those that could be used any time when needed. Unless the absence of light No. 2 or any of the lights helped to cause the injury, then the question of the absence of light is immaterial, you need not consider it, and it will have no effect on your verdict; and this is so whether you find the absence of light is wholly immaterial on the testimony of the plaintiff, or any of the other witnesses in the case. This is a material thing and one you want to carefully consider. The defendants say not only that they performed their duty in respect to lighting the premises, but that whether they did or not is wholly immaterial. You will consider carefully how that is, because if the defendants were remiss in their duty in this respect, and their negligence in this particular had nothing to do with the accident, it is a matter which you will not consider in determining the case. You will not hold the defendants liable on that account if it was not the cause of the plaintiff's injury."

The defendants excepted "to so much of the charge as instructs the jury (1) that the master is bound to provide a safe place to work, because it is inapplicable to this case, and (2) to so much of the charge as instructs that the master is liable if he had

provided lamps and had failed to see that they were lighted."

Edward R. Buck, of Windsor, and Hollis & Murchie, of Concord, for plaintiff. Samuel W. Emery, of Boston, Mass., and Hosea W. Parker, of Claremont, for defendant.

BINGHAM, J. The defendants say that their motions for a nonsuit and a verdict should have been granted and assign the following reasons: (1) That there was no evidence of any prior accident due to the sticky condition of the friction, from which it could be found that the defendants knew of this source of danger and were chargeable with a duty to warn the plaintiff; (2) that the absence of light was in no sense a contributing cause of the accident; (3) that it was impossible the accident should have happened by reason of the plaintiff's inability to withdraw his hand from the friction because of its sticky condition; that of necessity he had to let go of the friction while it was passing under roll G, and therefore he could have done the same thing before his hand came in contact with rolls D and E; (4) that the plaintiff knew and appreciated the danger attending the work of guiding the friction up to rolls D and E, and assumed the risk.

[1] It appeared in evidence that the plaintiff received his injury within a minute after he was sent to the rear of the machine to feed the friction into the rolls. He had never worked there before, and was not instructed as to the safe method of doing the work, or warned of the dangers he was liable to encounter. The work called for quick action and a thorough knowledge of conditions. The place was insufficiently lighted. Light was necessary to enable one to judge accurately of the progress of the friction toward the calender rolls and the distance from the rolls at which the operative should remove his hand from the friction to avoid injury. The heat of the rolls gave some warning of the approach to danger, but was inadequate on account of the added peril due to the sticky condition of the friction. It was conceded that the friction was sticky. The extent to which this quality was present was in dispute. The plaintiff testified that, when his left hand was four or five inches from rolls D and E, he undertook to withdraw it, but was unable to do so as it stuck to the friction. There was also evidence that one would experience as much difficulty in withdrawing his hand from the friction as he would if it were stuck between two sheets of sticky fly paper, and that at the time of the accident the composition of which the friction was made was so sticky that it held the plaintiff upon roll D for 25 minutes after roll E had been lowered and until the doctor came and removed him. It took ten thirty-sixths of a second for the friction to move toward the rolls one inch, and a little more than a second for it to

move four or five inches. It is thus seen that the sticky condition of the friction would not have to be great to occasion the delay or interference necessary to make the difference between safety and danger, and that this circumstance, or the absence of adequate light, or both combined, could have been found to have contributed to cause the accident. In view of the nature of the work, the circumstances under which it was being conducted, and the plaintiff's inexperience, it cannot be said that the danger was so obvious that the plaintiff must have known and appreciated it and assumed the risk. It was rather a question of fact for the jury, and was properly left to them to determine.

The contention that it was a physical impossibility for the plaintiff to have guided the friction with his left hand below and under roll G and between it and roll E, without letting go, and that the accident could not have happened as he testified is not supported by the facts presented by the record. Roll G rested in an adjustable socket 20 inches above the floor and from 5 to 8 inches distant from roll E. This does not disclose that it was impossible for the plaintiff to have done what he says he did. At the time of the accident to the plaintiff, the defendants had been manufacturing friction at their plant for about seven years, using the same formula the last three years at least; and for two weeks or more just prior to the accident the work at the rear of the calender machine had been carried on without the aid of sufficient light. If evidence of prior accidents would have aided the jury in arriving at the conclusion that the defendants were aware of the dangers which an inexperienced employé would encounter while feeding friction into the rolls at the rear of the machine, and have laid a basis for the imposition of a duty to warn and instruct, its absence is of no moment, as there was other evidence from which the same conclusion could have been drawn.

[2] The defendants knew or ought to have known of the sticky character of the friction, the absence of adequate light, the speed of the rolls, and the consequent danger an inexperienced employé was liable to encounter in performing the service. This would justify the imposition of a duty to warn and instruct.

[3] The first request for instructions was given so far as it was applicable to certain conclusions of fact that might be drawn from the evidence. This was all the defendants were entitled to. But to the extent that the evidence warranted the finding of other facts rendering the previous conclusion immaterial additional instructions were given to meet the changed condition. The additional instructions were proper. *Smith v. Railroad*, 73 N. H. 825, 61 Atl. 359;

Klineintle v. Mfg. Co., 74 N. H. 276, 67 Atl. 573; *Leazotte v. Mfg. Co.*, 74 N. H. 480, 69 Atl. 640.

[4] The second request was given in substance. That the language employed was different is unimportant. *Bond v. Bean*, 72 N. H. 444, 446, 57 Atl. 340, 101 Am. St. Rep. 686.

[5] The third request was properly denied. It required the court to instruct the jury that they must find that the absence of light No. 2 was not a contributing cause of the accident, if they believed the plaintiff's testimony; in other words, that there was no evidence in the case from which it could be found that the absence of light contributed to cause the accident. It was but another method of raising the same question heretofore considered upon the defendants' second assignment of error to the denial of their motion for a nonsuit. Upon this question the jury were instructed that, "unless the absence of light No. 2 or any of the lights helped to cause the injury, then the question of the absence of light is immaterial, you need not consider it, and it will have no effect on your verdict; and this is so whether you find the absence of light is wholly immaterial on the testimony of the plaintiff, or any of the other witnesses in the case." This instruction was applicable to the evidence, and was all the defendants were entitled to.

[6] The charge, so far as it considered the duty of the master as to providing the plaintiff a safe place to work, had to do simply with the question whether the light furnished was reasonably suitable to enable the plaintiff to perform his work with safety and bore directly on the increased danger he was liable to encounter if it was not. No satisfactory objection to this part of the charge has been suggested and we can conceive of none. It was clearly applicable to the evidence in the case. The second exception to the charge raises the same question previously considered under the first request for instructions.

When the plaintiff offered to prove by the witness Quirk that prior to the plaintiff's accident other workmen had been injured upon the same machine, it was conceded that the accidents about which the plaintiff was seeking to inquire had occurred on the front side of the machine, that they were not due to the sticky condition of the composition, and whether it was dark or light at the time was not suggested. The court thereupon found that the conditions under which these accidents occurred were not sufficiently similar to warrant the admission of the testimony and, in its discretion, excluded it. This ruling, as applied to evidence of prior accidents happening under the conditions enumerated, was the law of the trial. *Batchelder v. Railway*, 72 N. H. 329, 56 Atl. 752. But as to evidence of other accidents, hap-

if landed ownership was as much infringed and appropriated by the defendant, who deprived her of the use of the water of the river, as it would have been if the water had overflowed her field or garden, or had flooded her dwelling house; and the damage in the decreased value of her land might be much greater. Damage or injury to land in a legal as well as in a practical sense means an infringement of the owner's right to the use and possession of it. "If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes 'property,' although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then he had an unlimited right. Now he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A.'s unlimited right of using 100 acres of land to a limited right of using the same land may work a far greater injury to A. than to take from him the title in fee simple to one acre, leaving him the unrestricted right of using the remaining 99 acres. Nobody doubts that the latter transaction would constitute a 'taking of property.' Why not the former?" *Eaton v. Railroad*, 51 N. H. 504, 511, 512, 12 Am. Rep. 147.

It is clear, then, that the petition alleges a taking by the defendant of the plaintiff's property in land—a taking from the plaintiff of her common-law right of using, whenever she might choose, the power of the stream as an incident of her ownership of the land. The land without this power might be of little value, while with it it might be of very great value. The principal value of the plaintiff's real estate might consist in its natural availability for the development of water power. To deprive her without her consent of this element of the value of her land, whether rightfully or wrongfully under the law, would be to deprive her pro tanto of her land; for the ownership of land in fee simple without the right to enjoy its use is a palpable contradiction of terms. It is inconceivable that the Legislature intended to authorize one riparian owner to deprive another of the principal element of value in his land without compensation therefor, or that, when it made it a condition of the right of flowage that damages should be paid for the injury to "the land" thus "overflowed, drained, or otherwise injured by the use of such dam," the taking and appropriation of the most valuable part of the landowner's interest in his real estate should be deemed *dammum absque injuria* when it consisted of undeveloped water power. The language of the statute does not require such a construction. "Land" is there used in the sense of property in land, for the taking of which damages must be paid. Such, at least, is not an unreasonable construction of the word.

This fact, in connection with the practical absurdity and injustice of confining the meaning within narrow, restricted, and unusual bounds, demonstrates that the Legislature intended that the taking of undeveloped water power by virtue of the statute should be regarded as an injury to the adjoining landowner's property in land, for which compensation must be made. *Dolbeer v. Water Works Co.*, *supra*. Whether the statute is construed as authorizing the exercise of the power of eminent domain (*Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Ash v. Cummings*, 50 N. H. 591; *Light & Power Co. v. Hobbs*, 72 N. H. 531, 533, 58 Atl. 46, 66 L. R. A. 581), or of the power of regulating the rights of riparian owners (*Head v. Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 441, 23 L. Ed. 889), the result in this case is the same. In either view, compensation must be made for depriving one of his right of property in land, for such is the evident meaning of the statute. Knowing that a riparian proprietor might have valuable rights in the fall of the stream as an incident to his ownership of the land, the evidence is slight and somewhat visionary that the Legislature attempted to authorize another riparian owner to deprive him of those rights without also providing for his reimbursement. Whether a statute of that import could be sustained need not be considered, since the statute in question was not intended to have that effect.

Cases that reach a different result, like *Fuller v. Mfg. Co.*, 16 Gray (Mass.) 43, and *Cary v. Daniels*, 8 Metc. (Mass.) 466, 41 Am. Dec. 532, cannot be followed in this state, where the intention of the Legislature, ascertained as a fact from competent evidence, must be given full effect, and where it is in effect decided that at common law undeveloped water power is a property right inherent in the ownership of the adjacent land. *Electric Light Co. v. Jones*, *supra*. Nor does the fact that the defendant has a statutory right to set the water back upon the plaintiff's land because of its prior appropriation of the power of the river upon its land (*McMillan v. Noyes*, 75 N. H. 258, 72 Atl. 759) indicate a purpose on the part of the Legislature to relieve it of the obligation to indemnify the plaintiff for depriving her of her valuable right to the reasonable use of the water opposite her land—a right incident to her ownership of the land. No doctrine of reasonableness arising from such prior appropriation transfers A.'s property, whether used by A. or not, to the possession and use of B. without compensation. In order to complete and protect its right of flowage, the defendant must pay the plaintiff for her property which it has appropriated.

It is urged in argument in behalf of the defendant that it would be difficult to assess the plaintiff's damages, that they are from the nature of the case problematical and visionary, and that their assessment would for that reason be impracticable. But, with-

out attempting to point out what evidence would be and what evidence would not be competent and admissible upon that question, we can discover no such inherent difficulty in reaching a conclusion upon it that the amount of her damages could not be reasonably determined by the tribunal charged with that duty.

[4] The practical question would be: How much less was her land worth after the flowage than it was before? *Wright v. Power Co.*, 75 N. H. 3, 6, 70 Atl. 290; *Electric Light Co. v. Jones*, supra, 75 N. H. 182, 71 Atl. 871; *Philbrook v. Power Co.*, 75 N. H. 599, 74 Atl. 878. The demurrer should be overruled. Case discharged. All concurred.

AGRICULTURAL & MECHANICAL ASS'N OF WASHINGTON COUNTY v. GRAY.

(Court of Appeals of Maryland. Nov. 15, 1912.)

1. AGRICULTURE (§ 4*)—FAIRS—DEFECTIVE PREMISES—SUBSEQUENT CONDITION.

In an action for injuries to plaintiff by the giving way of an iron rail separating the front of a grand stand from a race course on defendant's fair grounds, evidence that a witness made an examination of the place about a month after the accident, and with reference to the condition in which he found a stay rod which had previously helped to support the rail, was admissible; the test of admissibility of evidence of a subsequent condition of the place of the accident being the relevancy of the facts testified to, and not the time of the examination.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 1, 4-9; Dec. Dig. § 4.*]

2. DAMAGES (§ 208*)—PERSONAL INJURIES—PERMANENCY—QUESTION FOR JURY.

In an action for injuries to plaintiff, evidence held to authorize the submission of the permanency of the injury to the jury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 54, 64, 68, 132, 144, 205, 220, 533, 534; Dec. Dig. § 208.*]

3. AGRICULTURE (§ 4*)—FAIRS—DANGEROUS PREMISES—CONTRIBUTORY NEGLIGENCE.

Where plaintiff was injured by falling from a platform in front of defendant's grand stand onto a race track, by the giving way of a defective guard rail while plaintiff was viewing races held at defendant's fair, he was an invitee, and was not negligent in occupying a place provided by defendant for witnessing the races.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 1, 4-9; Dec. Dig. § 4.*]

4. AGRICULTURE (§ 4*)—DANGEROUS PREMISES—INDEPENDENT CONTRACTORS.

Where plaintiff, a patron of defendant's fair, was injured by the giving way of a rail separating its grand stand platform from a race track, a request to charge, which was susceptible of misleading the jury to believe that those erecting the rail were independent contractors, and, if so, defendant was absolved from liability, was properly refused.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 1, 4-9; Dec. Dig. § 4.*]

5. AGRICULTURE (§ 4*)—FAIRS—DANGEROUS PREMISES—PERSONAL INJURIES—EVIDENCE.

Plaintiff, a patron of defendant's fair, was injured by the giving way of a guard rail separating the platform in front of the grand

stand from the race track, causing plaintiff to be precipitated to the track, some 10 or 12 feet below. A portion of the wall on which the railing was erected was constructed of loose stones, and the post that broke out from the stone was set in but 1½ inches. It was also shown that the crowd that pressed against the rail at the time of the accident was not unusual. Held sufficient to raise an inference of actionable negligence.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 1, 4-9; Dec. Dig. § 4.*]

Appeal from Circuit Court, Washington County; M. L. Keedy, Judge.

Suit by Louis F. Gray against the Agricultural & Mechanical Association of Washington County. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Henry H. Keedy, Jr., and J. Clarence Lane, both of Hagerstown, for appellant. Frank G. Wagaman, of Hagerstown, for appellee.

STOCKBRIDGE, J. The Hagerstown Fair is one of the events of the year in Western Maryland, attracting visitors from Washington and the adjacent counties. Among those who flocked thither in October, 1911, was Louis F. Gray, who on Thursday, the 12th of the month, betook himself to the fair grounds, as he had been wont to do in each year since 1881, for the double purpose of recreation and education. To accommodate the crowds which were anticipated, the Agricultural & Mechanical Association, which conducted the fair, had erected a grand stand some 200 feet long and from 100 to 150 feet wide. In front of this stand, and between it and a track used for racing, was an open space to accommodate the bookmakers, those who desired to place bets on the races, those who could not find space in the grand stand, and those who wished to view the finish of the races at closer range. This open space was elevated some 10 or 12 feet above the track, and a stone wall, partly laid in cement and partly with loose stones, retained the earth in place to the edge of the track. Along the top of this stone wall was a railing, made from iron piping, with upright posts at intervals, into which the horizontal piping was screwed by means of a thread cut in the pipe. The railing seems to have been intended for the two-fold purpose of preventing persons from falling down the 10 feet onto the track, and also for persons to lean or rest upon while watching the finish of the races. The posts spoken of were set in holes drilled in the stone, and secured in place by molten lead poured around them. There were also at intervals guy or stay rods from the rail, carried into the ground and supposed to be anchored there. The purpose of these guys or stays was to impart added strength to the rails. On the Thursday afternoon before spoken of,

the final race of the day was in progress. Gray, the plaintiff, had obtained a post of vantage next the rail to see the finish, an accident among the racers took place near the three-quarters pole, the crowd pressed forward to see what the trouble was, a portion of the rail gave way, and Gray was thrown to the track below, with some 10 or 12 others, and possibly with some of the others on top of him. On examination, Gray was found to have one, and perhaps two, of his ribs broken, and a contused injury on his shoulder, internal rather than external in its nature, and this appears to have affected his nervous system. It is to recover for these injuries that this suit was brought.

[1] Three bills of exception were taken in the progress of the trial, the first of which was with regard to the admission of certain evidence, and arose in this way: A witness by the name of Lowman, called by the plaintiff, testified that some time in November, about one month after the fair, he had made an examination to see how the stay rod was held in the ground, and was then asked the question: "State what examination you made of the place, and what you found at the time in November?" This was objected to by the counsel for the defense, and, when the objection was overruled, an exception was reserved. In support of the objection the case of *Annapolis Gas Co. v. Fredericks*, 109 Md. 595, 72 Atl. 534, and 112 Md. 455, 77 Atl. 55, was relied upon, where it was said that the "rule is well settled that evidence of a subsequent condition of the place where the accident occurred is not admissible to show a negligent condition at the time of the injury, because the question of negligence is to be determined by the actual condition at the time of the injury"; but in that same case it was also said that there are certain well-recognized qualifications and exceptions to this rule. The true test of whether such evidence is or is not admissible does not depend so much upon the time of the examination, "but upon the relevancy of the facts testified to to the issue, and their capability of explaining it. Any circumstances that may afford a fair and reasonable presumption of the fact to be tried are to be received, and left to the consideration of the jury, who are to determine upon their precise force and effect, and whether they are sufficiently satisfactory to warrant them in finding any of the facts in issue." *Brooke v. Winters*, 39 Md. 505; 29 Cyc. 614; *Refrigerating Co. v. Kreiner*, 109 Md. 361, 71 Atl. 1066; *Huff v. Simmers*, 114 Md. 549, 79 Atl. 1003; *Treusch v. Kamke*, 63 Md. 280. And the admissibility of evidence of this character is very fully considered in the case of *Md., D. & V. R. Co. v. Brown*, 109 Md. 319, 71 Atl. 1005, in which Judge Pearce reviews many of the decisions, and cites and adopts the rule as laid down in 1 *Wigmore on Evidence*, § 437, wherein the author holds that, in admitting or re-

jecting such evidence, much must be left to the discretion of the trial court. Examination of the record in this case does not lead to the conclusion that the discretion of the trial court in overruling the objection of the defendant and admitting the testimony was in any way abused, and therefore no reversible error was committed.

[2] The second exception was to the overruling of a special exception presented by the defendant to the granting of the plaintiff's third prayer, or so much of it as permitted the jury to take into consideration whether the injuries to the plaintiff were in their nature permanent. The evidence as contained in the record going to the permanency of the injuries is as follows: The plaintiff himself testified "that he suffered with his arm up until about Christmas; that it was very bad and he had not much use of it, had no strength in it; that there is a pole in the shop where they hang clothes, and it is impossible for him to use his right arm to hang them up, a pain strikes him in the arm, and goes right back to his shoulder blade, that continues to this time." This evidence was given at the trial of the case on March 5, 1912, or approximately five months after the injury. Dr. Miller, who was called for the plaintiff, testified to attending the plaintiff at the time of the injury, and from that time till the 25th of November following; that the contused wound on the shoulder was not at first discovered, because it did not show on the outside; that there are nerves in that part, and that the nerves were bruised with the flesh. He further testified that at the time when he ceased attending him the plaintiff was cured as far as professional knowledge could cure him; that he is a natural invalid, and therefore is not cured now. There is no contradiction of the evidence that the plaintiff suffers, and for a long time has suffered, from curvature of the spine, and he may possibly be below the normal of strength; but the plaintiff was before the jury, they could to some extent judge of his then condition, and with the testimony in the case, such as that mentioned, a court could not say as matter of law that there was no evidence of permanent injury. What the probative value of the evidence was was an entirely different question, one for the jury to pass upon. There was, therefore, no error upon the part of the court below in overruling this exception.

The third exception was reserved to the rulings of the trial court upon the prayers. So far as the fifth prayer of the defendant is concerned what has been said with regard to the special exception of the defendant is equally applicable here, and it follows that that prayer was properly rejected.

[3, 4] The second, fourth, and sixth prayers of the defendant in one form or another, are all based upon the theory of contributory negligence upon the part of the plaintiff; but the record entirely fails to disclose any act of

the plaintiff which could be regarded as contributory negligence, unless it be that at the time of the happening of this accident the plaintiff was in a place provided by the defendant for the witnessing of its races, and a court will never predicate an instruction of contributory negligence because of the mere presence of an individual at a point provided for him, and to which he has been invited by a defendant. In the form presented it was liable to mislead the jury, and create an impression in their minds that those erecting the rail were independent contractors, and that, if the jury believed them so to be, the defendant was thereby absolved from responsibility. Such, of course, is not the law, as was expressly decided in *Smith v. Benick*, 87 Md. 610, 41 Atl. 56, 42 L. R. A. 277, and was probably not the intention of the defendant's counsel in the drawing of it; but as the prayer was susceptible of that interpretation, it was properly refused.

[8] The remaining prayers can properly be considered together. In such an action as this, the basis of the right of a plaintiff to recover rests in some act or omission which constitutes negligence, and the main inquiry is whether the facts as testified to made out such a prima facie case as to give rise to a presumption of negligence, or to warrant a jury in drawing a conclusion of negligence. The defendant was conducting a fair, and charging an admission fee, and was impliedly, if not actively, inviting the public to attend. It thereby assumed an obligation towards all who accepted that invitation. The facts testified to which tend to show negligent construction of the rail are as follows: A portion of the retaining wall was built up of loose stones more liable to yield under pressure than a wall laid in cement. The post which broke out from the stone was one set in this loose stone wall, and the post itself was set down in the stone *but an inch and three-quarters*. The crowd which pressed up to the rail at the time of the accident was the usual crowd on such occasions, nothing more, as is testified to by three of the defendant's witnesses, Koontz, McCammon, and Newcomer. Tending to negate any idea of negligence is the evidence of two men, who repaired the rail and put in the guy rods, and the testimony of some of the officers and directors of the defendant, who made an inspection of the rail in question some three or four days before the accident and found it apparently in safe condition. The defendant attempts to rely upon a number of cases, of which *South Baltimore Car Works v. Schaefer*, 96 Md. 88, 53 Atl. 665, 94 Am. St. Rep. 560, in which the relation of master and servant was the controlling factor, *B. & O. R. R. v. State ex rel. Savington*, 71 Md. 590, 18 Atl. 969, where the deceased, running by the side of a moving train, stumbled and fell against the locomotive, *B. & O. R. R. v. Black*, 107 Md. 642, 69 Atl. 489, 72 Atl. 340, where the

marks on the train were mute, but compelling, evidence of contributory negligence, and *Arnold v. Green*, 95 Md. 217, 52 Atl. 673, of similar character are examples. Their application to a case like the one now under consideration is remote.

Closer in point and analogy is the case of *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, where the stairway of a grand stand at a race track fell and injured the plaintiff, with regard to which the court said: "It was the duty of the defendant to *know* that the structure was safe, or at least exercise the highest degree of care to that end." And in a concurring opinion by Ward, J., he says: "The collapse of the structure was sufficient prima facie evidence of negligence." So in *Francis v. Cockrell*, L. R. 5 Q. B. 184, it was said, of a building maintained for public exhibition purposes that the proprietor "impliedly undertakes that due care has been exercised in its erection." In this case a grand stand erected for viewing a steeplechase fell and injured a number of those on it, and in deciding it Hannen, J., said: "The nearest analogy as to the measure of duty is that afforded by a carrier of passengers. The charging of admission carries with it an implied warranty that due care has been used by those employed to do work and by the defendant himself." The case of *Schofield v. Wood*, 170 Mass. 415, 49 N. E. 636, bears a very close analogy to the case in hand. The language of the court in defining the obligation was as follows: "A person erecting and maintaining a place of public exhibition must use reasonable care in the construction, maintenance, and management of it, having regard to the character of exhibitions given therein and the customary conduct of spectators who witness them, and he cannot escape liability if he is negligent in the manner in which the guard rail in front of the gallery was constructed and maintained, and if a spectator who was injured by the falling of a guard rail during an exhibition was in the exercise of due care, on the ground that other persons may have contributed to the injury."

In the large number of cases the terms employed to designate the duty of the owner are "due care," "ordinary care," or "reasonable care." Thus this court said in *Albert v. State ex rel. Ryan*, 66 Md. 337, 7 Atl. 700, 59 Am. Rep. 159: "He who solicits and invites the public to his resorts must have them in a reasonably safe condition, and not in a condition to risk the lives and limbs of his visitors." See, also, 29 Cyc. 453; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Thornton v. Agricultural Society*, 97 Me. 108, 53 Atl. 979, 94 Am. St. Rep. 488; *Phillips v. Wis. State Agl. Soc.*, 60 Wis. 401, 19 N. W. 377; *Kann v. Meyer*, 88 Md. 551, 41 Atl. 1065; *Texas State Fair v. Brittain*, 118 Fed. 713, 56 C. C. A. 499; *Texas State Fair Ass'n v. Marti*, 30 Tex. Civ. App. 132, 69 S. W. 482; *Currier v. Boston Music Hall*

Ass'n, 135 Mass. 414; *Brown v. So. Kennebec Agl. Soc.*, 47 Me. 275, 74 Am. Dec. 484; *Dunn v. Brown Co. Agl. Soc.*, 46 Ohio St. 93, 18 N. E. 496, 1 L. R. A. 754, 15 Am. St. Rep. 556; *Williams v. Mineral Park Ass'n*, 123 Iowa, 32, 102 N. W. 783, 1 L. R. A. (N. S.) 427, 111 Am. St. Rep. 184, 5 Ann. Cas. 924. Yet, in each one of the cases where the measure of care or duty is defined by the use of the adjectives "due," "ordinary," or "reasonable," the application has been the same as in the cases of *Fox v. Buffalo Park*, and *Schofield v. Wood*, supra. The defendant's seventh prayer, which was granted, thus correctly defined the measure of the duty of the defendant, and in no way conflicts with the second prayer of the plaintiff, and it was therefore left to the jury to say by their verdict whether the defendant had or had not been guilty of negligence in the construction of the rail.

In the view of this court, the law of the case was fairly presented to the jury upon the facts testified to, and the judgment will accordingly be affirmed.

Judgment affirmed; appellant to pay costs.

COUGHLIN v. BRADBURY (two cases).

(Supreme Judicial Court of Maine. Dec. 18, 1912.)

1. DRUGGISTS (§ 9*)—FILLING PRESCRIPTION—NEGLIGENCE.

Defendant, who negligently fills a prescription, is liable for resulting injuries, though he is not a registered druggist.

[Ed. Note.—For other cases, see *Druggists*, Cent. Dig. §§ 7, 8; Dec. Dig. § 9.*]

2. DRUGGISTS (§ 9*)—FILLING PRESCRIPTION—NEGLIGENCE.

Where defendant undertook to compound a physician's prescription, calling for five grains of phenacetin and five grains of sugar milk, to be put in five powders, containing one grain each, of the phenacetin and sugar of milk, and failed to so mix the ingredients as to distribute the phenacetin throughout the mixture, so that substantially one grain was contained in each powder, and as a result the child to whom it was administered received an overdose of phenacetin, he was chargeable with negligence.

[Ed. Note.—For other cases, see *Druggists*, Cent. Dig. §§ 7, 8; Dec. Dig. § 9.*]

3. DRUGGISTS (§ 9*)—DAMAGES—CONTRIBUTORY NEGLIGENCE.

A mother was not chargeable with contributory negligence in administering to her four year old child, without first consulting a physician, a powder negligently compounded by defendant from a prescription calling for a certain mixture of phenacetin and sugar of milk, where she had previously administered, with favorable results, the medicine called for by such prescription.

[Ed. Note.—For other cases, see *Druggists*, Cent. Dig. §§ 7, 8; Dec. Dig. § 9.*]

On Motion from Supreme Judicial Court, York County, at Law.

Two actions, one by Helen Coughlin, pro am, the other by John P. Coughlin, both against Edward J. Bradbury. Verdict for

plaintiff in each case, and each case is brought up on motion. Motions overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Robert B. Seidel, of Biddeford, for plaintiffs. Frank L. Palmer and James O. Bradbury, both of Saco, for defendant.

PER CURIAM. These are actions against the defendant for alleged negligence in compounding a physician's prescription, calling for five grains of phenacetin and five grains of sugar of milk, to be put up in the form of five powders, containing one grain each of the phenacetin and sugar of milk. A verdict was rendered in each case in favor of the plaintiff. Except upon the question of damages, the two cases stand upon precisely the same testimony. In fact, the second case is a matter of expenses only, depending upon the result of the first.

[1] The defendant, who filled the prescription, was not a registered druggist; but this fact is immaterial. If negligent, whether registered or not, he would be liable, and vice versa, provided there was no contributory negligence on the part of those administering the drug. The facts are these:

About a year before the use of the drug upon which the case arose, the plaintiff John Coughlin procured a prescription from Dr. Cochrane for the compound above described. It had been refilled three or four times, and administered two or three times before to the little girl, Helen, four years old. When one of these last-obtained powders was given to her, it made her quite seriously ill, from the effects of which she suffered some weeks. The first action is brought to recover for this illness, alleged to have been caused by the defendant's negligence. Was the defendant negligent? There is only one ground upon which the defendant can be charged with negligence, and that is a failure to properly mix the ingredients of which the compound was made, so as to distribute the phenacetin throughout the mixture, so that substantially one grain was contained in each powder.

[2] It is not in controversy that the defendant pursued the usual course in filling this kind of a prescription. He weighed out five grains of each of the required ingredients, placed them in a mortar, stirred them with a pestle "from a minute and a half to two minutes," dumped the mixture upon a prepared paper, graded it up as near as possible, divided it into five equal parts, and then placed them into separate papers and folded them for use, properly marking the box in which they were contained. The evidence shows that this was the appropriate and usual method of filling this kind of a prescription.

Unfortunately, one of these powders was analyzed, and the inference to be drawn from this analysis is rather against the supposi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion of due care. The powder analyzed should have contained one grain of phenacetin, whereas it did contain but six-tenths of a grain, or one-tenth more than half. The surplus, consequently, must have gone into one or have been distributed in all the other powders. The other powders may also have been so unevenly mixed as to have enabled some one powder to have contained a very much larger proportion of the medicinal elements than was intended, and therefore have become an overdose for a child but four years of age.

It was incumbent upon the defendant either to so thoroughly mix the ingredients that each powder would contain substantially the quantity it was intended to have, or to compound each powder separately by weight, which was perfectly practicable to do.

[3] But the defendant contends that the plaintiff's mother, who administered the powder, was negligent in giving a child so young so powerful a drug, without first consulting a physician to discover if her physical condition, beside the malady for which the medicine was given, was in other respects healthy. It appears, however, that a powder, compounded from this same prescription, and presumed to be precisely like it, had previously been given to this little girl two or three times with perfect success. If this powder, when properly compounded, had several times been used with benefit, then the mother, we think, had a right to presume that a use of it again for a similar trouble, and it was similar, would effect a like result. She could not, therefore, be charged with negligence, even if her course was not in harmony with the highest degree of prudence. She was required to exercise only that caution which an ordinarily careful person would have done under like circumstances. We think her act comes within the rule.

Motion in each case overruled.

ROBERTSON v. BURKE & WARREN.

(Supreme Judicial Court of Maine. Dec. 18, 1912.)

NEW TRIAL (§ 168*)—MOTION IN APPELLATE COURT.

The credibility of witnesses and the value of documentary evidence are questions for the jury, and a verdict based on those questions will not be disturbed on motion for a new trial, made in the Supreme Judicial Court, where nothing appears in the evidence inherently contrary to the truth.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 245; Dec. Dig. § 168.*]

On Motion from Supreme Judicial Court, Lincoln County, at Law.

Action by Fred C. Robertson against Burke & Warren. There was a verdict for plaintiff, and defendants move for a new trial. Motion overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

C. L. Macurda, of Wiscasset, and A. S. Littlefield, of Rockland, for plaintiff. Cleaves, Waterhouse & Emery, of Biddeford, for defendants.

PER CURIAM. This case involves a written contract between the plaintiff and defendants for sawing lumber in a portable mill, which the plaintiff had bought of the defendants. He was to saw and pile the lumber at a given price per thousand, in regard to which there is no dispute. There are but two material issues in the case: (1) Was the quantity of lumber sawed to be determined by the mill scale, or by the returns received by the defendants, from those to whom they might sell and ship the lumber? (2) If the mill scale was to govern, then was the lumber properly surveyed and marked?

The written contract is silent as to how the quantity of lumber sawed should be determined. The defendants claimed, and offered evidence to prove, that it was to be determined by the return made to them of the sales. The plaintiff contended that it was to be made according to the mill scale of the sawed lumber. Upon this issue the jury found in favor of the plaintiff. The plaintiff's claim and contention seem to be so fortified by the improbability that he would consent to a surveying, which, as he claimed, is always subject to a material loss, resulting from waste, losses, dishonest consignees, and mistakes, that no adequate reason is found for disturbing the verdict upon this point.

It being settled that the mill scale is to prevail, then is presented the inquiry: Was the lumber properly surveyed and marked at the mill? Upon this issue the plaintiff offered ample evidence, if believed by the jury, to sustain his contention. His testimony showed that the lumber was surveyed and marked, as sawed, by sworn surveyors. Their surveys and accounts were offered to prove the quantity. Upon this contention the verdict of the jury must also stand. It is not for this court to pass upon the credibility of witnesses or the value of documentary evidence, unless there appears in the evidence something so improbably or inherently wrong as to become inconsistent with the truth. We discover nothing of this nature in the case before us. We should hesitate to say, upon the evidence, if we were to act in the capacity of jurors, that the verdict was wrong.

Our conclusion is that the motion should be overruled.

Motion overruled.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

STAPLES PIANO & MUSIC CO. v. PLUMMER.

(Supreme Judicial Court of Maine. Dec. 18, 1912.)

SALES (§ 181*)—PERFORMANCE OF CONTRACT—DELIVERY AND ACCEPTANCE.

In assumpsit for the sale and delivery of a piano, evidence that defendant refused to accept it, and, although permitting it to remain in the house, compelled it to be locked, did not establish an acceptance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 472-491; Dec. Dig. § 181.*]

Exceptions from Superior Court, Cumberland County.

Action by the Staples Piano & Music Company against Harry Plummer. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

E. A. Turner, of Portland, for plaintiff. H. H. Gray, of Millbridge, and Benjamin Thompson and F. J. Laughlin, both of Portland, for defendant.

PER CURIAM. This was an action of assumpsit, tried in the superior court of Cumberland county by the judge, without the intervention of a jury, subject to exceptions. The plaintiff's declaration contains two counts, one upon assumpsit for the value of a piano; the other upon assumpsit for the sale and delivery of the same piano.

At the close of the plaintiff's evidence, the judge, upon testimony, granted a nonsuit. To this ruling exceptions were taken and allowed. The case comes up on the evidence. The defense was that the piano, which the plaintiff carried to the defendant's house in the evening, did not correspond, either in make or quality, with the piano which the defendant had agreed to purchase. The plaintiff's own evidence shows conclusively that the defendant refused to accept the piano, and, although he permitted it to remain in his house, compelled the piano to be locked, which was done by Charles Staples, one of the plaintiff's agents. Whatever may be the plaintiff's rights upon a contract of sale, it is evident from the testimony that the contract of sale, if one was made, was not consummated by an acceptance by the plaintiff.

Motion and exceptions overruled.

STATE v. TALBERTH et al.

(Supreme Judicial Court of Maine. Dec. 19, 1912.)

CRIMINAL LAW (§ 1001*)—RECOGNIZANCE—POWER TO SUSPEND OR NULLIFY SENTENCE.

After defendant had been sentenced for the illegal keeping of intoxicating liquors, the

taking of a recognizance conditioned that he should not violate the prohibitory liquor laws for two years, thereby suspending sentence, was unauthorized, and the recognizance void.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2554-2559; Dec. Dig. § 1001.*]

Agreed Statement from Superior Court, Kennebec County.

State of Maine in scire facias against Henry T. Talberth and others. Judgment for defendants.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Joseph Williamson, County Atty., of Augusta, for plaintiff. F. W. Clair, of Waterville, for defendants.

PER CURIAM. Scire facias upon a recognizance given by the defendants under a sentence for illegal keeping of intoxicating liquors, imposed upon the defendant Talberth by the superior court for Kennebec county at the January term, 1911. The sentence was in the following form: "Fine of \$100 and costs taxed at \$40, and 30 days in jail, unless bail is given to keep out of business," etc. At the same term the other defendants, Murray and Rosen, appeared and became "sureties in \$500, conditioned that said Henry Talberth shall violate none of the provisions of the prohibitory liquor laws in the state of Maine for the term of two years from this date."

The defendants contend that the procedure in taking this recognizance was unauthorized, and the recognizance itself void.

Precisely the same question has been decided by this court in the case of *State v. Sturgis et al.*, 85 Atl. 474, very recently announced. In that case a sentence was imposed similar to that in the case at bar, and in an action of scire facias judgment was ordered for the defendants.

It was there held that, "when the court has pronounced the sentence of the law against one convicted of a criminal offense, it then has no power, unless so authorized by statute, to make any order, the effect of which would be to indefinitely suspend the execution of that sentence, or to nullify it, upon the happening of a contingency or the performance of some condition by the defendant, at his option; that any such order is void, and any bond or recognizance given in pursuance of such order is void."

The opinion in that case thoroughly discusses the question at issue, and is decisive of the case at bar.

Judgment for the defendants.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

SEIGER v. GERBER.

(Supreme Judicial Court of Maine. Dec. 30, 1912.)

LANDLORD AND TENANT (§ 180*)—ACTION BY TENANT—EVIDENCE—WAIVER AND ESTOPPEL.

Evidence in lessee's action for constructive eviction, through the lessor's sale to an adjoining proprietor of the privilege of attaching to the leased building a structure which shut out light therefrom, held to show that plaintiff, by encouraging the sale, waived his right to object, and was estopped to maintain the action.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 715-729; Dec. Dig. § 180.*]

Exceptions and Motion from Superior Court, Cumberland County.

Action by Samuel Seiger against David Gerber. Verdict for plaintiff, and the case comes before the law court upon exceptions and defendant's motion for new trial. Motion sustained.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALLEY, JJ.

Augustus F. Moulton, of Portland, for plaintiff. Clifford E. McGlaulin, of Portland, for defendant.

SPEAR, J. This case comes before the law court upon exceptions, and upon motion for a new trial by defendant after verdict of the jury against him.

The case submitted to the jury under instructions from the court, as appears from the plaintiff's declaration and defendant's pleadings, is briefly as follows: The plaintiff, Seiger, leased from the defendant, Gerber, by written lease in the usual form, dated December 18, 1909, "the following described premises, to wit: The entire building situated at No. 2, Portland Pier, in said city, county, and state, with the exception of the fruit store at the corner of said building." The term of the lease was four years from the 1st day of January, 1910. The rental was \$330 per year, payable \$25.50 monthly in advance. Lessor to pay taxes and water rates, and do outside repairing, and lessee to do inside repairing.

The lessee, Seiger, who was already occupying the premises, continued his occupancy after January 1, 1910, under the lease, making due payment of rent and complying with the terms of the lease until January 9, 1912, when he abandoned the premises. The reason given for such abandonment was that the lessor, Gerber, had, November 20, 1911, by conveyance in writing, without the lessee's consent, sold to the adjoining proprietor the privilege of attaching a structure to one side and one end of the leased building. Upon this state of facts the plaintiff contends that from the language of his lease was implied a covenant for quiet enjoyment, and that the sale of the right to the adjoining

proprietor to attach a structure to the side and end of his leasehold amounted to a breach of his covenant, in that such structure shut out the light from his premises, and rendered them useless, and operated as an eviction.

The defendant, Gerber, pleaded the general issue, with brief statement admitting the erection of the adjoining building, and that it shut out the light of the plaintiff's quiet enjoyment, but denied that any covenant had been broken, and alleged that the plaintiff consented to the erection of the building that shut out the plaintiff's light, and, further, that whatever rights the plaintiff had were waived for the consideration that Gerber, in his conveyance of the said wall rights to the proprietors of Portland Pier, had procured for Seiger the right to continue to rent from them for two years the lower floor of another adjacent building; this being the same floor then occupied by Seiger as tenant at will for a place of storage.

It is the opinion of the court that upon the question of waiver and estoppel the defendant's contention must prevail. The plaintiff's admission that he was present at Booth's office when \$300, the amount which the proprietors of the attaching structure were to pay, was paid, and that he himself told Gerber, through Booth, of this offer, together with the positive testimony of Gerber and the convincing testimony of Booth that the plaintiff consented to Gerber's taking the \$300, and even urged it, constitutes a degree of evidence so overwhelming that we cannot avoid the conclusion that the plaintiff, when he denies that he consented to Gerber making the lease for \$300, was mistaken. We should put but little stress upon Gerber's testimony alone as against that of the plaintiff; but the circumstances under which Mr. Booth's knowledge was obtained touching what was said and done in this transaction were such that he could scarcely fail to perfectly understand and comprehend them. He was in his office. Both Seiger and Gerber were there. Gerber says he brought Seiger to talk with Booth, because he could not talk English much. This question was under discussion. Booth was telephoning Baxter with regard to what he would pay for the right of attaching the proposed building. He communicated to Seiger, and through Seiger to Gerber, the amount which Baxter offered, and Seiger admits it. Booth further says that the building had been started, and that, previous to this occasion, both these parties had been to the proposed location to determine where it was about to be erected, and discovered that it was going to be put up close to the wall of the Gerber block, and would as completely shut out the light as if the timbers attached. He also advised them that "they might as well sell the wall rights, because they were as badly

off anyhow"; that Selger agreed with him, and spoke to Gerber about it; that Selger appeared to be urging him to accept the proposition; that they discussed the matter back and forth for a long time; that Gerber held off for a long time, but finally consented. Then follows this positive testimony of Mr. Booth: "Q. After the offer was finally made by Baxter, and the matter was explained, did he thereafter make any objection at all? A. No. Q. Did he acquiesce? A. I understand he did. Q. Did he even advise Mr. Gerber to? A. He certainly advised him to; yes. Q. To accept the Baxter proposition? A. Yes." It also appears that, as a compensation for the shed at the end of the building occupied by the plaintiff, Gerber procured the right for Selger to use and occupy the ground floor of the new building to be erected, on the easterly end of the Gerber building, at a rental of \$2 per month for the remaining term of the lease from Gerber to Selger.

Upon all the evidence, it is the opinion of the court that proof of both waiver and estoppel on the part of the plaintiff was ample to establish the defendant's contention upon these issues. *Libby v. Haley*, 91 Me. 333, 39 Atl. 1004; *Rogers v. Street Railway*, 100 Me. 90, 60 Atl. 713, 70 L. R. A. 574.

Motion sustained.

PROCTOR v. LIBBY et al.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. BOUNDARIES (§ 46*)—ESTABLISHMENT—AGREEMENT OF PARTIES.

When a boundary line is located and marked, and thereafter recognized and treated by parties as a true line, it is conclusive upon them and their assigns, although it be subsequently ascertained that it varies from the record line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.*]

2. BOUNDARIES (§ 37*)—EVIDENCE—SUFFICIENCY.

Testimony to overcome a record boundary line should be full, clear, and convincing, and should be scanned with care and caution.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.*]

3. BOUNDARIES (§ 37*)—SUFFICIENCY OF EVIDENCE—ESTABLISHMENT BY AGREEMENT.

Evidence in an action of trespass *quare clausum*, involving the location of a boundary line between adjoining owners, *held* sufficient to sustain a finding that there had been no agreement establishing a line different from the record line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.*]

4. BOUNDARIES (§ 47*)—ESTABLISHMENT—ESTOPPEL.

Where the owner of land points out a certain line as a boundary, he may be estopped from thereafter denying such a line as the true boundary.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 227-231; Dec. Dig. § 47.*]

5. BOUNDARIES (§ 37*)—SUFFICIENCY OF EVIDENCE.

Evidence in an action of trespass *quare clausum*, involving the location of a boundary line between adjoining owners, *held* sufficient to sustain a finding that a line different from the record line had not been established by estoppel.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.*]

6. ADVERSE POSSESSION (§ 114*)—TRIAL—SUFFICIENCY OF EVIDENCE.

Evidence in an action of trespass *quare clausum*, involving the location of a boundary line between adjoining owners, *held* not to establish a title by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. § 114.*]

On Motion from Superior Court, Cumberland County.

Action by John F. Proctor against Fred E. Libby and others. On plaintiff's motion for a new trial after verdict for defendants. Motion overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Symonds, Snow, Cook & Hutchinson, of Portland, for plaintiff. Wilbur C. Whelden and Foster & Foster, all of Portland, for defendants.

CORNISH, J. This is an action of trespass *quare clausum*; the tract in question being a triangular lot about 5 feet wide at the base, with side lines about 27 feet long, situated between Free street and Congress street, in the city of Portland, and in rear of Congress street stores. The jury having found for the defendants, the case is before the law court on plaintiff's motion for a new trial.

The parties are adjoining owners, and the issue is the true line between their respective lots.

So far as the record title goes, the deeds introduced by the plaintiff, beginning in 1886, and those by the defendant, beginning in 1896, show conclusively that a line run according to their calls would leave the triangle as a part of the defendants' land. The plaintiff's surveyor testified unequivocally that from an examination of all the deeds he found that the line as claimed by the defendants, the "Clapp line," so called, was the "deed line" between the two properties.

This "Clapp line," after running several courses, passes "thence northeasterly by said McCarthy's land 26 feet to land now or formerly belonging to George H. Cushman; thence southeasterly, by the line of said Cushman's land and line of land belonging to C. D. Livermore, to said Free street." This is the description in all the deeds, and it is this last call, "line of land belonging to C. D. Livermore," over which the controversy arises; the defendants having succeeded to

the land that C. D. Livermore formerly owned.

The record line being in the defendants' favor, the plaintiff relies for his title:

First, upon a line established by agreement, and by estoppel.

Second, upon adverse possession.

We will briefly consider these in their order, without entering upon a discussion of the evidence with too great detail.

The propositions of law involved are not seriously in controversy, and the only issues before this court are those of fact.

[1-3] 1. A line established by agreement and by estoppel.

The plaintiff claims that when a line is located and marked upon the face of the earth by the parties, and thereafterwards the line thus established is recognized and treated by them as the true line, it is conclusive upon the parties and their assigns, although it be subsequently ascertained that it varies from the one given in the deed. This is sometimes termed a conventional line, and the plaintiff's contention as to the recognition of the validity of such a line in law is sound. *Hathaway v. Evans*, 108 Mass. 267; *Orr v. Hadley*, 36 N. H. 578; *Davis v. Judge*, 46 Vt. 655; *Knowles v. Toothaker*, 58 Me. 172. In these cases, however, the parties by uncontradicted agreement and by positive acts, such as running the line, establishing monuments, building a fence, and subsequent occupancy up to the conventional line, and no further, left no room for doubt as to their intention, and the law simply enforced that intention. The defendants claim that the weakness of the plaintiff's evidence on this point is the absence of both the agreement and acts in furtherance of such agreement.

It is true that for more than 30 years a fence had existed on what the plaintiff claims to be the agreed line, extending back from Free street, to the corner of a building on the Livermore lot, and that the side of the building formed a continuation of the line for some distance along the easterly side line of the triangular lot in question; the balance of that line being unfenced. This was undoubtedly an apparent boundary line so far as it went; but it was for the jury to say, under all the facts of the case, how much weight the existence of the fence, on what was admittedly not the true record line, had as to its constituting a line actually agreed upon by the parties. The existence of a fence on a wrong line is not conclusive proof that it stands upon an agreed line.

In addition to this, the plaintiff testified that, prior to his purchasing the property, one Glazier, the trustee of the Clapp estate, pointed out this fence as the true boundary, and that on another occasion, but also prior to his purchase, Mr. Livermore, a predecessor in title to the defendants, "came out of his house on his own land, came along to his fence, and said that was the fence line, that

was the line he bought his property by," and "claimed the fence line was his property line."

Here, again, it was for the jury to determine whether these conversations actually took place. The evidence is uncorroborated. It comes from a deeply interested party. Glazier and Livermore are both dead. While this testimony might in the first instance have great weight with the court, we are not of the opinion that its rejection by the jury was manifestly wrong. Muniments of title are not to be lightly set aside, and testimony to overcome a record line should be full, clear, and convincing, and should be scanned with care and caution. It nowhere appears by whom, or under what conditions, or for what purpose the fence was built. No agreement between owners is proved, simply the inference to be drawn from the maintenance of the fence itself.

If the old fence marked the true line, then a small triangle on Free street was taken from the plaintiff's lot and given to the defendants, because the deed line and the fence line intersected. This triangle, however, the defendants do not claim.

Again, the projection of the fence line toward the rear of the stores on the north would create a jog, and call for three courses, instead of one, in all deeds subsequent to the making of the conventional line, and instead of reading, "thence southeasterly, by the line of said Cushman's land and the line of land belonging to C. D. Livermore, to Free street," they should have read, "thence southeasterly by the line of said Cushman's land; thence easterly by the line of said Cushman's land; and thence southerly by line of the land of C. D. Livermore to Free street." Yet the original description was followed in all subsequent deeds, and the alleged conventional line was never recognized in them.

[4, 5] In this connection, the plaintiff claims that the defendants are estopped from denying the fence line because of the conversation between Livermore and himself already recited, which took place prior to the plaintiff's purchase, and on the strength of which he claims to have made his purchase; and he relies upon *Louks v. Kenniston*, 50 Vt. 116, as conclusive upon this point.

The legal doctrine of estoppel in pais has been recognized and fully discussed in many cases in this court, and needs no further elaboration. *Martin v. Maine Central R. R. Co.*, 83 Me. 100, 21 Atl. 740; *Rogers v. Street Ry.*, 100 Me. 86, 60 Atl. 713, 70 L. R. A. 574; *Stubbs v. F. & M. Ry. Co.*, 101 Me. 355, 64 Atl. 625. The crucial question usually is: Do the facts warrant the application of the principle?

In *Louks v. Kenniston*, supra, so confidently relied upon by the plaintiff, the defendant, who owned land adjoining land that plaintiff was about to buy, told the plaintiff that a certain fence was on the true boundary

line, and the plaintiff, relying upon this statement, bought the land. The court held that the defendant was estopped to deny that the fence was on the true line.

That decision is undoubtedly sound; but it should be noted that in that case the suit was between the very parties who had held the conversation. The defendant, whose statement was relied upon, was still living and in court. He was the person estopped, not a remote grantee from him; and it might, perhaps, well be doubted whether such remote grantee, who is a bona fide purchaser for value and without notice, but relies upon the record title, would be also estopped.

Passing this point, however, without deciding it, it should be observed, in the second place, that there was no doubt about the representation having been made in the Vermont case. That fact was conceded; while in the case at bar, as has been said before, the only evidence of that fact comes from the plaintiff himself. The credibility of his statement was for the jury, and their finding on that issue we are not disposed to set aside.

So far, then, as the conventional line, or line by estoppel, is concerned, we cannot say that the verdict is glaringly wrong.

[§] 2. Adverse possession.

The plaintiff's evidence on this branch of the case is even less strong than on the other. Open, notorious, exclusive, uninterrupted, and adverse possession for more than 20 years was not made out. While the plaintiff and his predecessors in title had made use of the disputed tract, so had the defendants and their predecessors, and also outside parties, as this was used more or less as a thoroughfare for people having occasion to go from Free street to the rear of stores on Congress street.

The plaintiff claims to have received rent during the past 10 years for a portion of the lot; but, if so, it is not shown that the owners of the defendants' lot ever had any knowledge of the fact.

The sides of the triangle were never fenced, and a fence placed across the base about eight years after the plaintiff took title in himself was torn down by the defendants. It is significant, also, that the plaintiff erected a small building on his premises close to this triangle, but not over the line.

Many other facts and claims on the one side and the other might be referred to, but it is unnecessary. It is sufficient to say that a critical study of all the testimony has failed to convince us that the jury, in deciding that the plaintiff had not gained title by adverse possession, were controlled by bias or prejudice, or that they failed to comprehend the issues involved.

The case was carefully tried on both sides. The legal principles were fully stated to

the jury in a charge to which no exceptions were taken. Only questions of fact are before us, and on these the evidence is conflicting. While the issue is not free from doubt, yet, in view of the fact that the record title is in the defendants, the verdict in their favor upon the claims presented is not so manifestly wrong that it should be set aside.

Motion overruled.

INHABITANTS OF BAYVILLE VILLAGE CORPORATION v. INHABITANTS OF BOOTHBAY HARBOR.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. TAXATION (§ 49*)—COLLECTION OF TAXES—DISTRIBUTION—STATUTES—INEQUALITY—APPORTIONMENT.

Priv. & Sp. Laws 1911, c. 227, § 5, incorporating Bayville Village Corporation, providing that the town of Boothbay Harbor shall annually pay over to the treasurer of the village corporation out of the taxes collected from the inhabitants and the estates within the territory of the village a sum equal to 60 per cent. of all the town taxes, exclusive of the state and county taxes collected from such inhabitants and estates, related merely to the distribution as distinguished from the assessment of taxes, and hence the fact that the town was authorized to expend for its own purposes 40 per cent. of the taxes collected from assessments within a village corporation did not render the act in violation of the constitutional provision that all taxes assessed by authority of the state shall be apportioned and assessed equally according to the value of the property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 115-124; Dec. Dig. § 49.*]

2. CONSTITUTIONAL LAW (§ 28*)—DEPARTMENTS OF GOVERNMENT—LEGISLATIVE POWERS.

The legislative powers of the states are not measured by grants, but by limitations; the Legislature of the state representing the sovereign power of the people being limited only in the exercise of supreme authority by the inhibitions of the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. § 28.*]

3. MUNICIPAL CORPORATIONS (§ 64*)—ORGANIZATION—CONTROL.

Municipal corporations are but instruments of government created for political purposes, and are subject to legislative control.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 156, 157; Dec. Dig. § 64.*]

4. TAXATION (§ 911*)—DISTRIBUTION OF TAXES—PUBLIC WELFARE.

Priv. & Sp. Laws 1911, c. 227, § 5, providing that the town of Boothbay Harbor shall annually pay over to the treasurer of Bayville Village Corporation, an incorporated municipality within the town, out of the taxes collected from the inhabitants and estates within the territory of the village corporation, a sum equal to 60 per cent. of all the town taxes, exclusive of state and county taxes collected from the inhabitants and estates, was a proper exercise of legislative power to conserve the public welfare within the constitutional requirement that it shall enact all reasonable laws and requirements for the defense and benefit of the people.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 911.*]

Report from Supreme Judicial Court, Lincoln County, at Law.

Action by the Inhabitants of Bayville Village Corporation against the Inhabitants of Boothbay Harbor. A demurrer to the complaint was overruled, and defendant brings exceptions. Overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, and HALEY, JJ.

George W. Heselton, of Gardiner, and Clement F. Robinson, of Portland, for plaintiff. James B. Perkins, of Boothbay Harbor, and Heath & Andrews, of Augusta, for defendant.

SPEAR, J. This is an action based upon chapter 227 of the Private and Special Laws of 1911, in which the plaintiff seeks to recover of the defendant a sum equivalent to 60 per cent. of the taxes levied and collected by the defendant corporation for the year 1911. The defendant filed a general demurrer, which raises the decisive questions of law.

Bayville is a seaside resort in the town of Boothbay Harbor, occupied by summer residents who desire the enjoyment of certain advantages adapted to their own special comfort, for which they are amply able to pay, and for which it would be inequitable and unjust to tax the residents in other parts of the town, to whom the improvements desired would be of no particular benefit. In accordance with the long and well-settled policy of this state, these residents, in order to secure the enjoyment of these privileges, sought a charter, which the Legislature in its discretion granted, incorporating a portion of the town of Boothbay, within certain described limits into a special municipality, called the Bayville Village Corporation. The charter also prescribes the rights and duties of the corporation, its financial relation to the rest of the town, and designates the administrative rules and regulations by which the taxes shall be apportioned and assessed, collected, and distributed.

The defendant raised no question of the propriety of the administrative policy for the regulation and adjustment of the municipal and corporate relations. Nor under the well-settled law in this state is it easy to perceive how any well grounded objection could be suggested.

[1] The issue which the defendant raised under the demurrer is to that section of the special act which provides for the distribution of the taxes when assessed and collected in accordance with the machinery provided in the act. Section 5 reads: "The town of Boothbay Harbor shall annually pay over to the treasurer of said corporation out of the taxes collected from the inhabitants and estates within the territory of the Bayville Village Corporation, aforesaid, a sum equal to sixty per centum of all of the town

taxes exclusive of the state and county tax, collected from said inhabitants and estates." The objection raised to this section is not that the town of Boothbay Harbor is required to pay to the corporation 60 per cent., but that it is authorized to expend for its own purposes the other 40 per cent., a provision which it is contended violates that clause of our Constitution, which says that "all taxes upon real estate and personal property assessed by authority of this state shall be apportioned and assessed equally according to the just value thereof." In order to determine the precise application of this contention, it becomes necessary to ascertain the manner in which the tax is apportioned and assessed, from the proceeds of which 60 per cent. is to be returned to the village corporation and 40 per cent. retained for general town purposes. By reading section 11 it will be seen that this assessment is made by Boothbay Harbor upon all of the property of the town, including Bayville, precisely as if no corporation existed. The valuation and the rate are uniform upon all property. The levy for corporation purposes is immaterial to the issue here raised. It accordingly appears that the apportionment and assessment of the tax is in perfect harmony with the constitutional requirements. This proposition is not, as we understand it, controverted by the defendants. But they contend, notwithstanding this may be true, that the provision for the distribution of the proceeds of the assessment, whereby the town is authorized to retain 40 per cent., must result in unequal taxation, and comes within the ban of the constitutional provision. This raises the question: Of what does the inequality consist? Is it in the apportionment and assessment of the taxes? If so, the plaintiff must fail. If in the distribution of the proceeds of the tax, then the plaintiff should prevail. It already appears that the apportionment and assessment of the tax, from the proceeds of which 60 per cent. were to be paid to Bayville and 40 per cent. retained by the town, were in accord with the constitutional provision requiring that all taxes shall be assessed equally and according to the just value of the property upon which they are imposed. There was consequently no inequality in the apportionment and assessment of the taxes under the act in question. The only question remaining, therefore, is whether the distribution of the proceeds of the tax thus raised must be made with that strict equality required in the assessment. It is evident from a casual view, if such equality were demanded, that no distribution of the proceeds of a tax could ever be constitutionally made. But we think this question has been fully settled in the recent opinion of *Sawyer v. Gilmore*, not yet officially published, but found in 83 Atl. p. 673. This was a bill in equity brought to enjoin the Treasurer of

State and his successors in office from collecting a tax assessed under the provision of chapter 177 of the Public Laws of 1909. The question raised was that this act provided for an unequal distribution of the taxes levied, and was consequently a violation of the same constitutional provision invoked by the defendants in the case at bar. In this case the precise issue under consideration was raised, the court stating it as follows: "The first objection is that this act imposes an unequal burden of taxation upon the unorganized townships of the state, because, while the fund is created by the taxation of all the property in such townships as well as upon the property in the cities, towns, and plantations, no provision is made for the distribution of any part thereof to such townships, but it is all apportioned among the cities, towns, and plantations. The townships are omitted." As four subdivisions of the state were made to contribute to this fund, and only three were permitted to share in the financial benefit, it is clearly a case of unequal distribution. The court, nevertheless, say: "This objection, however, is without legal foundation. The Legislature has the right under the Constitution to impose an equal rate of taxation upon all the property in the state including the property in unorganized townships, for the purpose of distributing the proceeds thereof among the cities, towns, and plantations for common school purposes."

Another objection was raised, that the method of distribution was unconstitutional because it was made not according to the number of scholars, as in the school mill fund, but one-third according to the number of scholars and two-thirds according to valuation, thus benefiting the cities, and richer towns more than the poorer. Upon the assumption that this method of distribution worked an inequality, the court say: "But that result is not the test of constitutionality. Inequality of assessment is necessarily fatal, inequality of distribution is not, provided the purpose be the public welfare. The method of distribution of the proceeds of such a tax rests in the wise discretion and sound judgment of the Legislature. If this discretion is unwisely exercised, the remedy is with the people, and not with the court." With reference to the general authority of the Legislature, the court in this case further say: "The powers of the Legislature in matters of legislation, broadly speaking, are absolute, except as restricted and limited by the Constitution. As to the executive and judiciary, the Constitution measures the extent of their authority, as to the Legislature it measures the limitations upon its authority. * * * It follows, therefore, that a legislative act is to be held constitutional unless a positive restriction or limitation or prohibition is found in the Constitution which renders it invalid." In support of the de-

fendant's contention has been cited *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395, and *Dyar v. Farmington Village Corporation*, 70 Me. 515. The first case involved an exemption of property from taxation, which was clearly a violation of the constitutional provision that all property taxed, etc., shall be apportioned and assessed equally. It requires no further comment to show that the omission to tax certain property is not taxing all property. The latter case, as stated by the court, was one in which "five lots of land may be burdened with a tax from which the remainder of the real estate of the town is exempt," which is also so evident an inequality of assessment as to require no comment. These cases, therefore, cannot be regarded as precedents for a decision in the case at bar.

[2, 3] The court in the *Sawyer Case* said: "Inequality of assessment is necessarily fatal, inequality of distribution is not, provided the purpose be the public welfare." It remains, therefore, to consider whether the act in question comes within the public welfare clause of the Constitution which commands: "That the Legislature shall make and establish all reasonable laws and regulations for the defense and benefit of the people." As has already been seen, legislative powers are not measured by grants, but by limitations. The Legislature represents the sovereign power of the people, and is therefore limited in the exercise of supreme authority only by the inhibition of the Constitution. The Legislature has a large discretion with reference to its control of municipalities. Municipal corporations are but instruments of government created for political purposes and subject to legislative control. Cooley says: "They are created for convenience, expediency, and economy in government, and in their public capacity are and must be at all times subject to the control of the state which has imported to them life, and may at any time deprive them of it." In fact, the decisions are so numerous and uniform, conceding the power of the Legislature in its dominion over municipal corporations, including counties and towns, that citations are unnecessary. It may be well, however, to refer to the leading case of *Waterville v. County Commissioners*, 59 Me. 80, and the opinion of a minority of the justices in 99 Me. 528, 60 Atl. 85, where many of the authorities are collated. These cases tend to illustrate the power of the Legislature in directing the expenditure of moneys, received from taxation, for public purposes.

[4] The question, therefore, recurs whether the special act under consideration was reasonable and beneficial to the community affected. The natural advantages of the coast of Maine offer flattering inducements to nonresidents, seeking recreation and rest, to establish permanent summer homes within the state. It has become a matter of com-

mon knowledge and statistics that no factor in the progress of our social and financial interests has contributed more to our general prosperity than our summer resorts and game preserves. The people who come here are usually segregated in isolated communities. They often select unimproved lands. Out of waste places they create millions of dollars of taxable property. The increment upon these lands is taxed to its full value, under the law, although they may occupy it but a fraction of the year. The numerous islands along our coast are conspicuous examples of this development and creation of taxable property. It is not infrequent that the tax imposed upon a summer community, and occupying but a small section of a town, exceeds the assessment upon all the rest of the estates. They demand and are entitled to vast improvements which the municipalities are unable to furnish. In justice and in equity these communities are entitled to receive back for the establishment and maintenance of their own public utilities a part at least of the money they have paid in taxes. This end is precisely what the act under consideration was calculated to attain.

The Legislature has exercised its discretion as to the amount which, in this particular case, should be paid back, making it a fixed amount, instead of leaving it to the discretion of the selectmen to determine the amount, which might be entirely inadequate, or even nothing. It may accordingly well be said that the enactment of laws tending to encourage the growth of this kind of enterprise is both reasonable and beneficial. Upon a careful investigation of the authorities, therefore, we are of the opinion that the act comes within the public welfare clause of the Constitution. Our conclusion is that the demurrer should have been overruled.

Exceptions overruled.

STAPLES v. BERRY.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. JOINT TENANCY (§ 1*)—REQUISITES—"UNITY OF INTEREST"—"UNITY OF TIME."

An estate in joint tenancy does not exist unless there is unity of interest, title, time, and possession; "unity of interest" meaning that the interests must accrue by one and the same conveyance, "unity of time," that they must commence at one and the same time, and it must also appear that the interests of the joint holders remain the same until the death of one of them, when the survivor takes it all.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3817, 3818; vol. 8, p. 7695.]

2. HUSBAND AND WIFE (§ 49½*)—SAVINGS BANK DEPOSIT—OWNERSHIP.

A wife deposited \$150 in a savings bank in the name of her husband in April, 1898, and all, or nearly all, the subsequent deposits were made by her. Two withdrawals were made by the husband and one by the wife on the hus-

band's order. On July 1, 1901, the deposit amounted to about \$1,400, when the account was changed to a joint account to be drawn by either. After the change and until the husband's death, the deposit book was in their joint possession, and when he died the account, with accrued dividends, amounted to \$1,870.88. Thereafter the widow deposited to the credit of the account the proceeds of the husband's life insurance, of which she was the beneficiary, and in 1907 the whole account, amounting to \$4,878.46, was transferred by the widow to another savings bank and deposited to her sole credit. In December, 1910, the widow married defendant and two days afterwards executed a will by which she gave him her entire estate, and died in January, 1911. Held, that such facts were insufficient to show any gift of the bank deposit by the husband to the wife in his lifetime.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 249-255, 257; Dec. Dig. § 49½.*]

3. WILLS (§ 108*)—REQUISITES OF EXECUTION.

The act of a husband, owning a deposit in a savings bank, in causing an entry to be made in the bank ledger and the deposit book, adding the name of his wife as joint depositor with a statement that the money "may be drawn by either in any event" if intended as a gift to take effect at his decease, was a testamentary disposition void under the statute of wills.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 249-258; Dec. Dig. § 108.*]

Exceptions from Supreme Judicial Court, Sagadahoc County, at Law.

Action by Frank L. Staples, as administrator of Fred E. Savage, deceased, against John H. Berry, administrator and trustee of the estate of Nellie A. Berry, deceased. Judgment for plaintiff, and defendant brings exceptions. Overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, KING, and HALLEY, JJ.

Frank L. Staples, of Bath, for plaintiff. Barrett Potter, of Brunswick, and William T. Hall, Jr., of Richmond, for defendant.

CORNISH, J. The following essential facts appear in the agreed statement upon which the finding of the justice at nisi prius was based:

Fred E. Savage and Nellie A. Savage were married in March, 1873, and lived together until the death of the husband, on January 28, 1904. Two children were born to them, a son, Fred, born in 1877 and still living, and a daughter born in 1874, who married one Lewis and died in 1906, leaving a daughter, Marguerite.

December 7, 1910, the widow married the defendant, John H. Berry, executed her will on December 9, 1910, and died testate January 22, 1911, leaving him practically all her estate. He was subsequently appointed administrator with the will annexed. The plaintiff was appointed administrator of the estate of the first husband, Fred E. Savage, on July 10, 1911.

This controversy arises over a savings bank deposit, and the agreed facts as to that are as follows:

April 17, 1893, Nellie A. Savage deposited \$150 in the Gardiner Savings Institution in the name of her husband, Fred E. Savage. All, or nearly all, the subsequent deposits were made by her. Withdrawals of \$45 and \$25 were made by Fred E. on June 28, 1893, and July 15, 1896, respectively; and one of \$30 was made by the wife on July 13, 1893, upon the order of the husband. No other withdrawals were made during the life of Fred E. On or about July 1, 1901, when the aggregate deposits amounted to about \$1,400, the title of the Savings Bank account was changed by one of the officers of the institution, presumably by direction of the husband, on its ledger and on the deposit book, by inserting the necessary words so as to read "Nellie A. Savage and Fred E. Savage, may be drawn by either in any event." After that change and until the death of Fred E. Savage, the deposit book was most or all of the time in their joint possession; each having access to it. At the time of the death of Fred E., on January 26, 1904, the account amounted with accrued dividends to \$1,870.93. On February 8, 1904, the widow deposited to the credit of this account \$2,900, out of \$3,000 which she had received as insurance on his life; she being the beneficiary in the policy. On January 16, 1907, the account then amounting to \$4,878.46 was transferred by the widow to the Bath Savings Institution and there deposited to her sole credit.

Mr. Savage was for several years prior to the opening of the account with the Gardiner Savings Institution, and most of the time thereafterwards until his death, in the employ of Lawrence Bros. of South Gardiner, as their head sawyer, at wages of \$3 per day, with usually a gift or bonus at the end of the sawing season. During a part of the time, he and his wife carried on a boarding house for employes of Lawrence Bros., but had ceased to carry it on before the account in the Gardiner Savings Institution began. The deposits of said account, prior to his death, consisted of his earnings and their joint savings. At the time of their marriage, neither husband nor wife had any property worth mentioning, and neither received any during their married life except from their earnings.

Under these agreed facts, the plaintiff seeks to recover in this action for money had and received the amount of the deposit in the Gardiner Savings Institution at the husband's death, with interest.

The case was heard by a single justice, who found for the plaintiff in the sum of \$2,400.46, with interest from the date of the writ; and the defendant has brought the case to the law court upon exceptions to this finding.

The single issue is: Was that deposit the

property of Fred E. Savage at the time of his decease on January 26, 1904?

We start out with the conceded fact that the money deposited belonged to the husband. It came primarily from his earnings, and was his alone. How was the title to it, or any part of it, taken from him and given to his wife? The burden is on the defendant to show this, and it must be proved by clear and convincing evidence.

"A strong instinctive passion for property often leads a husband or wife into schemes for the absorption and conversion of the other's possessions, and equity is watchful to defeat all such wrongful appropriations. It requires that the donor's intention to divest himself or herself of the property, and the execution of that intention by an act of delivery, shall be clearly proved by the donee." *Lane v. Lane*, 76 Me. 521. The same requirement exists in the case at bar, which is an action for money had and received and equitable in its nature.

It is not claimed by the defendant that prior to July 1, 1901, the wife had gained any title to the deposit, but the contention is set up that by causing the entry to be changed on the bank ledger and the deposit book by adding the words "Nellie A. Savage, and" and "may be drawn by either in any event" followed by the joint possession of the book, the wife was thereby made an owner in joint tenancy in the technical sense, so that at the husband's death not only the deposits made prior to such change, but also all subsequent ones became hers by right of survivorship.

The learned counsel for defendant admits in his brief that under the facts as agreed there was no gift causa mortis, and that no trust was created, and he "does not claim that what was done amounted to an absolute gift by Mr. Savage in his lifetime to Mrs. Savage of the entire deposit. In that sense, but in that sense only, there was no gift inter vivos." His own statement of his position is this: "That a joint tenancy was created in 1901, with a right of survivorship, and that, on the death of Mr. Savage his wife surviving, she took the whole deposit; no part of it having been withdrawn after the change in title."

That is not, in our opinion, the true legal effect to be given to the transaction.

[1] In the first place, estates in joint tenancy are not favored in law at the present day and cannot be created in this state without unequivocal and compelling language. *Stetson v. Eastman*, 84 Me. 366, 24 Atl. 868. Our statute, first enacted in 1821, provides as follows: "Conveyances, not in mortgage, and devises of land to two or more persons, create estates in common, unless otherwise expressed. Estates vested in survivors upon the principle of joint tenancy shall be so held." R. S. c. 75, § 10.

In *Stetson v. Eastman*, supra, it was con-

tended that this section applied to real estate but not to personal property, and this contention was answered by the court in these words: "It seems incredible to us that any such distinction could have been contemplated. There is more reason for rejecting the offensive doctrine in its application to chattels or moneyed securities than in its application to landed estates." While therefore joint tenancy in personal property may exist in certain rare cases, it must be created by apt and explicit terms.

Can it be said that the additional entry made upon these savings bank books created necessarily a joint tenancy?

In the second place, it is laid down by all the authorities that there are four essential characteristics of a joint tenancy: Unity of interest, unity of title, unity of time, and unity of possession. 23 Cyc. 484; 17 Am. & Eng. Enc. of Law, p. 649, and cases cited. "Unity of title" means that the interests must accrue by one and the same conveyance; and "unity of time," that the interests must commence at one and the same time. *Case v. Owen*, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253.

This would seem to contemplate conveyance or devise by A., the sole owner, to B. and C. as joint tenants, not as splitting up of A.'s ownership so that B. becomes a joint tenant with A. But granting for the sake of argument that this might be done by carefully worded conveyance, it can hardly be said that this naked book entry meets the requirement which is so jealously guarded by the law, and that is the only evidence in the case to disclose the husband's intention.

In the third place, a joint tenancy implies that the interests of the joint holders remain the same until death, and then that the survivor takes all. Here, according to the book entry, either party could at any time withdraw the entire deposit, so that the joint property would be dissipated and the survivor would take nothing. This is utterly at variance with the attributes of a joint tenancy.

Another incongruity arises in regard to the deposits made after July 1, 1901, amounting to nearly \$500. Were they also transferred, as fast as made? Was it a continuing conveyance in joint tenancy?

So much for the technical requirements of the estate claimed.

[2] But it must not be forgotten that preliminary to the character of the estate granted is the prerequisite of the gift itself. Whatever the interest conveyed, the transfer itself must first be proved, and this case is barren of facts tending to show that the husband intended to make his wife at that time a gift of the whole, or in joint tenancy, or in tenancy in common, except what is to be inferred from the meager entry in the book. No officer of the bank testified as to what was said when the addition was made

or the reason for making it. No declaration of Savage to any one at any time is offered. Neither the intention to give is proved, nor the consummation of that intention by loss of dominion over the property given. The husband continued to have the same control over the deposit after July 1, 1901, as before. The book being in their joint possession, he could have withdrawn every dollar.

The more natural and reasonable inference to be drawn from the transaction is that the husband intended one of two things, either:

First, to constitute the wife his agent in order that the deposit could be drawn more conveniently; or

Second, to make a gift to take effect at his death, that is, a testamentary disposition which is void under the statute of wills.

The first inference is not far-fetched. The husband was a busy breadwinner. His work was at South Gardiner at some distance from the bank in which his money was deposited. To avoid the trouble of making out an order to his wife whenever he might wish to withdraw, this change might have been made. One such order had already been given by him, and, while there happened to be no withdrawals after the change, the reason apparently was that the husband and wife were prudent savers and they were able to make deposits instead of withdrawals. Before the change, only the husband could withdraw; after it, either could, as the book remained in their joint possession. "A possession which is as consistent with agency as with gift must indicate agency instead of gift. Between husband and wife, his possession of her property is her possession, and her possession of his property is presumed to be his possession." *Lane v. Lane*, 76 Me. 521.

The following are a few of the vast number of cases where entries similar to the case at bar have been held to have been made for convenience only and no title was transferred: "*Julia Cody or daughter Bridget Bolin*" (In re *Bolin*, 136 N. Y. 177, 32 N. E. 626); "*August Grote and wife Edvina or either*" (*Schick v. Grote*, 42 N. J. Eq. 352, 7 Atl. 852); "*Lawrence McDonald, Sarah McDonald and the survivor, subject to the order of either*" (*Dougherty v. Moore*, 71 Md. 248, 18 Atl. 35, 17 Am. St. Rep. 524); "*A. or B., either to draw*" (*Schippers v. Kempkes* [N. J. Err. & App.] 67 Atl. 74, 12 L. R. A. [N. S.] 355; *Skillman v. Wiegand*, 54 N. J. Eq. 198, 33 Atl. 929).

[3] On the other hand, if the husband by this entry intended to make a gift that should take effect at his decease, such a testamentary disposition would be void under the statute of wills.

This principle is so firmly established that it needs no discussion. *Burns v. Burns*, 132 Mich. 441, 93 N. W. 1077; *Whalen v. Milholand*, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208;

Nutt v. Morse, 142 Mass. 1, 6 N. E. 763; *Drew v. Hagerty*, 81 Me. 231, 17 Atl. 63, 3 L. R. A. 230, 10 Am. St. Rep. 255; *Norway Bank v. Merriam*, 88 Me. 146, 33 Atl. 840; *Bath Savings Institution v. Fogg*, 101 Me. 188, 63 Atl. 731.

It is therefore the opinion of the court that the defendant has not produced evidence sufficient to divest Fred E. Savage of the title to the deposit in the Gardiner Savings Institution at the time of his decease.

The justice at nisi prius gave judgment for the plaintiff in the sum of \$2,400.46 with interest from date of the writ. This sum was evidently made up by adding to the principal, \$1,876.98, the dividends thereon declared by the banks. The plaintiff claims that, as the wife treated the fund as her own, her estate should be charged at the rate of 6 per cent., making a total of \$2,740.07 with interest from date of the writ. But the plaintiff did not except to the finding, and, if he had, such a charge would not be equitable under the circumstances of this case. On the other hand, the defendant claims that the amount is too large and that in any event the plaintiff, as administrator of the husband's estate, should recover in this action only two-thirds of the amount due, because the wife would have been entitled to one-third of her husband's estate, which would now belong to the defendant as her administrator. We think, however, that the amount found by the court is correct, and that the judgment should be for the full amount and not for a fractional part; the distribution between the estates being a matter for the probate court and not for this court.

Exceptions overruled.

BARRETT v. LEWISTON, B. & B. ST. RY. CO.

(Supreme Judicial Court of Maine. Dec. 21, 1912.)

1. RELEASE (§ 57*)—VALIDITY—FRAUD AND MISREPRESENTATION.

In an action for personal injuries, resulting in the loss of a leg, in which defendant pleaded a general release, evidence to sustain plaintiff's claim that defendant, knowing the leg could not be saved, and knowing plaintiff believed it could be, fraudulently failed to disclose the truth to plaintiff, *held* insufficient to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 106-108; Dec. Dig. § 57.*]

2. CONTRACTS (§ 94*)—FRAUDULENT CONCEALMENT—"FALSE REPRESENTATION."

The concealment or suppression by a party to a contract, with intent to deceive, of a material fact which he is in good faith bound to disclose, amounts to a "false representation."

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2668-2670; vol. 8, p. 7661.]

3. CONTRACTS (§ 94*)—FRAUDULENT CONCEALMENT—"FRAUD."

A party to a contract, concealing any material fact peculiarly or exclusively within his own knowledge, knowing that the other party acts on the belief that no such fact exists, is guilty of "fraud."

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 8, p. 7666.]

4. CONTRACTS (§ 94*)—FRAUDULENT CONCEALMENT.

The duty of a party to a contract to disclose to the other party facts within his knowledge may arise from a trust relation, confidence, or inequality of condition and knowledge.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.*]

5. CONTRACTS (§ 94*)—FRAUDULENT "CONCEALMENT."

The "concealment" of facts by a party to a contract, which amounts to fraud, implies design or purpose, and mere silence is not itself concealment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1377-1384.]

6. CONTRACTS (§ 94*)—FRAUDULENT CONCEALMENT.

The concealment of material facts by a party to a contract is not fraud, unless the other party is thereby misled.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.*]

7. RELEASE (§ 57*)—VALIDITY—FRAUD AND MISREPRESENTATION.

In an action for personal injuries, resulting in the loss of a leg, in which defendant pleaded a release, evidence *held* insufficient to show that statements to plaintiff by a doctor employed by defendant that he thought the leg might be saved were intentionally false, or made for the purpose of inducing an easy settlement.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 106-108; Dec. Dig. § 57.*]

8. RELEASE (§ 17*)—ACTS CONSTITUTING—FRAUDULENT CONCEALMENT.

Where, although plaintiff was weakened by personal injuries, he clearly understood what he was doing, and was in a condition to judge intelligently and decide for himself, and knew or should have known the chance he was taking in executing a release to defendant of its liability for his injuries, there was no such inequality of condition or knowledge as made it defendant's duty to disclose its agent's belief as to the extent of his injuries.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. § 17.*]

On Motion and Exceptions from Supreme Judicial Court, Sagadahoc County, at Law.

Action by John W. Barrett against the Lewiston, Brunswick & Bath Street Railway Company. Verdict for plaintiff, and defendant excepts, and moves for a new trial. Motion for a new trial sustained.

See, also, 80 Atl. 1130.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, KING, and HALEY, JJ.

Oakes, Pulsifer & Ludden, of Auburn, for plaintiff. Newell & Skelton, of Lewiston, for defendant.

SAVAGE, J. Case for negligence. The plaintiff was a passenger on one of the defendant's cars, and was injured in some way. The manner is not described in the case, for the defendant admitted at the trial that it was originally liable. The plaintiff sustained a compound comminuted fracture of the bones of the right leg, near the ankle. The accident occurred in Topsham, October 11, 1906. The plaintiff was taken at first to the office of Dr. Palmer, in Brunswick, and from there to St. Mary's Hospital, in Lewiston; Dr. Palmer accompanying him. On November 21, 1906, his leg was amputated below the knee, and later it became necessary to amputate it above the knee. He remained in the hospital 141 days. On October 27th, 16 days after the accident, the defendant's superintendent paid him, on account of the company, \$500, and agreed to pay all his hospital and surgical expenses, and the plaintiff, in turn, by a general release, released the defendant from all claims and demands. The defendant relies upon that settlement as a complete defense. To this the plaintiff replies that the settlement was fraudulently obtained, and not binding. The case has been tried twice before; each trial resulting in a verdict for the plaintiff. At those trials the question of fraud was eliminated by the court, and the only question submitted to the jury was the mental competency of the plaintiff to make the settlement, at the time he made it. Those verdicts were set aside, one after the other, by the law court. It appeared clearly to the court that the plaintiff was mentally competent to make the settlement, that he well understood at the time what he was doing, and fully appreciated the effect of the settlement.

At the third trial, the presiding justice was of opinion that the evidence on the question of competency was no more favorable to the plaintiff than it had been at the other trials, and instructed the jury, in effect, that they would not be authorized to find a verdict for the plaintiff on the ground that he was mentally incompetent to make the settlement, but that, if they found certain facts to be true, they would be authorized to find that the settlement was fraudulently procured; and the jury so found. The case comes up on the defendant's exceptions to the instructions of the presiding justice on the question of fraud, and on a motion for a new trial.

[1] To understand the instructions, and the contentions of the plaintiff, it is necessary to state other facts. Two or three days after the accident Dr. Palmer was employed by Mr. Farr, the defendant's superintendent, to visit the plaintiff at the Lewiston Hospital.

He was directed, so he says, to "see that everything is done to save that man's leg." He says Farr told him to look out for him until he got out. He visited him at intervals, generally of three or four days, as long as he stayed in the hospital, and particularly, as relates to this case, October 14th, 18th, 22d, and 26th. The plaintiff did not know that Dr. Palmer was employed by the defendant. He had not himself employed him. It does not appear that he gave the matter any thought. The plaintiff testified that Dr. Palmer at one time told him that he thought the leg would be saved, but he was unable to fix the time the statement was made. Binette, a hospital nurse, testified that Dr. Palmer told the plaintiff every time that he was going to save his leg. Dr. Palmer testified that he never told the plaintiff that he would save his leg, but he says he had some hope of saving it; but on cross-examination he said that at one of the first two or three visits he might have told him that "he hoped to save the leg." He also said that he reminded him that Dr. Russell, the surgeon in charge of the hospital, told him at the start that he "thought the leg would have to come off." He further testified that on October 26th, the last time he saw him before the settlement, he thought there was "some chance of saving the leg," and that he talked with him that day about the leg, and the plaintiff said, in connection with some talk about a settlement, that he was "going to have the money and keep the leg." Binette testified that the plaintiff asked him several times if the leg could be saved, and that he told him "No." Dr. Russell testified that he advised amputation at the first, and that, although he talked with him about it, he never gave the plaintiff any encouragement that the leg could be saved. It appears that the plaintiff and Farr agreed upon the terms of settlement in a room in the hospital to which the plaintiff had been removed for that purpose, and that no one else was present; but nothing was said by either as to the prospects of saving the leg. But before the release was executed, Dr. Russell was called in by Farr, and the terms of settlement were stated to him. Dr. Russell testified that he read the release to the plaintiff, and explained to him that he would not get any more money, even if the leg had to be amputated. This is all the testimony that bears on the probabilities, on October 27th, of saving the leg, or on the plaintiff's expectations.

Upon the evidence in the case, we think the jury would have been warranted in finding that Farr's purpose in employing Dr. Palmer was not alone to secure his professional services in the treatment of the case, but that he might be of some assistance either in making a settlement, or, failing that, in litigation which might ensue on the question of damages, which in itself was not

an unlawful purpose. It does not appear, and should not be inferred, that Dr. Palmer was asked to say anything to the plaintiff about a settlement. Nor does the case warrant the inference that, if Dr. Palmer encouraged the plaintiff to think that the leg could or might be saved, he did so for the fraudulent purpose of inducing him to settle for a less sum than he would otherwise have insisted upon.

But Farr asked him to let him know if the plaintiff wanted to see him, or said anything about a settlement. On October 26th, as the doctor testified, the plaintiff said he thought "it would be better to effect a settlement with the road, and not be bothering with lawyers," that he would like to talk with somebody about it, and that he said he did "not want to see any of his folks" about it. Dr. Palmer communicated the fact of this conversation, and, we think it fair to assume, the substance of it, also, to Farr, who had been called to the hospital that day by Dr. Russell to see the leg dressed. He also advised Farr that the plaintiff was in a suitable condition physically to make a settlement. An arrangement was made for Farr to see the plaintiff the next day. The evidence makes it probable that Dr. Palmer made the arrangement with Dr. Russell. Dr. Russell gave directions that no opiates be administered in the meantime to the plaintiff. The plaintiff was not told of the arrangement, nor did he know that he was to meet Farr, nor that a settlement was to be attempted, until the nurse was preparing to move him from his cot in the general ward to a private room. Farr came to the meeting with a general release all prepared, except filling blanks, and with 100 \$5 bills, which at some time during the negotiation were laid in a pile on the table before the plaintiff.

Although the evidence is clear that the plaintiff was mentally competent, at the time, to make a settlement, it appears that morphia had been administered to him from time to time to alleviate suffering, and that while under its influence he was "dopy," and his mind was not clear; and it would be a warrantable inference from the testimony that, by reason of the shock of the accident, the nature of his injury, and the condition of his leg, he was naturally, if not necessarily, weakened to some extent in body, and unstrung in mind and in will, and therefore more susceptible to the influence of impressions, false or otherwise.

Upon this evidence, with the additional fact, as the plaintiff claims it to be, that the settlement was unfair and grossly inadequate, it is contended in his behalf that the jury were warranted in finding the settlement to have been fraudulently procured, in these respects: That the defendant, through the opinion of Dr. Palmer, knew that the leg could not be saved; that the plaintiff, also

through the opinion Dr. Palmer, the defendant's paid agent, believed that the leg could be saved; that the defendant was bound in good faith to disclose to him the truth; and that, having failed to do so, it was equivalent to a false representation, and, the concealment being intentional, it was fraudulent.

[2, 3] The law is unquestioned. If, with intent to deceive, one party to a contract conceals or suppresses from the other a material fact, which he is in good faith bound to disclose, it is tantamount to a false representation. The gist is fraudulently producing a false impression upon the mind of the other party. *Stewart v. Wyoming, etc., Co.*, 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439. If a party conceals any fact material to the transaction, and peculiarly or exclusively within his own knowledge, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if it were expressly denied. *Thomas v. Murphy*, 87 Minn. 358, 91 N. W. 1097; *Maynard v. Maynard*, 49 Vt. 297; *Prentiss v. Russ*, 16 Me. 30; *Atwood v. Chapman*, 68 Me. 36, 28 Am. Rep. 6.

[4-6] The suppression must relate to a material fact, known to the party, and which it is his legal duty to communicate to the other party. The duty may arise from a relation of trust, from confidence, or from inequality of condition and knowledge. *Jordan v. Pickett*, 78 Ala. 331. Concealment implies design—purpose. Mere silence is not of itself concealment. *Stewart v. Wyoming, etc., Co.*, supra. Whatever the purpose, if the party is not misled, no relief can be had for fraud. *McDonald v. Christie*, 42 Barb. (N. Y.) 36. We think these citations cover every phase of *suppressio veri* that is open to argument in this case; and the question now is whether the facts bring this case within these rules.

In support of the charge of fraud and deception, the plaintiff relies upon the conduct and statements to him of three persons, Dr. Palmer and Mr. Farr, the defendant's superintendent, and Dr. Russell, the surgeon in charge of the hospital. Of Dr. Russell it need only be said that he seems to have believed from the first that the leg would not be saved, and so expressed himself to the plaintiff. Though he assisted in making the arrangement for the meeting between the plaintiff and Farr, we do not discover that he did anything more than was proper for a surgeon in charge to do under such circumstances. On the contrary, he seems to have taken especial pains that the plaintiff's mind should not be clouded by the effect of opiates at the time of the meeting, and actuated, as we think the evidence shows that he was, by the belief that the proposed settlement was inadequate, he also took especial pains to make certain that the plaintiff fully understood and appreciated what he was doing. We do not think the situation called

upon Dr. Russell to intervene, like a guardian of the plaintiff.

[7] The plaintiff in his brief says that Dr. Palmer "was secretly the defendant's paid agent to procure a settlement." We have already said that he was employed by the defendant, and that that employment was not known by the plaintiff. What would have been the result, if Dr. Palmer in the course of his employment had misled the plaintiff by false statements of his belief as to the probability of saving the leg, or if he had falsely created an unfounded belief that the leg would be saved, for the purpose of inducing the plaintiff to make an easy settlement, we need not discuss. We think that a finding of fact to that effect could be based only upon inferences not warranted by the evidence. It may be conceded that Dr. Palmer, as the plaintiff testified, told him at one time that he "thought the leg would be saved." But that of itself is not enough. If it appeared that this statement of opinion was intentionally false, it might probably be inferred, under the circumstances, that the purpose was fraudulent. But it does not so appear. The opinion was, as it turned out, a mistaken one. But it is asserted, and not denied, that the plaintiff's condition became worse about a week after the settlement, and yet the amputation was deferred two weeks longer. No reason for the delay is suggested, unless it was that further efforts could be made to save the leg.

Mr. Farr's part in the settlement had already been described.

The situation, then, was this: Mr. Farr, we assume, feared that the leg could not be saved. Indeed, he may have had a strong conviction of it. The plaintiff had the opinions of two doctors to be guided by, one unfavorable, and the other more favorable, but not fraudulent. He hoped to save the leg. He says he believed he would save it. He chose to act upon that belief, and he made what may be called an improvident settlement. It is asserted, and not denied, that he said he meant to "have the money and keep the leg." This statement indicates, we think, that he knew the question of saving the leg was debatable, or, at least, had been debated.

[8] Under these circumstances, we think it cannot be said properly that the defendant, or its agent, had fraudulently produced a false impression upon the mind of the plaintiff, or that the probability of saving the leg was a fact peculiarly or exclusively within the knowledge of the defendant or its agents, or that it was the defendant's legal duty to communicate to the plaintiff the belief of its agents as to a recovery. Although the plaintiff was weakened, as already stated, we think the case shows, almost beyond dispute, that he clearly understood what he was doing, that he was in a condition to judge intelligently and decide for himself,

that he knew or ought to have known the risk or chance he was taking, and, therefore, that there was no such inequality of condition or knowledge as made it the legal duty of the defendant to impart its own beliefs to him. The verdict was clearly wrong, and the motion for a new trial must be sustained. It is unnecessary to consider the exceptions.

Motion for a new trial sustained.

STATE v. SWEETEN et al.
(Supreme Court of New Jersey. Nov. 30, 1912.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 61*)—EXCISE COMMISSIONERS—CRIMINAL RESPONSIBILITY—"DISCRETION."

Though the excise commissioners of the city of Camden have discretionary power to grant or refuse licenses to sell intoxicating liquors, and though "discretion" means the exercising of the best of their judgment upon the occasion that calls for it, yet if this discretion be willfully abused it is criminal, and an indictment will therefore lie against such commissioners who grant or refuse such a license from corrupt and improper motives.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 60-62; Dec. Dig. § 61.*]

For other definitions, see Words and Phrases, vol. 8, pp. 2095-2099.]

2. INDICTMENT AND INFORMATION (§ 137*)—CRIMINAL RESPONSIBILITY—INDICTMENT.

An indictment, charging the excise commissioners of the city of Camden with misconduct in granting a license for the sale of intoxicating liquors, which avers in effect that, with knowledge that the applicant had "previously violated the law relating to the sale of intoxicating liquors" and "was altogether an unfit person to be granted a license," the defendants, "being minded and intending to maintain the number of inns and taverns in the city of Camden in defiance of their lawful duties" and the requirements of good order and government, "did wrongfully and corruptly grant" such license, will not be quashed upon the ground that it fails to charge any wrongful and corrupt design or intent.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 147; Dec. Dig. § 137.*]

3. INDICTMENT AND INFORMATION (§ 137*)—CRIMINAL RESPONSIBILITY—INDICTMENT.

An indictment, charging the excise commissioners of the city of Camden with misconduct in refusing a license for the sale of intoxicating liquors, which avers in effect that the defendants, with knowledge of the good character of the applicant and the fact that he had always conducted his tavern in accordance with the law, and "not regarding their duty but wrongfully and maliciously and corruptly intending to oppress, injure, hurt, and aggrieve" the applicant, by color of their office, did "corruptly, maliciously, and unjustly" refuse to grant such license, will not be quashed upon the ground that it fails to charge any wrongful and corrupt design or intent.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 147; Dec. Dig. § 137.*]

4. INDICTMENT AND INFORMATION (§ 136*)—QUASHING—DISCRETION OF COURT.

The discretion to quash an indictment will not be exercised unless upon the clearest and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plainest ground, but the defendant will be left to a demurrer, motion in arrest of judgment, or writ of error.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 470, 471; Dec. Dig. § 136.*]

Four writs of certiorari to review indictments against Joseph H. Sweeten and others. Heard on motion to quash. Denied.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

William T. Boyle, of Camden, for the State. Lewis Starr, of Camden, for defendants.

TRENCHARD, J. These four indictments, removed by certiorari from the Camden county court of quarter sessions to this court, charge the defendants, the excise commissioners of the city of Camden, with misconduct in office. Three of them charge misconduct in granting licenses for the sale of intoxicating liquors, and the fourth in refusing a license. Motions are now made to quash each of them, and, since they have been argued together, they will be considered together.

The principal grounds urged in support of the motions are as follows: (1) That the commissioners had an absolute discretion in granting and refusing licenses, and that therefore there could be no breach of duty that would constitute a criminal offense. (2) That the indictments fail to charge any wrongful and corrupt design or intent.

[1] We grant that the defendants were vested with discretionary power to grant or refuse licenses. That is conceded by the state. But under the law this grant of discretionary power does not carry with it complete immunity from indictment. With respect to licenses for the sale of intoxicating liquors, the excise commissioners of the city of Camden have much the same powers as justices of the peace in England. In *Rex v. Young*, 1 Burr. 556 (97 Eng. Rep. Reprint 447), Lord Mansfield said: "But though discretion does mean (and can mean nothing else but) exercising the best of their judgment upon the occasion that calls for it; yet if this discretion be willfully abused, it is criminal, and ought to be under the control of this court." "But if it clearly appears that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion, and have (consequently) abused the trust reposed in them, they are liable to prosecution by indictment or information." Again, in *Rex v. Williams*, 3 Burr. 1817 (97 Eng. Reports Reprint, 851), Lord Mansfield declared: "That the court granted this information against the justices, not for the mere refusing to grant the licenses (which they had a discretion to grant or refuse, as they should see to be right and proper), but for the corrupt motive of such refusal; for

their oppressive and unjust refusing to grant them, because the persons applying for them would not give their votes for members of Parliament as the justices would have had them." In *Rex v. Hann*, 3 Burr. 1716 (97 Eng. Rep. Reprint, 1062), Lord Mansfield again expresses himself upon this subject in the following language: "The court should never interpose against magistrates, unless they have acted from bad motives and mala fide; especially in such a case as this where they are intrusted with an absolute discretion. But, for that very reason, this is the strongest case for the interposition of the court, if it appears that they have acted upon corrupt motives." In *King v. Holland*, 1 T. R. 692 (99 Eng. Rep. Reprint, 1324): "The court were clearly of the opinion that an information should be granted against a justice as well for granting a license improperly as for refusing one in the same manner. And indeed the mischief of granting a license improperly was infinitely greater than that of refusing one; for in the former case it might be productive of injury to the whole community, while in the latter the grievance was felt only by the individual. That the only ground of these applications was the improper conduct of the magistrates." In the state of New York, in *People v. Norton*, 7 Barb. 477, the court said: "The duty of commissioners of excise in this state is extremely similar to that of justices of the peace in England, in granting or refusing licenses to sell ale. The conduct of justices, in that respect, has frequently been the subject of investigation; and it seems clear, says Mr. Russell, that though upon this matter they have a discretionary jurisdiction given them by law, and though discretion means the exercising the best of their judgment upon the occasion that calls for it, yet, if this discretion be willfully abused, it is criminal, and under the control of the Court of King's Bench. That court will therefore grant an information against the justices who refuse, from corrupt and improper motives, to grant such licenses, and information will be granted against them, as well for granting a license improperly, as for refusing one in the same manner." See, also, *King v. Sainsbury*, 4 T. R. 450 (100 Eng. Rep. Reprint, 1113); *Kings v. Borron*, 3 B. & A. 432 (106 Eng. Rep. Reprint, 721); *People v. Jones*, 54 Barb. (N. Y.) 311; *People v. Meakim*, 133 N. Y. 214, 30 N. E. 828; *People v. Worsley*, 49 Hun, 609, 1 N. Y. Supp. 748.

We conclude, therefore, that, though the excise commissioners of the city of Camden have discretionary powers to grant or refuse licenses to sell intoxicating liquors, and though "discretion" means the exercising the best of their judgment upon the occasion that calls for it, yet if this discretion be willfully abused it is criminal, and an indictment will therefore lie against such commissioners

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

who grant or refuse such a license from corrupt and improper motives.

Nor are we inclined to quash the indictments on the theory that they fail to charge any wrongful and corrupt design or intent.

[2] The indictments alleging misconduct in the granting of licenses to Peter Kelly, Thomas Kelly, and John Flood, respectively, each in effect sets forth: (1) That the defendants constituted the board of excise commissioners; (2) their power to grant licenses for the sale of intoxicating liquors; (3) the application for a license; (4) the knowledge upon the part of the defendants that the applicant had "previously violated the law relating to the sale of intoxicating liquors" and "was altogether an unfit person to be granted a license"; (5) that "being minded and intending to maintain the number of inns and taverns in the city of Camden in defiance of their lawful duties" and requirements of good order and government, they "did unlawfully, wickedly, wrongfully, and corruptly grant" said license.

[3] The indictment charging misconduct in refusing a license to one Leon Miller sets forth in effect: (1) That the defendants constitute the board of excise commissioners; (2) their power to grant licenses for the sale of intoxicating liquors; (3) the application for a license regular in all respects; (4) the knowledge upon the part of the defendants of the good character of the applicant and the fact that he had always conducted his tavern in accordance with the law; (5) that "not regarding their duty, but wrongfully and maliciously and corruptly intending to oppress, injure, hurt, and aggrieve said Leon Miller," by color of their office, did "corruptly, maliciously, and unjustly" refuse to grant said license.

It will be observed that the indictments charging misconduct in granting licenses aver that the defendants, *being minded and intending to maintain the number of inns and taverns in the city in defiance of their lawful duties and the requirements of good order and government, did wrongfully and corruptly grant such licenses.* It will also be seen that the indictment charging misconduct in refusing a license avers that the defendants, *not regarding their duty, but wrongfully and maliciously and corruptly intending to oppress, injure, hurt, and aggrieve the applicant, by color of their office, did corruptly, maliciously, and unjustly refuse to grant such license.* Surely, in the face of such averments it cannot be said that it clearly appears that the indictments fail to charge any wrongful and corrupt design or intent. See *Rex v. Brooke*, 2 T. R. 190, 195.

[4] The rule is that the discretion to quash an indictment on motion will not be exercised unless upon the clearest and plainest ground, but the defendant will be left to a demurrer, motion in arrest of judgment, or writ of error.

Proctor v. State, 55 N. J. Law, 472, 26 Atl. 804; *State v. Johnson*, 81 Atl. 657.

The motion to quash in each case will be denied, and the indictments will be sent to the Camden quarter sessions for trial.

STATE v. SWEETEN.

(Supreme Court of New Jersey. Nov. 30, 1912.)

(Syllabus by the Court.)

PERJURY (§ 25*)—INDICTMENTS—SUFFICIENCY.

An indictment for perjury will not be quashed upon the ground that the alleged false testimony "was not material to the investigation of the complaint by the grand jury," when it avers in effect: (1) That the grand inquest in and for the county of Camden was investigating the alleged misconduct of the board of excise commissioners of the city of Camden in corruptly refusing to grant a license to sell intoxicating liquors to one Leon Miller; (2) that during such investigation it appeared that Miller had held a license for three years then last past and had never violated any law or ordinance relating to the sale of intoxicating liquors; (3) that the question then became material whether any legal and sufficient reason existed for such refusal; and (4) that the defendant appeared before the grand jury and was duly sworn as a witness and willfully, corruptly, falsely, and knowingly testified among other things that Miller, while holding a license, continually opened his place of business before 5 o'clock in the morning contrary to an ordinance of the board of excise commissioners.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. §§ 82-89; Dec. Dig. § 25.*]

Certiorari to review indictment against Joseph H. Sweeten for perjury. Heard on motion to quash the indictment. Denied.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

William T. Boyle, of Camden, for the State. Lewis Starr, of Camden, for defendant.

TRENCHARD, J. This writ brings into this court from the court of quarter sessions of the county of Camden an indictment for perjury, and a motion is now made to quash it.

The main grounds urged for quashing the indictment are: (1) "That no legal conviction can be predicated upon the indictment or the facts therein alleged"; and (2) that "the questions put to the defendant, which it is alleged he falsely answered, were not material to the investigation of the complaint by the grand jury as set forth in the indictment."

The indictment avers in effect: (1) That the grand inquest in and for the county of Camden was investigating the alleged misconduct of the board of excise commissioners of the city of Camden in corruptly refusing to grant a license to sell intoxicating liquors to Leon Miller; (2) that during such investigation it appeared that Miller had held a

license for three years then last past, and had never violated any law or ordinance relating to the sale of intoxicating liquors; (3) that the question then became material whether any legal and sufficient reason existed for such refusal; and (4) that the defendant appeared before the grand jury and was duly sworn as a witness, and willfully, corruptly, falsely, and knowingly testified, among other things, that Miller while holding a license continually opened his place of business before 5 o'clock in the morning contrary to an ordinance of the board of excise commissioners.

We are of opinion that the objections urged against the indictment are without merit. We have had occasion at this term, in *State v. Sweeten*, 85 Atl. 309, to point out that, though the excise commissioners of the city of Camden have discretionary power to grant or refuse licenses for the sale of intoxicating liquor and though discretion means the exercising of the best of their judgment upon the occasion that calls for it, yet if this discretion be *willfully abused* it is criminal, and an indictment will therefore lie against such commissioners who refuse such a license from *corrupt and improper motives*. It follows, therefore, that anything tending to show a corrupt motive in refusing the license to Miller was material to the investigation of the complaint by the grand jury. If Miller had violated the ordinance relating to the sale of intoxicating liquors, it would tend to show that the action of the board in refusing him the license in question was in good faith. If, on the contrary, Miller's conduct in that regard had been blameless, it would be a circumstance tending to show a corrupt motive. Clearly, therefore, the testimony of the defendant to the effect that Miller, while holding his license, continually opened his place of business before 5 o'clock in the morning, contrary to the ordinance of the board of excise commissioners, was material to the investigation of the complaint by the grand jury.

The motion to quash will be denied, and the indictment will be sent to the Camden quarter sessions for trial.

M. L. SHOEMAKER & CO. v. BOARD OF HEALTH OF GLOUCESTER CITY.

(Supreme Court of New Jersey. Nov. 27, 1912.)

(Syllabus by the Court.)

LICENSES (§ 34*)—ILLEGAL ORDINANCE—VOLUNTARY PAYMENT—RECOVERY.

The fact that a payment of a license fee to a city board of health was accompanied by a written protest against the right of the board to exact it does not relieve the payment of the character of having been voluntarily made.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 68; Dec. Dig. § 34.*]

Appeal from District Court of Camden.

Action by M. L. Shoemaker & Co. against the Board of Health of Gloucester City. Judgment for plaintiff, and defendant appeals. Reversed, and judgment entered for defendant.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Charles W. Letzgus, of Camden, for appellant. Wescott & Wescott, of Camden, for appellee.

MINTURN, J. The suit was instituted to recover two license fees paid by plaintiff to defendant under the requirements of "An ordinance to regulate the gathering of bones, fat, hides and other offal and refuse from slaughterhouses and meatshops." This ordinance, upon a writ of certiorari obtained at the instance of the plaintiff, as prosecutor, was set aside by this court. *Shoemaker v. Board of Health*, 81 Atl. 349. Having paid two license fees under it, the plaintiff, basing its suit upon the illegality of the ordinance, thus declared nugatory, seeks to recover them.

The inquiry thus presented is whether they are in the category of voluntary payments. The facts are not in controversy. On July 3, 1909, the plaintiff paid without protest the required license fee of \$50. On July 19, 1910, the plaintiff paid the license fee for that year, and protested at the same time by letter against the validity of the ordinance and the right of defendant to exact the fee. On May 8, 1911, the writ of certiorari removed the ordinance to this court, and on October 20, 1911, its validity was adjudicated. After the ordinance had been declared invalid this suit was instituted, and the district court awarded judgment in favor of the plaintiff. It is difficult to perceive upon what ground the first payment can be recovered, since, having been made without protest, it possesses no distinctive features that can be said to mark it as other than a voluntary payment. 30 Cyc., and cases cited.

The real inquiry, therefore, must be directed to the second payment, which was made while the plaintiff was disputing with the defendant as to the legality of the ordinance, and accompanied its payment with a written protest against the right of defendant to exact it. We think this is fully answered by the reasoning of Chief Justice Beasley in *Davenport v. City of Elizabeth*, 41 N. J. Law, 362 et seq., speaking for the Court of Errors and Appeals, in which it was held that a payment made under such circumstances is none the less a voluntary payment. In that case the claim was made upon an assessment for benefits, where the assessment had been subsequently set aside and declared invalid by this court. The claim was there made in an attempt to collect the assessment, which it was contended was prac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

tically paid under duress, or per minas. The sale of the assessed premises by the municipality for nonpayment was the alternative, and yet that stringent contingency was held not to relieve such a payment of the character of being voluntary. "In this state," said the Chief Justice, "a writ of certiorari is a perfect safeguard against unwarranted taxation of every description. This remedy, too, is so efficient that from the time of its issuing it is a supersedeas of the proceedings of the officers to whom it is addressed."

The status of the plaintiff here, therefore, resolves itself into argumentum ab inconvenienti; for it had the privilege and opportunity, before paying the fee, to remove the ordinance upon the claim of illegality to this court by writ of certiorari, which writ would operate as a supersedeas. It chose the alternative of paying the fee, and thus secure the privilege of operating under its license almost during the entire license period. The rule in this state is settled beyond possibility of reasonable controversy that under such circumstances a payment is impressed by law with the character of having been voluntarily made. *Camden v. Green*, 54 N. J. Law, 591, 25 Atl. 357, 33 Am. St. Rep. 636; *Turner v. Barber*, 66 N. J. Law, 496, 49 Atl. 676; *Fuller v. Elizabeth*, 42 N. J. Law, 427.

For these reasons, the judgment below will be reversed, and judgment ordered entered for the defendant.

METROPOLE CONST. CO. v. HARTIGAN.
(Supreme Court of New Jersey. Dec. 12, 1912.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 190*)—ACTION FOR RENT—EVICTION.

Where a tenant entered into possession of premises under an agreement with the landlord for the use of a telephone service and a hall boy, and later the landlord dispensed with the service of both, and the tenant refused to pay rent, claiming an eviction, although continuing to occupy the premises, *held*, that his occupancy of the premises was under the circumstances inconsistent with his claim of eviction, and that he was liable for the rent due.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 765-769; Dec. Dig. § 190.*]

2. LANDLORD AND TENANT (§ 130*) — COVENANT OF QUIET ENJOYMENT—LIABILITY FOR BREACH.

His remedy against the landlord was for a breach of the implied covenant of quiet enjoyment.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 470-481; Dec. Dig. § 130.*]

(Additional Syllabus by Editorial Staff.)

3. LANDLORD AND TENANT (§ 190*)—"RENT"—SUSPENSION BY EVICTION.

The term "rent," under the common law and feudal system, had reference distinctively to land, and was inappropriately used when intended to indicate a return for the use of mon-

ey or personality; and, while now applied indiscriminately to the return for the use of personality as well as of real property, the fundamental distinction and derivation must be kept in view in determining the question of suspension of rent by eviction.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 765-769; Dec. Dig. § 190.*]

Appeal from District Court of Jersey City. Action by the Metropole Construction Company against Frederick Hartigan. Judgment for plaintiff, and defendant appeals. **Affirmed.**

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Theodore Rurode, of Jersey City, for appellant. Charles Hershenstein, of Jersey City, for appellee.

MINTURN, J. The suit was instituted by the plaintiff, as landlord of an apartment house in Jersey City, against the defendant, as tenant, to recover the agreed rent for the month of January and February, 1912. The defendant filed a recoupment, alleging that since the 1st of January, 1912, the plaintiff had failed to furnish telephone service and hall boy service in connection therewith, whereby the defendant had been damaged. The court found that at the time of the renting the agent of defendant represented to plaintiff "that, among other improvements, telephone service would be furnished, and a boy in the lower front hall to attend the same at a switchboard. Through this switchboard connection was made with the hall phone, and with telephones in booths in each tenant's apartment. These booths were so arranged that the tenant could have his own telephone service therein independent of the house phone. The boy at the switchboard in the hall at the house phone answered the front door. When the arrangements were made for leasing the apartments, these matters were talked over, and agreed to be furnished. The telephone service and the boy at the switchboard in the hall were discontinued after January 1, 1912." The telephone booths and wiring were not disturbed so that each tenant could supply his own service thereafter at his own expense. A written lease was drawn up, but never executed, and the tenancy continued under the verbal agreement. There was no proof in substantiation of the claim of recoupment, and the trial court disallowed it. The insistence of the defendant was that the taking out of a telephone service and the hall boy worked a constructive eviction, and upon that ground he refused to pay the rent. The trial court declined to so view the matter and rendered judgment for the plaintiff, from which adjudication this appeal was taken.

This court has held that the fact that the tenant continued in possession of the demised premises after the commission of

the alleged acts of eviction does not preclude him from setting up the claim of a constructive eviction in answer to the landlord's demand for rent. *Morris v. Kettle*, 57 N. J. Law, 218, 30 Atl. 879; *Meeker v. Spalsbury*, 66 N. J. Law, 60, 48 Atl. 1026; *Hunter v. Reilly*, 43 N. J. Law, 480.

The situation thus presented resolves itself into the inquiry whether the act of commission of the landlord operated as a constructive eviction, so as to suspend the payment of rent. The rule was settled in *Upton v. Townsend*, 17 C. B. 30, and has been followed by this court, "that to constitute an eviction the act of the landlord must be not a mere trespass, but something of a grave and permanent character, with the intention of depriving the tenant of the enjoyment of the demised premises." Cited in *Meeker v. Spalsbury*, 66 N. J. Law, 64, 48 Atl. 1026. In *Hunter v. Reilly*, 43 N. J. Law, 483, Mr. Justice Scudder said, speaking for this court: "The consequences of an eviction by a landlord of his tenant from the whole or a part of the demised premises is that, where there is a suspension of the entire rent during the continuance of the eviction, the tenancy is not thereby ended for all purposes, but the rent and all remedy for its collection are suspended." "The rule of the common law is inflexible," says Mr. Justice Depue, in *Morris v. Kettle*, 57 N. J. Law, 219, 30 Atl. 880. "For the rent which by the terms of the demise would accrue during the continuance of the eviction the landlord can neither sue nor can he distrain for the rent reserved or any part of it; nor can he recover for use and occupation, although in either case the tenant has continued in possession of the remaining part of the premises demised." The difficulty encountered by the courts in determining the question in each case submitted has not arisen from any misconception of the rule, but solely in its application to the facts of the given case. Thus the learned editor of the *American and English Cases Annotated*, in a valuable footnote to the case of *Wade v. Herndl*, 127 Wis. 544, 107 N. W. 4, 5 L. R. A. (N. S.) 855, 7 Ann. Cas. 591, says: "Formerly nothing short of actual expulsion of the tenant from the demised premises operated as an eviction." *Townsend v. Gusey*, 1 Sweeney (N. Y.) 155. "But in modern times the rule has been liberalized in favor of the tenant, and now any act of the landlord or of any one who acts under authority or legal right given him by the landlord which renders the demised premises unfit for the purpose for which they were leased, or which seriously interferes with the beneficial enjoyment thereof, in consequence of which the tenant abandons the premises, constitutes an eviction by construction of law; and whenever it takes place the tenant is released from the obligation under the lease to pay rent accruing thereafter." The payment of rent which at common law

was substituted for the rendering of feudal service was based upon the theory that the land demised was the necessary factor to produce the rent, and that, when the landlord directly or indirectly deprived the tenant of the use of the land in whole or in part, the tenant's inability to reap or produce the rent from the land formed an insuperable obstacle to its collection, and consequently the payment of rent was suspended until the landlord made it possible for the tenant again to produce the rent by possessing the land under the terms of the demise. *Coke*, Lit. 47; 2 *Black. Com.* 41; 1 *Wealth of Nations*, 190; 3 *Foundations of Legal Liability*, p. 289.

The legal effect of an eviction, therefore, based entirely upon the deprivation of the beneficial use, except where it took place by reason of title paramount, or at the instance of the king, was to suspend payment of the whole rent. *Walker's Case*, 8 Rep. 22; *Mayor of Poole v. Whitt*, 15 M. & W. 571. It will be observed, therefore, that the term "rent" under the common law and feudal system had reference distinctively to land, and was inappropriately used when intended to indicate a return for the use of money or for the use of personality to which the term "interest" is properly applicable in the legal and economic vocabulary. The devolution of the feudal system of tenures, and the turning of land under the demands of trade and commerce into the market as a commodity, caused a commingling and confusion of terms until the word "rent" is now applied indiscriminately to the return which an owner receives for the use of personality, as well as for the use of real property.

But the fundamental distinction and the derivation of the term must be kept in view in any attempt to intelligently apply the decisions under the doctrine of eviction at common law to modern conditions, conceding, as we must, that *cessante ratione legis cessat ipsa lex*. Reading the language employed in the decisions in this state which we have quoted, it will be perceived that the eviction spoken of refers entirely to the actual or constructive dispossession of the tenant from the land demised, or part of the demised premises, *eo nomine*, and not from the possession of a mere incidental fixture, which, while its absence may cause inconvenience, cannot be said to be a part of the demised premises, and requisite for their beneficial enjoyment. In *Hunter v. Reilly*, *supra*, the eviction claimed was the total deprivation of the use of a hotel. In *Meeker v. Spalsbury*, *supra*, the insistence was that the hotel demised had become useless, because of the blocking up of a street leading thereto. In *Morris v. Kettle*, *supra*, the eviction was from part of the demised land. The language therefore employed by the learned jurists in these adjudications as to the right of the tenant to withhold payment of rent for a partial eviction clearly refers to an

actual dispossession of the tenant from the whole or part of the demised premises *eo nomine*—i. e., to the lands demised, or to the buildings thereon—so that the tenant, although in possession of a part of the premises, is unable to enjoy them beneficially by reason of the detriment suffered to the remaining part. So manifest is this the ratio decidendi that Chief Justice Beasley in 1868, in *Birkhead v. Cummins*, 33 N. J. Law, 56, denominated the right of removal in the tenant for a partial dispossession as “the highly questionable fiction of a constructive expulsion.”

Reference is here made to the fundamental doctrine underlying the cases, for the reason that the principle is therein enunciated that a partial eviction suspends the payment of rent, and for the purpose of demonstrating that in each case, the learned justices had in mind a dispossession from the land or its appurtenances, or both, and not a mere dispossession of use of what the law classifies as a fixture in connection with the realty, and which may be capable of severance therefrom, without detriment to the beneficial enjoyment of the substantial subject of the demise. Therefore it is that in the leading case in England of *Upton v. Townsend*, etc., 17 C. B. 30, we find the test of an eviction laid down as “not a mere trespass, but an act of a permanent character done by the landlord in order to deprive, and which had the effect of depriving, the tenant of the use of the demised premises.”

[1] It follows, therefore, that where the act of the landlord is not of a permanent, but of a temporary, character, which does not result in depriving the tenant of the use of the whole or a part of the demised premises, it cannot be said to constitute an eviction. An instance of this character is presented in *Meeker v. Spalsbury*, supra, where the act complained of was the temporary obstruction of a passageway to the demised premises. In the case at bar no claim is made that the tenant by reason of the landlord's act was compelled to remove from the premises; nor does the recoupment allege it, or the state of the case present it as a fact found by the trial court. The only inconvenience suffered was the loss of the telephone service, which has not resulted in the tenant vacating the whole or any part of the demised premises. The status, therefore, is that the tenant remains in possession, claiming the right, upon the theory of self-help, to withhold the entire rental of the premises as *quid pro quo* for the inconvenience suffered by the loss of the telephone service. The cases are unanimous that such is not his legal right. To work a constructive eviction, there must be an actual giving up of possession of the whole or part of the demised premises as a result of the landlord's act. Such, in effect, is the view expressed by Chief Justice Green in *Chambers v. Ross*,

25 N. J. Law, 297. “We know of no case,” says the Supreme Court of Massachusetts in *Talbott v. English*, 156 Ind. 308, 59 N. E. 860, “sustaining the doctrine that there can be a constructive eviction without a surrender of the premises.” “Any neglect,” says the same high authority, “of the plaintiff to make the improvements promised did not by reason of the breach, so long as the defendant chose to occupy them, give to him any right to decline payment of the rent.” *Taylor v. Finnigan*, 189 Mass. 568, 76 N. E. 205, 2 L. R. A. (N. S.) 973. The rule is similar in New York. *Borel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170; *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716. Valuable notes containing the cases elucidating this rule will be found at the foot of the opinion in *Wade v. Herndl*, 7 Ann. Cas. 591, and in 17 L. R. A. 275; also, 24 Cyc. 1059.

[2] The inquiry naturally results as a corollary to this conclusion whether the tenant in possession is remediless. The answer is found in the authorities. In *Meeker v. Spalsbury*, supra, Mr. Justice Collins, speaking for this court, says: “The remedy, if any, of the tenant for such obstruction as was authorized by the landlord, was not to cease paying rent, but to seek damages for a breach of the landlord's implied covenant of quiet enjoyment.” In *Johnson v. Oppenheim*, 12 Abb. Prac. (N. S. N. Y.) 449, the rule is laid down as follows: “Where the landlord commits an act of trespass which interferes more or less with the beneficial enjoyment of the premises, but which leaves the demised premises intact, and does not deprive the tenant of any part of them, so that, though he may be injured, he is not thereby dispossessed, here the rule is, inasmuch as the wrongful act of the landlord stops short of depriving the tenant of any portion of the premises, that such trespass is no defense against the liability for rent, and the tenant's sole remedy therefor is an action for damages against the wrongdoer”—citing *Edgerton v. Page*, 20 N. Y. 281. See, also, 24 Cyc. 1059, and cases cited. That the defendant in the case at bar properly conceived his remedy in this regard is manifest from the fact that he filed his recoupment, but, as the trial court found was unable to sustain it by the necessary proof of damage.

The judgment will be affirmed.

WESCOTT v. BAKER.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

1. ATTORNEY AND CLIENT (§ 130*)—COMPENSATION—SERVICES IN ANOTHER STATE.

An attorney may have compensation for examining the title for a survey made on and ascertaining the incumbrances upon property located in a state, where such matters were not connected with any pending litigation.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key. No. Series & Rep'r Indexes

though he was not licensed to practice in that particular state.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 292, 293, 295, 296, 307, 311; Dec. Dig. § 130.*]

2. ATTORNEY AND CLIENT (§ 160*)—COMPENSATION—ACTION PREREQUISITE—TAXING OF COSTS.

Under Practice Act (3 Comp. St. 1910, p. 4054) § 9, which provides that no solicitor or attorney shall commence or maintain any action for the recovery of any fees or disbursements in equity or at law against his client or his legal representative without having first delivered a copy of the taxed bill of such fees, charges, and disbursements, an attorney was not precluded from having a recovery for services rendered for which no fees were taxed, where such services consisted only of the examination or preparation of papers which were not connected with any pending litigation.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 360; Dec. Dig. § 160.*]

3. TRIAL (§ 232*)—INSTRUCTIONS—STATEMENT OF COUNSEL'S CONTENTION.

In an action for attorney's fees, a part of the charge that "attention is called in the argument of counsel to the failure of the defendant to call a sister of hers to substantiate her testimony in denial, and counsel for the plaintiff relies upon that as a circumstance which you are to take into consideration and which he contends furthers the plaintiff's contention," is a mere statement of a contention of counsel which the court neither expressly nor by implication approves or disapproves, and it will not constitute a ground for reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 524, 525; Dec. Dig. § 232.*]

Error to Circuit Court, Atlantic County.

Action by John W. Wescott against Elizabeth B. Baker. From a judgment for plaintiff, defendant brings error. Affirmed.

E. A. Higbee and Harry R. Coulomb, both of Atlantic City, for plaintiff in error. Thompson & Smathers, of Atlantic City, for defendant in error.

GUMMERE, C. J. The plaintiff, an attorney at law of this state, brought this suit to recover compensation for professional services rendered to the defendant. Those services consisted in aiding in the reorganization of certain corporations of the state of North Carolina in which the defendant was largely interested; in attending meetings of the directors and stockholders of those corporations from time to time from the year 1901 to the year 1906; in preparing for such meetings, and advising with relation to the various matters proposed, considered, and determined thereat; collecting two insurance policies; aiding in the settlement of the estate of the defendant's deceased husband, and securing the defendant's interests therein; bringing about an exchange of real estate in the city of Philadelphia for real estate in North Carolina, and examining and passing upon the papers and titles involved therein, and various other matters covering the period already mentioned. The trial resulted in a verdict for the plaintiff, and the

judgment entered thereon is now before us for review.

The defendant below seeks a reversal of the judgment upon three grounds: First, because the trial court refused a nonsuit at the close of the plaintiff's case; second, because of the refusal to direct a verdict for the defendant; and, third, for alleged error in the charge to the jury.

The motion to nonsuit and the motion to direct a verdict for the defendant were based upon the theory that, so far as the professional services rendered by the plaintiff related to matters happening in North Carolina or concerned North Carolina interests, there could be no recovery for professional services rendered by an attorney unless he was a licensed practitioner of that state, and that it did not appear that the plaintiff held such a license. It was also argued that, so far as Mr. Wescott acted in a professional capacity in this state, he was barred from recovery whether the services rendered are considered as those of a counsel, or of an attorney; that an action will not lie for services rendered as counsel, except upon an express contract, and that no such contract is claimed to exist in the present case; and that for services rendered as an attorney there must be a taxation of his fees for the same as a prerequisite to the bringing of a suit, which was done in the present case.

[1] Conceding the legal propositions upon which these motions were based to be sound, so far as they were applicable, the proofs show that some of the services for which the plaintiff claims compensation were rendered with relation to the exchange of a piece of property belonging to the defendant in Frankfort, Pa.; that they consisted, among other things, in the examining of the title of property located in that state, having a survey made of it, and an ascertainment of the incumbrances upon it. It appears from the testimony of the plaintiff himself that at the time of the rendition of those services he was a licensed attorney of the state of Pennsylvania. For these services he was entitled to a reasonable compensation, and consequently it would have been improper to nonsuit him, or to direct a verdict in favor of the defendant.

[2] The judicial action is justifiable upon another ground. Some of the services for which the plaintiff claimed compensation were such as properly may be rendered by an attorney of this state, and yet were not of such a character as required a taxation of his fees under the ninth section of the Practice Act (3 Comp. St. 1910, p. 4054), consisting, as they did, in the examination or preparation of papers which were not connected with any pending litigation. Such services were similar in character to those referred to in *Brown v. Harriot*, 81 N. J. Law, 484, 80 Atl. 479, and are not within the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

purview of the statute, under the authority of that case.

[3] The assignment of error which deals with the instruction of the court to the jury attacks the following excerpt from the charge: "Attention is called in the argument of counsel to the failure of the defendant to call a sister of hers to substantiate her testimony in denial, and counsel for the plaintiff relies upon that as a circumstance which you are to take into consideration, and which he contends furthers the plaintiff's contention." The assignment seems to be based upon the theory that the court in using the language quoted left it to the jury to determine whether or not they would infer from the failure of the defendant to call her sister that the sister's testimony would have been injurious to her case. But manifestly that is not so. The quoted words lay down no legal proposition. They are a mere statement of a contention made by plaintiff's counsel, and which the court, neither expressly nor by implication, approves or disapproves. If the defendant had desired a judicial ruling upon the matter said to have been mooted by counsel for the plaintiff, she should have submitted a request for the instruction.

The judgment under review will be affirmed.

BATTSCHINGER v. ROBINSON et al.
(two cases).

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 207*)—INSTRUCTIONS—DISCRETION OF COURT.

The refusal of the trial court to instruct the jury as to the probative effect of a fact in evidence is discretionary, but not obligatory upon a request to charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 498, 499, 501; Dec. Dig. § 207.*]

2. LANDLORD AND TENANT (§ 169*)—FAILURE OF LANDLORD TO REPAIR—INSTRUCTIONS.

In a suit to recover damages caused by the negligence of a landlord in neglecting to repair, a request to the trial court to charge that if an inspection was made during the period in question, and such inspection did not disclose the danger complained of, the verdict must be for the defendant, which request the trial court refused, held not erroneous, since the request failed to include the legal requirement of duty that the inspection be carefully and properly made.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644-646, 663-667, 681-684; Dec. Dig. § 169.*]

3. APPEAL AND ERROR (§ 1082*)—REVIEW—OBJECTIONS NOT MADE BELOW.

An objection not urged in the Supreme Court upon review will not be considered in this court upon writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1183-1186, 4270, 4281-4292; Dec. Dig. § 1082.*]

Error to Supreme Court.

Actions by Otto Battschinger against Rebecca V. Robinson and others, and by George Battschinger against the same defendants. Judgments for plaintiffs, and defendants bring error. Affirmed.

Frank E. Bradner, of Newark, for plaintiffs in error. Osborne & Astley, of Newark, for defendants in error.

MINTURN, J. Two cases involving the claims of parent and child, respectively, arising out of an accident to the latter, were tried together in the Essex circuit, and a judgment was rendered for each. The infant plaintiff, while delivering ice in the course of his employment to a tenant in the defendants' apartment house in Newark, was injured by the fall of a dumb waiter, and upon the alleged negligence of the landlord in failing to repair the actions are founded.

[2] Liability of the landlord is predicated upon the theory that from want of proper inspection the rope to which the dumb waiter was affixed was suffered to get into disrepair, and thereby became unfit for the purpose for which it was intended to be used by the tenants in the building. The jury having found for the plaintiff upon that issue, the defendants now assign error upon six reasons for reversal of the judgment, all of which are directed to the charge of the trial court or to its refusal to charge as requested. It is quite apparent that the proof in support of the plaintiffs' contention as to the defective condition of the rope was ample to enable the jury to conclude as they have concluded. The first request to charge was substantially that if the defendant or her agent inspected the dumb waiter and rope between certain periods covered by the testimony, and such inspection did not disclose the danger, the verdict must be for the defendant. Such a request eliminates the essential element in the rule of duty regulating the defendants' conduct, viz., that the inspection must be ample and carefully and properly made. Upon that ground the request was properly denied. 24 Cyc. 1125, and cases cited; Owings v. Jones, 9 Md. 108; Albert v. State, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159.

The second request presented the proposition that, in order to warrant a recovery, the plaintiff must prove that the defendant or her agents failed to make an inspection of the dumb waiter and rope, and that such inspection, if made, would have disclosed the frayed condition of the rope. This request limited the defendants' negligence to the frayed condition of the rope, and left out of consideration any other elements of deterioration resulting from lack of proper inspection and repair which may have caused or contributed to cause the damage, and it therefore imposed too narrow a theory of liability upon the landlord, and was properly refused.

The third request required the court to instruct the jury arbitrarily as to the conclusion they should reach from the fact that a piece of lint discovered by a witness did not as defendant contended come from the part of the rope which was found to be broken, and therefore was not evidence of the damaged condition of the rope.

[1] The facts regarding this element of the case were entirely before the jury, and the court would not be warranted in making that distinct feature of the case a basis for instructing the jury upon it as a conclusive factor in determining the existence of a defect in the rope. It was an element in the case, in no wise conclusive, but to be accepted with the other facts and circumstances in evidence as bearing upon the mooted question as to proper inspection; and so the court quite properly left it to the jury under adequate instructions. In reality the request was designed to draw from the court an opinion as to the effect of the testimony in question, upon the controlling inquiry in the case. This was discretionary with the court, but in no wise obligatory. Consolidated Tract. Co. v. Chenoweth, 58 N. J. Law, 416, 34 Atl. 817. The trial court charged that, in order to recover, the plaintiff must prove that the defendant or her agents "failed to make intelligent, careful inspection with reasonable frequency, which, if made, would have disclosed that the rope was liable to break, so that due care forbade its further use in its existing condition. Unless the proof shall satisfy you that the defendants failed to make such a careful and reasonably frequent inspection you should find for the defendants." Exception to this instruction as imposing a burden upon the defendants that was greater than the rule of a legal duty imposes. It is difficult to perceive in what manner and to what extent such an instruction imposes any burden upon the defendants, but per contra it is quite apparent that it imposed the entire burden of showing want of proper inspection, and due care upon the plaintiff as sine qua non to recovery, and so it must be treated as harmless in its application to defendants.

It is objected, but not assigned for error, and therefore not legally before us, that there was no evidence in the case upon which damages to the father could be given by the jury; and the trial court's instruction upon that subject is criticised as follows, viz.: "That the legal inference resulting from the boy's age is that he is still in a state of dependent minority and his father is entitled to his wages." We are not upon this hearing called upon to inquire into the quantum of the verdict. In the absence of testimony to the contrary, the legal presumption is that the father received the infant's wages, the amount of which was proved in the case, and upon which we must assume this verdict for the father was based, the infancy having

been established, and in no wise controverted. Emancipation will not be presumed, and the burden of proving it is upon the defendant. The postea returned with the judgment record discloses that the trial of the case was had before "Frederic Adams, one of the Justices of the Supreme Court," and the defendant assigns that misdescription of the trial judge as error. It might be urged that the maxim *falsa demonstratio non nocet* supplies a sufficient answer to his objection. *Bittleston v. Cooper*, 14 M. & W. 399.

[3] But the complete answer under the circumstances is found in the fact that the objection was not assigned for error in the Supreme Court, and therefore cannot be assigned for that purpose here.

The judgment will be affirmed.

VULCAN DETINNING CO. v. AMERICAN CAN CO.

(Court of Errors and Appeals of New Jersey. Nov. 18, 1912.)

1. INJUNCTION (§ 194*)—USE OF SECRET PROCESS—ACCOUNTING—PROFITS.

A complainant, who in a suit to restrain the use of a secret process also seeks an accounting of profits derived by defendant from the use of the process, elects to treat defendant as a quasi trustee and not a wrongdoer; and he may only recover the net profits made by defendant in the conduct of the business during the period of the accounting.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 414; Dec. Dig. § 194.*]

2. INJUNCTION (§ 199*)—USE OF SECRET PROCESS—ACCOUNTING—NET PROFITS.

A defendant, in a suit to restrain him from using a secret process, and for an accounting of profits made by him from the use of such process, is entitled on the accounting to be credited with expenses in the carrying on and for the benefit of the business, such as moneys paid for repairs to plant and machinery, insurance, and taxes thereon, and depreciation in value, though such depreciation is abnormal, because the plant can no longer be used by defendant for the carrying on of the business for which it was originally designed, and cannot be adapted to other and legitimate uses without the expenditure of large sums of money.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 419; Dec. Dig. § 199.*]

3. INJUNCTION (§ 194*)—USE OF SECRET PROCESS—ACCOUNTING—NET PROFITS.

A complainant, suing to restrain the use of a secret process, and for an accounting of profits from the use of such process, is entitled to interest on the net profits made by defendant in the business, subject to the ordinary rules governing an accounting between trustee and cestui que trust, so that the account must be stated with annual rests, and interest on the annual net profits must be allowed.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 414; Dec. Dig. § 194.*]

Appeal from Court of Chancery.

Suit by the Vulcan Detinning Company against the American Can Company. From a decree advised by Vice Chancellor Howell, both parties appeal. Reversed and modified. See, also, 62 Atl. 881.

Robert H. McCarter, of Newark, and Henry Wollman and Edward S. Seidman, both of New York City, for complainant. Richard V. Lindabury, of Newark, and Thomas Thacher, Philip G. Bartlett, and Julius F. Workum, all of New York City, for defendant.

GUMMERE, C. J. A final decree having been made in this case restraining the defendant, the American Can Company, from continuing the use of a secret process of the complainant company for detinning tin scrap, and requiring it to account to the complainant for the profits which it had made through the use of that process, a reference was directed to Hon. William J. Magie, one of the masters of the Court of Chancery, for the purpose of stating such an account. Both parties attended before the master, and an exhaustive examination, covering many days, was had of the expenditures made by the defendant in connection with the use of the complainant's secret process, and of its income from that source. At the conclusion of this examination the learned master filed his report, stating the account between the parties, from which it appeared that the net profits derived by the defendant from the use of the secret process during the period covered by the accounting amounted to the sum of \$677,352.18. Each party excepted to the account, and a hearing of the exceptions was had before the Vice Chancellor, who, after a consideration of each item of the account which was made the subject-matter of an exception by either party, confirmed the report of the master in toto, basing his approval of the disposition made by that officer of the items excepted to upon the reasons given by him, and set forth in his report. From the order confirming the master's report, both parties have appealed to this court, and each of them now contends that, so far as the overruling of the exceptions to the report taken by it are concerned the order is erroneous, but not otherwise.

Our examination and consideration of the voluminous testimony taken before the master, of the careful, painstaking, and lucid report of that officer, and of the exhaustive briefs which have been furnished us by counsel for the respective parties satisfies us that, except with regard to certain items which were disallowed by the master, the account was rightly stated between the parties, and the master's report properly confirmed.

[1] Taking up the consideration of those items. It is to be borne in mind that when, in a suit to restrain the use of a secret process, the complainant also seeks an accounting of the profits made by the defendant, he elects to treat the latter as a quasi trustee, rather than as a wrongdoer, who should be compelled to answer in damages

for his wrongful acts. In other words, the complainant, in effect, says: "The profits which would have been distributed among the stockholders of the American Can Company, had the user of the secret process by that company been a lawful one, belong to me; and I am entitled to have an account taken, showing what those profits amount to, and an order that they be paid to me, instead of to the stockholders of the Can Company." But the fact that the complainant has elected to stand in the place of the stockholders of the defendant company, as the party for whose benefit the account is to be stated, does not at all affect the principles upon which the statement of the account is to be had. The proceeding is not one for the punishment of a wrongdoer, not one for the imposition of a penalty upon a person who has been guilty of a fraud, not one for the ascertainment of the sum which will compensate the complainant for the loss suffered by it from the wrongful use of the secret process by the defendant, but one taken for the sole purpose of ascertaining what, in fact, was the net profit made by the defendant company in the conduct of the business during the period of the accounting.

[2] In an account so taken the defendant is entitled to be credited with all expenditures made by it in the carrying on of the business, and for the benefit of the business; and this includes not only the items allowed by the master, but also the following items disallowed by him, viz., all moneys paid for repairs to plant and machinery, all moneys paid for insurance thereon, and all moneys paid for taxes thereon. It also includes depreciation in the value of the plant and machinery, notwithstanding the fact that such depreciation is abnormal, because the plant can no longer be used by the defendant for the carrying on of the business for which it was originally designed, and cannot be adapted to other and legitimate uses without the expenditure of large sums of money. Such depreciation, no matter what causes it, decreases the profits made in the business, and, as we have already said, the sole matter to be ascertained is: What were the *actual* profits made? In determining this matter, it is immaterial what the conditions were which operated to increase or decrease them.

Because of the refusal to allow a credit of these items to the defendant in its accounting, the order confirming the master's report must be reversed. If the parties can agree as to how much of the expenditures for repairs, insurance and taxes were made during the period covered by the accounting, and how much of the depreciation of the plant, and so forth, is attributable to the same period, the order may be modified by allowing credit to the defendant for the sums so agreed upon; otherwise the case must be sent back to the master for the ascertainment of these amounts.

[3] In the accounting before the master the complainant claimed that it was entitled to interest on the net profits made by the defendant in its business, and this claim was rejected by the master, and his action in this regard confirmed by the court below. We think this claim should have been allowed. The defendant, as we have already stated, occupies the position of a quasi trustee, carrying on the business for the benefit of the complainant. Normally a trustee conducting a business for the benefit of a cestui que trust is bound to account for and pay over to the latter, at reasonable intervals, the profits made by him; and if he retains the profits after such payment should have been made he is chargeable with interest upon the sums so retained. Instead of treating the defendant as a wrongdoer, the complainant elected (as it had a right to do) to hold it as a trustee carrying on the business for its benefit; and it is entitled to have the ordinary rules governing in an accounting between trustee and cestui que trust applied to the defendant. The account should be stated with annual rests, and interest on the annual net profits shown allowed to the complainant.

If the parties can agree upon the amount of interest to which the complainant is entitled under the rule stated, the order will be modified in accordance with such agreement; otherwise this matter also must be sent back to the master for ascertainment.

The order under review will be reversed and modified in accordance with the views herein expressed.

FARMERS' & MECHANICS' NAT. BANK OF WOODBURY v. FRANKLIN TP. IN GLOUCESTER COUNTY.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1912.)

(Syllabus by the Court.)

TOWNS (§ 46*)—LOAN OF MONEY—RESOLUTION—SUFFICIENCY.

Where a township committee borrows money under the provisions of section 81 of the Township Law (P. L. 1899, p. 406), providing that it may do so in anticipation of the collection of any sum or sums voted or granted for township purposes not exceeding the amount voted, it is not necessary for the resolution upon which the committee borrows to state that the money is borrowed in anticipation of the collection of such sums as are voted for township purposes.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 81-84; Dec. Dig. § 46.*]

Error to Supreme Court.

Action by the Farmers' & Mechanics' National Bank of Woodbury against the Township of Franklin, in the County of Gloucester. Judgment for plaintiff, and defendant brings error. Affirmed.

Harvey F. Carr, of Camden, for plaintiff in error. David O. Watkins, of Woodbury, for defendant in error.

TREACY, J. This action is based upon six promissory notes made by the township of Franklin to the plaintiff, aggregating the sum of \$4,564.11. The dates and amounts of these notes are, respectively, as follows: July 1, 1907, \$500; February 4, 1908, \$500; June 1, 1908, \$700; February 1, 1909, \$1,364.11; June 7, 1909, \$500; May 5, 1910, \$1,000. The case was tried without a jury, and the court sitting as a jury directed a verdict for the plaintiff for the entire amount of its claim. This action of the trial court is challenged on the present writ of error.

The plaintiff contends that the resolution of the township committee providing for the borrowing of the money did not state that the moneys were borrowed in anticipation of the collection of taxes for the then current year, and that therefore the township is not liable. In support of this contention we are referred to the case of Swackhamer v. Hackettstown, 37 N. J. Law, 191. That case held that municipal corporations, in the absence of a specific grant of power, do not in general possess the capacity to borrow money. This was prior to the passage of the Township Act of 1899 (P. L. 1899, p. 372). Section 81 of that act provides as follows: "The township committee may borrow money from time to time in anticipation of the collection of any sum or sums voted or granted for township purposes not exceeding the amount voted and may secure the payment thereof, with interest, by notes of the township, which shall not with all renewals thereof, run for a longer period than one year." By this act the township is enabled to borrow money in anticipation of the collection of taxes or other moneys necessary for township purposes, a power that was lacking when the case of Swackhamer v. Hackettstown was decided. It was upon the want of this power in the township that that case was decided.

In the present case it is indisputable that the notes were given for moneys borrowed for township purposes and used for those purposes, principally for the construction of roads and in anticipation of collecting the money. The delay in the payment of the notes was shown by the testimony of the plaintiff's cashier to be the fault of the defendant. The cashier had demanded, each year, the payments of the amount due, and was told it would be attended to as soon as the money was collected. Even if the right to incur the indebtedness were limited to one year and the debt must be paid out of the revenues for the year, the failure of the township officers to pay cannot discharge the debt. Ford v. Washington, 71 N. J. Law, 49, 52, 58 Atl. 79. It will be presumed that the township committee acted properly, unless

there is evidence tending to show the illegality or impropriety of its action. There is no evidence of that kind in this case. On the contrary, everything appears to have been done in accordance with the law. The township appropriations were made in the years in which the moneys were borrowed. The township did not exceed its borrowing capacity.

It was not necessary that the resolution upon which the moneys were borrowed should state that they were borrowed in anticipation of taxes. If the moneys were in fact borrowed in anticipation of sums voted to be raised for the current year, the township is bound to pay the same.

The judgment should be affirmed.

JAEGHIG & PEOPLES, Inc., v. FRIED.
(Supreme Court of New Jersey. Dec. 13, 1912.)

(Syllabus by the Court.)

1. SALES (§ 181*)—ACTION FOR PRICE—EVIDENCE.

To recover in an action for the value of goods sold and delivered, there must be proof of delivery and acceptance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.*]

2. TRIAL (§ 191*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action to recover for the value of materials sold and delivered, it is erroneous for the judge to instruct the jury as a matter of law that the "materials were delivered to the defendant," when it appears that they were not installed as a part of the plant for which they were intended, and when the evidence upon the part of the defendant tends to show that before the materials were brought to his premises he notified the plaintiff "not to deliver them," as they were "not needed," and that the plaintiff said, "All right."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

Appeal from District Court of Newark.

Action by Jaehnig & Peoples, Incorporated, against Isaac Fried. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Michael J. Tansey, of Newark, for appellant. William Greenfield, of Newark, for appellee.

TRENCHARD, J. This is the defendant's appeal from a judgment in favor of the plaintiff, entered upon a verdict of a jury in the district court. The action was to recover for (1) work done, and (2) for materials sold and delivered, in connection with the steam-heating plant in the defendant's house. No doubt the motions to nonsuit and direct a verdict were properly denied. A part of the claim was for work done, and the evidence as to that presented a jury question. As we shall presently point out, the proofs upon

the other branch of the claim likewise presented a jury question as to that.

[1] But we think the charge of the court was erroneous and requires a reversal. The defendant insisted that there was no delivery and acceptance of the materials. Of course, to recover in an action for the value of goods sold and delivered, there must be proof of delivery and acceptance. *Trenton City Bridge Co. v. Perdicaris*, 29 N. J. Law, 367; *McNeal v. Braun*, 53 N. J. Law, 617, 23 Atl. 687, 26 Am. St. Rep. 441; *Lummis v. Millville Mfg. Co.*, 72 N. J. Law, 25, 60 Atl. 219; *Addison on Contracts* (Morgan's Ed.) vol. 2, § 588.

[2] The learned trial judge charged the jury as a matter of law that the materials "were delivered to the defendant." That was erroneous. The question whether there had been a delivery was, under the evidence, for the jury. The materials in question consisted of a "fire pot" and "section" of a steam boiler. The materials were never installed, and the evidence upon the part of the defendant tended to show that before the materials were brought to his premises he caused the plaintiff to be notified "not to deliver them," as they were "not needed," and that the plaintiff said, "All right." It was therefore erroneous for the judge to determine that question as a matter of law.

The judgment under review will be reversed, and a venire de novo awarded.

PLAINFIELD-UNION WATER CO. v. INHABITANTS OF CITY OF PLAINFIELD.

(Supreme Court of New Jersey. Dec. 9, 1912.)

(Syllabus by the Court.)

1. INJUNCTION (§ 59*)—MANDAMUS (§ 133*)—WATERS AND WATER COURSES (§ 201*)—PUBLIC WATER SUPPLY—EFFECT OF CONTRACTS WITH MUNICIPALITY.

Contracts between a private water company and municipalities pursuant to statutory authority, not only give the municipalities a right to a supply of water, but create a public duty on the part of the company to supply consumers under proper regulations, to be enforced by mandamus by one not already supplied, or by injunction against cutting off a supply already begun.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 114-116, 128; Dec. Dig. § 59;* Mandamus, Cent. Dig. § 268; Dec. Dig. § 133;* Waters and Water Courses, Cent. Dig. § 275; Dec. Dig. § 201.*]

2. EMINENT DOMAIN (§ 47*) — EXTENT OF POWER—PROPERTY PREVIOUSLY DEVOTED TO PUBLIC USE.

The Legislature may authorize one public agency to condemn property already devoted to a public use by another public agency, but the intention to grant such authority must be manifested in express terms, or by necessary implication.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

8. EMINENT DOMAIN (§ 47*) — EXTENT OF POWER—PROPERTY PREVIOUSLY DEVOTED TO PUBLIC USE.

The act of April 21, 1876 (1 Comp. St. 1910, p. 823), was not meant to authorize the condemnation, either in whole or in part, of a water supply plant supplying several municipalities.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

Certiorari, prosecuted by the Plainfield-Union Water Company, to review the appointment of commissioners, on application of the Inhabitants of the City of Plainfield, to condemn a portion of the waterworks of the prosecutor. Order appointing commissioners set aside.

The prosecutor is a corporation formed by the consolidation of the Plainfield Water Supply Company and the Union Water Company, pursuant to the General Corporation Act. The consolidation agreement is dated September 21, 1906. The Plainfield Water Supply Company existed under a special charter of April 2, 1869, and the Union Water Company under a special charter of March 17, 1870. The Plainfield Company was authorized to take water from any lake, pond, stream, or spring within the county of Union or adjoining counties, except the Rahway river and its branches, and to convey the same through Plainfield and adjoining towns. The municipalities were authorized to agree with the company for a supply of water. The Union Water Company was authorized to erect works and lay pipes for the supply of water to the town of Cranford and other places in Union county, and to make contracts for such supply, and empowered to take and use the water from the Rahway river at or near Cranford. Prior to the consolidation of the two companies, contracts had been made by the city of Plainfield, on May 2, 1892, with the Plainfield Water Supply Company, by the township of Cranford, the township of Westfield, the board of fire commissioners of fire district No. 1 of the township of Union, the borough of Roselle, the borough of Fanwood, and the borough of Garwood, with the Union Water Company, and by the township of Fanwood with the Plainfield Water Supply Company. After the consolidation contracts were made with the borough of North Plainfield, the town of Westfield, the borough of Garwood, the township of Cranford, the borough of Roselle, the borough of Roselle Park, and the borough of Kenilworth.

The city of Plainfield seeks by these proceedings to condemn a portion of the works of the consolidated company, and a portion only of the plant of the Plainfield Water Supply Company as it was prior to the consolidation, including, however, the source of supply.

Argued June term, 1912, before SWAYZE, VOORHEES, and KALISCH, JJ.

Frank Bergen, of Newark, and Gilbert Collins, of Jersey City, for prosecutor. Albert C. Wall, of Jersey City (William M. Stillman, of Plainfield, on the brief), for city of Plainfield.

SWAYZE, J. (after stating the facts as above.) [1] The questions in this case are interesting and most important, and, as far as we know, of first impression. We pass the question as to the extent of the powers and rights acquired by the consolidation of the two water companies, and do not decide whether thereby the right of the Plainfield Company was so extended as to justify it in supplying water to municipalities under the Union Company charter which it was not authorized to supply under its own. The Plainfield Company was by its charter authorized to supply, not only the village (now the city) of Plainfield, but also the adjoining towns. If there had been no subsequent legislation, it would be an interesting question whether by the word "towns" in this charter the Legislature meant townships, as contended by the prosecutor, or whether it meant towns in the narrower sense of more densely populated territory similar in character to the then existing village of Plainfield. This inquiry, we think, becomes unnecessary in view of subsequent legislation. The act of 1888 (C. S. p. 3647, pl. 669), the act of 1887, relating to boroughs (C. S. p. 268, pl. 76), and the act of 1899, relating to townships (C. S. p. 5599, pl. 65), authorize municipal corporations, boroughs, and townships to contract for a water supply with a private water company. The act of 1888, by express terms, the borough act of 1897, and the township act of 1899, by necessary implication, authorize the water company to make the contract. In pursuance of this statutory authority, the consolidated company has made contracts with several municipalities. It can make no difference that some of the contracts were made on the eve of the present proceedings to condemn. Whatever may have been the motives of the water company, the municipalities acquired rights thereunder. These rights sprang out of contracts authorized by statute, but they are more than mere contractual rights the infraction of which is to be redressed by an action for damages only. In *Town of Boonton v. Boonton Water Company*, 69 N. J. Eq. 23, 61 Atl. 390, affirmed 70 N. J. Eq. 692, 64 Atl. 1064, the water company had agreed to supply the town 500,000 gallons a day, with the right to increase the quantity to 1,000,000 gallons. The successor of the water company was enjoined from furnishing water from its plant to any person or corporation for the purpose of creating power for mechanical purposes, either by the creation of steam, or for propelling any water motor. The effect of the decree was to give the town a paramount right in the water company's source of supply;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and, as this paramount right was held to bind the successor of the water company that made the contract, it is hardly distinguishable from a right of property in the water. In *Jersey City v. Jersey City Water Supply Co.*, 74 N. J. Eq. 104, 70 Atl. 497, affirmed in this respect 76 N. J. Eq. 607, 76 Atl. 3, we enforced specific performance of a contract for the conveyance of waterworks. If, however, the contracts did not give the municipalities a property right, strictly so-called, in the water supply, for which compensation must be made upon condemnation, they gave a right to a supply of water from the consolidated company, and created a duty on the part of the company to furnish the supply. This duty is more than a mere duty to perform a contract; it is the public duty of a public service company to supply consumers under proper regulations. *Olmsted v. Proprietors of Morris Aqueduct*, 47 N. J. Law, 311, 333, overruling *Paterson Gaslight Co. v. Brady*, 27 N. J. Law, 245, 72 Am. Dec. 360. If this duty is not performed, the wrong may be redressed, not merely by an action of the municipality for damages for breach of contract, but by mandamus at the suit of a citizen, if he is not already supplied with water (40 Cyc. 792, note 8; *People v. New York Suburban Water Co.*, 38 App. Div. 413, 56 N. Y. Supp. 364), just as the Court of Chancery has held in a case of the supply of gas (*Public Service Corporation v. American Lighting Co.*, 67 N. J. Eq. 122, 123, 57 Atl. 432), or by injunction against cutting off a supply already begun. *Dayton v. Quigley*, 29 N. J. Eq. 77; *Coe v. N. J. Midland Railway Co.*, 30 N. J. Eq. 440; *Johnson v. Belmar*, 58 N. J. Eq. 354, 44 Atl. 166; *Washington v. Washington Water Co.*, 70 N. J. Eq. 254, 62 Atl. 390.

We have, then, a case where a private corporation is under a public duty to supply the citizens of several municipalities with water, an article of prime necessity for life and health, and an effort on the part of one municipality to condemn for its own purposes an essential portion of the plant. The effort, if successful, will not only dismember the plant of the water company, but will prevent it from supplying water to citizens of municipalities other than the city of Plainfield, since the city seeks to condemn the source of supply. It is unnecessary to hold that the rights of citizens of these municipalities are increased by the fact that some of the contracts provided for a supply from a specific source at *Netherwood*, since the public duty is the same under contracts that name no specific source. The city of Plainfield is attempting to condemn property already devoted to a more extensive public use in such a way as to destroy that use.

[2.3] The Legislature may authorize one public agency to condemn property already devoted to a public use by another public agency; but the intention to grant such authority must be manifested in express terms,

or by necessary implication. 15 Cyc. 614. In *State, Mayor, and Aldermen of Jersey City v. Montclair Railway Co.*, 35 N. J. Law, 328, the railroad company sought to condemn land held by the city for a prospective reservoir. In *N. Y. S. & W. R. R. Co. v. Paterson*, 61 N. J. Law, 408, 39 Atl. 680, the city sought to open a street across a railway freight yard. In both cases the right was denied. The Court of Errors and Appeals has recently, by inference, recognized the principle, at least in a case where the pre-existing user will be destroyed or seriously impaired. *Paterson & R. R. Co. v. Mayor and Aldermen of City of Paterson*, 83 Atl. 886. In the present case the condemnation of the property sought by Plainfield will destroy the water supply of other municipalities. Has the Legislature given it such power? The city claims the power under the act of April 21, 1876 (C. S. p. 823). This authorizes the city to purchase of any water company owning waterworks within the city all its real estate, personal property, and works, and all its corporate rights, powers, franchises, and privileges. The act was subject to a referendum clause, and did not become effective in Plainfield until 1910, four years after the consolidation of the Plainfield Company and the Union Company. The corporation to which the power of condemnation is applicable is necessarily the consolidated corporation, which was the only corporation owning waterworks in Plainfield when the act became effective there. The property authorized to be condemned is all the property, corporate rights, powers, franchises, and privileges of the company. Some statutes of the kind may properly be construed as mere enabling acts. The word "all" may mean "all or any." Other statutes may properly be construed as imposing a limitation on the condemning agency. The word "all" may mean "all or none." In the present case the question is not free from difficulty. In view of the purpose of the condemnation, the evident intent of the Legislature in authorizing the condemnation of the corporate rights, franchises, and privileges of the company, as well as the property, the fact that the rights of other municipalities must have been contemplated by the Legislature in 1876, since it had previously authorized the Plainfield Company to supply adjoining towns, and the Union Company to supply Cranford and other places, and the importance of securing to every one dependent thereon a continuous supply of water, we think the Legislature, in 1876, if it meant the statute to apply at all to a case like the present, must have meant to authorize only the condemnation of the whole plant of the water company, and to use the word "all" in its literal meaning. No other construction would save the rights of other municipalities and their citizens. The city could not take a

portion, subject to the burden of carrying out the contracts of the water company. The severance in title of the pipe lines at the city's boundary would make it impossible to supply consumers outside the city limits without the use of property still belonging to the water company; and the city for its own supply—the end contemplated by the statute—would not have the power to condemn the right to use those pipes. The Legislature cannot be supposed to have contemplated a dismemberment of a water company's plant in such a way that a part of it would be rendered useless; useless to the condemning municipality, since it could not acquire that part, and useless to the company because it would be cut off from the source of supply. The city would, under the ordinary rules applicable to condemnation, be compelled to compensate the company for the damage done by the severance to the property not taken, and for the value of the contracts with other municipalities which could no longer be performed. *Long Island Water Company v. Brooklyn*, 116 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165. The city would thus be compelled to pay substantially the whole value of the plant, and would acquire for itself a portion only. Such a waste of public money cannot have been contemplated by the Legislature; and an examination of the act of 1876, in connection with other contemporaneous legislation, shows that it was not meant to authorize the condemnation, either in whole or in part, of a water supply plant supplying several municipalities. The power given is to supply such quantity of water as may be required by the inhabitants residing within the corporate limits of the city—a power in itself clearly insufficient to authorize the supply of inhabitants of adjoining towns. "To this end," to use the language of the statute, "the city is authorized to purchase of any water company owning waterworks within the city, all the real estate, personal property and works, and all the corporate rights, powers, franchises, and privileges, and, in the event of disagreement as to the amount of compensation, is empowered to condemn." The words "within the city," qualifying the waterworks authorized to be acquired, naturally import waterworks situated within the city, and not elsewhere. The case where the source of supply might be without the city is provided for by the authority to acquire the rights, powers, franchises and privileges. Although the language is susceptible of a construction that would permit the acquisition of the whole plant, wherever situate, of a company that owned waterworks within a city, this less natural construction is not in harmony with the end for which the acquisition is authorized—a supply of water to the inhabitants residing within the corporate limits. At that time the acts authorizing contracts by

one municipality for the supply of water to another had not been passed. P. L. 1877, pp. 58, 198; P. L. 1881, p. 118; C. S. p. 3643; P. L. 1882, p. 83; C. S. p. 835. The Legislature was dealing with a situation where each city had, or was to have, its own supply. Section 16 provides that the act shall remain inoperative in any city until assented to by a majority of the legal electors thereof voting at an election to be held in said city. If the act had been meant to apply to a case where several municipalities were interested in the same water supply, the Legislature would not have given one municipality the right, at its own election, to condemn the supply of another. The title of the act points to the same construction. It indicates the intent to enable cities to supply the inhabitants with pure and wholesome water. It seems to indicate a future supply, rather than a change of ownership of an existing supply; and it certainly indicates no intent to enable a city to deprive another municipality of an already existing supply. We do not mean to say that the title does not suffice to comply with the constitutional requirement, but it is not such a title as the Legislature would have adopted if the act was meant to be as broad in its powers as the city of Plainfield now contends. The narrower construction of the act is in harmony with the words of the title, and avoids the possibility of constitutional objections.

It cannot be said that the act of 1876 was meant to establish a general scheme by which a public supply might be substituted for a private supply. If that had been the intent, the scope of the act would not have been limited to cities. At that time the comparative merits of public ownership, as against private ownership, had not become the subject of common discussion. The subject then before the Legislature was evidently the necessity of making some provision for water supply other than by specially chartered companies, as had previously been the custom. The constitutional amendment of 1875 had just been adopted. It thereupon became the duty of the Legislature to pass general laws under which corporations might be organized. In pursuance of this duty the Legislature passed an act which was approved April 21, 1876, the same day as the act now before us, under which private water companies might be incorporated. P. L. 1876, p. 318; C. S. p. 3635. The two acts were parts of a general scheme. One provided for a supply by private water companies, and applied to all municipalities having not less than 2,000, and not more than 15,000 inhabitants. The other authorized a public supply in cities, which at that time included all municipalities having over 15,000 inhabitants. The Legislature seems then to have thought that smaller municipalities either did not need a

water supply if the population was less than 2,000, or ought not to incur the risk of a supply at public expense, unless they had attained the rank of cities. That the act relating to cities limited the right to acquire waterworks to such as supplied a single city, we have already shown. The act for the incorporation of water companies was similarly limited. It requires the consent of the corporate authorities of the town or city proposed to be supplied with water. This can only refer to a single municipality. We think the Legislature, in 1876, omitted to provide for the acquisition by one municipality of waterworks incorporated for the supply of more than one. The omission at that time was natural. The necessity of legislation for such a situation as is here presented, if apparent at all, was not as clear as it has now become. It is a situation that requires legislation having in view the rights of all municipalities concerned, where the supply of water has ceased to be abundant for the increased population, as is sufficiently indicated by the recent legislation for the state water supply commission. C. S. 5797-5808.

For these reasons, we think the city of Plainfield has no right to condemn a water supply which is already devoted in part to the public use of other municipalities. The order appointing commissioners must therefore be set aside with costs.

ATLANTIC CITY AERIE NO. 64, FRATERNAL ORDER OF EAGLES, v. INTERNATIONAL FIDELITY INS. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

INSURANCE (§ 436*)—GUARANTY AND INDEMNITY INSURANCE — LIABILITY — "CASH ON HAND."

A bond insuring a fraternal order against the dishonesty of its treasurer required insured's auditing committee once quarterly to make a full and complete examination of the treasurer's books and accounts, and verify the bank balance by comparison of the cash on hand with the check book and bank book. It also required all moneys coming into his custody to be deposited immediately on the next succeeding business day in a bank. It further required insured to give notice of anything of which it had knowledge likely to cause a claim on or loss to the insurer or of any dishonest act or default. *Held*, that the "cash on hand" which the auditing committee was required to verify was the cash on deposit in the bank as shown by the books of the bank, and, where the committee merely examined the treasurer's bank book and check book without making any inquiry at the bank and thus failed to discover a defalcation, the insurer was not liable.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 436.*

For other definitions, see Words and Phrases, vol. 1, p. 996.]

White, Bergen, Voorhees, Garrison, Bogert, and Minturn, JJ., dissenting.

Error to Supreme Court.

Action by the Atlantic City Aerie No. 64, Fraternal Order of Eagles, against the International Fidelity Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Garrison & Voorhees, of Atlantic City, and De Witt Van Buskirk, of Bayonne, for plaintiff in error. Bourgeois & Coulomb, of Atlantic City, for defendant in error.

KALISCH, J. The errors assigned by the plaintiff in error for a reversal of the judgment under review are five in number, but only one of them requires consideration by the court, and that one relates to the refusal of the trial judge to direct a verdict for it, the defendant below. The plaintiff below, a fraternal order, brought an action against the Fidelity Insurance Company, the defendant below, on a bond given by the insurance company to it, to indemnify it, the plaintiff, from any loss it might sustain, by reason of the dishonesty of its treasurer James B. Adams. Adams subsequently embezzled \$943.52 from the order, and June 28, 1910, the order notified the insurance company of its treasurer's shortage. The bond recites: "This bond is issued by the surety and accepted by the obligee subject to the following express conditions, which shall be conditions precedent to the right of the obligee to recover hereunder." The twelfth provision of the bond provided: "The auditing committee of the obligee shall consist of other than any of the officials named herein and shall, as often as the constitution and by laws of the obligee require, but at least once quarterly make a full and complete examination of the books and accounts of the officials, and verify the bank balance, by comparison of the cash on hand with the check book and bank book."

The evidence shows that Adams assumed the office of treasurer January 19, 1909. At that time there was standing to the plaintiff's credit in the Atlantic City National Bank, as shown by its ledger, \$489.60. The plaintiff appointed an auditing committee to audit the treasurer's account February 23, 1909, which was a quarterly audit, required by provision 12 of the bond, and covered the month of December, 1908, and the months of January and February, 1909. This committee reported the result of its labor March 23, 1909, to the plaintiff, to the effect that after a full inspection of the books it found the balance stated therein to be correct. The evidence further showed that January 26th there was turned over to the treasurer \$176.85; February 2d, \$205.95; February 9th, \$240.55; February 16th, \$69.15; and February 23d, \$77.65. The bank's ledger showed that there were no records of any deposits of \$240.55, received by the plaintiff's

treasurer February 9th, nor of \$69.15, received by him February 16th, nor of \$77.65 received by him February 23d. The ledger further showed that March 1, 1909, the plaintiff's balance in bank was \$473.96, whereas from the testimony of Mr. Gillison, one of the plaintiff's auditors, it appears that the treasurer ought to have had at that time, according to the books inspected by them, a balance to the plaintiff's credit of \$883.21. It is evident from this testimony that Adams was a defaulter before March 1, 1909, to the extent of \$409.25. It is also self-evident that, if the auditing committee had complied with the twelfth provision of the bond, the defalcation would have been discovered, and the further peculations which took place by its treasurer prevented. It was the duty of the plaintiff under the third provision of the bond to give immediate notice of anything of which the obligees have knowledge likely to cause a claim on or loss to the surety or of any dishonest act or default of any official. Compliance with provision 12 of the bond and prompt action by the plaintiff in notifying the surety would have enabled it to take such immediate legal steps which might have resulted in its obtaining a reimbursement for its loss. And, besides, it was a duty resting on the obligee according to the seventh provision of the bond to render every assistance, not pecuniary, capable of being rendered to bring the defaulting official to justice and enable the surety to be reimbursed for such loss as it shall have sustained.

The essential requirements of provision 12 of the bond are: (1) The auditing committee shall at least once quarterly make a full and complete examination of the books and accounts of the officials. (2) It shall make this full and complete examination, by verifying the bank balance, by comparison of the cash on hand with the check book and bank book.

The evidence shows that the auditing committee complied with the first essential requirement, but it disregarded the second and most essential requisite by failing to verify the bank balance by comparison of the cash on hand with the check book and bank book. The treasurer is not supposed to have any cash on hand. The cash on hand refers to the cash on hand as appears by the books in the bank. This is made clear by provision 13 of the bond, which requires that all moneys coming into the custody of the treasurer shall immediately and on the next succeeding business day be deposited by him in the bank in the name of the obligee. Therefore it is apparent that the only place where the auditing committee could have ascertained the actual amount of cash on hand was at the bank. And this is the one of the safeguards against dishonest accounts that is within the contemplation of provision 12. It is a verification by a

comparison of the cash on hand, as shown by the bank balance in the books of the bank, and the accurate amount of which must of necessity be ascertained from the bank, an independent and reliable source, and by comparing such balance with the check book and bank book in the possession and under the control of the treasurer. If this be not so, then the required verification is no verification at all, but simply an idle and useless ceremony, so far as the surety is concerned. It was never intended that the verification should consist only of a comparison of the account of the books of the order, more or less under the control of its officials, and the correctness of whose accounts is under investigation. The evidence clearly demonstrates that, by reason of the fact that the auditing committee failed to make the verification as required by provision 12 of the bond in making its quarterly audit ending March 1st, it failed to detect the embezzlements made by its treasurer amounting to more than \$400, which resulted in the retention of a dishonest official in a position of trust, who, it appears, continued to embezzle the plaintiff's moneys until the total of his defalcations at the time he fled from justice pending the quarterly auditing of his account for the quarter ending June 1st amounted to \$943.52, the amount sued for by the plaintiff, and for which it had judgment with interest. The testimony shows that the bank book was taken away by the treasurer in his flight, so that it could not be ascertained whether the entries of the deposits evidenced thereby were really made by the bank or were forgeries.

The defendant company had a right to rely upon the performance by the plaintiff of its contract with it. It had a right to place full reliance on a strict and faithful compliance by the plaintiff with the provisions of the bond. There was no duty arising out of the contract resting on the surety to inquire into or inspect the manner in which the auditing committee appointed by the plaintiff performed its task. It had a right to rely upon the presumption that the plaintiff was fulfilling the obligations imposed upon it by the bond. Therefore, when the auditing committee failed to discover the embezzlements by the treasurer before March 1, 1909, it was due to its failure to comply with provision 12 of the bond in not making the verification required by that provision. The verification required by that provision, as has already been stated, would have discovered the treasurer to be a defaulter. The failure to make the discovery was due to a breach of that provision. Since it appears that the defalcations could have been discovered if provision 12 had been complied with by the plaintiff, and that as a result from its own act they were not unvelled, it follows as a fair and just conclusion that the defendant should not be held to suffer

for the plaintiff's failure to give immediate notice of the defalcations to the defendant company, March 1st, when the audit was completed. The plaintiff should not be permitted to defeat the provision of the bond requiring notice where the dishonesty of the official bonded is detected, upon the plea that it had no knowledge of such dishonesty, when it appears that such want of knowledge was the result of its failure to comply with some other provision of the bond which would have imparted such knowledge. These provisions were intended for the security of the obligor, and it had the right to require a strict observance of and compliance with them. The provisions of the bond are made by the contracting parties conditions precedent to the right of the obligee to recover thereon. The plaintiff was obligated to show a performance of these provisions. This it did not do. Its failure to make the proper audit is the basis of the violations by it of the other provisions referred to.

For these reasons, the judgment of the circuit court will be reversed.

WHITE, J. (dissenting). This case hinges upon the meaning of the word "verify," as used in article 12 of the bond. "Verify," in its broad and unrestricted sense means "to prove to be true or correct." If this was the meaning intended in this instance, there should have been no direction as to how this "verification" was to be accomplished, but the auditing committee should have been left to pursue its own methods of verification, inasmuch as its association was to be concluded by the result thereof. Article 12, however, does not leave the method of verification to the discretion of the auditing committee, but, on the contrary, prescribes what the auditing committee shall do by way of verification. In doing this, it is obvious that the meaning of the word "verify" is limited, so that all the assured association is to be held answerable for is the verification of the accounts of the insured against officer in the manner prescribed by the language used, and not to a verification in the sense of a guaranty by the association that the auditing committee shall discover any error or irregularity in such accounts if there be any. In other words, as I interpret the clause in question, the use of the word "verify" cannot be taken to enlarge the scope of the method of verification prescribed, but, on the contrary, the method prescribed must be taken as limiting, to the scope of such method, the sense in which the word "verify" is used. What, then, is the proper interpretation of the language used in article 12, prescribing the method to be pursued by the auditing committee in its verification? This language is to be construed strictly against the defendant insurance company. That company is a corporation conducting a busi-

ness of insuring for hire against loss by reason of dishonesty, amounting to larceny or embezzlement. Its contracts are printed forms prepared in language of its own selection. It is the obligor under these contracts, and in the present case the clause of the contract under which defense is made, not only is drawn in the form of a condition precedent, working, and here claimed to work, a forfeiture, but is in derogation to the purpose of the obligation. For each one of these reasons the clause must be strictly construed against the obligor.

Article 13 of the bond requires the treasurer to deposit all funds coming into his hands in the company's account in bank, and article 12 prescribes a method for the auditing committee to pursue in ascertaining whether or not his account of the funds so deposited is correct. The ordinary and practically universal method pursued by people who have bank accounts in verifying their accounts of their bank balances is to have their bank book balanced by the bank officials and returned to them with their cancelled checks which have by that time been presented to the bank and paid. These checks are then checked off on the stubs of the check book and it is thus ascertained what checks are outstanding, and the sum of these outstanding checks is then added to the bank balance as shown by the depositor's own account, and, if the sum thus ascertained corresponds with the bank balance shown by the settlement of the bank book by the bank officials, it is a verification of the depositor's account of his balance in bank. A careful reading of the language of article 12 does not disclose to me a direction for the auditing committee to follow any different course. The language is that the auditing committee shall "make a full and complete examination of the books and accounts of the officers, verifying bank balances by comparison of the cash on hand with the check book and the bank book." As I read this clause, the words "verifying bank balances" clearly refer to the bank balances shown by the "books and accounts of the officers" (in this case the treasurer) being audited, and it then says that this verification shall be by a comparison of the cash on hand, namely, the cash shown to be on hand by the treasurer's accounts as being in bank (because all of the cash had to be in the bank balance under article 13) "with the check book and the bank book." It seems to me that the clause standing alone is only susceptible of this interpretation, but, if there was any doubt about it, I consider that doubt dispelled by the language of the printed application for the bond, which, by the terms of the bond, is expressly made a part thereof, and "the basis of the bond." This application makes the applicant undertake to have the books of account of the official insured examined by the auditing

committee at least once quarterly, and provides: "The examination will include an actual count of the cash on hand, a verification of the bank balance as shown by the bank book and the bank balance as shown by the check book and the cash on hand." This provision in the application, relating as it does to exactly the same subject covered by article 12 of the bond, and expressly made the "basis upon which the bond is issued," must clearly be read in connection with article 12, and, if it requires any explanation, as explaining the language of that clause to refer to the "bank balance as shown by the bank book." I think, therefore, that the clause 12 in question prescribes for the auditing committee exactly the course which was pursued by it in this case; that such course is the practically universal way in use by people having bank accounts in keeping and verifying their own accounts of their moneys in bank; and that there is an entire failure in the clause in question to definitely prescribe or direct any other method than the one thus ordinarily pursued.

It is said that the concrete method of verification expressly provided for does not in fact verify. If this be granted, it does not alter the rules for the construction of contracts or relieve the party who drew the contract in his own favor from its strict construction. Further than that, to hold that, by reason of the use of the word "verify," the auditing committee was bound to proceed to an absolute verification, irrespective of any method pointed out or prescribed in express language in the same sentence, would, of course, necessitate an auditing of the accounts of the bank to guard against mistakes there as well as of the books of the official insured against. A sufficient answer to this proposition, aside from its absurdity, is that, if that were intended, the defendant company which drew this bond was bound to say so. If some intermediate course was meant by the use of the word "verification," the question naturally arises: Who is the one to decide what that intermediate course is? The bond itself is silent upon this point. If, as contended by the defendant, this modified form of verification should include only a visit by the auditing committee to the bank, and on inquiry to the president, the cashier, one of the clerks, the porter, or some other person equally without authority to give any verbal statement on the subject, as to what the books of the bank show the balance to be at that time, this method is open to, at least, three objections: In the first place, the verbal communication thus received is difficult of certain proof; second, it does not offer a means by which the auditing committee can verify the accounts of the official insured against, because as it affords no information as to which outstanding

checks have been presented and cashed by the bank, and which are still outstanding, the auditing committee has no basis upon which to make its calculations; and, third, if this method were adopted, it would still leave the defendant company free to claim, with equal, or as I think greater, reason, that it was not the method that the auditing committee should have adopted in order to make an adequate "verification." For these reasons, I think the trial judge committed no error in leaving the question to the jury as to whether or not there had been an examination of the accounts of the defaulting official by the auditing committee in the manner prescribed by the terms of the bond; those terms being explained to the jury in accordance with the foregoing views, and there being conflicting evidence as to whether or not such audit was really made.

I think, also, that a company which issues a contract upon forms prepared by itself for the purpose of accomplishing a certain general purpose for which it is paid should be required to state any exception in derogation of the purpose of that contract in such clear and unequivocal form that there can be no honest mistake as to its meaning. That the clause under consideration fails to comply with this suggestion is apparent from the fact that the auditing committee (which was misled by it), the trial judge in the court below, and a minority of this court has taken a different view of its meaning from that entertained by a majority of this court. A clause which is even more offensive from this standpoint, in that it means nothing or almost anything accordingly as a court may not or may interpret something into it which it does not contain, and which only fails to be involved in this case because it has not been invoked, is article 13 of this bond, which provides that it shall be a condition precedent, involving, of course, a forfeiture of any right of recovery, that the officer insured against shall deposit the moneys of the lodge coming into his hands from the collecting officials at each meeting in the bank of the company (where it can only be drawn out by the signature of two officials) on the next succeeding business day after the meeting. In other words, the bond says that, in consideration of the premium paid, the insurance company will insure the plaintiff against loss from embezzlement of its funds by its treasurer, but that if the treasurer shall embezzle the funds during the only time when it is within his power so to do (which is just what this treasurer did), namely, while he has them in his possession before he deposits them, the insurance will become void. It would seem that a company which (putting it most favorably) by its apparently careless or ignorant use of legal terms comes so near issuing a fraudulent contract should

in its own interest not have its alleged "conditions precedent" taken too seriously.

I am requested by Justices BERGEN, VOORHEES, and GARRISON, and Judges BOGERT and MINTURN to say that they concur in the views herein expressed.

WEED v. TOWNSHIP COMMITTEE OF HILLSDALE, BERGEN COUNTY.

(Supreme Court of New Jersey. Nov. 18, 1912.)

1. CERTIORARI (§ 57*)—REVIEW OF RESOLUTIONS OF TOWNSHIP COMMITTEE—MATTERS PRESENTED.

Where neither the reasons presented for the granting of a writ of certiorari to review resolutions of a township committee nor the writ itself included the ordinance pursuant to which the resolutions were passed, the legality of such ordinance was not before the court.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 145; Dec. Dig. § 57.*]

2. HIGHWAYS (§ 157*)—ORDINANCES—ATTACK—LACHES.

The right of a property owner to attack the validity of an ordinance passed pursuant to P. L. 1899, p. 372 (4 Comp. St. 1910, p. 5585), empowering a township committee to make ordinances for the removal of dirt from highways, was barred where he made no attack until six years after its passage.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 423-429, 434; Dec. Dig. § 157.*]

3. CERTIORARI (§ 31*)—GROUNDS—RESOLUTIONS OF TOWNSHIP COMMITTEE.

Where the resolutions of the township committee provided for the removal of obstructions to the free flow of surface water on a road had been passed six months prior to the issuance of a writ of certiorari to review them, and where the work of removing the obstructions had been performed and paid for by the township committee, certiorari, being then inefficient, was not the proper remedy.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 43, 88-90; Dec. Dig. § 31.*]

4. HIGHWAYS (§ 157*)—REMOVAL OF OBSTRUCTIONS—RESOLUTIONS—VALIDITY.

Under an ordinance passed pursuant to P. L. 1899, p. 372 (4 Comp. St. 1910, p. 5585), empowering township committees to make ordinances for the removal of obstructions from streets and highways, a township committee was empowered to pass resolutions requiring a property owner to remove an accumulation of sand from the gutter fronting his premises within five days, as an alternative to prosecution for violation of the ordinance.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 423-429, 434; Dec. Dig. § 157.*]

5. HIGHWAYS (§ 157*)—EASEMENT OF PUBLIC—RIGHT OF PROPERTY OWNER.

A property owner can possess no interest in a road superior to the right of the public to a dominant easement which carries with it the implied power to keep the public way free and clear of obstructions.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 423-429, 434; Dec. Dig. § 157.*]

6. HIGHWAYS (§ 157*)—REMOVAL OF OBSTRUCTIONS—RESOLUTIONS—MINISTERIAL ACT.

The requirement that a property owner remove an accumulation of sand from the gutter fronting his premises was properly made by the township committee by resolution under an ordinance which had been passed prior thereto, and it was not necessary for it to be made by a

special ordinance; such requirement being ministerial in nature rather than legislative.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 423-429, 434; Dec. Dig. § 157.*]

7. CERTIORARI (§ 64*)—REVIEW OF RESOLUTION OF TOWNSHIP COMMITTEE—SCOPE OF INQUIRY.

On certiorari to review resolutions of a township committee, the court could consider only the regularity of the proceedings removed, and not the motives which actuated the committee in the passage of the resolutions.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 174, 175, 183, 184; Dec. Dig. § 64.*]

Certiorari by Albert C. Weed to review resolutions of the township committee of Hillsdale, Bergen county. Writ dismissed, with costs.

Argued before MINTURN, J., by consent, under the statute.

John Mulvaney, of Jersey City, for prosecutor. Warner W. Westervelt, Jr., of Hackensack, for defendant.

PER CURIAM. The writ of certiorari granted in this case is intended to review certain resolutions of the township committee of Hillsdale, in Bergen county, passed on November 6th and 14th, and on December 4, 1911, and July 9, 1912, providing for the removal of obstructions to the free flow and passage of surface water on the Pascack road, fronting the premises of the prosecutor in the writ. The resolutions were passed in pursuance of the provisions of an ordinance passed by the township committee in the year 1907. The ordinance was passed in pursuance of an act of the Legislature entitled "An act concerning townships" (L. 1899, p. 372, vol. 4, C. S. p. 5585), which empowers the committee to make, alter, and repeal ordinances inter alia for the removal of snow, ice, and dirt from the sidewalks and gutters of the streets and highways. My reading of the testimony taken in this case leads me to the conclusion that the prosecutor at the time these resolutions were passed was maintaining an obstruction of dirt and other material on the public highway, and that it was within the power of the township committee to remove or cause its removal.

[1, 2] The only inquiry therefore under this writ is whether the removal was accomplished legally. I am not concerned in that inquiry with the question sought to be raised by the prosecutor in many reasons filed as to the legality of the passage of the ordinance of 1907, known as Ordinance No. 6. The reasons presented for the granting of the writ did not include the ordinance, and the writ itself does not include the removal of the ordinance, so that it is not legally before the court for consideration. Aside from that, the prosecutor's laches alone under the circumstances would bar consideration of the legality of its passage six years after the fact. *Carling v. Hoboken*, 64 N.

J. Law, 223, 44 Atl. 950; *Hopewell v. Village of Flemington*, 69 N. J. Law, 597, 55 Atl. 653.

[3] The resolutions in question, but one, were all passed at least six months prior to the granting of this writ, and the work of cleaning the gutter and street of the obstructions complained of had been performed and paid for by the township committee. Under such circumstances, certiorari is not the remedy applicable, since its use would be inefficacious and valueless. *Jersey City v. Traphagen*, 53 N. J. Law, 435, 22 Atl. 190; *Reynolds v. West Hoboken*, 63 N. J. Law, 497, 43 Atl. 682.

[4] The only resolution, therefore, before the court which requires consideration is that of July 9, 1912, requiring the prosecutor to remove the accumulation of sand from the gutter fronting his premises within five days as an alternative to prosecution for violation of the provisions of the existing ordinance. This resolution seems to be clearly within the powers vested in the committee by the provisions of the ordinance referred to. The power to keep the streets and gutters clear and unobstructed is an important and essential function of municipal government, and in this instance that power is expressly conferred upon the committee by the township act. It was exercised in a general and in a legislative manner by the passage of Ordinance No. 6, and its exercise thereafter in any particular instance was properly manifested by an administrative resolution.

[5] This resolution calls for no invasion of a property right in the prosecutor, for it cannot be reasonably maintained that any servient ownership the prosecutor may possess in the street or road is superior to the public right of way in the dominant easement, which carries with it the implied power to keep the public right of way free and clear of obstructions. *City of Grand Rapids v. Hughes*, 15 Mich. 54. And so it has been held that, when highways are naturally obstructed as by the fall of snow or the presence of natural objects, such obstructions may be arbitrarily removed when sanctioned by public officials as an exercise of a discretionary power vested in them to improve highways and streets, and to preserve and maintain them in a proper condition for travel. *Vanderhurst v. Tholcke*, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267; *Gaylord v. King*, 142 Mass. 495, 8 N. E. 596; *Abbott, Mun. Corp.* 2075.

[6] This power was properly exercisable by resolution, being an act done in the ministerial capacity, and not in the legislative capacity of the municipality, a distinction clearly recognized by the adjudications. *City of Paterson v. Barnett*, 46 N. J. Law, 62; *Abb. Mun. Corp.* 1305.

[7] The reasons filed by the prosecutor contemplate a discussion of the motives and reasons which are alleged to have actuated

the committee in the passage of these resolutions. An inquiry into these considerations would be profitless, since the only question with which this court can deal upon this writ is the regularity of the proceedings removed, and in that respect no illegality is perceived. *Moore v. Haddonfield*, 62 N. J. Law, 386, 41 Atl. 946.

For these reasons, the writ will be dismissed, with costs.

STATE v. MERKLE.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912. Dissenting Opinion,
Dec. 3, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1129*)—ASSIGNMENT OF ERROR—STATUTORY PROVISION.

The provision of section 136 of the Criminal Procedure Act (P. L. 1898, p. 915), by which the right of review is extended beyond errors assigned on the record or upon bills of exception, does not supersede the review of such matters upon assignments of error or require that the plaintiff in error shall relinquish any of the advantages of such a review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.*]

2. CRIMINAL LAW (§ 1129*)—ASSIGNMENT OF ERROR—SCOPE OF REVIEW.

Under the criminal procedure in force in this state, a review in criminal cases may be had under a single writ of error (1) for errors properly assigned upon the record or bills of exceptions, and (2) for matters appearing in the trial record disclosing that manifest wrong and injury has resulted to the plaintiff in error from the judicial conduct of the trial in respect to certain specified matters.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.*]

3. FORMER DECISION FOLLOWED.

The case of *State v. Lyons*, 70 N. J. Law, 635, 58 Atl. 398, followed as to the construction of the 136th section of the Criminal Procedure Act (P. L. 1898, p. 915).

4. CRIMINAL LAW (§ 1170*)—WRIT OF ERROR — HARMLESS ERROR — EXCLUSION OF EVIDENCE.

Where the official character of a document was a relevant circumstance on the merits of the defense, the refusal to admit such document in evidence was error that was not rendered harmless because there was oral testimony in the case as to same facts as those stated in such document.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

5. CRIMINAL LAW (§§ 1149, 1186*)—WRIT OF ERROR — REVIEW — DISCRETION OF TRIAL COURT—HARMLESS ERROR.

An indictment, charging the soliciting of a bribe to vote for one Hannis, omitted to state that it was Hannis who was solicited, which was made the ground of a motion to quash which was denied. The motion disclosed that the fact that it was Hannis' name that was omitted was known to the defendant, who was in no wise prejudiced at the trial by such omission.

Held, that the denial of a motion to quash,

being a matter of discretion, was not reviewable upon error assigned on a bill of exceptions.

Held, also, that, conceding the right to review such a denial as a matter of discretion under the 136th section (P. L. 1898, p. 915), the judgment could not be reversed for an omission in the indictment that had not prejudiced the defendant in maintaining his defense upon the merits. P. L. 1855, p. 649, § 2; Revision of 1877, p. 284, § 89; Revised Criminal Procedure Act (P. L. 1898, p. 915) § 136.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3039-3043, 3058, 3215-3219, 3230; Dec. Dig. §§ 1149, 1186.*]

Walker, Ch., and Trenchard and White, JJ., dissenting.

Error to Supreme Court.

Sylvester Merkle was convicted of soliciting a bribe for his official vote (83 Atl. 186), and brings error. Reversed.

Joseph M. Noonan, of Jersey City, for plaintiff in error. Pierre P. Garven, of Jersey City, for the State.

GARRISON, J. The judgment of the Supreme Court affirming the judgment of the Hudson quarter sessions convicting Sylvester Merkle of soliciting a bribe for his official vote is before us on "a writ of error bringing up the bill of exceptions as signed and sealed in the cause." Revised Criminal Procedure Act 1898 (P. L. 1898, p. 915) § 136. "The entire record of the proceedings had upon the trial" is also returned under the provision of the statute cited. The error with which this opinion deals is presented by an assignment of error based upon the bill of exceptions so signed and sealed.

Merkle was a member of the board of education of the town of West New York. The principal of one of the public schools in that town was Warren F. Hannis, whose reappointment was to come before the board on May 17, 1909. Hannis testified at the trial that on the day before this meeting Merkle came to his house and told him that a combination of certain members of the board had been formed, one of whom was Von Scholtzke, and that Von Scholtzke said that he (Hannis) could have his job for \$100; that he did not pay the money and failed to get his reappointment at the meeting held on the following evening at which Merkle voted against his reappointment. To rebut the inference that he had voted against Hannis' reappointment because the money said to have been solicited had not been paid, Merkle, after denying Hannis' charge in toto, sought to show that his vote against Hannis was due to an official report that showed Hannis' unfitness for the place. Specifically what Merkle sought to show was that, pursuant to an order of the board of education, Mr. Bahrheidt, the supervising principal, had, for the information of the members of the board in the performance of their official duties, prepared a report showing the ratings of the various schools under his jurisdic-

tion, and that, because of the rating of Hannis' school as shown by this official report, he (Merkle) had voted against his reappointment. Of the relevancy of this line of proof and of its cogency if such official report was proved and produced there can be no sort of question.

Two witnesses were called by the defendant in his effort to introduce this report in evidence. One was Mr. Bahrheidt himself, who testified that he had the report with him. The other was a Mr. Gompert, who testified that he had a copy of the report in his pocket. This is what happened at the trial: The witness Bahrheidt, on being asked, "Have you the rating with you?" replied, "I have." "Q. Will you produce it?" to which the objection interposed by the prosecutor was, "It is incompetent, irrelevant, and immaterial." "The Court: Objection sustained." To which ruling a bill of exceptions was signed and sealed. The witness Gompert was asked: "Q. Where is that rating? A. I have it in my pocket. Q. From whom did you get it? A. From Mr. Bahrheidt." Objection: "It is immaterial, irrelevant, and incompetent. The Court: Objection sustained." To which ruling a bill of exceptions was signed and sealed.

Nothing can be clearer than that the rulings displayed by this bill of exceptions were erroneous and injurious to the plaintiff in error.

The Supreme Court before whom the errors thus assigned were argued practically conceded that the plaintiff in error had been erroneously deprived of testimony that was "manifestly," to use the words of the court, "both competent and relevant upon the question of the motive that induced Merkle to vote against the reappointment of Hannis."

[1] Notwithstanding this conclusion, the court below decided that the error thus manifestly erroneous did not justify a reversal of the judgment. This decision is placed upon two grounds in neither of which are we able to concur.

This is what the court said in its opinion: "It is difficult to understand upon what ground this line of testimony was excluded, for manifestly such testimony was both competent and relevant upon the question of the motive which induced Merkle to vote against the reappointment of Hannis. But the mere fact that the rulings complained of were erroneous will not justify a reversal of the conviction before us. The defendant, instead of seeking a review upon a strict bill of exceptions, has seen fit to avail himself of the beneficent provisions of section 136 of the Criminal Procedure Act, which permits a defendant to bring up the whole record of the proceedings had upon the trial, and subject to the scrutiny of a court of review all rulings of the trial court either admitting or rejecting testimony whether objection was made thereto or not, every denial

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by the trial court of any matter which was a matter of discretion, and the whole charge of the jury whether a bill of exceptions was signed and sealed thereto, or not. Having resorted to this method of review, the defendant is, by the express words of the statute, entitled to a reversal of the judgment against him only when 'it appears' that he has 'suffered manifest wrong or injury' by some of such rulings on evidence, or denials of matter of discretion, or by something contained in the charge. The question, therefore, which these causes of reversal present for determination, is not whether the rulings on evidence complained of were erroneous, but whether it appears, from an examination of the whole proceedings had at the trial, that the defendant suffered manifest wrong or injury thereby. An examination of these proceedings shows that Hannis himself, on the witness stand, admitted that his rating as a principal was 'very poor,' and that the defendant testified that the rating of Hannis was 'the poorest rating' of any principal in the town. No attempt was made on the part of the prosecution to controvert this statement, and it went to the jury practically an admitted fact. The excluded evidence was therefore merely cumulative, and it is not perceived how it can be logically said that the defendant has suffered manifest wrong or injury by the refusal to admit testimony which merely supports the existence of an uncontroverted fact that has been proved by other evidence in the case."

This opinion, which was filed April 10, 1912, followed the opinion of the same court in the case of *State v. Brown* (Sup.) 82 Atl. 302, filed February 27, 1912, in which, speaking of the review specially provided by the 136th section of the Criminal Procedure Act, it was said: "When a person convicted of crime takes advantage of the liberal review provided by that section, he relinquishes any advantage which might come to him from mistakes made at the trial unless he can show that he has suffered manifest wrong or injury by such mistakes."

If, as may be gathered from the opinion, *State v. Brown* came up for consideration solely under the 136th section, the language quoted, although broader than such a case required, was, as applied to such a case, a mere paraphrase of the section under which the case came up; if it was applied to errors regularly assigned upon bills of exceptions sealed at the trial, it was a distinct novelty.

In the present case, which appears to be the first in which it has been done, the effect of applying the rule, formulated in *State v. Brown*, to errors assigned upon bills of exceptions, is to construe the review provided by the 136th section as superseding the review upon assignments of error of exceptions taken at the trial which by force of such construction are, when the entire record is brought up, not only negligible, but entirely

negatory. For if a plaintiff in error, by returning the entire record "with the writ of error bringing up the bill of exceptions as signed and sealed at the trial" (section 136), ipso facto relinquishes all advantage of such bill of exceptions, the review accorded him is precisely as if such exceptions had not been taken, or, if taken, had not been brought up with the writ.

Under this construction of the statute, plaintiffs in error perform an entirely futile act when they bring up their "bill of exceptions as signed and sealed in the cause," since the only review to which they are entitled in such case is one in which such bills of exceptions are treated as if they did not exist.

Such a construction of this much used statute is strangely at variance with the practice that has universally obtained in this court and in the court below, in each of which, ever since the enactment of the revised Criminal Procedure Act of 1898, it has been the constant practice of the bar to bring up with the entire record their bill of exceptions as specifically provided by the 136th section and to argue and rely upon the errors assigned thereon; and it has been the equally constant practice of this court to consider and adjudicate the errors so assigned and argued. Indeed, in *State v. Miller*, 71 N. J. Law, 527, 60 Atl. 202, where the entire record was returned, this court not only received and adjudicated errors assigned on a bill of exceptions, but would hear nothing else. "In the case before us now," said Chancellor Magie, "upon the objection of the prosecutor, we feel bound to declare that plaintiff in error cannot require us to review any matters *except those presented by bills of exception and the assignments of error thereon.*" In *State v. Callahan*, 77 N. J. Law, 685, 73 Atl. 235, the point expressly decided by this court was presented by error assigned on a bill of exceptions, although the entire record was brought up from the Supreme Court, where both "assignments and causes" were examined. *Id.*, 76 N. J. Law, 426, 429, 69 Atl. 957, 958.

[3] The same is true of *State v. Brand*, 77 N. J. Law, 486, 72 Atl. 131, and of *State v. Bertchey*, 77 N. J. Law, 640, 73 Atl. 524, 18 Ann. Cas. 931, and of literally a host of cases which it would serve no useful purpose to enumerate, for the reason that the construction placed upon the 136th section of the Criminal Procedure Act by this court, as categorically stated by Chancellor Magie in *State v. Lyons*, 70 N. J. Law, 635, 58 Atl. 398, has never been departed from or qualified in this court. That case required for its disposition a consideration of the nature of the review designed by the 136th section of the Criminal Procedure Act. After referring to the fact that the earlier case of *State v. Young*, 67 N. J. Law, 223, 51 Atl. 939, had not called for such a consideration,

Chancellor Magle said: "The present case seems to require a decision of the question of the extent of the review which the provisions of sections 136 and 137 compel the court to make." The opinion then proceeds to construe these sections as follows:

[2] "The legislation which is not contained in section 136 of the Criminal Procedure Act was plainly designed to enlarge the privilege and right of one convicted of crime to question the propriety of his conviction beyond the limits of the privilege and right previously conferred by our statute, which permitted exceptions to be taken and required errors assigned thereon to be reviewed. *It was not designed to supersede a review of matters reviewable under assignments of error.* On the contrary, the relief permitted, when it appeared from the record of the trial that the plaintiff in error had suffered manifest wrong or injury in certain respects, is to be given 'whether objections were made thereto, or not,' and, 'whether a bill of exceptions was settled, signed, and sealed thereto and error assigned thereon, or not.' *The plain purpose is to permit a review by writ of error (1) for errors properly assigned upon the record or bills of exception, and (2) for matters appearing in the trial record disclosing that manifest wrong or injury had been done to plaintiff in error by the course taken at the trial in respect to certain specified matters.'*"

Words cannot more clearly state that, in the opinion of this court, the review of errors assigned on bills of exceptions was not taken away or superseded or affected by the statute under consideration. That this opinion confirmed the practice that had always theretofore obtained, and that it has resulted in the continuance of such practice, has already been pointed out.

The view thus expressed was no casual comment upon a topic alien to the one under consideration, i. e., an obiter dictum, as is evident from the internal evidence of the opinion itself in which this point is introduced and treated with that care and consideration that the learned writer displayed in all of his judicial work; while the fact that the point thus decided appears in the syllabus in our official reports shows how it was regarded and intended to be regarded. Furthermore, the rule that has obtained in this court since the November term of 1899, by which every opinion is in the hands of every judge for private consideration before it is considered in conference or voted upon in public, forbids us to assume that this carefully formulated construction of an important public statute, to which there was no dissenting voice, was not promulgated by this court as its unanimous view.

The controlling effect of a judicial pronouncement of this character upon the court that declares it rests in sound judicial poli-

cy; upon inferior courts it has the force of authority.

It would be entirely foreign to such policy and contrary to our established judicial habit, as well as manifestly unfair to counsel and the clients whose litigation they direct, for us now to say that a proceeding taken in reliance upon our opinion had the opposite effect from that given to it by such opinion. Under such a vacillating policy no counsel, however careful, could safely advise a client or direct his litigation.

The present case is an example of this. When the experienced counsel engaged in this case was considering the expediency of supplementing the points covered by his bill of exceptions by returning the entire record therewith, he had a right to rely not only upon a uniform and unchallenged course of practice in this court, but also upon the express declaration of this court in confirmation of such practice. Having thus determined his course of action, he ought not now to be met with the assertion that by relying upon our opinion he had jeopardized his client's interests and had unwittingly relinquished all advantage of his exceptions taken upon the trial.

Sound judicial policy requires that the declaration of this court in *State v. Lyons*, as to the meaning and effect of this statute, be adhered to until some change in the statutory language there construed requires or at least permits of a different construction. Until that has been done by this court, it is not open to any court to place a new and different construction upon the language of this statute.

In so far therefore as relief was denied the plaintiff in error upon a construction of the 136th section that conflicted with *State v. Lyons*, the court below was in error.

[4] This brings us to the consideration of the second ground on which the plaintiff in error was denied relief in the court below, viz., that the exclusion of the official report, although erroneous, was harmless because there was oral testimony at the trial that Hannis' rating was "poor" or "the poorest."

The testimony thus referred to goes only to the *fact* of Hannis' rating, and not to the whole or even to the most important part of the defense which was the *official* character of the excluded document.

Merkle's defense was that his vote against Hannis had been determined by an official report prepared under the order of the board of education to guide its members in the performance of their official duty. The official report which was the essential feature of this defense was erroneously excluded, and all that the jury had was oral testimony that as a fact Hannis' rating was the poorest. This did not in any practical way compensate the accused for the wrongful exclusion of the document which because of its official character had influenced his vote.

The effect upon the jury of such an official report would most certainly and very properly be far greater than mere oral testimony to the same state of facts. Merkle had been influenced, not by the fact that Hannis had the poorest rating, but by the official report of that fact to him in his official capacity.

The proper evidence and the best evidence was offered by the accused on the merits of his defense and was excluded. He had a right to have this evidence, and, if he would have had any substantial advantages from its admission that he did not have from mere oral testimony, the error of its wrongful exclusion was not cured.

That the defendant's case was materially weakened by the wrongful exclusion of the official report is too clear to require demonstration.

Moreover, the doctrine as to cumulative testimony applies properly to testimony of the same or a lower grade than that already received, whereas the production of a document about which there has been some oral testimony is evidence of a higher grade to which the term "cumulative" cannot properly be applied.

For these reasons we conclude that the exclusion of the official report was an injurious error that requires the reversal of the judgment of the Supreme Court to the end that a *venire de novo* may be awarded.

[5] Counsel for the accused, upon a motion to quash the indictment, pointed out that it omitted to charge that the accused "had gone to Hannis and solicited money for his vote." The motion was denied, and a bill of exceptions allowed to the defendant. Whether this was proper practice we need not now inquire, since such denial, being a matter of discretion, is not placed in train for review by such procedure. *State v. Dayton*, 23 N. J. Law, 49, 53 Am. Dec. 270; *Proctor v. State*, 55 N. J. Law, 472, 26 Atl. 804.

The matter is also presented by a cause for reversal under the 136th section. Here again we need not inquire whether the motion to quash was "a proceeding had at the trial," and hence brought under review by the trial record returned under that section, for the reason that counsel made his motion upon the express ground that it was the omission of Hannis' name that rendered the indictment defective. Having this knowledge before the trial, as counsel in his brief very frankly admits, the trial proceeded without the least embarrassment or prejudice to the defendant from this source. Regarding therefore the refusal to quash as a denial of a matter of discretion under the 136th section, we are expressly prohibited from reversing the judgment for an omission in the indictment that did not prejudice the defendant on the merits. The omission in this case did not render the indictment one in which no offense was charged; it charged an offense, but charged it defectively. Such

an omission in an indictment may or may not prejudice the defendant on the trial upon the merits. In the present case it clearly did not, and in such a situation the very statute invoked by the plaintiff in error forbids in terms a reversal for such an omission. This statutory prohibition applies equally to the error assigned in the bill of exceptions, for it is neither a new provision nor confined to errors reviewable solely under the 136th section. For more than half a century this feature of our criminal law has been on the statute books. Enacted originally as section 2 of the act of 1855 (P. L. p. 648), it later became section 89 of the Revised Criminal Procedure Act (Revision 1877, p. 284), and is now found in the 136th section of that act as revised in 1898. It has been consistently applied to matters of substance as well as of form. *Donnelly v. State*, 26 N. J. Law 463, 493; *Hunter v. State*, 40 N. J. Law, 493, 543; *Gibbs v. State*, 45 N. J. Law, 379, 388, 46 Am. Rep. 782.

The transfer of this provision by the revisers of the Criminal Procedure Act of 1898 to the 136th section of that act has not changed its character or limited its scope.

WALKER, Ch., and TRENOHARD and WHITE, JJ., dissenting.

WALKER, Ch. (dissenting). My dissent from the opinion of the majority of the court in this case is based upon the construction of section 136 of the Criminal Procedure Act (P. L. 1898, p. 915). The majority of the court reached the conclusion that the judgment of guilty rendered against the defendant in the Hudson quarter sessions should be reversed because it was harmful error for the trial judge to have excluded the defendant's offer of a written statement prepared by the supervising principal of schools of the town of West New York which showed that Hannis, the school principal who was up for re-election, had the poorest rating of all the school principals in the town; the defense being that Merkle voted against Hannis by reason of that rating, and not because he had solicited a bribe from Hannis which the latter refused to give him. I am in entire agreement with all that the Supreme Court said in its opinion relating to this offer and its rejection. To use the words of the Supreme Court: "It is difficult to understand upon what ground this line of testimony was excluded, for, manifestly, such testimony was both competent and relevant upon the question of the motive which induced Merkle to vote against the reappointment of Hannis." But the harmfulness of the ruling complained of, as a practical fact, was done away with by the admission of Hannis on the witness stand that his rating as a principal was very poor, and the defendant himself, who was a member of the board of education of the town of West New York,

testified that the rating of Hannis was the poorest of any of the principals in the town, and there was no contradiction of this testimony. Therefore the case went to the jury with the rating of Hannis proved as an uncontroverted fact.

It is true that the objection to the court's exclusion of the written report resides in a bill of exceptions, and, had the case been brought here on a strict bill of exceptions, it must necessarily have resulted in a reversal of the judgment below. But the entire record of the proceedings had upon the trial was returned by the plaintiff with his writ of error bringing up the bill of exceptions signed and sealed in the cause, in pursuance of section 136 of the Criminal Procedure Act, above mentioned. In this posture of a criminal cause the statute provides: "On the argument such entire record shall be considered and adjudged by the appellate court; and if it appear from such record that the plaintiff in error on the trial below suffered manifest wrong or injury, either in the admission or rejection of testimony, whether objection was made thereto or not, or in the charge of the court, or in the denial of any matter by the court, which was a matter of discretion, whether a bill of exceptions was settled, signed and sealed thereto, or error assigned thereon, or not, the appellate court shall remedy such wrong or injury and give judgment accordingly, and order a new trial."

Now, by the very language of section 136, when the entire record of the proceedings had in a criminal cause is brought up for review, the "entire record *shall be considered and adjudged* by the appellate court." From the kind of review thus required the bill of exceptions, in my judgment, is placed on a level with the specification of causes in the record relied upon for relief or reversal, as provided in section 137. In fact, the latter section goes further and provides that the plaintiff in error "shall not be confined to his bill of exceptions."

Two kinds of review in criminal cases concededly exist in this state: One, a review on a strict bill of exceptions signed and sealed; and, the other, on the entire record of the proceedings had upon the trial of the plaintiff in error. But each should not exist independently of the other on one and the same review.

The entire record cannot be brought up without the aid of at least one exception signed and sealed. The 136th section says so in plain terms; and it and the succeeding section (137) make provisions concerning one, and only one, kind of review. It is anomalous indeed if a defendant in a criminal case, on removing the entire record of the proceedings to an appellate court, is unable to obtain relief on a perfectly good cause for reversal which appears in the record, as to which, however, he took no exception on the

trial and only claimed he was entitled to relief under section 136, but is able, on that same record, to demand of the appellate court a reversal of the judgment against him, because there resides in his strict bill of exceptions a valid objection to some proceeding in the court below, while elsewhere in the record it palpably appears that he suffered no wrong or injury whatever in respect to the matter of which he complains.

If any adjudication in this state decides that this dual review of a judgment in a criminal case may be had in the appellate court, when the entire record of the proceedings in the trial court is removed there under section 136, it is *State v. Lyons*, 70 N. J. Law, 635, 636, 58 Atl. 398, where Chancellor Magie, speaking for this court, remarked that the legislation contained in section 136 was not designed to supersede the review under assignments of error, but, on the contrary, permitted relief when it appeared from the record that the plaintiff in error had suffered manifest wrong or injury whether objection was made thereto or not, and *whether a bill of exceptions was settled, signed, and sealed thereto and error assigned thereon or not*. There is certainly nothing in this statement of the learned chancellor to the effect that a dual review may be had in causes taken up under section 136. Of course, the act under discussion does not operate to nullify the exceptions taken on the trial; it permits them to stand and be reviewed along with the causes assigned for reversal. This is borne out by the expression "whether objection was made thereto or not"; the plain meaning being that, if objection were made, then just as certainly the relief afforded by section 136 is to be granted as though the objection had not been taken at the trial and was only specified as a cause for reversal under section 137. Nor does the further language of the learned chancellor (on page 639 of 70 N. J. Law, page 399 of 58 Atl.), to the effect that the purpose of the act is to permit a review for errors assigned *and* for matters appearing in the record disclosing that manifest wrong has been done to the plaintiff by the course taken at the trial, make it necessary to save to the defendant the advantage of a strict bill of exceptions brought up with the entire record of the case, when that record discloses that no wrong or injury was done to the defendant on the trial in the court below.

The foregoing observations lead to the inevitable conclusion that the Supreme Court in the case sub judice rightly decided that, having resorted to a review of the entire proceedings had upon the trial, "the defendant is, by the express words of the statute, entitled to a reversal of the judgment against him only when 'it appears' that he has 'suffered manifest wrong or injury' by some of such rulings on evidence, or denials of matter of discretion, or by something contained

in the charge. The question, therefore, which these causes of reversal present for determination, is not whether the rulings on evidence complained of were erroneous, but whether it appears, from an examination of the whole proceedings had at the trial, that the defendant suffered manifest wrong or injury thereby. * * * The excluded evidence was therefore merely cumulative, and it is not perceived how it can be logically said that the defendant has suffered manifest wrong or injury by the refusal to admit testimony which merely supports the existence of an uncontroverted fact that has been proved by other evidence in the case."

Mr. Justice TRENCHARD and Judge WHITE authorize me to say that they are in entire accord with the views above expressed. In our opinion the judgment of the court below should be affirmed.

In re H— C—, Jr.

(Court of Chancery of New Jersey. Dec. 6, 1912.)

(Syllabus by the Court.)

1. EQUITY (§ 393*)—MASTER IN CHANCERY—REVOCATION OF COMMISSION—GROUNDS.

Annexed to a bill for injunction and relief was an affidavit made by a master in chancery, setting forth, among other things, that a man and woman whom he did not know called upon him, and represented themselves to be A. Di S. and wife, and requested him to draw deeds for a property standing in the wife's name to one T. A., and from him to A. Di S., the alleged husband. All this was done; the master taking the acknowledgments of the parties to the respective deeds, and they were afterwards recorded. Thus it appeared that the master did not know A. Di S. and the woman (who, in fact, personated his wife); but, as it appeared that he might have known T. A., the chancellor wrote him a letter of inquiry, to which he replied that T. A. was introduced to him by A. Di S. on the day of the deed from him (T. A.) to A. Di S. was executed and acknowledged. It then appearing that the master did not know any of the parties executing and acknowledging the instruments for want of acquaintance with A. Di S., a rule was made requiring him to show cause why he should not be deprived of his office of master in chancery, and why his commission should not be superseded and returned into court to be vacated and canceled, or why he should not be otherwise disciplined and punished for his unlawful execution of his office.

Upon the return of the rule, the master showed by credible evidence that he in fact did know A. Di S. prior to drawing and taking the acknowledgments to the conveyances, and that the woman who falsely personated his wife was introduced by him to the master as his wife, and that he also introduced T. A. to him. The master's excuse for making the misleading affidavit, which was drawn for him by the complainant's solicitor (apparently without fault on the part of the solicitor), was that, while it did not exactly meet with his approval, he signed it in order to save delay, and in the belief that he would soon be called as a witness in the case when he could go into details and make an explanation. Upon all the foregoing facts:

Held, that the master's conduct, grossly care-

less and reprehensible as it was, does not involve moral turpitude, and that the proprieties of the case do not require the revocation of his commission as master in chancery or that he be otherwise punished; sufficient discipline, in the court's opinion, arising out of the exposure of the matter and the censure herein and hereby visited upon him.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 852, 853; Dec. Dig. § 393.*]

2. EQUITY (§ 393*)—NOTARIES (§ 2*)—ACKNOWLEDGMENT—REMOVAL—KNOWLEDGE AS TO PARTIES.

Before a master in chancery or other officer intrusted with that power and authority may take acknowledgments to deeds of conveyance and other instruments under section 22 of the act concerning conveyances (2 Comp. St. 1910, p. 1542), he must be satisfied that the party making the acknowledgment is the identical grantor named in the instrument. He cannot be so satisfied unless the grantor is known to him. He need not be well known, he may be only casually known, but in one way or another he must be known; that is, the officer taking the acknowledgment must be satisfied in his conscience that the party making it is the identical person named in and who executed the instrument. Knowledge of the grantor may be acquired by introduction from one with whom the officer is acquainted, and in whom he has such confidence that he has no doubt but that the person introduced is the person he is represented to be. If in such a situation the officer is purposely or innocently deceived, no criticism can properly be leveled against him. His action in certifying an acknowledgment after such an introduction of the grantor would be blameless, even if he were deceived. When a man appears before an officer, introduces himself, produces an instrument which he says he desires to execute, if then the officer takes and certifies an acknowledgment, certifies that he is satisfied that a perfect stranger is the identical grantor named in the instrument, he solemnly certifies to an untruth and should be deprived of his office, or otherwise appropriately punished; and it seems he would be liable for damages sustained by reason of his false certificate, if, in fact, the grantor was falsely personated.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 852, 853; Dec. Dig. § 393.* Notaries, Cent. Dig. §§ 1½-6, 8-10; Dec. Dig. § 2.*]

Rule to show cause why the commission of H— C—, Jr., as master in chancery, should not be revoked for unlawful execution of his office. Rule discharged.

H— C—, Jr., pro se.

WALKER, Ch. A bill was recently filed (Di Sapio v. Di Sapio, 35,191), in which the complainant alleged that her husband, who was residing separate and apart from her, appeared before H— C—, Jr., a master in chancery, with a woman whom he represented to be his wife, and informed the master that she was desirous of conveying to him a property, the title to which stood in her name; whereupon Mr. C— drew a deed from Di Sapio and the woman, describing her as his wife, to one Atellizzi, and a deed from him to the man Di Sapio, and took the acknowledgments to both deeds. The bill, which was filed by Di Sapio's wife, alleges false personation of her by the woman, who, with her husband, made the deed to Atellizzi, and prays to have the deed an-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

nulled, set aside, and delivered up to be canceled.

[1] The bill of complaint was presented to me on an application for a preliminary injunction, and annexed to it was an affidavit by Mr. C— himself. In it he says: "A man and woman of the Italian race, who were unknown to deponent, appeared at his office, and pretended and represented themselves to be Antonio Di Sapio and Maria Di Sapio, his wife, stating that the said Maria Di Sapio was the owner of lands and premises in the city of Long Branch, in this state, which are more particularly described in the foregoing bill of complaint, and requesting that deeds be drawn conveying the said lands and premises to the said Antonio Di Sapio; that the said conveyance was made through an intermediary, one Thomas Atellizzi, on the day last above mentioned, when the said woman, who represented herself to be Maria Di Sapio, executed, acknowledged, and delivered a deed of conveyance for the said lands and premises, the said Antonio Di Sapio joining therein, to the said Thomas Atellizzi, dated on the same day and year, who by deed dated on the same day and year conveyed the said lands and premises to the said Antonio Di Sapio in fee simple absolute, both of which said deeds were subsequently recorded in the clerk's office of the county of Monmouth." The master in his affidavit further says that afterwards he was introduced to Maria Di Sapio, the wife of Antonio, by the solicitor of the complainant, and that she was not the woman who appeared before him in the company of Antonio and represented herself to be his wife, and who, with him, executed, acknowledged, and delivered the deed to Atellizzi.

It thus appeared before me by the master's own sworn statement that he did not know Di Sapio and the woman who represented herself to be his wife when to a deed from them to one Atellizzi he took and certified an acknowledgment, including a separate acknowledgment of the alleged wife, which made the instrument evidence and entitled it to be recorded. He did not state, however, that he did not know Atellizzi, but it was to be inferred that he did not. Now, it appeared to me that the master did not know Di Sapio and the woman when they called upon him, but that he might have known Atellizzi, and that the latter might afterwards have made him acquainted with Di Sapio and the woman, introducing her as his wife, before the execution and acknowledging of the deed from them, although the presumption was clearly the other way; and, not wishing to do the master an injustice, I wrote him a letter asking him if he knew Atellizzi, to which he replied that Atellizzi was introduced to him by Di Sapio on the day that the deed from him (Atellizzi) to Di Sapio was executed and acknowledged.

Upon this state of facts being made to ap-

pear, I entered a rule which, after certain preliminary recitals, concluded as follows: "That at and before the time of the taking and certifying of the said acknowledgments, and since, the said H— C—, Jr., was unacquainted with and did not know either the said Antonio Di Sapio or the said woman representing herself to be Maria Di Sapio, or the said Thomas Atellizzi, from all of which it appears that the said H— C—, Jr., took said acknowledgments in violation of section 22 of 'An act respecting conveyances' (Revision of 1898 [2 Comp. St. 1910, p. 1542]), which provides that deeds and certain other instruments may be acknowledged before certain officers, including masters in chancery, such officers being satisfied that the parties are the grantors in such deeds or instruments, and it appearing that the said H— C—, Jr., was not, and could not have been, satisfied that said parties were the grantors in said deeds—that is, the true and lawful grantors mentioned and described in said deeds—and that, therefore, he unlawfully executed his office as master in chancery. It is therefore hereby ordered that the said H— C—, Jr., do show cause before the Chancellor at the state house in Trenton on Tuesday, the 24th of September instant (1912), at 10 o'clock in the forenoon, why he should not be deprived of his office as master in chancery of New Jersey, and why his commission as such should not be superseded and returned into court to be vacated and canceled, or why he should not be otherwise disciplined and punished for his unlawful execution of his office as aforesaid."

Upon the return of the rule, the master, who is also an attorney and solicitor, somewhat to my astonishment, asserted that he knew Di Sapio previously to his visit to him (the master) on the occasion of his presenting the woman as his wife, and requesting the drawing of the conveyances. His story can better be told perhaps in his own language as it appears in his affidavit on the return of the rule. It is this: "H— C—, Jr., being duly sworn according to law, on his oath, deposes and says: That he is a counselor at law of the said state of New Jersey, a master of the Court of Chancery, and one of the firm of W. I. & H. C—, maintaining an office in the city of Long Branch, in the county and state aforesaid, where he resides; that on or about the second day of December, one thousand nine hundred and ten, Mr. Edward Dambrisi, an Italian gentleman, whom deponent had previously known for some time, brought Mr. Antonio Di Sapio to their office and introduced him to deponent in the presence of W— I. C—, deponent's father; that then and there the said Antonio Di Sapio stated to deponent that his wife, Maria Di Sapio, was the owner of a certain property on Laird street, in the said city, and that

she desired to convey the same to him, her husband; not having her deed for the said property with him at that time, the said Antonio Di Sapio returned later in the day and produced to deponent two title-deeds for the said property, showing that the title thereof stood in the name of the said Maria Di Sapio, and said that Mr. Thomas Atellizzi would act as the third party through whom the property might be conveyed; that the said Di Sapio then and there requested deponent to draw deeds conveying the said property to him, and said that, if deponent would draw the said deeds, they would come up the following day and execute them.

"And deponent further says that he prepared the said deeds, as requested, and dated them the third day of December, one thousand nine hundred and ten; that on the day and year last aforesaid the said Di Sapio again called at the said office, and informed deponent that they would not be up that day to sign the deeds, as his wife had run away, and he requested deponent to hold the said deeds until she returned; that afterward the said Di Sapio called again at the said office on several different days, and informed deponent that she had not yet returned home.

"And deponent further says that afterwards, to wit, on the fourteenth day of December, one thousand nine hundred and ten, the said Di Sapio called again at the said office, and brought with him an Italian woman whom he introduced to deponent as Mrs. Di Sapio, his wife, and said that they had come up to sign the deed; that deponent talked to her, and she told him that she desired to convey her said property to her husband, and that her husband had informed her all about the said deeds; that deponent read over to them the first deed and she informed him that she could not write her name in English, but would make her mark; that, upon referring to the aforesaid title deeds, deponent then observed that in one of them the said Maria Di Sapio had there also made her mark; that then and there they executed the said deed for the said property to the said Thomas Atellizzi, dated as aforesaid, and acknowledged the same in due form of law before deponent as a master in chancery, and that thereupon deponent certified said acknowledgments upon the said deed; that before leaving that day the said Di Sapio informed deponent that Mr. Atellizzi was working that week, and would not be up then, but that just as soon as he had a day off he would be up and sign the other deed. And deponent further says that subsequently, to wit, on the twentieth day of December, one thousand nine hundred and ten, the said Di Sapio called again at the said office, and brought with him Mr. Thomas Atellizzi, and introduced him to deponent, saying at the same time that he was the man who had come

up to sign the deed; that deponent talked to the said Thomas Atellizzi, and, when deponent spoke of signing the other deed, Mr. Atellizzi replied that that was what he had come up for; that Mr. Di Sapio had told him about it; that deponent read over the said deed to him; and that then and there the said Thomas Atellizzi executed the other deed for the said property to the said Antonio Di Sapio, dated as aforesaid, and acknowledged the same in due form of law before deponent as a master in chancery, and that thereupon deponent certified said acknowledgment upon the said deed. And deponent further says that, being so acquainted with and knowing the said parties, he was satisfied that the said Antonio Di Sapio and Maria Di Sapio, his wife, and the said Thomas Atellizzi were the grantors in the said respective deeds; and that the said deeds were executed and acknowledged according to law. And deponent further says that on July 11, 1912, he signed an affidavit which was attached to and made a part of the bill of complaint in the case of Di Sapio v. Di Sapio et al., which said affidavit did not set forth that deponent knew the said Antonio Di Sapio, Maria Di Sapio (the woman who signed the said deed), or Thomas Atellizzi, or that deponent was satisfied as a master of this court that they were the grantors named in the said deeds at the time of taking the said acknowledgments; that deponent did not exactly approve of the said affidavit at the time of signing it, and he so expressed himself at that time to his said father, before whom deponent was sworn; that deponent signed the same, however, to save any further delay, thinking that the solicitors had drawn it purposely in general terms, and expecting soon to supplement it by giving the facts more fully in his testimony at the hearing of the said cause; that deponent returned the said affidavit and bill to Mr. William N. Cooper, one of the said solicitors in the said case from whom he received them on the day and year last aforesaid, together with a letter stating that the said affidavit did not exactly meet with deponent's approval, and giving his reasons as aforesaid for signing the same."

The master's father corroborates his son by an affidavit, in which he states he was present when Dambrisi brought Di Sapio to their office and introduced him to his son, that he was present also the next day when Di Sapio called again and said that his wife had run away, and was present afterwards when Di Sapio called on several different days. He says further that, before his son signed the affidavit above referred to, he heard him say that it did not exactly meet with his approval, that it was drawn in too general a way, but that he would sign it to save delay as he expected soon to be called to give the facts at the hearing, and that his son at the time he returned the affidavit

to the solicitor sent him a letter to that effect. The master also submitted an affidavit of Lillie Celli, the daughter of Dambrisi, who says that her father, a citizen of the United States who has lived in Long Branch over 30 years, is now in the kingdom of Italy, and will probably not return to this country before next spring. This, of course, was put in to excuse the want of an affidavit from Dambrisi.

The solicitor of the complainant makes an affidavit on behalf of the master, in which he states that he prepared a form of affidavit to be signed by him which he mailed to the master for the purpose of having it executed; that it was executed and returned with a letter, which he, the solicitor, had been unable to find, but that his recollection is clear that it said that the affidavit did not exactly meet with the master's approval, but that he had signed it in order to save delay; and that he undoubtedly would be called as a witness in the case, and then would go into details more fully. In fact, the complainant has two solicitors, and both swear that they saw the letter which the master says he wrote and sent with the affidavit.

It must be admitted that a man who will make an affidavit which he did "not exactly approve of * * * at the time of signing it" is very free with his oath, even if he "so expressed himself at that time." When the affidavit which he made for the complainant was sent him, and which did not state the facts truly, as he says, he was at liberty to change it before executing it, so that the truth, which it would seem was of almost vital interest to him, would appear. Why he did not do so he but feebly explains. However, such conduct, grossly careless and reprehensible as it is, does not, I presume, make a cause of moral turpitude against the person involved.

[2] I greatly fear that some masters in chancery and other officers intrusted with the power and authority to take acknowledgments to deeds of conveyance and other instruments do not fully appreciate their responsibility, and do not fully understand what is required of them in the way of executing their office in these instances. The statute (Comp. Stat. p. 1542, § 22) provides that certain officers, including masters in chancery, may take acknowledgments of deeds of conveyance and other instruments, "such officers having first made known the contents thereof to such party making such acknowledgment and being also satisfied that such party is the grantor in such deed or instrument."

Now, it must be perfectly obvious that no one can be satisfied of the identity of another unless that other is known to him. He need not be well known, he may be only casually known, but in one way or another he must be known; that is, the officer taking the acknowledgment must be satisfied in his

conscience that the party making the acknowledgment is the identical person named in and who executed the instrument. Knowledge of the grantor may be acquired by introduction from one with whom the officer is acquainted, and in whom he has such confidence that he has no doubt but that the person introduced is the person he is represented to be. If in such a situation the officer is purposely or innocently deceived, no criticism can properly be leveled against him. His action in certifying an acknowledgment after such an introduction of the grantor would be blameless, even if he were deceived. When a man appears before an officer, introduces himself, produces an instrument which he says he desires to execute, if then the officer takes and certifies an acknowledgment, certifies that he is satisfied that a perfect stranger is the identical grantor named in the instrument, he solemnly certifies to an untruth, and should be deprived of his office, or otherwise appropriately punished. And he is doubtless liable for damages sustained by reason of his false certificate, if, in fact, the grantor was falsely personated. 1 Cyc. 628. A well-considered case on the subject under discussion is that of *Wood v. Bach*, 54 Barb. (N. Y.) 134, at page 142, in which the remarks of Judge Cardozo are particularly apposite. He said: "The statute requires that an officer taking an acknowledgment shall know or have satisfactory evidence that the person making such acknowledgment is the individual described in and who executed the conveyance; but it nowhere prescribes either how such knowledge shall have been acquired, nor that it must have existed for any definite period of time. That being so, who shall fix a rule by which it shall be determined whether the commissioner was justified either by the length of his acquaintance, or the method of forming it, in certifying that he knew the party? Must it not necessarily be a question for the conscience of the officer taking the acknowledgment, and is not that just where the statute meant to leave it, if there were anything at all upon which the officer's conscience could be called upon to act? As no specific period of prior acquaintance is fixed by the statute, who shall say that one month would not be sufficient if the officer taking the acknowledgment so regard it? And if one month, why not an hour, or the moment at which the acknowledgment is taken? It is clear that the right to take the acknowledgment does not depend upon the length of the officer's acquaintance with the person. Is that right dependent on the manner in which the officer's knowledge is acquired? The statute does not say so. The means through which the officer obtains knowledge of the person's identity are not material. One officer might consider a person known to him through a method that another might entirely reject. But in this case the usual means of knowledge were acted on and re-

ceived by the officer as sufficient. Knowledge of persons and their identity is most frequently acquired by introduction through mutual friends, and, when such introduction has taken place, the parties certainly know each other. Every-day men, in social life, thus become known to each other, and I never heard that such an introduction was not sufficient, or that any length of time after it must elapse, to justify a statement or certificate that they were acquainted. When an introduction does not proceed from such a source as satisfies the officer's conscience, undoubtedly he should not certify that he knows the party, but should require 'evidence' which, of course, must be on oath; but when the character of the introducer, whom the officer knows, conveys knowledge to the officer's conscience, he may well be satisfied and may properly give the certificate. In this case the parties making the acknowledgments were introduced to the officer, the ordinary way of becoming known, by one in whom he had such confidence that 'he had no doubt' that they were the persons they purported to be. Upon that, in social life, he would have been regarded as knowing them, and knowing them in social life he had the right, if his own conscience were convinced, from that knowledge of their identity, to take their acknowledgments in his official capacity."

Upon this whole matter I have been able to arrive at the conclusion that the proprieties of the case do not call for the removal of the master from his office or that he be otherwise punished; sufficient discipline, in my opinion, arising out of the exposure of the matter, and the censure necessarily herein and hereby visited upon him.

MACHLIN v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey. Dec. 17, 1912.)

(*Syllabus by the Court.*)

1. CARRIERS (§ 320*)—INJURY TO PASSENGER—EVIDENCE—DIRECTING VERDICT.

A motion to nonsuit was properly denied, where the evidence justified a finding that the plaintiff, a passenger, was injured through the giving way of the adjustable handrail, which he took hold of in boarding a vestibule car of the defendant's train, because the lower end of the rail had not been put in the socket by the defendant's servant, who adjusted it for the assistance of passengers boarding the car at that stop.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

2. TRIAL (§ 386*)—BY JUDGE—REQUESTS.

Requests to apply certain rules of law, submitted to a judge sitting without a jury, are properly refused, when they are either unsound or inapplicable to the facts in evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 901, 902; Dec. Dig. § 386.*]

Appeal from District Court of East Orange.

Action by Jacob Machlin against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Vredenburgh, Wall & Carey, of Jersey City, for appellant. Charles M. Mason, of Newark, for appellee.

TRENCHARD, J. [1] This is the defendant's appeal from a judgment rendered for the plaintiff by the judge of the district court, sitting without a jury. From the evidence at the trial it was open to the judge to find that the plaintiff, a passenger, was injured through the giving way of an adjustable handrail, which he took hold of in boarding a vestibule car of the defendant's train at Newark, because the lower end of the rail had not been put in the socket by the servant, who adjusted it for the assistance of passengers boarding the car at that stop. The judge rendered a judgment compensating the plaintiff for his injury. We think the motion for nonsuit was properly denied. There was a reasonable inference of a negligent omission of the servant in failing to secure the rail properly, deducible from the fact that it was out of the socket when the plaintiff grasped it.

[2] At the conclusion of the case the judge was requested to apply certain rules of law in accordance with the procedure pointed out in *Mills v. Mott*, 59 N. J. Law, 15, 34 Atl. 947. In effect he refused to apply them. This was proper, if they were either unsound or inapplicable to the facts in evidence. We think they were. The first and third were inapplicable, and the second, fourth, and fifth were wrong in law.

The judgment will be affirmed.

KELLERS v. KELLERS et al.

(Court of Errors and Appeals of New Jersey. Nov. 19, 1912.)

WILLS (§ 616*)—CONSTRUCTION—ESTATE DEVISED.

A will devised to testator's wife his entire estate to her, her heirs and assigns forever, if she be living at the time of his death, otherwise "that my estate be divided among my children" two shares to each daughter and one share to each son, and further provided that, should the wife acquire the estate, she might dispose of it by will, but, should she die without making a will, that testator's will should operate and his estate be divided among his children. Held, that the wife merely took the right to enjoy the profits thereof for life, and the further right to dispose thereof by will, so that, upon her failure to dispose of the estate by will, testator's children would take it as tenants in common.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418-1430; Dec. Dig. § 616.*]

Appeal from Court of Chancery.

Action by Johanna A. L. Kellers against Frederick T. Kellers and others. From a decree of the Court of Chancery for defendants (79 N. J. Eq. 412, 82 Atl. 94), plaintiff appeals. Affirmed.

John F. Gough, of Jersey City, for appellant. Merritt Lane, of Jersey City, for respondents.

GUMMERE, C. J. The bill in this case was filed under the act to quiet title to lands (Comp. Stat. p. 5399); and the rights of the parties turn upon the true construction of the following paragraphs contained in the will of Frederick N. Kellers, deceased, who was the husband of the complainant, and the father of the defendants:

"I give, devise and bequeath to my beloved wife Johannah A. L. Kellers my entire estate both real and personal of whatsoever the same may consist and wheresoever situate, to her, her heirs and assigns forever, if she be living at the time of my decease. In case my said wife should die before my decease it is my will, and I direct, that my estate be divided among my children * * * each of my daughters to receive two portions, or shares, to each of my sons one share, and to them and their assigns forever."

"Should my said wife acquire my estate as aforesaid she may dispose of my estate by will as she sees fit, should she however die without making a will, then this will shall operate and my estate be divided between my children as hereinbefore provided."

The complainant's contention is that by this devise she took an absolute estate in the lands of her husband, notwithstanding the limitation over contained in it. The defendants, on the other hand, contend that by the proper construction of the will their mother was given a life estate in the property with a power to dispose of it by will, and not otherwise; and that, in default of her making such disposition of it, it will pass to them under their father's will as absolute owners thereof.

The learned Vice Chancellor held that the complainant was not seised in fee simple of the property devised by testator's will, but that she had the right to enjoy the rents, issues, and profits thereof during her natural life, and the further right to dispose thereof by a last will and testament, but in no other way and that the defendants, the children of the testator, were entitled, in the event of the complainant dying without leaving a last will and testament, to have the property pass to them as tenants in common, two shares to each of the daughters, and one share to each of the sons.

We concur in the result reached by the court below. The devise which it was called upon to construe so far as its legal effect is concerned differs in no material respect from

that which was before this court in the early case of *Kent v. Armstrong*, 2 Halst. Chy. 637. It was held in that case that the primary devisee took a life estate only, with a power of testamentary disposition, and that in the event of her dying intestate the executory devise over became operative. Thirty-five years later we again had before us in the case of *Cantine v. Brown*, 46 N. J. Law, 599, the question of the construction of a devise similar to that under scrutiny in *Kent v. Armstrong*, and declared that the decision in the earlier case must be regarded as the law of construction in this state on such devises. All that the Court of Chancery, therefore, was required to do in its consideration of this case, was to ascertain whether the devise in the present case could be fairly differentiated from that contained in the will which was the subject of litigation in *Kent v. Armstrong*, and if it could not be, then to apply the rule of construction promulgated in that case.

The decree under review will be affirmed.

TREASURER OF CITY OF ELIZABETH v. LYTTON.

(Supreme Court of New Jersey. Dec. 18, 1912.)

(Syllabus by the Court.)

1. THEATERS AND SHOWS (§ 3*)—LICENSE—PUBLIC DANCING.

An ordinance declaring that "any person * * * who shall publicly * * * perform, or cause to be publicly * * * performed, in any place whatever, for any price, gain or reward, any * * * dancing, * * * feats of uncommon dexterity and agility of the body, * * * and any * * * person having possession or care of any building * * * who shall permit any performance of any kind in such building, * * * without first having obtained license for that purpose, shall be liable to a fine of fifty dollars for every offense," applies to an individual performer who may be hired to help make up an exhibition.

[Ed. Note.—For other cases, see *Theaters and Shows*, Cent. Dig. § 8; Dec. Dig. § 3.*]

2. CERTIORARI (§ 64*)—REVIEW—WAIVER OF OBJECTIONS.

On certiorari, the Supreme Court need not consider matters which, although they appear in the state of the case, are not referred to in the argument or brief presented on behalf of the prosecutor.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 174, 175; Dec. Dig. § 64.*]

Certiorari by Nellie Lytton to review a conviction of violation of an ordinance of the City of Elizabeth. Conviction affirmed.

Argued June term, 1912, before **TRENCHARD, PARKER, and MINTURN, JJ.**

Abe J. David, of Elizabeth, for prosecutor. James C. Connolly, of Elizabeth, for defendant.

TRENCHARD, J. The prosecutor, Nellie Lytton, was convicted in the Elizabeth police court of publicly "dancing and performing

feats of uncommon dexterity and agility of the body" for gain or reward, in a hall in Elizabeth, without first having obtained a license for that purpose, contrary to section 190 of an ordinance of that city. The writ brings under review the legality of that conviction.

[1] Many reasons for reversal were filed, but counsel for the prosecutor has condensed them into one proposition which he has thus expressed in his brief: "The ordinance is meant to apply, not to any individual performer or performers who may be hired to help make up a show or exhibition, but to the person or persons directly responsible for the performance or exhibition, either by presenting it or furnishing the place for its presentation." That is the only reason argued, and we think there is no merit in it. The ordinance alleged to have been violated provided: "Sec. 190. Any person * * * who shall publicly * * * perform, or cause to be publicly * * * performed in any place whatever, for any price, gain or reward, any * * * dancing, * * * feats of uncommon dexterity and agility of the body, * * * and any * * * person having possession or care of any building * * * who shall permit any performance of any kind in such building * * * without first having obtained license for that purpose, shall be liable to a fine of fifty dollars for every offense." We think that a consideration of the language of the ordinance renders it quite plain that it applies to an individual performer who may be hired to help make up an exhibition, as well as to the proprietor of the place of the performance. No doubt, under it, a license obtained by the proprietor of the place for the entire performance would protect any individual performer. But this latter question does not call for decision in this case, since no license was obtained or applied for by any person for the performance either in whole or in part.

[2] We wish to be understood as expressing no opinion as to the legality of the conviction, or the ordinance, in any other aspect than that herein considered. No other objection was raised in the argument or brief presented by counsel, and no other need be considered. *Sharp v. Sweeney*, 74 N. J. Law, 428, 85 Atl. 859.

The conviction will be affirmed, with costs.

KAIGHN v. FRIDAY et al. SAME v. FOX et al. SAME v. ERRICKSON et al.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(*Syllabus by the Court.*)

MECHANICS' LIENS (§ 288*)—PROCEEDINGS TO ENFORCE—QUESTION FOR JURY.

In a suit upon a mechanic's lien claim between the materialman and the owners and

builder, the latter testified that he had surrendered his holdings of stock in the plaintiff's company to the company in full satisfaction of the claim in suit, and that, under an oral agreement between him and the company, the surrender had been accepted for that purpose. This testimony was corroborated by another witness, and denied by two officers of the company. *Held*, that an issue of fact upon the question of payment was thus raised, and that the direction of a verdict for the defendant was error.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 583-589; Dec. Dig. § 288.*]

White, J., dissenting.

Error to Circuit Court, Cape May County.

Action by William P. Kaighn, trustee for the Five Mile Beach Lumber Company, bankrupt, against Mary E. Friday and others; by the same plaintiff against Marian Fox and others; and by the same plaintiff against Annie Errickson and others. Judgment for plaintiff, and defendants bring error. Reversed, and venire de novo awarded.

Matthew Jefferson and John W. Wescott, both of Camden, for plaintiffs in error. Bleakly & Stockwell, of Camden, for defendant in error.

MINTURN, J. These three cases involving the right of the plaintiff to recover upon mechanic's liens filed against the owners and the builders were before this court upon another phase in *Kaighn, Trustee, v. Friday et al.*, reported in 77 N. J. Law, 709, 73 Atl. 540, and as a result of that review the cases were tried anew upon a venire de novo. The result of the second trial is before us upon writ of error removing a judgment in favor of the plaintiff based upon the direction of a verdict by the trial court. By a stipulation entered into between the parties the issue was limited to the question of payment, and this court upon its previous review of the case involving a consideration of that stipulation held that the effect was to exclude all other defenses.

Upon this trial the case was tried by attempting to prove payment *inter alia* by two methods: First, by an adjudication in bankruptcy of the contractor, Garrison, in which proceeding the plaintiff it was contended, sought to prove its claim against the contractor, which claim included the amount due upon these lien claims, and it was insisted that a pro rata payment of a share of Garrison's estate had been made to the plaintiff which should be credited upon this demand; and, secondly, by proving actual payment by Garrison to the plaintiff by a surrender of his stock holdings in the plaintiff's company under an oral agreement with the plaintiff's officers that the absolute surrender of the stock should cancel the indebtedness of Garrison to the plaintiff, including the amount claimed to be due upon these lien claims. To prove payment by the first method the defendants offered at the trial by consent of

the parties a special plea by Garrison which was objected to as insufficient and immaterial, and the plea was overruled as though a demurrer had been filed thereto, and this action of the trial court is assigned as error. To prove payment in fact, Garrison testified that his stock held at the time by the plaintiff as collateral security for the payment of his own indebtedness was surrendered by him to the company in full payment of his entire indebtedness to it, including the amount claimed in this controversy upon these lien claims, and that the company had accepted it as full payment in an oral agreement to that effect, entered into by Garrison and the representatives of the plaintiff in the presence of one Pharo, who also testified to the making of such an agreement in his presence. The making of this agreement was contradicted by the president and secretary of the company, so that a distinct issue of fact was thus presented upon the essential issue litigated in the cause. Upon the question raised by the overruling of the plea we find it unnecessary to pass, since the plea was never entered upon the record, and forms no part of the pleadings before us.

Upon the second inquiry whether in view of the existence of a distinct issue of fact the surrender of the stock of Garrison had been accepted by the company in full settlement of the indebtedness litigated upon these lien claims, we think there was a controverted question of fact for the jury to determine, and that the trial court erred under the circumstances in ignoring it and directing a verdict for the plaintiff.

The judgment will be reversed and a venire de novo is awarded.

WHITE, J., dissenting.

LYNCH v. PUBLIC SERVICE RY. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 19, 1912.)

COSTS (§ 230*)—ON APPEAL—ORDERING NEW TRIAL.

Under P. L. 1910, p. 211, re-enacted by P. L. 1911, p. 756, § 1, providing that the prevailing party in any action in courts of law shall be entitled to costs, except where otherwise provided by law, and unless the court before whom the action shall be taken shall order otherwise, an application to the Court of Errors and Appeals by plaintiff for costs in that court upon reversing a judgment for defendant and awarding a new trial is addressed to its discretion, and where the reversal was due solely to the mistakes of law by the trial judge, and does not finally determine any issue, but merely leaves the parties where they were before trial, the Court of Errors and Appeals will not allow plaintiff costs in that court.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 869-876; Dec. Dig. § 230.*]

Action by Mildred Lynch against the Public Service Railway Company. On plaintiff's motion to allow costs in the Court of Errors

and Appeals upon reversing a judgment for defendant. Motion denied.

See, also, 83 Atl. 382.

Benjamin M. Weinberg, of Newark, for the motion. Lefferts S. Hoffman, of Newark, opposed.

PER CURIAM. Upon the trial of this case a judgment resulted in favor of the defendant. A review being had in this court, that judgment was reversed and a venire de novo awarded. The plaintiff now asks to be allowed to have her costs of suit in this court taxed against the defendant.

Prior to the passage of the act of April 8, 1910, entitled "An act concerning the fees and costs, and the taxation thereof, in the courts of law in this state" (P. L. p. 211), no costs were recoverable in this court on the reversal of a judgment, and the award of a venire de novo. *Lehigh Valley R. R. Co. v. McFarland*, 44 N. J. Law, 674. By force of the first section of that act (which was re-enacted May 2, 1911 [P. L. p. 756]), the prevailing party on the review of a judgment at law in this court is entitled to costs, except where otherwise provided by law, unless we shall otherwise order. *International Watch Co. v. Del., Lack. & West. R. R. Co.* (Sup.) 82 Atl. 730. The present application is, consequently, addressed to the discretion of the court.

The judgment brought up for review was reversed for error committed by the trial court. Neither party, of course, was responsible for the erroneousness of the ruling which necessitated the reversal. Both parties suffered from it, by being put to expense which otherwise they would not have been compelled to incur. The statute, by conferring power upon this court to withhold costs from the successful party, contemplates that cases will arise in which such power should be exercised. We think that a case in which the reversal is due solely to a mistake made by the trial judge, and does not finally determine any issue between the parties, but leaves them just as they were before the trial was had, except that they have both been compelled to expend, without benefit to themselves, considerable sums of money, is a proper one in which to exercise such power.

The application of the plaintiff is denied.

TAPSCOTT et al. v. McVEY.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

CONTRACTS (§ 187*)—CONTRACTS FOR BENEFIT OF THIRD PARTY.

A provision in a written contract between vendor and vendee for the sale of real estate contained this provision: "And it is further agreed by the parties hereto that the said deed

shall be delivered and received at the office of Tapscott Bros. who are hereby recognized by the party of the first part [the defendant] as the brokers in the transaction, and entitled to 2½ percentage on the amount the property is sold for." *Held*, in a suit by the real estate brokers to receive their commissions upon a completed sale, that under the provisions of chapter 251 of the Laws of 1902, conferring the right to recover upon a third party, where the contract is made for his benefit, the broker had a legal cause of action.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

Error to Supreme Court.

Action by Charles S. Tapscott and another against Lucy C. McVey. Judgment for plaintiffs in the district court was affirmed by the Supreme Court (81 Atl. 348), and defendant brings error. Affirmed.

Robert Newton Crane, of Plainfield, for plaintiff in error. Vincent W. Nash, Jr., of Plainfield, for defendants in error.

MINTURN, J. The following provision in a contract for the sale of real estate furnished the basis for the claim of the plaintiffs in this action: "And it is further agreed by the parties hereto that the said deed shall be delivered and received at the office of Tapscott Bros. who are hereby recognized by the party of the first part [the defendant] as the brokers in the transaction, and entitled to 2½ percentage on the amount the property is sold for."

Judgment was rendered for the plaintiffs in the district court, and the Supreme Court affirmed it. The objections to that affirmation upon this writ of error are contained in seven assignments of error, only three of which, so far as the record shows, were presented to the attention of the Supreme Court, and upon well-settled rules of practice, applicable to the reviewing tribunal, the remaining assignments are not legally before us. *Van Vechten v. McGuire*, 70 N. J. Law, 657, 58 Atl. 331. In the district court the legal questions presented were raised upon a motion to nonsuit, and upon a motion for judgment at the end of the case.

The only questions of law presented to the Supreme Court were, first, that the contract sued upon was an entire contract, and had not been fully performed. Since this question had not been presented to the trial court, it was not properly before the Supreme Court, and cannot be considered here. *Van Vechten v. McGuire*, supra. In any event, it presented a question of fact not reviewable here. P. L. 1910, p. 236.

Secondly, because the title to lands came in question, and the district court was therefore without jurisdiction. The Supreme Court found this objection to be without force, and without passing upon the legal effect of the Act of 1910, p. 228, we concur in that view.

The only question before the district court upon this phase of the litigation was whether

or the plaintiffs had earned their commissions, in view of the defendant's attempt to show that the title he had received from the vendor was defective. The transaction had been closed, the conveyance had been recorded, and title had passed, so that the essential legal requirements to sustain the plaintiffs' claim were in evidence. It is difficult, under such circumstances, to perceive how the plaintiffs could be affected by any claim of defective title, which we may assume was properly safeguarded in favor of the vendee by a covenant in the deed of conveyance. In any event, the trial court found, in reaching its judgment, that the title to lands was not involved; and the defendant is precluded in the Supreme Court from disputing that finding of fact, where there is some testimony, as well as the essential facts involved in the controversy, to sustain it. *Lavin v. Public Service Ry. Co.*, 77 N. J. Law, 217, 71 Atl. 58.

The third reason urged in the Supreme Court for reversal was that the statute of frauds intervened to prevent a recovery. This objection does not seem to have been urged in the trial court, and was not considered in the Supreme Court, and we are therefore not called upon to deal with it here. The meritorious question in the case was that dealt with in the Supreme Court, i. e., whether, under the provisions of the contract between the vendor and vendee, a legal contract was evolved in favor of the plaintiffs, under the provisions of chapter 251 of the Laws of 1902: The Supreme Court satisfactorily dealt with this phase of the case in finding that such a contract existed under the clear intent of the statute, and the judgment will therefore be affirmed.

MEYER & PETER v. CREIGHTON.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 706*)—COLLISION WITH AUTOMOBILE—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In the trial of an action brought by the plaintiffs to recover damages for injuries to their motor vehicle, sustained from a collision with defendant's automobile in a public highway, the plaintiffs' evidence showed that while their machine was being driven at a rate of speed of about 8 miles an hour, and was turning into a private road, the defendant's car, running at a rate of speed of 45 miles an hour, overtook it and collided with it. At the close of the plaintiffs' proofs the defendant moved the court below to nonsuit, because no negligent management by defendant's car had appeared. The motion was denied. *Held*, that the rate of speed at which the latter machine was being driven when it overtook and collided with the plaintiffs' vehicle was evidence of its negligent operation, sufficient to put the defendant upon his defense. *Held*, also, that the further motion made by defendant to nonsuit, on the ground that the plaintiffs' proofs show-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed their driver had been guilty of contributory negligence, was, under the circumstances, a jury question, and was properly denied.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

2. EVIDENCE (§ 341*) — DOCUMENTARY EVIDENCE.

A certificate issued by the commissioner of motor vehicles of this state, under his hand and seal, certifying as follows, viz., "We have searched our files and fail to find that a driver's license has been issued to Herman Herbert," is not a copy of any act, rule, order, or decision made by the commissioner, or of any paper filed in his office, and is not evidential for any purpose.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1289-1292; Dec. Dig. § 341.*]

Error to Supreme Court.

Action by Jacob S. Meyer and Joseph Peter against Harold T. Creighton. Judgment for plaintiffs, and defendant brings error. Affirmed.

James R. Nugent, of Newark, for plaintiff in error. Lindabury, Depue & Faulks, of Newark, for defendants in error.

VREDENBURGH, J. This suit was brought by the owners of an electric delivery wagon for injury done to it on July 15, 1911, in a public highway in Deal, N. J., from a collision with an automobile belonging to the defendant.

Evidence at the jury trial under review (the second jury trial of the cause) showed that both motor vehicles were being driven, at the time they collided, in the same (westerly) direction along Roseld avenue, a street about 35 feet wide from curb to curb; that the plaintiffs' vehicle was running ahead of the automobile; and that, as the driver of the former was turning from the avenue into a private road leading out from the south side of the avenue, the defendant's car overtook it from the rear and collided with it, inflicting serious injury upon it. The plaintiffs' machine driver testified he was going at a speed of about 8 miles an hour along the right of the center of the avenue when he turned a little to the right and started to turn to the left, in order to enter the private road; that when he reached a point nearly opposite this road, and before he turned to the right, he gave the usual and customary signal (holding out his left hand), so that it could plainly be seen by any driver behind him that he was going to turn to the left, and had gone about 6 or 7 feet to the left when he saw there was a car back of him, and then the collision occurred. He says he had received no warning or notice of any kind before the collision of the approach of any automobile from behind. Other evidence of the circumstances of the collision and of its effects was presented before the court by the plaintiffs, to which it is not here necessary to advert.

At the close of these proofs motions were made by the defendant's counsel that the court order a nonsuit, because it was insisted there was not proof of negligence on the part of the defendant sufficient to carry the case to the jury, and because the evidence adduced had shown the plaintiffs' driver had been guilty of contributory negligence sufficient to bar recovery. These motions were denied, and it is now urged, after error assigned, that there was legal error committed by such denial.

Upon such demurrers to the sufficiency, in law, of the plaintiffs' proofs, the first question confronting us is: Was there any substantial proof (not a mere scintilla of evidence) before the trial court from which the jury could have reasonably concluded the defendant had been guilty of actionable negligence in the premises?

[1] The negligence averred in the declaration, which the plaintiffs were obliged, in order to entitle them to recover, to establish by proof, was that the defendant's servant in charge of his automobile so negligently drove it at an excessive rate of speed, and so negligently managed it without any notice or warning of its approach, that it was driven into and collided with the plaintiffs' motor vehicle so as to greatly wreck and damage it, notwithstanding the latter was being driven with due and proper care. In support of these averments the plaintiffs proved, in addition to the circumstances of the collision above set forth, that defendant's automobile was being driven, at the time it overtook the plaintiffs' car, at the unlawful speed rate of 45 miles an hour.

The Legislatures of 1906 and 1909 enacted laws containing provisions intended, as I understand them, to secure, primarily, the *safety* of traffic and travel in the public highways of the state against the dangers liable to result to person and property arising from the high rate of speed which motor vehicles were then known by the public to be capable of attaining.

Part 7, p. 189, of Laws of 1906, is entitled "Provisions concerning *safety* to traffic," and section 23 thereunder provides as follows, viz.: "The following rates of speed may be maintained, *but shall not be exceeded*, upon any public street, public road or turnpike, public park or parkway, or public driveway or public highway, in this state by any one driving a motor vehicle"—and then follow subdivisions 1, 2, and 3 of that section, fixing certain slow rates of speed per mile at corners and intersections of prominent crossroads (not now material to be considered); but its fourth subdivision provides as follows, viz.: "Elsewhere and except as otherwise provided in subdivisions one, two and three of this section, a speed of one mile in three minutes; provided, however, that nothing in this section contained

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

shall permit any person to drive a motor vehicle at any speed greater than is reasonable, having regard to the traffic and use of highways, or so as to endanger the life, limb or injure the property of any person; and it is further provided that nothing in this section contained shall affect the right of any person injured, either in his person or property, by the negligent operation of a motor vehicle to sue and recover damages as heretofore." Subsequently, in the year 1909, the Legislature enacted certain amendments to this law of 1906; the only change now necessary to be noticed being that the maximum speed allowed under the said subdivision 4 of section 23, Act of 1906, as amended by Laws 1909, p. 465, was enlarged from 1 mile in 8 minutes to a speed of 25 miles per hour.

The rate of speed of 45 miles an hour, which the plaintiffs' evidence shows the defendant's motor vehicle was running in the public highway when it overtook and collided with that of the plaintiffs, was expressly forbidden by the law just quoted, and such fact, I think, should, under the circumstances of the collision above recited, be held to be evidence of the defendant's negligence, sufficient to put him upon his defense, and justified the denial of the defendant's motion. Independently of any statute, the driving of any vehicle on a public highway at a rate of speed that is inconsistent with such control of the vehicle as is necessary to avoid running down other vehicles going in the same direction is some proof of negligence.

It is further urged that the plaintiffs' proofs showed their driver had been guilty of contributory negligence in the management of their motor vehicle.

In *Sutton v. Bell*, 79 N. J. Law, 507, 77 Atl. 42, where the circumstances of the collision between two automobiles upon the public highway were remarkably similar to those of the case under review, this court, in holding that the trial court rightly denied the defendant's motion to take the case from the jury (made upon the ground of the plaintiff's alleged contributory negligence), said: "That the existence of negligence, whether of the plaintiff or of the defendant, depended upon the conclusion to be reached from a variety of circumstances considered, not as isolated occurrences, but altogether, and in view of their relation to and reaction upon each other. To draw a conclusion as to the conduct of the parties under circumstances thus connected is of the very essence of the jury functions."

The principle thus declared pointedly applies, I think, to the question of the plaintiffs' contributory negligence in the case at bar; and such question must, in the light

of the circumstances already sufficiently set forth, be regarded as falling within the province of the jury.

It is also separately assigned for error that the trial court erred in denying defendant's motion, made at the close of the defendant's testimony, that the court direct a verdict for defendant upon the same ground taken on the motion to nonsuit. This motion was also properly denied. While the defendant's proofs tended to contradict those of the plaintiffs, they did not alter or affect the character of the issues, which, under the evidence, belonged to the province of the jury. *Consolidated Traction Co. v. Haight*, 59 N. J. Law, 577, 37 Atl. 135; *Zolpher v. Camden, etc., Ry. Co.*, 69 N. J. Law, 417, 55 Atl. 249.

Error is further thus assigned, viz.: "That the court below admitted in evidence, against the defendant's objections, the depositions of the witnesses Reiss and Glaze." Upon turning to the printed brief of counsel for the plaintiffs in error, we find no point raised or reason given against the admissibility in evidence of these depositions. The only insistence seems to be that it was error to permit them to be taken to the jury room. The brief says: "In taking these depositions to the jury room, it gave the testimony of these two witnesses undue prominence over the testimony of other witnesses. The jury were judges of the facts," etc. But after examining the whole record we find nothing to show that in fact these depositions were taken to the jury room.

[2] It is further and lastly assigned for error that the court below refused to admit in evidence a certain certificate of the Secretary of State relating to the license of Herman Herbert (the plaintiffs' driver). This certificate, issued by the commissioner of motor vehicles under his hand and seal, certifies as follows, viz.: "We have searched our files and fail to find that a driver's license has been issued to Herman Herbert." But this certificate cannot be regarded as evidential for any purpose. Section 18 of the automobile law provides as follows, viz.: That "the commissioner of motor vehicles shall keep a record of all his official acts, and shall preserve copies of all decisions, rules and orders made by him, and shall adopt an official seal. Copies of any act, rule, order or decision made by him, and of any paper or papers filed in his office may be authenticated under said seal, and when so authenticated shall be evidence equally with and in like manner as the original." For such a certificate as that offered in evidence there is no authority given in the law, and it was therefore properly excluded.

The judgment below, which was for the plaintiffs, is, for the above reasons, affirmed.

TOWNSHIP OF FRANKLIN v. JONES.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1912.)

(*Syllabus by the Court.*)

DISCOVERY (§ 8*)—PROCEEDING IN EQUITY—
GROUNDS.

A prayer for discovery in a bill in equity, in order to give jurisdiction in a suit otherwise cognizable at law, will not be deemed sufficient if it is not in aid of the facts necessary to establish the case of the complainant.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 9; Dec. Dig. § 8*]

Appeal from Court of Chancery.

Bill in equity by the Township of Franklin, in the County of Gloucester, against Wilson T. Jones. From an order overruling defendant's demurrer, he appeals. Reversed.

Austin H. Swackhamer, of Woodbury, for appellant. Harvey F. Carr, of Camden, for respondent.

VREDENBURGH, J. This bill is filed by the township against its clerk to collect from him various sums of money charged to have been illegally paid to and received by him from the township for his services and salary as clerk of the township. It exhibits certain payments made by it to him taken from the township ledger and minute books, commencing in the year 1893 and ending March 4, 1910, totalling the sum of \$3,050.37, purporting to have been paid him at certain dates during these years, for his attendance at committee meetings, for his services as township clerk, and for his salary as such clerk. These payments for various reasons set forth in the bill are charged to have been unlawful and contrary to the provisions of the statute in such case provided.

The prayer of the bill, so far as now material, is that the defendant may set forth and discover what services were rendered by him as clerk during his continuance in office, for which he was entitled to be compensated by law, the nature and particulars of the services for which he presented bills or statements, and how the same were made up, and what particular services, item by item, are comprehended thereby, and discover how many meetings of the township committee he attended as clerk thereof, and that he may be decreed to account to the complainant, and to pay over to it all moneys paid to him as aforesaid to which he was not entitled by law.

Demurrer to the bill was filed by the defendant setting up that the complainant had not stated such a case as entitled it to any discovery from the defendant or any relief against him as to the matters contained in the bill, that the facts stated in the bill did not bring the cause under any head of equity jurisdiction, and that the complainant had an adequate remedy at law, and other causes

not necessary to be noticed. The demurrer was overruled in the court below.

It is evident from the statement on the face of the bill and its prayer for discovery that this is a pure collection suit by a creditor against his debtor for money had and received to the use of the former for which an action at law will lie, and that no fiduciary relation existed between the parties in respect to the money sued for. It is also plain that the discovery prayed for is not such as will give jurisdiction in equity, since the matter sought to be elicited relates solely to the defense which the complainant expects the defendant will interpose to its suit, and is not matter sought for in aid of the facts necessary to establish complainant's case.

Under the principles settled in this court in the suit between the same township and Mathias F. Crane, decided at the present term, and for reasons given in the opinion there filed, I think the demurrer should have been sustained, and the order overruling it should therefore be reversed.

WILSON v. WEST JERSEY & S. R. CO. et al.
(Court of Errors and Appeals of New Jersey.
Nov. 20, 1912.)

(*Syllabus by the Court.*)

CARRIERS (§ 356*)—CARRIAGE OF PASSENGERS
—AUTHORITY OF TICKET COLLECTOR.

The authority of a ferry ticket collector to represent his company in the collection of ferriage at its entrance gates is limited to the collection from each passenger of either cash, or its equivalent—i. e., a ticket valid upon its face for ferry passage—and, where the statements of the passenger as to the use of his ticket conflict with its face marks, the collector is not authorized to either inquire into, or decide upon, the truth of such statements, but must be governed solely by the intrinsic effect of the ticket as expressed on its face at the time of its tender for passage.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1409, 1410, 1423-1432; Dec. Dig. § 356*]

Error to Circuit Court, Camden County.

Action by J. O. Wilson against the West Jersey & Sea Shore Railroad Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Wilson & Carr, of Camden, for plaintiff in error. Gaskill & Gaskill, of Camden, for defendants in error.

VREDENBURGH, J. The plaintiff, a lawyer residing in Collingswood, N. J. (distant a few miles from Camden), purchased from the West Jersey & Sea Shore Railroad Company a series of tickets which entitled him to passage, in either direction, by boat over the ferry between Philadelphia and Camden, and from the latter city by train upon the defendants' railroad to Collingswood. The tickets consisted of two separable parts, one

part in blue color, applicable to the ferry trip, and the other in white, applicable to the railroad passage. On the Camden side of the river, in addition to the ferry entrances, there is a train gate so situated that a passenger, after being admitted within this train gate, could take the boat and cross the river to Philadelphia, or take a railroad train to Collingswood and other points in New Jersey, and all passengers passing through this gate were required by the regulations of the company to have their railroad tickets examined and punched by the ticket collector there stationed for that purpose. The tickets were punched by a distinguishing cancellation mark, by the use of a punch making a small cut through the ticket of a crescent design "C." Special written instructions had been issued under date of May 23, 1908, by the defendants to their ticket collectors who collected ferry tickets on the Philadelphia side of the river that they "should bear in mind that 'C' cut must be regarded by them as indicating that ferry passage has been taken, the same as the ordinary round cut."

On the afternoon of May 16, 1911, the plaintiff, being in Camden, presented his blue ferry ticket at the entrance gates of the ferry to the ticket collector there, who canceled the ticket by punching a cut through it of the shape of a "C," and, having returned it to the plaintiff, admitted him through the gates. The latter, however, finding, as he testified, that his train to Collingswood had gone, says he took neither train nor ferryboat, but, retaining his canceled ticket, used another mode of conveyance from the ferryhouse. On the evening of the same day the plaintiff, having gone to Philadelphia, and intending, he says, to cross the river and take a train to his home, entered the Market street ferryhouse and offered for his ferriage to the collector of ferry tickets there the blue canceled ferry ticket he had retained, which the collector refused to accept, and at the same time told the plaintiff that it was not good for his ferriage because of the crescent punch mark upon it. Notwithstanding this refusal, the plaintiff, asserting that he had not used the ferry ticket for either ferriage or train, and claiming his right to use it, entered the ferryboat. While he was standing upon the boat, and before it had left the Philadelphia side, an employé of the ferry company went to him and notified him that he had not paid for his ferry passage, and would have to get off the boat. He declined to do so, and his ejection from the boat immediately followed. The present action is brought by him to recover damages for such ejection.

From what has preceded it will be seen that the defendants' agent in refusing to accept the canceled ferry ticket as a payment for ferriage acted upon the above-stated instructions of the company to him requiring him to treat the plaintiff's ferry ticket (mark-

ed on its face a "C" cut) as indicating that ferry passage had been taken upon it, and consequently as invalid as a tender for future ferriage. Unless we are prepared to hold that it was the duty of the ticket collector at the entrance gate to accept the statement of the plaintiff that he had not used the tendered ticket for prior passage as correct, notwithstanding the contradiction implied by the face marks on his ticket, it must be conceded, I think, that he is without legal standing here. The practical difficulties of a ticket collector correctly ascertaining at the ferry gates during the rush of such travel at these congested entrances whether a canceled ticket has been used by a passenger for a previous trip or not obviously forbid such an inquiry, and demonstrate the reasonableness of the defendants' instructions in that regard. It should not escape attention that it appeared by the evidence in the case that under what was called a prescribed custom of the company, in cases where the passenger, after the cancellation of his ticket, and his admission within the ferry shed, had not chosen to take a ferryboat, he was entitled, upon application to the ticket collector who had canceled his ticket, to have it validated for a future ferry trip by that officer by his putting an encircling mark upon the face of the ticket around the cut "C," together with the initials of his name. But, this course not having been pursued by the plaintiff, it is evident that his right to ferry passage upon his ticket as it then existed in his hands rests entirely upon the proper effect the ferry ticket collector was required, in the performance of his duty to his company, to give to the canceled ticket as tendered him. And such right we must now determine without regard to the fact whether the plaintiff had, or had not, used his ferry ticket for previous ferry passage. The ferry ticket collector was certainly not an agent selected by the company to look behind and beyond its written instructions to him in order to determine its legal rights in such regard, nor to represent it in contests involving the reasonableness or validity of its ticket regulations.

In the recent case in the Supreme Court of *Ervin v. Burke et al.*, reported in the advance sheets of 83 Atl. 772 (in which the right of a conductor of a street railway car to eject a passenger, who refused to pay his fare was involved), this important principle is considered and decided in favor of the railway company. Mr. Justice Garrison, in his opinion delivered in that case, pointedly remarks that "controversies of this nature are not to be settled in a wrangle between a passenger and the conductor over the payment of a fare." That case followed the unanimous decision of this court in *Shelton v. Erie Railroad Co.*, 73 N. J. Law, 558, 66 Atl. 408, 9 L. R. A. (N. S.) 727, 118 Am. St. Rep. 704, 9 Ann. Cas. 883, where the same skilled judge delivered the opinion of that

court. After a very thorough exposition of the legal principles there involved (which are also now presented by the case in hand), it was held that the expulsion from a railroad train of a person who refused to pay the conductor any fare other than the tender of a limited ticket that on its face had expired was not actionable. In the case of *Wright v. Orange Valley P. V. Ry. Co.*, 77 N. J. Law, 774, 73 Atl. 517, 23 L. R. A. (N. S.) 571, the foundation of the right of railway companies to treat as trespassers those who insist upon riding in their cars but refuse to pay fare is traced by Mr Justice Minturn to early common-law principles. These decisions, supported as they are by a long line of authority referred to by them, have settled the law upon this subject.

The duty of the ferry ticket collector toward a passenger in case of his nonpayment of ferriage in cash, or of a tender of a valid ticket in lieu of cash, is strictly analogous to that of the railroad train conductor under like circumstances. Their authority to represent the carrying companies is limited to the collection from the passenger of either cash, or its equivalent; i. e., a ticket, valid upon its face for passage. Where the statements of the passenger conflict in such regard with the face of his ticket, the ferry ticket collector is not authorized to either inquire into, or decide, as to the truth or correctness of such statements, but must be governed entirely by the intrinsic effect of the ticket as expressed on its face at the time of its tender. What remedy the plaintiff might have against the ferry company in the event it should refuse to redeem the canceled ticket upon his proper application to it, and proffer of proof that he had not made use of the ticket for an actual ferry trip, we are not now called upon to decide.

For the reasons above stated, the judgment below, which was for the defendants, is affirmed.

HALL v. PASSAIC WATER CO.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1912.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 406*)—REPRESENTATION BY OFFICERS—SUPERINTENDENT.

A corporation is not bound by the agreement of a superintendent which is not shown to be within the scope of his express or implied authority, which is not in the course of the ordinary business of the company, and which it has not ratified, acquiesced in, or knowingly profited by.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1611-1614; Dec. Dig. § 406.*]

2. PRINCIPAL AND AGENT (§ 119*)—AUTHORITY OF AGENT—BURDEN OF PROOF.

One who seeks to charge another with the act of an agent must prove that the agent acted within the scope of his authority actual or apparent or ratification or acquies-

cence in or acceptance of the benefit of the act on the part of the employer.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 891-401; Dec. Dig. § 119.*]

3. CORPORATIONS (§ 406*)—DOMESTIC SUPPLY—VALIDITY OF CONTRACT.

A superintendent of a water company had made arrangements with a number of persons for the supply of water to the buildings owned by them for ordinary household and mill purposes and the regular scheduled rates. The proof showed that no water was supplied to any one for fire purposes, except at special rates. The plaintiff claimed he made a contract with the superintendent for a supply of water at a certain pressure for fire purposes, but at the regular scheduled rate charged to persons who did not have a contract for fire purposes, and plaintiff never paid the defendant any other rate. Plaintiff's mill having burned down through the alleged failure of the water supply, he sought to hold the defendant liable for his loss. It was not shown that the superintendent had ever made any similar contract with any one, that he had never been authorized to make such a contract, that the other officers and directors never knew of it, and the company's books contained neither that nor any other contract of a similar character. Held, that the defendant was not liable thereon.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1611-1614; Dec. Dig. § 406.*]

4. WATERS AND WATER COURSES (§ 206*)—LIABILITIES OF WATER COMPANIES—FAILURE TO FURNISH SUPPLY.

A water company which has a contract with a city for a supply of water is not liable upon such contract to an inhabitant for loss which he sustains through the failure to supply sufficient water to extinguish a fire in a building owned by such inhabitant.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.*]

Trenchard, Minturn, Kalisch, Bogert, Congdon, and White, JJ., dissenting.

Error to Supreme Court.

Action by Isaac A. Hall against the Passaic Water Company. Judgment for defendant, and plaintiff brings error. Affirmed.

John W. Harding, of Paterson, and James G. Blauvelt, of Passaic, for plaintiff in error. William H. Corbin, of Jersey City, and Michael Dunn, of Paterson, for defendant in error.

TREACY, J. The defendant is a corporation of this state, engaged in the supplying of water to the city of Paterson, and to the inhabitants thereof. The plaintiff is an inhabitant of the city of Paterson, and was the owner of a factory building on Fulton street, in that city. He erected in said building two standpipes which ran from the top floor through the other floors to the ground, and connected with the pipes of the defendant. There were in the mill also other water pipes which supplied water for the ordinary uses connected with the business. The plaintiff complained that the defendant agreed, in consideration of the payment for water at a stipulated price by plaintiff, to deliver

a supply of water to plaintiff's mill under a pressure of not less than 10 pounds to the square inch at each opening of the standpipes and the other water pipes; that a building across the street from plaintiff's mill took fire; that the flames spread to the plaintiff's mill, and through the failure of the defendant to keep the water at the pressure stated the mill and its contents were destroyed. The defendant pleaded the general issue and the statute of limitations. The trial court directed a verdict for the defendant. The plaintiff assigns error on this, and, while he has other assignments of error, this is the only one which he argues.

If the defendant made the contract alleged in the declaration, it would, of course, be bound to keep the supply of water in the plaintiff's mill at the stipulated pressure, notwithstanding that an unforeseen accident made it impossible to do so. *Middlesex Water Co. v. Knappmann & Whiting Co.*, 64 N. J. Law, 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. Rep. 467.

[1, 3] To prove his case, the plaintiff testified that, when he determined to build his mill, he saw William Ryle, the superintendent of the defendant, informed him of his plans, and asked him if he would have sufficient water pressure for fire purposes, and that Ryle told him he could go ahead with his building, and that he would have sufficient supply for fire and other purposes. He testifies: "I then asked him [Ryle] what that pressure would be or was. He said the pressure was not less than 10 pounds, but he said: 'Mr. Hall, you will have more throughout your mill.' I then asked him what the charge would be for such service. He said the charge would be as charged to manufacturers for what they used and as used." To establish Ryle's authority to make such a contract, the plaintiff called as witnesses several property owners in Paterson, who testified that they had made arrangements for the supply of water to their premises by defendant with Ryle. But none of these witnesses proved that he or any other person had any agreement or arrangement similar to that claimed by the plaintiff. None of them had a contract guaranteeing a 10-pound pressure of water or any other pressure, and the only witness (Ryle) besides the plaintiff who claims to have spoken to Ryle about a supply to a standpipe in his mill says that all Ryle agreed to give was the best pressure that he could. "There was no reference as to the amount of pressure," he says, "but Mr. Ryle volunteered to make connection with the Essex street main, that was the pressure, the best he could do for that purpose." The testimony of these witnesses was altogether inadequate to establish knowledge on the part of the defendant of the making of the contract sued upon or to make out a course of conduct on the part of Ryle in the making of contracts of the character of

that claimed by the plaintiff which would raise a presumption that the defendant authorized expressly or by acquiescence the making of such contract. The case of *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. Law, 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. Rep. 467, does not apply. In that case there was a written contract to supply water sufficient for fire purposes. The water main broke and the Knappmann Whiting Company's mill took fire, and, owing to lack of water supply, was burned. The water company was properly held liable in that case. In that case the contract was admittedly and undeniably the contract of the water company to supply water for the extinguishing of fires. The water company brought suit upon the contract for money due to it for water supplied to the Knappmann Whiting Company, and the latter set up in recoupment the damages suffered by it through the destruction of its mill. The water company in defending against this claim contended that an unforeseen accident, the breaking of the main, prevented its compliance with its contract, and excused it. No question arose as to the authority of an agent to make the contract. The question involved in the case sub judice is whether the defendant's superintendent had authority to make the contract sued upon, namely, to guarantee a sufficient amount of water under all circumstances under a 10-pound pressure to the square inch to extinguish fires.

There is no evidence in the case of the existence of such authority. So far as appears from the testimony, no one else ever had a contract guaranteeing a certain pressure at all times and under all circumstances. The testimony of the witnesses who said they had arranged with Ryle on different occasions for a supply of water for general mill and tenement house purposes may have been sufficient to establish the fact that he had authority to make such contracts. It certainly did not prove an authority in him to make what would seem from the evidence to have been an extraordinary contract. The testimony of the witnesses for the defense, Gardner, the managing director, and Bell and John C. Ryle, two of the active directors of the defendant, negated the existence of such authority.

While the defendant evidently supplied water to some property owners for fire purposes, these cases were entered in their books for "fire purposes only," and these customers paid a fixed charge for that purpose whether the water was used or not. Of course, this arrangement was entirely different from the one which the plaintiff claims to have made, which was the supplying of water for fire and other purposes to be paid for on the basis of "what was used and as used," and the bills rendered to and paid by the plaintiff showed that he paid only the same rates as ordinary consumers

who did not have any agreement with the water company for fire purposes. The defendant did not deny that Ryle had authority to make ordinary contracts for the supply of water to users for general purposes. But it did deny and prove by its directors that he had not authority to make the unusual contract set out by the plaintiff, to guarantee a supply for fire purposes at a certain pressure at all times and under all conditions, and upon the terms claimed by the plaintiff. And it supplemented this proof by its contract book which did not contain any other contract of the kind. There was no evidence on the part of the plaintiff tending to disprove the testimony of the defendant on this point. The facts therefore as to the authority or lack of authority of the agent on the crucial question were undisputed and the question as to his authority was one of law for the court and the direction of a verdict was not erroneous. *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Belcher v. Manchester B. & L. Ass'n*, 74 N. J. Law, 833, 839, 67 Atl. 399. In *Thomson v. Central Passenger Ry. Co.*, 80 N. J. Law, 328, 78 Atl. 152, it was held that a corporation is not bound by an unauthorized agreement made by its president, outside of the scope of his express or implied authority and not in the course of its ordinary business, which it, through its directors, has neither ratified, acquiesced in, or knowingly profited by.

[2] Not only does the burden of proof as to the fact of agency rest with one who seeks to charge another as principal with the acts of an alleged agent, but the burden also rests with him to prove the extent of the agency; in other words, the burden is upon him to show that the act or acts of the agent were within the scope of his authority. 31 Cyc. 1644, and cases therein cited. Whenever it is out of the usual course of an agent's business to make a guaranty, the party seeking to hold his principal liable thereon has the burden of showing the agent's authority to make the guaranty, or that the principal subsequently ratified his act. 31 Cyc. p. 1647, citing *Willard v. Mellor*, 19 Colo. 534, 36 Pac. 148; *Gray v. Gillilan*, 15 Ill. 453, 60 Am. Dec. 761. The case of *Murphy v. Cane*, 82 Atl. 854, is not on a parallel with the present one. In that case the president of a corporation which never held any meetings of its directors and which allowed him to make all its contracts and always accepted the benefit of them made one of the usual contracts in the name of the corporation with the plaintiff, and it was held that the corporation was bound by it.

[4] The plaintiff further claims that he is entitled to the benefit of the contract made by the city of Paterson with the defendant for the supply of water to the city for fire hydrants and other purposes, and which pro-

vided for a 10-pound pressure to the square inch. It has been frequently held that a party contracting with a city is not liable to an inhabitant of the city on such contract for loss which he sustains through the failure to properly perform the same. *Styles v. Long*, 87 N. J. Law, 416, 51 Atl. 710; *Id.*, 70 N. J. Law, 301, 57 Atl. 448; *Davis v. Clinton Waterworks*, 54 Iowa, 59, 6 N. W. 126, 37 Am. Rep. 185; *Beck v. Kittanning Water Co. (Pa.)* 11 Atl. 300; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1.

The other assignments of error not having been argued in the brief of the plaintiff in error will not be considered.

The judgment should be affirmed, with costs.

TRENCHARD, MINTURN, KALISCH, BOGERT, CONGDON, and WHITE, JJ., dissent.

ADAMS v. VILLAGE OF SOUTH ORANGE.
(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

1. MUNICIPAL CORPORATIONS (§ 513*)—IMPROVEMENTS—ASSESSMENTS—VALIDITY—QUIETING TITLE.

The fact that assessments for street improvements are limited to lands within an arbitrary distance of the improvement, though lands more distant are also benefited, the remainder of the expense being met by the municipality, does not render the assessment so clearly invalid as to subject it to attack by an owner, whose assessment was not disproportioned to his benefits, by suit to quiet title.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1188-1206; Dec. Dig. § 513.*]

2. MUNICIPAL CORPORATIONS (§ 536*)—SPECIAL ASSESSMENTS—PERSONAL OBLIGATION OF OWNER OF PROPERTY.

The charter of the village of South Orange, requiring assessments for street improvements on the owners of lands specially benefited thereby, and referring to lands on which assessments have been made, does not make an assessment a personal debt of the owner, but the language in reference to the owner is given only as part of the designation of the lands assessed, and the assessment is made on the lands specially benefited.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1304-1306; Dec. Dig. § 536.*]

Appeal from Court of Chancery.

Suit by Gertrude Adams against the Village of South Orange. From a decree for defendant, rendered on the advice of Vice Chancellor Emery, complainant appeals. Affirmed.

Andrew S. Taylor, of Newark, and Charles E. Souther, of New York City, for appellant. Jay Ten Eyck and Thomas A. Davis, both of Newark, for respondent.

PER CURIAM. The bill in this case was one to quiet title. The suit arose in this wise: The board of assessments of the vil-

lage of South Orange levied certain assessments for benefits against the lands of the complainant for the laying out and opening of West End road in that village, and the municipality, claiming the assessment to be a valid and subsisting lien against the premises because of the unpaid assessments, advertised the same for sale. The complainant then filed her bill, praying, *inter alia*, that it be decreed that the defendant had no incumbrance on her land, or any part thereof, and that its claim thereto is vexatious and void, and for an injunction against the sale of the premises for nonpayment of the assessment.

The complainant alleges that the mode of assessment is not in conformity with constitutional requirements, and that therefore the assessments were void from their inception. The assessments appear to have been regularly made under section 20 of the village charter, which provides as follows: "That it shall be the duty of the board of assessments to assess, as fairly, honestly and impartially as may be, damages in favor of the owner or owners of any lands and real estate that shall be taken for, or damaged by, any general or local improvement hereinafter mentioned; and to assess the said damages or the expenses of any such improvement, as the case may be, fairly, honestly and impartially upon the owner or owners of any lands or real estate on or within five hundred feet of the line of the whole of the streets so improved, which in the opinion of said commissioners, or any three of them, will be peculiarly benefited thereby, and in such proportions as they may consider said lands and real estate to be so benefited, and to the extent of such benefit, and to assess any excess of such damages, or expense, as the case may be, upon the village at large."

[1] At the conclusion of the case the learned vice chancellor delivered the following oral opinion:

"The only question is whether the fact that beyond the amount levied on property specially benefited within 500 feet the assessment is laid on the township or village at large, and that the special benefits which may accrue to lands outside of the 500 feet are not specially assessed against them, is any ground for holding the law or rule of assessment unconstitutional as to the lots within the 500 feet. That involves the question whether a legislative limitation of the area of the assessment of the expense of an improvement, which provides that the special assessment for benefits shall only include a portion of the lands which are or may be benefited, makes the assessment invalid. The contrary view must, of course, be based on the contention that the Legislature has no option in reference to declaring that all the lands specially benefited, whether within a limited space or not, must be assessed in order to make a valid assessment. That question has

been up twice, as I understand it, before the law courts. First in the case of *State, Society for Useful Manufactures, Prosecutors, v. Paterson*, in 42 N. J. Law, 615 (1880). The Court of Appeals held in that case that the area of an assessment might be restricted; and in the case of *State, Hudson County, v. Road Commissioners*, 41 N. J. Law, 83-88, the Supreme Court, in a learned opinion by Mr. Justice Depue, held that the Legislature has the power to limit the area of the assessment, and that no person within that area could object, provided he was not assessed more than he was specially benefited. That opinion was affirmed in the Court of Appeals in 42 N. J. Law, 608. So that as the decisions of the Supreme Court and Court of Appeals now stand on this question—that lies at the basis of this case—I do not see that there is any such claim of unconstitutionality as would allow a court of equity, on a bill to quiet title, to say that the holding of that assessment as an outstanding lien is such a patently fraudulent claim of title that a court of equity will wipe it out. That is the ground on which the original jurisdiction of the court is put in *Bogert v. City of Elizabeth*, 27 N. J. Eq. 568, where the principle of assessment had been so decidedly wrong that it was an absolute unfounded assertion of title for a municipality to claim rights under it. In that case the entire expense was laid on the lands benefited, without limitation to the amount they were benefited, and under our decisions it was clearly unconstitutional. And the court said: 'If the city asserts title under a void assessment, either by proceeding to sell, as is done in this case, or by selling and then holding the title, a court of equity will decree that the claim is so absolutely unfounded that the title should be quieted.' But in view of these decisions I have referred to, one of which was cited in defendant's brief, I cannot say that the village of South Orange is so clearly asserting an unfounded claim under these assessments that they should be set aside.

[2] "I have considered the further question raised as to the unconstitutionality of the twentieth section of the defendant's charter, by reason of the direction for assessment of benefits upon the owner or owners of lands benefited, instead of directing the assessment upon the lands themselves. No injunction against the proceedings to collect the assessment or sale of the lands should be granted on this objection.

"The assessment is not by the act made a personal debt of the owner, and the whole scope of the act shows that the assessment is made upon the lands, and not on the owner. See, especially, sections 36, 45, and 46 referring to the 'lands' upon which assessments have been made or are liens.

"The language used in reference to the owner of lands is similar to that generally

used in tax and assessment acts, and the name of the owner of the lands taxed or assessed is given as part of the designation of the lands assessed. In many of such acts it is provided that a mistake in the name of the owner shall not invalidate the tax or assessment. Section 45 of the village charter contains such provision."

The decree under review will be affirmed, with costs, for the reasons set forth in Vice Chancellor Emery's opinion.

DORDONI v. HUGHES.

(Supreme Court of New Jersey. Dec. 16, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTIONS—SUFFICIENCY OF EVIDENCE.

Facts found by the district court will be presumed to rest on competent proof, when nothing appears to the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

2. APPEAL AND ERROR (§ 906*) — REVIEW — QUESTIONS OF FACT.

The Supreme Court will not reverse a judgment that is based upon a conclusion of the district court upon a mixed question of law and fact, if the conclusion is legally inferable from the facts proven.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3908-3911; Dec. Dig. § 906.*]

3. SALES (§ 79*)—CONSTRUCTION OF CONTRACT —PLACE OF DELIVERY.

In the absence of any provision in the contract fixing a place for delivery, the general rule is that delivery shall be made at the place of business of the seller; but this rule may be modified by the understanding of the parties that delivery shall be made at the place of business of the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 214-216; Dec. Dig. § 79.*]

4. SALES (§ 88*)—CONSTRUCTION OF CONTRACT — PLACE OF DELIVERY — QUESTIONS FOR JURY.

Where the evidence disclosed that the contract for sale of a truck did not fix a place for delivery, and also tended to show that the seller attempted to deliver it at the place of business of the buyer, who refused to receive it because of its imperfect condition, and the seller, conceding that it did not comply with the contract, promised to perfect it, and for that purpose took it to his garage, it cannot be said as a matter of law that the finding of the trial judge that the place of delivery was at the buyer's place of business was not a reasonable inference from the evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 248-250; Dec. Dig. § 88.*]

5. SALES (§ 196*)—PERFORMANCE OF CONTRACT —PAYMENT OF PRICE.

Where a contract calls for payment of the purchase price when delivery of the article sold is tendered at a certain place, tender of the price will be excused when the seller has refused to tender the article at the place designated, or at any other place.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 510; Dec. Dig. § 196.*]

6. SALES (§ 196*)—PERFORMANCE OF CONTRACT —PAYMENT OF PRICE.

Where the contract called for the delivery of a truck at the buyer's place of business "at once," and the evidence tended to show that, after the seller had attempted to there deliver an imperfect truck, he promised to perfect it, and for that purpose took it to his garage where he kept it seven weeks, and then sold it elsewhere without tendering delivery to the original buyer, the inference is permissible that the seller in effect refused to perform his contract, and that tender of the balance of the purchase price was excused.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 510; Dec. Dig. § 196.*]

7. SALES (§ 54*) — CONTRACT — PRACTICAL CONSTRUCTION BY PARTIES.

If the language of a contract is ambiguous with respect to the identity of the article sold, the intention of the parties may be ascertained by the construction which the parties themselves have put upon it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 152; Dec. Dig. § 54.*]

Appeal from District Court of City of Paterson.

Action by Constant Dordoni against Thomas Hughes. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Charles F. Lynch, of Paterson, for appellant. Jacob Veenstra, Jr., of Paterson, for appellee.

TRENCHARD, J. This is the defendant's appeal from a judgment for the plaintiff rendered by the judge of the district court sitting without a jury. The suit was brought to recover a deposit paid on account of the purchase of an automobile truck. The contract of purchase was in writing and called for "one Model 2 A. Truck Panel Body to be delivered at once, barring delay in transportation, or other causes beyond our control." One hundred and fifty dollars was acknowledged to have been received on account of the purchase price, and the contract called for the payment of the "balance when delivery of car is tendered." At the conclusion of the trial, the judge considered that the plaintiff was justified in rescinding the contract because of the failure of the defendant to deliver the truck, and so gave judgment for the plaintiff for the amount of the money advanced by him. Several of the reasons for reversal may be considered together. They are those which challenge the finding of the trial judge that "the place of delivery of the truck contracted for was to be the place of business of the plaintiff in Paterson."

[1] In the first place, it may be answered that a fact found by the district court is presumed to rest on competent proof when nothing appears to the contrary. Home Coupon Exchange Co. v. Goldfarb, 78 N. J. Law, 146, 74 Atl. 143. And since all the evidence is not returned to this court, but only

abstracts from it, it is for that reason impossible for us to say that the finding was not properly reached from the facts proven.

[2] In the next place, it may be said that such evidence as is returned justifies the finding. This court will not reverse a judgment that is based upon a conclusion of the district court upon a mixed question of law and fact, if the conclusion is legally inferable from the facts proven. *Burr v. Adams Express Co.*, 71 N. J. Law, 284, 58 Atl. 609. We think this is such a case.

[3] The contract did not designate the place of delivery. In such case, while the general rule is that delivery shall be made at the place of business of the seller, yet this rule may be modified by the understanding of the parties that delivery shall be made at the place of business of the buyer. *Field v. Runk*, 22 N. J. Law, 525; *Sales of Goods Act*, C. S. p. 4657, § 43.

[4] The record discloses that the evidence upon the part of the plaintiff tended to show that some time after the contract was executed the defendant attempted to deliver a truck to the plaintiff at the plaintiff's place of business in Paterson, who refused it because of its imperfect and unfinished condition and that the defendant, conceding that it did not comply with the contract, promised to perfect it, and for that purpose took it to his garage. We cannot say as a matter of law that the finding of the trial judge that the place of delivery was at the buyer's place of business was not a reasonable inference from the evidence. *Field v. Runk*, 22 N. J. Law, 525.

[5] Nor is there any merit in the objection "that the evidence does not show that the plaintiff at any time offered to pay to the defendant the balance of the purchase price of the truck, or that the defendant refused at any time to deliver the truck upon tender of the balance of the purchase price." Where a contract calls for payment of the purchase price when delivery of the article sold is tendered at a certain place, tender of the price will be excused when the seller has refused to tender the article at the place designated or at any other place. 35 Cyc. 272, 273.

[6] The evidence upon the part of the plaintiff tended to show that, after the attempted delivery of the imperfect truck, the defendant promised to perfect it, and for that purpose took it to his garage where he kept it seven weeks, and then sold it elsewhere without tendering delivery to the plaintiff. Such evidence justified the trial judge in concluding that the defendant had in effect refused to perform his contract, and that tender of the balance of the purchase price was excused. Possibly the defendant might have fulfilled his contract by seasonably tendering another truck of the same type in perfect condition (*Parsons v. Woodward*,

22 N. J. Law, 196), but that he did not do. According to the plaintiff's testimony he made no tender at all.

[7] The language of the contract was ambiguous with respect to the identity of the truck to be delivered. In such case the intention of the parties may be ascertained by the construction which the parties themselves have put upon it. 35 Cyc. 99. And we think that the negotiations between the parties to this contract, based on the particular individual truck, reasonably justified the inference of a construction by them that the particular individual truck was meant.

These conclusions completely answer every other reason urged for reversal.

The judgment will be affirmed, with costs.

ROSE et al. v. AMERICAN PAPER CO.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

1. ACCORD AND SATISFACTION (§ 10*)—PART PAYMENT — DISPUTED OR UNLIQUIDATED CLAIMS.

Where a claim is unliquidated or in dispute, payment and acceptance of a less sum than claimed, in satisfaction, operates as an accord and satisfaction.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 66-74; Dec. Dig. § 10.*]

2. ACCORD AND SATISFACTION (§ 7*)—PART PAYMENT — DISPUTED OR UNLIQUIDATED CLAIMS.

To constitute an accord and satisfaction in law, dependent upon the offer of the payment of a less sum than that claimed, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts or declarations as amount to a condition that if the money is accepted it is to be in full satisfaction, and be of such a character that the creditor is bound to understand such offer.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 46-59, 66; Dec. Dig. § 7.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 81-84; vol. 8, p. 7651.]

3. ACCORD AND SATISFACTION (§ 1*) — PART PAYMENT — DISPUTED OR UNLIQUIDATED CLAIMS.

The party seeking to settle for a less sum than is claimed to be due must, by his words or conduct when making the offer, clearly inform the other of what is sought and expected. The transaction must be such that the condition is as plain as the tender, so that the acceptance of the tender will involve the acceptance of the condition. In other words, the tender and the condition must be incapable of severance.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 1-13; Dec. Dig. § 1.*]

4. ACCORD AND SATISFACTION (§ 11*) — PART PAYMENT — DISPUTED OR UNLIQUIDATED CLAIMS.

The condition that if a tender be accepted it shall be in full satisfaction of the disputed claim may be expressed in the check itself, or in the letter, or account, or receipt accompany-

ing the remittance, or even orally in conversation.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75–83; Dec. Dig. § 11.*]

5. ACCORD AND SATISFACTION (§ 27*)—QUESTIONS FOR JURY.

Whether a tender is accompanied by such acts and declarations as are necessary, on its acceptance, to constitute an accord and satisfaction must be determined from the facts of each particular case. If the evidence is conflicting, the question is to be determined by the jury.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 59, 83, 97, 110, 135, 150; Dec. Dig. § 27.*]

Error to Supreme Court.

Action by Abraham Rose and another, trading as A. Rose & Son, against the American Paper Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

John A. Hartpence, of Trenton (Vredenburg, Wall & Carey, of Jersey City, on the brief), for plaintiff in error. J. Fithian Tatem, of Camden, for defendants in error.

TRENCHARD, J. In October, 1907, the American Paper Company, the defendant below, ordered of A. Rose & Son, the plaintiffs below, 100 tons of "good, clean, dry, mixed papers" at 47½ cents per hundredweight, f. o. b. Philadelphia, Pa. The paper was shipped by the plaintiffs and received by the defendant. Upon unloading the paper the defendant claimed that it was of inferior quality, dirty, and wet, and notified the plaintiffs that the stock was not satisfactory. A few days thereafter one Mr. Rose, a member of the plaintiffs' firm, went to Bogota, where the defendant's mill is located, and had a conversation with the general manager of the company. As to just what took place at this interview, there is a conflict of testimony. Both sides admit that it was agreed that the price of the paper should be reduced from 47½ cents to 45 cents per hundredweight.

The manager of the defendant company testified that it was also agreed that the percentage of moisture in the paper should be determined by drying samples, and that settlement should be made upon the basis of dry weight. This was expressly denied by the plaintiffs, one of whom testified that the only agreement made was the reduction in price from 47½ cents to 45 cents per hundredweight.

Two payments were made, both by check, one for \$289.08 and the other for \$313.75, amounting to \$602.83, leaving, according to the plaintiffs' contention, a balance still due of \$331.37, for which suit was brought.

At the close of the trial at the Bergen circuit, the defendant moved for the direction of a verdict, "on the ground that the acceptance and use of the checks, under the circumstances disclosed by the evidence in the case, amounts to an acceptance of the

terms upon which the checks were tendered, and that the plaintiff is thereby barred from a recovery of any balance shown." The motion was denied, an exception allowed, and the case submitted to the jury. The jury found a verdict for the plaintiffs for \$206.22, and the judgment entered thereon is here for review.

The only question requiring examination may be determined by a consideration of the propriety of the denial of the motion for a direction of a verdict. That motion, it will be observed, was rested upon the proposition that the plaintiffs' recovery was barred by an accord and satisfaction.

At the time of payment, said to have been accepted in satisfaction, the amount of the plaintiffs' claim was in dispute.

[1] Now, of course, the rule of law is that where a claim is unliquidated or in dispute payment and acceptance of a less sum than claimed, in satisfaction, operates as an accord and satisfaction. 1 Cyc. 329.

[2] To constitute an accord and satisfaction in law, dependent upon the offer of the payment of a less sum than that claimed, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts or declarations as amount to a condition that if the money is accepted it is to be in full satisfaction, and be of such a character that the creditor is bound to understand such offer. 1 Cyc. 333.

[3] The party seeking to settle for a less sum than is claimed to be due must, by his words or conduct when making the offer, clearly inform the other of what is sought and expected. The transaction must be such that the condition is as plain as the tender, so that the acceptance of the tender will involve the acceptance of the condition. In other words, the tender and the condition must be incapable of severance; for otherwise the inference will not be drawn that the acceptance of the tender involves the acceptance of the condition. Lang v. Lane, 83 Ill. App. 543, approved Reid v. McMillan, 189 Ill. 411, 59 N. E. 948.

[4] The condition may be expressed in the check itself (Kerr v. Sanders, 122 N. C. 635, 29 S. E. 943), or in the letter or account (Whitaker v. Eilenberg, 70 App. Div. 489, 75 N. Y. Supp. 106), or receipt accompanying the remittance (Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695), or even orally in conversation (Cole v. Champlain Trans. Co., 26 Vt. 87).

[5] Whether a tender is accompanied by such acts and declarations as are necessary, on its acceptance, to constitute an accord and satisfaction must, of course, be determined from the facts of each particular case. If the evidence is conflicting, the question is to be determined by a jury. Bahrenburg v. Conrad Schopp Fruit Co., 128

Mo. App. 526, 107 S. W. 440; Day v. McLea, L. R. 22 Q. B. (1889) 610; Nathan v. Ogden, 93 L. T. N. S. 553; Johnson v. Collins, 20 Ala. 435; Mayo v. Leighton, 101 Me. 63, 63 Atl. 298; Singer Sewing Mach. Co. v. Lee, 105 Md. 663, 66 Atl. 628; Walsh v. Lunney, 75 Neb. 337, 106 N. W. 447; Jones v. Johnson, 3 W. & S. 276.

In the case at bar the plaintiffs received and cashed two checks in payment. With respect to the first, which was for \$239.08, it is sufficient to say that there is nothing upon the check itself, or in the letter accompanying it, or elsewhere in the testimony, tending to show that it was intended to be in full satisfaction of the claim. The second check was for \$313.75, and in order to determine its effect it is necessary briefly to look at its history.

After some verbal negotiations between the parties, and after the receipt of the first check, the plaintiffs threatened suit for the balance claimed to be due. On January 25, 1908, the defendant wrote the plaintiffs as follows: "Inclosed we hand you our check for \$313.75, which is in full settlement of your account. * * * This settlement is made in accordance with agreement with Mr. Rose, and if the same is not entirely satisfactory, return check to us at once." There was inclosed therewith a check, dated January 25, 1908, containing upon its face the words, "In full of all demands to date." On January 28, 1908, the plaintiffs returned that check to the defendant, inclosed in a letter of that date reading as follows: "Inclosed please find check which you sent us in full settlement of our claim. Such arrangements are not satisfactory. If you will send us check for the same without any stipulation marked thereon, I will accept the same." On February 1, 1908, the defendant acceded to that request by sending to the plaintiffs a check of like date and amount as the returned check, inclosed in a letter reading as follows: "Yours of the 28th ult. at hand and we do not object to leaving off the stipulation you object to, as it does not and will not change our agreement with Mr. Rose, and this settlement is in accordance with the agreement made with Mr. Rose when he visited us and is in full settlement to date. If the check is not satisfactory return it to us at once." The check was cashed by the plaintiffs, who acknowledged receipt of it "on account," and at the same time demanded the balance for which this suit was brought.

Now, looking at the tendered check only, it is seen that no condition was imposed. Looking only at the letter which accompanied it, the inference is that it imposed a condition that if the check was used it was to be in full satisfaction. But looking at the letter in the light of plaintiffs' letter of January 28, 1908, in which plaintiffs refused to ac-

cept a check with such condition imposed, a fair inference is that it was tendered without such condition. This latter inference is strengthened when we consider the conduct of the parties. The defendant, on January 25, 1908, tendered a check marked "In full of all demands." The plaintiffs returned it, saying it was not satisfactory. The defendant did not return that check, but kept it, and returned a new check without such objectional feature, saying, "We do not object to leaving off the stipulation you object to," in the very letter which is now claimed to be, in law, conclusive that there has been an accord and satisfaction.

Looking at the conflicting testimony with respect to the alleged oral agreement between Mr. Rose, one of the plaintiffs, and the defendant, referred to in the defendant's letters, we find nothing from which it can be said, as a matter of law, that the payment in question was made under the condition that it was to be in full satisfaction.

It is quite plain from the conduct and letters of the plaintiffs that they did not in fact consider that any such condition was ever imposed upon their acceptance of the check in question. And after an examination of all the proofs our conclusion is that it cannot be said, as a matter of law, that the tender was accompanied with a condition that it was in full settlement, nor that the plaintiffs were bound to consider it as such. We think the evidence bearing upon that question was conflicting, and the matter was therefore properly submitted to the jury.

The judgment of the court below will be affirmed.

ROBSON v. C. E. FENNIMAN CO.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

1. CORPORATIONS (§ 308*)—OFFICERS—COMPENSATION—QUESTION FOR COURT.

The determination whether an officer of a corporation is entitled to the annual salary, fixed for that office after his entrance, for the time of service before it was fixed or only thereafter, is for the court.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

2. CORPORATIONS (§ 308*)—OFFICERS—SALARY.

Where an officer of a corporation was appointed and served for a year, he is entitled to the yearly salary fixed for that office by resolution passed some time after the beginning of his incumbency.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

3. CORPORATIONS (§ 298*)—MEETINGS OF DIRECTORS—NOTICE.

A resolution by the board of directors of a corporation passed at a meeting held without formal call or notice is valid, where every member of the board was present, and it was the result of their joint action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1319; Dec. Dig. § 298.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. EVIDENCE (§ 157*)—ACTION OF BOARD OF DIRECTORS—CORPORATE RECORD.

Where no minute is made of actions of the board of directors of a private corporation, parol evidence thereof is receivable; such being the best evidence available.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 472, 473, 474½-504, 506-526; Dec. Dig. § 157.*]

5. CORPORATIONS (§ 90*) — LIABILITY FOR STOCK—AGREEMENT OF OTHER INCORPORATOR TO PAY.

An incorporator cannot defeat the collection of his unpaid subscription for stock by showing that another incorporator agreed to pay for the stock subscribed by him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 383-419; Dec. Dig. § 90.*]

6. CORPORATIONS (§ 90*)—STOCK—ACTIONS ON SUBSCRIPTIONS—DEFENSES.

The payment of a subscription to corporate stock cannot be defeated on the ground that the actual certificates were never delivered to the subscriber, for one is not entitled to a certificate of stock until making payment, this being particularly true where it appeared that the subscriber acted as a stockholder, attending all of their meetings, and became an officer of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 383-419; Dec. Dig. § 90.*]

7. CORPORATIONS (§ 89*)—PAYMENT OF STOCK—DEMAND.

Where, in an action by an officer of the corporation to recover claims for salary, the corporation set up as a counterclaim plaintiff's unpaid subscription to its stock, the counterclaim was a sufficient demand to fix plaintiff's obligation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 367-382; Dec. Dig. § 89.*]

Error to Circuit Court, Essex County.

Action by William H. Robson against the C. E. Fenniman Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Andrew Van Blarcom, of Newark, for plaintiff in error. James E. Pyle, of Jersey City, for defendant in error.

GUMMERE, C. J. This action is brought by the plaintiff to recover unpaid salary claimed to be due to him as treasurer of the defendant corporation for the year beginning July 2, 1908, and terminating July 2, 1909. The trial resulted in a verdict in his favor for the full amount sued for; and the defendant now seeks a reversal of the judgment entered upon that verdict because of alleged errors occurring during the trial.

[1, 2] The defendant corporation was organized under the laws of the state of New York on the 2d day of June, 1908, with an authorized capital of \$25,000. The amount of capital with which it proposed commencing business, as set forth in its certificate of incorporation, was \$3,000, divided into 30 shares subscribed for by the incorporators (of whom there were three), as follows: C. E. Fenniman, 15; William H. Robson, 14; and Albert Van Winkle, 1. The first meeting of the stockholders was held on July 2, 1908. At that meeting by-laws were adopted and

a board of directors elected. On the same day the board of directors held a meeting and elected the plaintiff as treasurer of the corporation for a period of one year; that being the term of his office as fixed by the by-laws. Immediately upon his election, he entered upon the performance of the duties of his office, and served in it during the ensuing year. The salary to be paid to the treasurer of the company was not determined upon at the board meeting of July 2d, but, at a later one held by the board on the 6th of August, it was resolved that the treasurer be paid an annual salary of \$2,000. At the trial the plaintiff claimed that, having served as treasurer for the full term for which he was elected, he was entitled to receive the whole of the salary which was attached to the office by the resolution of August 6th. The defendant claimed that he was only entitled to so much of the salary as was earned between August 6, 1908, and July 2, 1909. The court left it to the jury to determine this controversy, and they sustained the plaintiff's claim. The defendant duly excepted to this judicial action upon the ground that the controversy was one for the determination of the court, not of the jury; and it now assigns error upon that exception.

We think the ruling was erroneous, but it was not harmful to the defendant. Both the term and the salary being annual and coextensive, an incumbent who serves in the office during the full term is entitled to the full salary, and the fact that the amount of the salary was determined upon after, instead of before, the plaintiff's election to the office, is immaterial in the absence of any claim that it was excessive.

[3] The defendant attempted to show at the trial, in reduction of the amount of the plaintiff's claim, that at an informal meeting of the board of directors held in February, 1909, at which all of the directors and officers of the company were present, the financial embarrassment of the company having first been discussed, both the president and the treasurer of the corporation consented to a reduction of their salaries, and that the plaintiff entered into an agreement with the president and directors by the terms of which he was thereafter to accept the sum of \$25 per week in lieu of his salary, and to waive payment of all salary that was then in arrears. The offered proof was objected to, first, upon the ground that the meeting of the board was not a formal and regular one, and that for this reason the agreement said to have been entered into at that meeting did not bind the corporation; and, second, upon the ground that the proof offered was by the mouth of witnesses who were present at the meeting, instead of by the minutes of the corporation. The grounds of objection were considered by the trial court to be well founded, and the testimony was thereupon excluded.

Exception was taken and allowed to this ruling, and error is now assigned upon it.

We think the proof offered was competent. The fact that the meeting of the directors was held without a formal call first being had, and notice thereof given to the members, did not operate to invalidate it, or to render the proceedings which were taken at it void, for every member of the board was present, and their joint action as completely bound the corporation as if the meeting had been called with due formality, and every one of the directors had received proper notice of it. *Breslin v. Fries-Breslin Co.*, 70 N. J. Law, 280, 58 Atl. 313; *Murphy v. W. H. & F. W. Cane, Inc.*, 82 Atl. 854; *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227.

[4] As to the method of proof: It appeared that no entry of the proceedings had at the meeting in question was made in the minute book of the company. But the failure on the part of the secretary of the board to perform this clerical duty did not operate to nullify the corporate action. Conceding that if the proceedings had been recorded in the minute book, and afterward approved by the board, that record would be the best evidence of what the transactions were, it does not follow that, in the absence of such record, no other evidence could be resorted to. On the contrary, all that is required to prove such transactions, in the case of a private corporation, is the best evidence available; and so, when no minute thereof has been made, parol evidence of parties who were present is receivable for the purpose. *Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. 402; *McMichael v. Brennan*, 31 N. J. Eq. 496.

[5, 6] The defendant at the trial asserted a right to set off against the claim of the plaintiff his unpaid subscription for 14 shares of the corporate stock of the defendant company made by him at the time of the latter's incorporation. The plaintiff admitted that the subscription had not been paid by him, but contended that the obligation to make the payment did not rest with him, but upon Fenniman, one of the incorporators, for the reason that the latter had agreed with him at the time of the formation of the company to pay into the corporate treasury the amount of plaintiff's subscription as well as his own. Plaintiff further contended that no obligation rested upon him to pay his subscription, because, as he undertook to show, no certificate of stock representing that subscription was issued and outstanding, either in his own hands, or in those of any one claiming through him. The trial court properly overruled the first of these contentions, but left it to the jury to determine whether the second one was sustained by a preponderance of the evidence, and charged them that "if the company has parted with 14 shares of stock to Mr. Robson, or to some

one for him, for which he was to pay, and for which he had not paid, and which is still outstanding against the company, the set-off is good. If not, the set-off fails." The defendant now challenges the validity of this portion of the charge. We think the instruction complained of was erroneous. The subscription of the plaintiff, and its acceptance by the corporation, were considered by both parties as constituting the plaintiff a stockholder of the company. The proofs show that he acted as such by attending all stockholders' meetings held from the date of the organization of the company until the expiration of his term of office as treasurer and voting thereat. Having subscribed for the shares, and having been admitted to membership in the corporation on the strength of his subscription, his obligation to pay for the shares became fixed. *Cook on Stockholders*, § 69, and cases cited. And that is so although no certificate of shares was ever issued to him, or to any one standing in his right; for he was not entitled to receive such certificate in advance of his making such payment.

[7] It is contended that the plaintiff's obligation to pay his subscription did not arise until demand had been made upon him by the company to do so, and that the proofs in the case do not disclose that any such action was taken by the defendant. We cannot concede that the plaintiff's obligation to pay his subscription did not become binding until demand for such payment was made upon him. *McCarter, Receiver, v. Ketcham*, 74 N. J. Law, 825, 67 Atl. 610, would seem to be an authority to the contrary. But, assuming the contention to be well founded, we consider the claim made by the defendant by way of set-off a sufficient demand to establish the plaintiff's liability.

The judgment under review will be reversed, and a venire de novo awarded.

McCOY v. MILLVILLE TRACTION CO.
(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 191*)—QUESTIONS OF FACT—SUFFICIENCY OF EVIDENCE.

To justify a trial judge in his charge in deciding a question of law against a plaintiff, the proofs must be in such a state that no inference of fact upon which the legal question depends can be legitimately drawn in his favor.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 435; *Dec. Dig.* § 191.*]

2. CARRIERS (§ 369*)—CARRIAGE OF PASSENGERS—EJECTION—LIABILITY FOR INJURIES.

Even as to persons who are partly incapacitated, a carrier is not liable for subsequent injuries, unless there was negligence as to the time and place of expulsion from the carrier's car.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1483, 1485-1487, *Dec. Dig.* § 369.*]

3. CARRIERS (§ 366*)—CARRIAGE OF PASSENGERS—EJECTION—LIABILITY FOR INJURIES.

In ejecting a drunken passenger from its car, the carrier is bound to exercise reasonable care to avoid injuring him. The servants of the carrier should use due care not to expel a passenger (or even a trespasser) at a time or place which is dangerous, and the carrier will be liable for negligence in that regard, not only for injuries directly suffered in connection with such expulsion, but also for subsequent injuries proximately due thereto, such as an injury from other cars which the ejected passenger could not reasonably avoid, the probable consequences of improper exposure, and the like. And it will be no answer that the person was injured by reason of his helplessness due to intoxication or like cause, if his condition was known to the servants of the carrier, and the consequent injury resulting from such expulsion could have been reasonably anticipated.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1454; Dec. Dig. § 366.*]

4. CARRIERS (§ 383*)—CARRIAGE OF PASSENGERS—EJECTION—QUESTIONS FOR JURY.

Where the proofs would have justified the jury in finding (1) that the decedent, when ejected from the defendant's trolley car, was so drunk as to be unable to stand without assistance, or to care for himself, and that (2) he was put off in the nighttime at a point where the snow on either side of the track was banked two feet deep, and which point was distant 20 yards from a "shelter shed" maintained by the defendant on the opposite side of and abutting the track, the question whether reasonable care was exercised in putting him off at a safe place is for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1492-1496; Dec. Dig. § 383.*]

Gummere, C. J., and Voorhees and White, JJ., dissent.

Error to Supreme Court.

Action by James McCoy, administrator of the estate of Thomas O. McCoy, against the Millville Traction Company. Judgment for defendant, and plaintiff brings error. Reversed, and venire de novo awarded.

Wescott & Wescott, of Camden, for plaintiff in error. Walter H. Bacon, of Bridgeton, for defendant in error.

TRENCHARD, J. The plaintiff's intestate, Thomas O. McCoy, boarded defendant's trolley car at Millville, about 7 o'clock Christmas night, 1908. He was so drunk that he had to be helped aboard of the car. He was bound for Vineland, several miles away, where he lived. At first he sat on a rear seat, and then went out on the rear platform where he stood "with his back to the dash, and his arm on the controller." Meanwhile the car had proceeded about one mile out into the open country over the single-track road which runs in a northerly direction on the east side of a public highway. A dispute then arose between McCoy and the conductor over the payment of fare, and later he was put off the car. He was put off on the left-hand or west side of the car, at a point about 20 yards distant from a "shelter shed" maintained by the defendant, and which stood on the east side of and

abutting the track. At the time the ground was covered by snow. According to the testimony, there was a bank of snow about two feet high on both sides of the track, where it had been thrown by a snowplow. Shortly after he was put off, another car of the defendant company, running in the same direction as that in which McCoy had been riding, ran over and killed him, and this suit was brought by his administrator to recover damages for his death. The trial at the Cumberland circuit resulted in a verdict for the defendant, and this writ of error brings up for review the judgment entered thereon.

We are of opinion that the judgment must be reversed because of error, prejudicial to the plaintiff, in the charge of the court. The declaration charged negligence in two aspects: (1) In ejecting the plaintiff's intestate at a dangerous time and place while in a state of "extreme intoxication and unable to care for himself"; and (2) in the careless operation of the second car.

In his charge to the jury the learned trial judge said: "The fair inference from the proof is that he (McCoy) was ejected because he did not pay his fare." Continuing, he said: "As this case stands the company had a legal right to put Mr. McCoy off the car. In doing what they did they were exercising their plain, clear legal right, and under the proof they discharged him in a place of safety. They discharged him where they usually discharged passengers, on the public highway, where he was entirely safe. So that you must, under the charge of the court, entirely eliminate from consideration any act of the company up to and including the time he was discharged from the car upon the public highway. The only question, therefore, under this declaration, that you are permitted to consider is: Was the company negligent in running him down?"

[1] Now, before passing to a consideration of that part of the charge clearly necessitating a new trial, it may serve a useful purpose to point out the doubtful propriety of holding as a matter of law that the company had a clear legal right to eject McCoy in view of the meager proof. The judge so held because he said: "The fair inference from the proof is that he was ejected because he did not pay his fare." No doubt such was a fair inference, but the question confronting the judge was this: Was it the only legitimate inference? The only witness who testified upon this topic said: "The conductor went out after his fare, and when he went I heard him say to him—I didn't hear what Tommy (McCoy) said—but he says, 'You will have to pay your fare or get off.' Then he shut the door, and I did not hear any more." How soon thereafter McCoy was put off does not appear, but it is a reasonable inference from the testimony that

some considerable time intervened. If from this meager testimony an inference was to be drawn that McCoy had not in fact paid his fare, and that he was ejected for that reason, we incline to think it must be drawn by the jury, and not by the judge, for the reason that it was not the only legitimate inference that might possibly have been drawn therefrom. To justify a trial judge in his charge in deciding a question of law against the plaintiff, the proofs must be in such a state that no inferences of fact upon which the legal question depends can be legitimately drawn in his favor.

[2] We pass now to that part of the charge which in our opinion clearly requires a reversal of the judgment. We refer to the instruction that, "under the proof, they (the company) discharged him (McCoy) in a place of safety." If the judge erred in treating this as a court question, it prejudiced the plaintiff, and leads to a reversal, because even as to persons who are partly incapacitated the carrier is not liable for subsequent injuries, unless there was negligence as to the time and place of expulsion. *Burch v. Baltimore, etc., R. Co.*, 3 App. Cas. (D. C.) 346, 26 L. R. A. 129; *McClelland v. Louisville, etc., R. Co.*, 94 Ind. 276; *Haley v. Chicago, etc., R. Co.*, 21 Iowa, 15; *Brown's Adm'r v. Louisville, etc., R. Co.*, 103 Ky. 211, 44 S. W. 648; *Edgerly v. Union St. R. Co.*, 67 N. H. 312, 36 Atl. 558; *Roseman v. Carolina Cent. R. Co.*, 112 N. C. 709, 16 S. E. 766, 19 L. R. A. 327, 34 Am. St. Rep. 524; *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601.

[3] In ejecting a drunken passenger from its car, the carrier is bound to exercise reasonable care to avoid injuring him. The servants of the carrier should use due care not to expel a passenger (or even a trespasser) at a time or place which is dangerous, and the carrier will be liable for negligence in that regard, not only for injuries directly suffered in connection with such expulsion, but also for subsequent injuries proximately due thereto, such as an injury from other cars which the ejected person could not reasonably avoid, the probable consequences of improper exposure, and the like. And it will be no answer that the person was injured by reason of his helplessness due to intoxication or like causes, if his condition was known to the servants of the carrier, and the consequent injury resulting from such expulsion could have been reasonably anticipated. *Louisville, etc., R. Co. v. Gatewood*, 14 Ky. Law Rep. 108; *Young v. Texas, etc., R. Co.*, 51 La. Ann. 295, 25 South. 69; *Hudson v. Lynn, etc., R. Co.*, 178 Mass. 64, 59 N. E. 647; *Eldson v. Southern R. Co.* (Miss.) 23 South. 369; *Louisville, etc., R. Co. v. Johnson*, 108 Ala. 62, 19 South. 51, 31 L. R. A. 372; *Illinois Cent. R. v. Latimer*, 128 Ill. 163, 21 N. E. 7; *Central R. R. Co. v.*

Glass, 60 Ga. 441; *Gill v. Rochester, etc., R. Co.*, 37 Hun (N. Y.) 107.

[4] The testimony in the case at bar would have justified the jury in finding, if they had seen fit and had been permitted so to do, (1) that the decedent when ejected was so drunk as to be unable to stand without assistance, or to care for himself; and (2) that he was put off in the nighttime at a point where the snow on either side of the track was banked two feet deep, and which point was distant 20 yards from the shelter shed on the opposite side of and abutting the track. Whether, therefore, reasonable care was exercised in putting him off at a safe place, involved a consideration of the physical and mental condition of the decedent, and the surroundings and condition of the place of his expulsion, and that question under the proofs in this case should have been submitted to the jury.

Because of the erroneous action of the trial judge in treating that as a court question and deciding it adversely to the plaintiff, the judgment will be reversed, and a venire de novo awarded.

GUMMERE, C. J., and VOORHEES and WHITE, JJ., dissent.

COMMONWEALTH v. CURTIS PUB. CO.
(Supreme Court of Pennsylvania. July 2, 1912.)

TAXATION (§ 166*)—CAPITAL STOCK TAX—FOREIGN CORPORATIONS.

A New Jersey manufacturing company having offices in such state, but carrying on its business in Pennsylvania, is subject to the tax on its capital stock provided by Act June 1, 1889 (P. L. 420), as amended by Act June 8, 1891 (P. L. 229), and Act June 8, 1893 (P. L. 353), but is not liable for tax on bank balances or other evidence of indebtedness owned by it, though held on deposit within the state.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 288, 294; Dec. Dig. § 166.*]

Appeal from Court of Common Pleas, Dauphin County.

Action by the Commonwealth against the Curtis Publishing Company. From the judgment levying a tax on a portion only of its capital stock, the Commonwealth appeals. Affirmed.

Kunkel, P. J., filed the following opinion: "This case comes before us on an appeal from the settlement made by the accounting officers of the commonwealth against the defendant company for tax on its capital stock for the year 1908. It has been submitted to us for determination pursuant to the act of April 22, 1874 (P. L. 109). The facts are not in dispute, and we find them to be as follows:

"Findings of Facts.

"(1) Defendant company, is a manufacturing corporation chartered by the state of

New Jersey. During the year 1908 it owned and operated an extensive manufacturing plant in the city of Philadelphia. In its report to the Auditor General for that year of capital stock it set forth that its total property and assets amounted to \$3,991,658.59. Of this amount \$1,226,561.89 consisted of bonds of certain corporations, some of this state, but the greater number of other states. The bonds were purchased with cash derived from the sale of manufactured products, and were held as a fund to be used to meet the growing necessities of the defendant's manufacturing business. During the greater part of the year 1908, they were deposited for safe-keeping in the safe deposit box of a certain trust company in the city of Philadelphia.

"(2) There was also included in the amount of property and assets reported by the defendant certain cash in bank in Pennsylvania, which was in use and intended to be used in the defendant's manufacturing business within this state, and consisted of money which had been received from the sale of manufactured products. The average daily balance so held in bank during the year 1908 was \$50,000, upon which the defendant received interest at the rate of 2 per centum per annum.

"(3) During the year 1908 the defendant's chief office was in the city of Camden, in New Jersey, where the corporation meetings were held and the corporation business transacted. It also had a business office in the city of Philadelphia in connection with its manufacturing plant, where its physical operations and the business connected therewith were located.

"(4) On October 2, 1909, the Auditor General and the State Treasurer stated an account against it for tax on its capital stock for the year 1908, charging it with a tax at the rate of 5 mills on the dollar on its \$1,226,561.89 of bonds and on its \$50,000 of bank deposits, making the total sum upon which tax was charged \$1,276,561.89, and the amount of the tax claimed, \$6,382.81. The rest of its property, it was conceded, was exempt from taxation because it was employed in the manufacturing business. From this settlement the defendant duly appealed.

"Discussion.

"The defendant company is doing business and carrying on its operations in the state of Pennsylvania. It is using and employing its capital and property in this state. It therefore falls within the class of corporations subjected to the capital stock tax provided for it by the act of June 1, 1889 (P. L. 420), as amended by the act of June 8, 1891 (P. L. 229), and the act of June 8, 1893 (P. L. 353). However, that part of its property actually employed and invested in its manufacturing plant and business is exempt-

ed from the tax by the proviso of the amending act of 1893.

"The commonwealth seeks by this settlement to collect the tax upon so much of the defendant's capital stock as is represented by the bonds of \$1,226,561.89 and the \$50,000 deposited in bank. The tax on the capital stock of a corporation is a tax upon its property. Its capital stock is in the state to the extent that its property which represents its capital stock is in the state. So much of its capital stock is taxable in the state as is represented by its property taxable in the state. The real question therefore before us is whether the property sought to be taxed as representing the capital stock is in the state for the purposes of taxation within the contemplation of law. For years the doctrine has been sustained by the courts of this state that the situs of intangible personal property for taxation, such as bonds, mortgages, and other evidences of indebtedness, is the domicile of the owner. It was so held in *Commonwealth v. Standard Oil Co.*, 101 Pa. 119, and even as late as in *Commonwealth v. Traction Co.*, 233 Pa. 79, 81 Atl. 932, in which case the bonds held to be taxable were physically in the state of New York. And in the *Standard Oil Case* it was further held that, although the revenue statute imposed a tax on the capital stock of a corporation doing business in this state, it did not mean that the whole capital stock was taxable in the state, but only so much thereof as was within the taxing jurisdiction of the state, so that shares of stock in corporations in the state owned by the defendant were not taxable here, but in the state of Ohio, its domicile. The doctrine to which we refer prevailed at and before the time the revenue legislation under which the tax, which is here sought to be recovered, was enacted, and has been enunciated since. *Hood's Estate*, 21 Pa. 106; *McKeen v. Northampton County*, 49 Pa. 519, 88 Am. Dec. 515; *Short's Estate*, 16 Pa. 63; *Whitesell v. Northampton County*, 49 Pa. 526; *Commonwealth v. Standard Oil Co.*, 101 Pa. 119; *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 Atl. 443, 1 L. R. A. 237, 9 Am. St. Rep. 116; *Commonwealth v. Delaware & Hudson Canal Co.*, 1 Dauphin County, 257; *Commonwealth v. Penna. Coal Co.*, 197 Pa. 551, 47 Atl. 740; *Commonwealth v. Traction Co.*, 233 Pa. 79, 81 Atl. 932. It is true that in other jurisdictions the doctrine has been modified and limited by express statute, and the power of the states, to so legislate, as suggested by the learned counsel for the commonwealth, has been sustained. *New Orleans v. Stempel*, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174; *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; *Liverpool & London & Globe Ins. Co. v. Orleans Assessors*, 221 U. S. 346, 31 Sup. Ct. 550, 55 L. Ed. 762, but it has not

been pointed out to us, nor have we been able to find, that the doctrine has been modified or limited in this state by any statutory provision. It would seem that, if a change or modification was intended to be made, the Legislature would have clearly indicated it. In the absence of any such indication, we must construe the revenue statutes in the light of the doctrine that intangible personal property follows the person of the owner. We are constrained to conclude, therefore, that it was not the intention of the Legislature to tax through its capital stock such property of a corporation as was not under the decisions of the state courts within the taxing jurisdiction of the state. Accordingly it results that the cash in bank and the bonds in bank for safe-keeping in this state are not within the jurisdiction of the state for purposes of taxation, although physically present here, and, that being so, that the capital stock represented by them is not in the state, and subject to the tax imposed on the capital stock of corporations.

Besides what we have said, it appears that the cash in bank is used in connection with the defendant's business. It represents capital stock employed in carrying on the business, and is incident and appurtenant thereto. It is impossible to conceive of carrying on a business without a bank account. Of course, the amount of cash in bank is an important consideration when the question of exemption is claimed. If the amount is no more than is reasonably necessary, and the deposit is strictly incident to and employed in the business, it is entitled to the same exemption allowed other property actually employed. We do not mean to say that all cash in bank, to any amount, would be exempt, but so much as is essential to and actually used in the business. There is no suggestion by the commonwealth that the sum of \$50,000 in the present case is in excess of the business needs of the defendant. However, the principal question which is here involved is not one of exemption, but one of express or affirmative taxation. The domicile of the defendant is the state of New Jersey, the state of its incorporation or its origin (*Bank of Augusta v. Earle*, 38 U. S. [13 Pet.] 519, 588, 10 L. Ed. 274; *Paul v. Virginia*, 75 U. S. [8 Wall.] 168, 19 L. Ed. 357; *Commonwealth v. Standard Oil Co.*, 101 Pa. 119), and the situs for taxation of its money in bank and bonds in bank for safe-keeping in that state.

"Conclusions of Law.

"We therefore conclude:

"(1) That the capital stock of the defendant company represented by the bonds of \$1,226,561.89 deposited in the trust company in the city of Philadelphia for safe-keeping is not subject to the capital stock tax, un-

der the act of 1889 and its amendments of 1891 and 1893.

"(2) That the capital stock represented by the \$50,000 of deposit in the Pennsylvania bank is not subject to the capital stock tax, under the acts of 1889 and its amendments of 1891 and 1893.

"(3) That neither of these items of property are subject to tax through the capital stock of the defendant company.

"(4) That the defendant company is entitled to judgment. Wherefore judgment is directed to be entered against the commonwealth and in favor of the defendant company, unless exceptions be filed within the time limited by law."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Wm. M. Hargest, Asst. Deputy Atty. Gen., of Harrisburg, and John C. Bell, Atty. Gen., for the Commonwealth. A. C. Stamm and M. E. Olmsted, both of Harrisburg, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of Judge Kunkel.

BROWN v. CENTRAL PENNSYLVANIA TRACTION CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. APPEAL AND ERROR (§ 727*)—ASSIGNMENTS OF ERROR—REMARKS OF COUNSEL.

A judgment will not be reversed, because the court refused to withdraw a juror and continue the case, and because of remarks of counsel, where the assignment of error fails to show what those remarks were.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2998, 3010-3024; Dec. Dig. § 727.*]

2. TRIAL (§ 114*)—REMARKS OF COUNSEL.

In action for personal injuries, the jury should find the facts, and fix the amount of recovery as compensation, and not as a warning, and remarks of counsel urging the latter consideration are ground for reversal.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 275-278; Dec. Dig. § 114.*]

Appeal from Court of Common Pleas, Dauphin County.

Action by Jacob H. Brown against the Central Pennsylvania Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

C. L. Bailey, of Harrisburg, for appellant. James A. Stranahan, of Harrisburg, for appellee.

MOSCHZISKER, J. At the trial of this case the plaintiff testified that, while he was in the act of boarding a car of the defendant company, it started, and he was thrown to

the ground and injured. The defense was that the plaintiff had attempted to get on a moving car. The issue was submitted to the jury, and a verdict was rendered for the plaintiff. The defendant has appealed. There is but one assignment of error, and that complains of the refusal of the trial judge to withdraw a juror and continue the case because of certain objectionable remarks made by counsel for the plaintiff during the course of his address to the jury.

[1] The appellant contends that the plaintiff's counsel said to the jury "that, if the car was so crowded as to require the conductor to be inside, the company was negligent in not providing three men to manage it." While the excerpts from the notes of testimony covered by the assignment of error indicate that something of this nature may have been said, counsel denies having made any such statement, and the assignment fails to show precisely what his remarks were. Whatever they may have been, there is nothing upon the record which shows that he made the assertion attributed to him by counsel for the appellant. Not having the language objected to before us, we cannot say that the court below committed error in its rulings in respect thereto. However, we are of opinion that the statement made by counsel for the plaintiff, after the refusal to withdraw a juror, to the effect that "a verdict against a corporation of this kind would be a blessing for this company, as well as the community; it will preserve the safety of passengers in the community; it will act as a safeguard, as a warning, to the company"—was highly improper, and had an application for the withdrawal of a juror and continuance of the case, based thereon, been declined, it might well have been urged as reversible error; but this course was not pursued. On the contrary, counsel for the defendant merely stated to the court: "I object to that line of argument, that there should be three men on a car; there is no custom shown or necessity for it." The court replied, "We will take care of that * * * to the jury;" and counsel then said, "I simply note my objection." From this we must take it that the defendant did not then desire to insist upon the withdrawal of a juror, else counsel would have directed the court's attention particularly to the objectionable matter indicated by us, insisted upon his rights, and, if refused, secured an exception. But, instead of so doing, he simply noted an objection.

[2] In cases of this character it is the jury's duty to find the facts, and, when the plaintiff is entitled to recover, to fix the amount of the damages; but the verdict should be given by way of compensation to the plaintiff, and not punishment or warning to the defendant. To urge these latter considerations upon the attention of a jury merely serves to divert their minds from

the proper line of thought, and counsel indulge in such tactics at their peril. *Saxton v. Pittsburgh Rys. Co.*, 219 Pa. 492, 68 Atl. 1022; *Carothers v. Pittsburgh Rys. Co.*, 229 Pa. 558, 79 Atl. 134; *Connelly v. Pittsburgh Rys. Co.*, 230 Pa. 366, 79 Atl. 635; *Freeman v. Wilkes-Barre & W. V. Traction Co.*, 36 Pa. Super. Ct. 166; *Brown v. Sunbury & S. E. Ry. Co.*, 43 Pa. Super. Ct. 61. While in *Brown v. Scranton*, 231 Pa. 593, 80 Atl. 1113, and *Miller v. Phila. Rapid Transit Co.*, 231 Pa. 627, 80 Atl. 1108, we recently overruled specifications of error which complained of alleged objectionable remarks of counsel, those cases are not to be taken as indicating any change of attitude by this court upon the general subject under discussion. As stated by the present Chief Justice in *Saxton v. Pittsburgh Rys. Co.*, supra, such remarks are "intemperate appeals to the prejudices of the jury and invitations to find a verdict upon false grounds," and they should be condemned accordingly. But, owing to the state of the present record, we must dismiss the assignment of error.

The judgment is affirmed.

COMMONWEALTH ex rel. BELL, Atty. Gen.,
v. TRADESMEN'S TRUST CO. OF
PHILADELPHIA.

(Supreme Court of Pennsylvania. July, 2,
1912.)

1. CORPORATIONS (§ 613*)—WHEN APPEAL
LIES—DISSOLUTION OF CORPORATION.

No appeal lies from an order of the common pleas dissolving a corporation, and, if taken, can only be regarded as a certiorari bringing up the record alone.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2431-2434, 2437-2444; Dec. Dig. § 613.*]

2. BANKS AND BANKING (§ 77*)—TRUST COMPANIES—RECEIVER.

In a petition for a receiver to wind up a trust company, a traverse to the averment of insolvency is insufficient which denies the necessity for dissolution on the ground that it closed its doors in order to conserve and distribute its assets, and is ineffectual when it admits the closing of its doors.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

3. BANKS AND BANKING (§ 73*)—TRUST COMPANY—"INSOLVENCY"—WHAT CONSTITUTES.

"Insolvency," in its legal sense, as applied to banks and trust companies, exists whenever such an institution, from any cause, is unable to pay its debts in the ordinary course of business.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 154, 155; Dec. Dig. § 73.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3647-3655; vol. 8, p. 7689.]

Appeal from Court of Common Pleas; Dauphin County.

Action by the Commonwealth, on the relation of John C. Bell, Attorney General, against the Tradesmen's Trust Company of

Philadelphia. From a decree declaring respondent insolvent, and ordering its dissolution, it appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Henry J. Scott and John G. Johnson, both of Philadelphia, for appellant. John C. Bell, Atty. Gen., and William N. Trinkle, Asst. Deputy Atty. Gen., for appellee.

STEWART, J. [1] The statute authorizing the particular proceeding out of which this controversy arises makes no provision for an appeal. It results that the present appeal can be regarded only as a certiorari, bringing nothing to our attention except the record in the case. In the first place, we have the suggestion of the Attorney General, filed September 25, 1911, setting forth, upon proper information, that the defendant corporation is in an unsound and unsafe condition to do business; that its business and manner of conducting the same is injurious and contrary to the interest of the public, and that said corporation is insolvent; that on Monday, September 18, 1911, it voluntarily closed its doors; that on Tuesday, September 19, 1911, a hearing was held by the Attorney General at his office; and that counsel for the defendant there admitted the necessity for a temporary receiver, but denied insolvency, etc. Waiving the service of a rule, on October 5, 1911, the defendant corporation, through its president, filed an answer, which made no denial of any of the averments contained in the Attorney General's suggestion, but in which it was alleged that the corporation had voluntarily closed its doors September 18, 1911, not because it was insolvent, but in order to conserve its assets, so that they should be distributed in a proper manner to the interests of all concerned, and consenting that a receiver should be appointed. Next, we have the decree of the court in the following words: "And now, to wit, October 11, 1911, an answer having been filed admitting that said company is in an unsafe and unsound condition to do business, and admitting the necessity for the appointment of a receiver, the court, having heard the testimony offered by the commonwealth, finds that said Tradesmen's Trust Company is in an unsafe and unsound condition to do business, and that its business and manner of conducting the same is injurious and contrary to the interests of the public, and that said corporation is insolvent." An order for the appointment of a receiver followed, and for the dissolution of the corporation as well. It is the order for a dissolution contained in the decree, and that alone, which appellant seeks to avoid, and this on the ground that the insolvency of the corporation was not established in the manner required by law. The complaint is that, as shown by the decree itself, there was no "hearing by the

court of the allegations and proofs of the respective parties."

[2] Section 9 of the act of February 11, 1895 (P. L. 4), provides that "whenever a corporation shall deny that there is good reason for the institution of the proceeding, or that its business should be closed, or that it should be dissolved, it shall forthwith file its answer in said court of common pleas of the county of Dauphin, * * * whereupon the said court or law judge thereof, after hearing the allegations and proofs of the respective parties, shall make such order in the matter as the interest of the parties and that of the public may require." The court had before it the suggestion of the Attorney General averring facts which in themselves, if admitted, were entirely sufficient, without more, to warrant a decree of dissolution of the parties, and that of the court that "the interest of the parties and that of the public" so required. Not one of the charges preferred by the Attorney General, each specifying a statutory failure by the corporation, was directly or indirectly denied in the answer filed. Admitting that the corporation had closed its doors as charged, it simply avers that this was not because of insolvency. This was no denial of insolvency, either directly or by necessary implication. If it was desired to contest the proceeding on any such ground, the traverse on this point should have been positive and unequivocal. But what would a contest on this point have availed, in view of the admission that the corporation had closed its doors? This mere fact established insolvency, within the meaning of the statute. The corporation was a trust company, and one of its privileges was to receive and pay out the money of depositors. Closing the doors of an institution of this character can only be construed as a clear admission that it is unable to meet the demands of its creditors according to the usual course of its business.

[3] It is not insolvency in its popular sense that the law regulating banks and trust companies and kindred corporations deals with, but insolvency in its legal sense, which exists whenever such an institution as this, from any cause, is unable to pay its debts in the ordinary or usual course of its business. Without this, there being no specific denial of insolvency in the answer, the court would have been warranted in accepting it as admitted. Not only so, but it is only when "a corporation shall deny that there is good reason for the institution of the proceeding or that its business should be closed, or that it should be dissolved" (section 9 of the act), that any issue requiring proof can be raised. Where there is no such denial, it is for the court "to make such order in the matter as the interest of the parties and that of the public may require." The record shows no denial of any of these things, all of which are distinctly averred.

The decree of dissolution is based on what the court properly regarded as admissions by the defendant which dispensed with other proofs; and the mere statement contained in it, to the effect that the court had heard testimony offered by the commonwealth, may well be regarded as mere surplusage. The defendants' appeal, if modification of the decree is desired, must be to the court that entered the decree.

The appeal is dismissed at cost of appellant, and the decree is affirmed.

REAL ESTATE TRUST CO. OF PHILADELPHIA v. PENNSYLVANIA SUGAR REFINING CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. CORPORATIONS (§ 481*)—BONDS AND MORTGAGES—ATTACHED COUPONS—PREFERENCES.

A bona fide holder of coupons secured by a corporate mortgage, who is not a holder of the bonds, is entitled to a preference on foreclosure sale given to arrears of interest under the mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1876; Dec. Dig. § 481.*]

2. CORPORATIONS (§ 479*)—CORPORATE BONDS—COUPONS.

Where corporate bonds and coupons attached are protected by a mortgage, each coupon is a part of each bond bearing on its face the number of the bond to which it belongs, and on severance the holder of the coupon becomes equitably the owner of a proportion of the bond.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872-1874; Dec. Dig. § 479.*]

Appeals from Court of Common Pleas, Philadelphia County.

Action by the Real Estate Trust Company of Philadelphia, trustee, against the Pennsylvania Sugar Refining Company. From a decree overruling exceptions to auditor's report, the Trust Company, Thomas W. Synnott, and Joseph R. Wainwright separately appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

George H. Earle, Jr., M. Hampton Todd, Joseph De F. Junkin, and Thomas B. Harned, all of Philadelphia, for appellants. Alex. Simpson, Jr., of Philadelphia, and Wm. S. Kirkpatrick, of Easton, for appellee.

BROWN, J. This appeal is from a decree distributing the proceeds of a foreclosure sale of the property and franchises of the Pennsylvania Sugar Refining Company. The sale was made by the trustee named in a first mortgage executed by the company to secure the payment of \$3,000,000 of coupon bonds. The seventh clause of article 6 of the mortgage directs that the net proceeds of the sale by the trustee shall be applied by it as follows: "First, in or toward pay-

ment, to the holders of unpaid bonds, *pari passu*, in proportion to the amount due to them respectively, and without any preference or priority whatsoever, of all arrears of interest remaining unpaid on such bonds; secondly, in or towards payment to the holders of unpaid bonds, *pari passu*, in proportion to the amount due to them respectively, and without any preference or priority either on account of any bond having been drawn for redemption or otherwise howsoever, of all principal moneys due on such bonds, whether such principal moneys shall or not be payable according to the tenor of the said bonds; and, thirdly, the trustee shall pay the surplus, if any, of such moneys to the company or its assigns." The single and very narrow question before us is whether coupons detached from bonds secured by the mortgage, and held by one who is not the holder of the bonds from which they were detached, are entitled to the preference given to arrears of interest. If not detached, they are admittedly so preferred, as they represent arrears of interest.

Adolph Segal delivered to the Easton National Bank, the appellee, as collateral security for the payment of his obligations held by it, certain unpaid coupons, which he had detached from the first mortgage bonds of the Pennsylvania Sugar Refining Company, of which bonds he was the owner. How the bank happened to get these coupons, or whether it became a holder of them for value, is utterly immaterial, in view of two facts found by the court below, which have not been assigned as error. They are: (1) "The bank, at the time it received the overdue coupons, had no notice or knowledge of any invalidity of the title of Mr. Segal thereto. In fact, no evidence has been presented to show that Mr. Segal had not a good title to the coupons, or to the bonds from which they were detached, unless the fact that he was the promoter of the company in some way affects his title. Nor is there any evidence that the coupons, or any of them, were ever paid by or for the Pennsylvania Sugar Refining Company. Nor is there any evidence that said Adolph Segal, or any one for him, ever represented to the pledgees or owners of the bonds from which the coupons were detached that they, or any of them, had been paid, or were to be canceled, or would be postponed in their payment in favor of the bonds or coupons attached thereto." (2) "It has not been shown that the general body of bondholders, or even those who acquired from Segal the bonds from which the coupons were cut, have any defense to the claim on the coupons, even if asserted by Segal." With these facts before us, especially the second, unchallenged by the appellants, the conduct of Segal towards them, and especially towards the Real Estate Trust Company, how-

ever reprehensible it may have been, is not to be considered as an element in the case. If the detached coupons held by the appellee were still in his hands, and he was still the holder of the bonds from which they were detached, they would be, under the two facts found by the court below, admittedly entitled to a preference as arrearages of interest, and the sole question for our determination is whether that preference was taken from them when they were pledged to the bank. In other words, is the bank deprived of the preference which Segal, its assignor or pledgor, would unquestionably have, under the undisputed facts, if he were still the holder of the bonds from which the coupons were cut or detached?

[1] If the coupons held by the appellee are to be preferred as arrears of interest, the preference claimed for them must be found in the first item of the seventh clause of article 6 in the mortgage, which provides that the trustee shall apply the proceeds of the sale, "first, in or toward payment, to the holders of unpaid bonds, *pari passu*, in proportion to the amount due to them respectively, and without any preference or priority whatsoever, of all arrears of interest remaining unpaid on such bonds." The contention of the appellants is that this provision, being free from all ambiguity, must be read exactly as it is written, and, when so read, the only coupons to be preferred are those presented by the holders of the bonds from which they were detached. The learned auditor and the court below refused to so read it, and we are unable to so construe it. Its purpose was to secure the payment of interest due on the bonds secured by the mortgage, if the proceeds of the sale of the mortgaged property should be insufficient to pay both principal and interest. What is first to be paid? "All arrears of interest on such bonds." What are "such bonds"? They are defined in the preferential provision to be "unpaid bonds"; but the appellants contend that, conceding this to be so, under a strict construction of that provision, interest is to be paid to no one as a preference, unless he is the actual holder or owner of the bond or bonds upon which the interest had accrued. There is no conceivable reason why there should be any difference between a valid coupon detached from a bond and one attached to it as the representative of interest due, and no such difference is made in the clause in the mortgage giving preference to unpaid interest. Coupons are not mentioned in it. Interest, an intangible thing, is its sole subject. Coupons, tangible things, stand for and represent interest, and, when they are paid, the interest represented by them is paid.

[2] Suppose the literal meaning of the words of the preferential provision in the mortgage should require us to hold that only

the actual owners of bonds secured by the mortgage are to be preferred in the payment of interest; what are the holders of the coupons but proportionate holders of the bonds? Each bond, with the coupons attached, is an obligation protected by the mortgage. Each coupon is a part of each bond, bearing upon its face the number of the bond to which it belongs, and, if the owner of any bond chooses to sever it from its coupons, he thereby divides it, and the holder of the coupons becomes equitably the owner of a proportion of the bond. *Burke v. Short*, 79 Fed. 6, 24 C. C. A. 422. Though the appellants do not contend that the detached coupons held by the appellee are not to participate at all in the distribution here reviewed, such must be their fate if the appellants' construction of the seventh clause of article 6 in the mortgage is to prevail. The three items of that clause provide where the proceeds of the sale are to go, and they cannot go elsewhere. Detached coupons cannot be paid under the second item, for it provides only for the payment of the principal of the bonds; and they are not to be paid under the third, for it gives whatever surplus may remain after the payment of the principal of the bonds "to the company or its assigns." If the detached coupons are to be paid, as they surely must be before any surplus can be handed over to the company, they must be paid under the first item of the seventh clause as arrears of interest.

This was the manifestly correct view of the learned court below, and its decree is affirmed, at appellants' costs.

HUSVAR v. DELAWARE, L. & W. R. CO.
(Supreme Court of Pennsylvania. July 2, 1912.)

MASTER AND SERVANT (§ 291*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In an action by an employé for personal injuries, an instruction that the burden of proving plaintiff's contributory negligence is on defendant is not error, where general instructions were given as to the burden of proof of both parties, and the jury was told that plaintiff could not recover if any testimony showed his contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1133, 1134, 1136-1147; Dec. Dig. § 291.*]

Appeal from Court of Common Pleas, Lackawanna County.

Action by James C. Husvar against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER and ELKIN, JJ.

Everett Warren, D. R. Reese, and J. Hayden Oliver, all of Scranton, for appellant. M. A. M. McGinley, of Scranton, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

PER CURIAM. At the trial the plaintiff obtained a verdict, but judgment was entered by the court for the defendant non obstante veredicto. On appeal to this court the judgment was reversed, and judgment entered for the plaintiff. Our order entering judgment was afterwards, on the application by the defendant, reconsidered and rescinded, and in pursuance of the practice established by *Hughes v. Miller*, 192 Pa. 365, 43 Atl. 976, the record was remitted, with directions to the court of common pleas to enter judgment. This appeal is by the defendant.

When the case was here before the judgment *n. o. v.* was reversed, on the ground that, while the plaintiff had shown only an unexplained accident, the deficiency of his testimony was supplied by testimony furnished by the defendant, which showed that the timbers that supported the hopper, the fall of which injured the plaintiff, were in bad condition, and that this testimony required the submission of the case to the jury. See *Husvar v. Railroad Co.*, 232 Pa. 278, 81 Atl. 298. The main contention of the appellant here, that it was entitled to binding instructions was decided against it and set at rest by the prior adjudication.

The assignments of error to the charge disclose nothing that calls for reversal. The statement that "the burden of proving the plaintiff's contributory negligence is on the defendant" was made in connection with the general instruction as to the burden of proof that rested on the parties. The jury had been before, and was afterwards, told that the plaintiff could not recover if it appeared from the testimony that his negligence contributed in any degree to the accident. This was equivalent to saying that he must present a case clear of contributory negligence.

The judgment is affirmed.

SMITH v. YORK RYS. CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. MASTER AND SERVANT (§ 88*)—INJURIES TO SERVANT—EXISTENCE OF RELATION.

Where plaintiff for several years, up to within a few days of an accident to him, was employed by defendant railway company as a laborer on its tracks, and the chief engineer, who was also vice president of an electric light company, directed plaintiff's boss to send him and another laborer to work at a pit being dug by the light company, without any indication that they were not to continue as employees of the defendant company, or that the work was not being done by it, and plaintiff continued to report to defendant's foreman, who kept his time and furnished his transportation and tools, and plaintiff received his wages from defendant company as before, the defendant cannot be heard to say that plaintiff was not in its employ at the time of the injuries.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 144-152; Dec. Dig. § 88.*]

2. MASTER AND SERVANT (§ 118*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

In employing servants to work in excavations, the duty is on the master to furnish a reasonably safe place for the work; and, to prevent the caving in of the walls of a pit, the employer should brace it and shore its sides.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

Appeal from Court of Common Pleas, York County.

Action of trespass by Ed. Smith against the York Railways Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Richard E. Cochran, George S. Schmidt, and John A. Hooper, all of York, for appellant. John L. Rouse, of York, for appellee.

BROWN, J. [1] A recital of undisputed facts will suffice to show that the appellant cannot be heard to say that the appellee was not its employé at the time he was injured, and that, if his injuries resulted from negligence, it is chargeable to another. During 1910, and for several years prior thereto, Edward Smith, the appellee, was employed by the York Railways Company as a laborer upon its tracks. In the early part of September, 1910, the Edison Electric Light Company was digging a pit for the foundation of a smokestack. This work was being done by one John Stover, a cellar digger. Lewis C. Mayer, the vice president of the light company, complained to Stover of the slow progress he was making in the work, and, upon Stover's saying that he did not have enough help, Mayer, who was also the chief engineer of the York Railways Company, agreed to furnish him two more men. In pursuance of this agreement, Mayer immediately instructed a section boss of the York Railways Company, under whom the appellee was working, to send him and another laborer to work at the pit which was being dug by the light company. On September 10th these two employés were directed by their foreman to go to work at that place, and they did so, but without any indication whatever from the foreman, or from any one else, that at that point they were not to continue to be the employés of the York Railways Company, or that the work being done there was not being done for it. On the contrary, the uncontradicted testimony is that the appellee, while working at the pit, reported once a day to Ness, the defendant's foreman, who had directed him to go to work there; that Ness kept his time, and furnished him daily with transportation over the company's lines from his home to his work and return; that the tools with which he worked at the pit were furnished to him by the appellant;

that he received his wages from the appellant during the period he worked at the pit, in the same manner as when he worked on the tracks, and Mayer, chief engineer of the appellant, supervised the work which was being done.

The appellee may have been lent by his employer to an independent contractor, as the learned counsel for appellant contends, but he was in utter ignorance of the loan, and the only employer whom he continued to know was the company which had assigned him to duty at the pit, without even an intimation from it to him that he was to work there for another. Nothing in *Patton v. McDonald*, 204 Pa. 517, 54 Atl. 356, or in *Walters v. American Bridge Co.*, 234 Pa. 7, 82 Atl. 1103, sustains the appellant's contention that, if the appellee had a cause of action for his injuries, it was against the electric light company. The relation of employer and employé admittedly existed between the appellant and the appellee when it set him to work at the pit, and it neither said nor did anything to him at any time to indicate to him that, while he was working there, he would not be doing so as its employé. It continued, as a matter of law, to be his employer up to the time he was injured, no matter what secret arrangement it may have had with the electric light company.

[2] After the appellee had worked at the pit for about 11 days it was dug to a depth of about 19 feet, and, when of that depth one side of it caved in. The appellee was caught in the falling mass and injured, and, if the caving in was due to negligence, it was, as to him, the negligence of the appellant, his employer. The negligence of which he complains is that the appellant, in putting him to work in the pit, failed to make the place reasonably safe for him as a workman in it. The specific charge in the statement is that the appellant "neglected and refused to properly brace and shore the sides of said hole or pit, in order to prevent the

caving in or falling of the sides thereof." In employing servants to work in excavations, such as sewers, trenches, pits, and cellars, the duty is upon the master, as it is in all cases of employment, to see to it that his servants have a reasonably safe place to do the work to which he assigns them; and, to prevent the caving in of the walls of a pit, when such caving in is likely to happen by reason of the depth of the pit, it is the duty of the employer to brace and shore up its sides. The appellee did not, on the trial, rely upon this rule alone, but produced affirmative testimony that the custom in the neighborhood was that, in making excavations, the sides of an excavation were shored or braced up when they exceeded the height of the diggers. In the present case the depth of the pit, at the time its side caved in, was 19 feet, or more than three times the ordinary height of a man.

The question of the defendant's negligence could not have been taken from the jury, and, as the same is true of the alleged contributory negligence of the plaintiff, the defendant's first point was properly refused. Nor could defendant's second point have been affirmed, for its averment of his assumption of risk in helping to excavate the pit assumes his knowledge of such risk; but the jury could fairly have found that he did not have such knowledge. The work was new to him, and it does not appear from the testimony that, after he had been assigned to it, any one in the employ of the defendant company, or in charge of the digging, informed him of any danger connected with it.

No error was committed in the ruling of the learned trial judge on the offers of evidence which are the subjects of the first, second, third, fourth, fifth, and sixth assignments. Nor is any error to be found in the portions of the charge set forth in the seventh, eighth, ninth, tenth, and eleventh assignments.

The judgment is therefore affirmed.

SEIDLER v. BURNS.

(Supreme Court of Errors of Connecticut. Dec. 19, 1912.)

1. NEW TRIAL (§§ 70, 77*)—VERDICT—RIGHT TO SET ASIDE.

The trial court should not set aside a verdict as against the evidence where there was some evidence to sustain it, but should not refuse to set it aside where the manifest injustice of the verdict is so plain as to denote mistake, prejudice, corruption, or partiality.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143, 157-161; Dec. Dig. §§ 70, 77.*]

2. MALICIOUS PROSECUTION (§ 69*)—DAMAGES—EXCESSIVE DAMAGES.

Where plaintiff suing for malicious prosecution showed that he was arrested about 5 o'clock in the afternoon and taken through the public streets to the police station, where he was kept in a cell until the next morning, that his case was then adjourned until the following day when he was acquitted, and there was evidence that the acts of defendant were wanton and malicious, a verdict of \$500 would not be disturbed as excessive.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 158; Dec. Dig. § 69.*]

3. MALICIOUS PROSECUTION (§ 67*)—DAMAGES—ELEMENTS.

The circumstances of aggravation, bodily pain, mental anguish, and injury to reputation, and expenses of litigation less taxable costs, are proper elements of damages for malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 155, 156; Dec. Dig. § 67.*]

Appeal from Superior Court, Hartford County; William H. Williams, Judge.

Action by Michael Seidler against John J. Burns for malicious prosecution. There was a judgment for plaintiff, and the court refused to set aside the verdict as against the evidence, and defendant appeals. Affirmed.

Joseph L. Barbour, of Hartford, for appellant. A. Storrs Campbell, of Hartford, for appellee.

PER CURIAM. This is an action claiming damages for a criminal prosecution of the plaintiff alleged to have been instituted by the defendant maliciously and without probable cause. The jury rendered a verdict for the plaintiff to recover \$500 damages. The defendant filed a motion to set aside the verdict and for a new trial upon the ground that it was against the evidence and that the damages were excessive. This motion was denied. The denial of the motion is the only error assigned in the appeal.

[1] "A trial court should not set aside a verdict as being against the evidence where it is apparent that there was some evidence upon which the jury might reasonably reach

their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they or some of them were influenced by prejudice, corruption, or partiality." Steinhert v. Whitcomb, 84 Conn. 262, 263, 79 Atl. 676.

The defendant contends that the record contains no evidence of malice upon the part of the defendant, nor that the institution of the criminal prosecution was without probable cause. It clearly appears from the conceded facts that there was sufficient proof to warrant the jury in finding for the plaintiff upon the question of actual malice, aside from the malice implied from the proof of want of probable cause. Upon the question of probable cause, the evidence of the defendant materially conflicted with that of the plaintiff. Apparently the jury did not accept the defendant's explanation, but gave credence to the plaintiff's testimony and that of his witnesses. We cannot say that the jury were not warranted in so reaching such a conclusion.

The damages awarded are not so excessive as to warrant an interference by the Supreme Court. In cases like the present one, there is no fixed rule of damages as in an action of contract. The object is the remuneration for a personal injury which is not capable of an exact cash valuation.

[2-3] It appears that Seidler was arrested about 5 o'clock in the afternoon, taken through the public streets of Hartford to the police station, where he was kept in a cell until the next morning. His case was then adjourned until the following day, when he was acquitted.

The circumstances of aggravation, the bodily pain, the mental anguish, and the injury to his reputation were all elements which the jury might have properly considered in assessing damages. But these were not all. As we have said, there was evidence from which the jury could have consistently reached the conclusion that the acts of the defendant were wanton and malicious. In this class of cases the plaintiff's expenses of litigation in the suit, less his taxable costs, are also a proper element of damages. *Hanna v. Sweeney*, 78 Conn. 492, 494, 62 Atl. 785, 4 L. R. A. (N. S.) 907; *Hassett v. Carroll*, 85 Conn. 23, 38, 81 Atl. 1013. Viewed in the light of these suggestions, we are not prepared to say that the damages assessed in the present case are so exorbitant and unreasonable as to warrant the interference of this court in a matter within the province of the jury to determine.

There is no error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 85 A.—24

McLAUGHLIN et al. v. THOMAS et al.(Supreme Court of Errors of Connecticut.
Dec. 19, 1912.)**1. APPEAL AND ERROR (§ 1001*)—GROUNDS—WEIGHT OF EVIDENCE.**

The trial court should not set aside a verdict, where there is some evidence upon which the jury might reasonably reach their conclusion, but where the manifest injustice of the verdict is so plain and palpable as to denote clearly that some mistake was made by the jury in the application of legal principles, or to justify the suspicion that they were influenced by prejudice, corruption, or partiality, it should be set aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. EVIDENCE (§ 434*)—FALSE REPRESENTATIONS—PAROL EVIDENCE.

In an action on a written contract to purchase a share in a stallion, payments to be secured by notes, defended on the ground of fraud, parol evidence that plaintiffs' agents falsely represented that they were about to form a corporation to purchase the stallion, that, if defendants would sign the contract, they would not be required to perform its conditions until the corporation was formed, and would not be bound by its terms unless they chose to sign the notes referred to, that at the meeting to be called for the purpose of organizing the corporation they might withdraw entirely, and not be bound, and that the name of each signer would be submitted for approval to defendants, and no person accepted as a stockholder unless satisfactory to them, was competent, since fraud may be proved by parol evidence, although it changes the terms of a written instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

3. FRAUD (§ 12*)—ACTS CONSTITUTING—"FRAUDULENT REPRESENTATIONS."

While a promise to do an act in the future cannot be untrue at the time it is made if made in bad faith, and with no intention of performing, it constitutes a fraudulent representation.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 14; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 3, p. 2961.]

4. CONTRACTS (§ 352*)—DETERMINATION—QUESTION FOR JURY.

In an action on a written contract for the purchase of a share in a stallion, defended on the ground of false representations by plaintiffs' agents that they were about to form a corporation for its purchase, and that, if defendants signed the instrument, they might subsequently withdraw, and not be bound, the court properly left the question to the jury whether the failure of defendants to appear at a meeting of the signers after notice or to give notes as required by the contract or their refusal to accept the horse or do anything further about the matter was a sufficient repudiation of the contract for fraud.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1494; Dec. Dig. § 352.*]

5. TRIAL (§ 194*)—INSTRUCTIONS—COMMENT ON EVIDENCE.

The court may properly direct the attention of the jury to evidence on a subject and comment on its weight.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

6. FRAUD (§ 65*)—INSTRUCTIONS—PRESUMPTIONS.

Instructions that those alleging fraud must prove it, that it need not, however, be proved directly, but may be inferred from the facts and circumstances surrounding the transaction, but that such facts and circumstances ought to be such as to lead fairly and reasonably to the inference, "for fraud is not otherwise to be presumed," was not erroneous as implying that fraud might be presumed in some cases, since it must have been understood as meaning that, while it might be inferred as indicated, it could not be presumed.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 72-74; Dec. Dig. § 65.*]

7. EVIDENCE (§ 135*)—SIMILAR TRANSACTIONS—FRAUDULENT REPRESENTATIONS.

In an action on a written instrument defended on the ground of fraudulent representations, the testimony of a witness as to similar representations to induce him to sign a similar writing was competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 392, 394, 404, 405; Dec. Dig. § 135.*]

Appeal from Superior court, Hartford County; Joel H. Reed, Judge.

Action by James S. McLaughlin and others against Joseph B. Thomas, Jr., and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

William F. Henney and Joseph P. Tuttle, both of Hartford, for appellants. Birdsey E. Case and Andrew J. Broughel, both of Hartford, for appellee R. G. Henry. Hugh M. Alcorn, of Hartford, for appellees H. P. and J. M. Eno. Howard J. Bloomer, of Hartford, for appellees Thomas and Strong.

RORABACK, J. The plaintiffs bring this action against five of the signers of a writing which reads as follows: "Simsbury, and vicinity, September, 1907. Name of Stallion—Esprit De Vin 4225. McLaughlin Brothers agree to sell the above-named stallion for \$3600.00 to the other undersigned subscribers, who wishing to improve their stock agree to pay McLaughlin Brothers \$300 for each share in said stallion. Capital stock, \$3600. No. of shares, 12. Payments to be made in cash; or one-third in one year, one-third in two years, and one-third in three years, after July 1, 1908, secured by joint and several negotiable notes with interest. McLaughlin Bros., Joseph B. Thomas, Jr., Frank H. Strong, C. F. Fienemann, C. A. Raymond, Harry P. Eno, Jonathan E. Eno, A. S. Jaynes, C. A. Hawkes, E. A. Isaacson, 1/2, J. E. Callahan, 1/2, R. G. Henry, Geo. L. Wells, 1/2, S. N. Woodhouse, 1/2, J. B. Ryan, 1/2." The complaint alleges that all the signers of the contract have complied with its terms except Joseph B. Thomas, Jr., Harry P. Eno, Jonathan E. Eno, Frank H. Strong, and R. G. Henry, the defendants in this action. The record discloses that some of the signers of the contract who it is alleged have complied with its terms, signed notes in pursuance of an agreement in writing made with

the plaintiffs that they would not be held liable on these notes "until each and every one of the subscribers to said contract shall have signed the same." As stated, the suit was originally brought against the five signers above named, and on their motion other signers to the writing were made parties. The plaintiffs sought "a decree requiring the defendants to execute the joint and several notes, or pay for their share in cash as provided for in said contract." The answers interposed by the several defendants all involve the question whether they were induced to sign the writing in suit by the false representations of the plaintiffs. The record contains 24 reasons of appeal. Those contested relate to the denial of a motion to set aside the verdict as against the evidence, the refusal to charge as requested, and to the charge as it was made, and the improper admission of evidence. It appears by an examination of the record that there was evidence from which the jury might reasonably have found against the plaintiffs upon the question of fraud. The judge who heard the testimony of the witnesses and weighed the same by overruling the motion to set aside the verdict has given his approval to the action of the jury.

[1] This court has repeatedly declared that the trial court should not set aside a verdict "where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they or some of them were influenced by prejudice, corruption or partiality." *Burr v. Harty*, 75 Conn. 127, 129, 52 Atl. 724; *Birdseye's Appeal*, 77 Conn. 623, 625, 60 Atl. 111; *Bradbury v. South Norwalk*, 80 Conn. 298, 300, 68 Atl. 321; *Wye-man v. Deady*, 79 Conn. 414, 416, 65 Atl. 129, 118 Am. St. Rep. 152, 8 Ann. Cas. 375. With these considerations in mind we cannot find that there is error in refusing to set aside the verdict.

During the trial in the superior court the defendant's main contention was that a large number of statements and misrepresentations made by the plaintiffs' agents were false and fraudulent, and were such as to furnish a good defense to the action upon this alleged contract.

[2] For the purpose of showing that the defendants were induced to sign this writing by the fraudulent representations of the plaintiffs, the defendants offered evidence tending to prove, and claimed to have proven, that one Raymond and one Lawrence, when acting as agents for the plaintiffs, falsely represented to the defendants that they were about to form a corporation to purchase from the plaintiffs a certain stal-

lion which was then represented to be of great value; that they desired to obtain the names of several men of good financial standing and ability located in Simsbury and vicinity in order to enable the plaintiffs to form such a corporation; that, if they would sign the written instrument, they would not be liable thereon, or be required to perform the conditions thereof until such corporation should be formed by the plaintiffs; that they would not be bound by the terms of the contract, unless they should thereafter see fit to sign the notes therein referred to; that at the meeting to be called by the plaintiffs for the purpose of organizing such corporation any and all of these defendants could withdraw entirely, and not be bound either by this writing or to take stock in the corporation; that the name of each signer of the instrument would be submitted for approval to these defendants, and that no person would be accepted as a stockholder in the corporation, unless such person was approved by these defendants, and was of satisfactory financial responsibility and a resident of Simsbury or vicinity; that these defendants would not be holden to the performance of the instrument unless and until said corporation was formed; that after said names had been secured a meeting would forthwith be called and held by the plaintiffs for the purpose of organizing the corporation; and that these representations were false, and made with the knowledge of their falsity, and that the defendants were thereby induced to sign the contract. Parol evidence of these alleged false representations was properly admitted, notwithstanding the plaintiffs' objections that it tended to change the terms of a written agreement. In *Feltz v. Walker*, 49 Conn. 93, 98, this court said: "It is unfortunately true that written instruments are often used or attempted to be used as a means of perpetrating a fraud. It is equally true that there is no rule of law that deprives the court of the power to defeat the attempt whenever it is discovered. Fraud vitiates all contracts, written or verbal, and sealed or unsealed. To this rule there is no exception as between the original parties. With equal reason no contract, whatever its form or however valid for other purposes, can lawfully be used for a fraudulent purpose. There is no contract sealed or unsealed that is sufficient of itself, unaided by other circumstances, to cover and protect fraud. And rules of evidence which exclude parol proof when offered to affect written instruments will generally give way and allow the fraud to be proved." *Arnold v. Lane et al.*, 71 Conn. 61, 40 Atl. 921. See, also, *Gustafson v. Rustemeyer*, 70 Conn. 125, 39 Atl. 104, 39 L. R. A. 644, 66 Am. St. Rep. 92; *Fox v. Tabel*, 66 Conn. 397, 34 Atl. 101; *Ayres v. French*, 41 Conn. 142; *Roy v. Moore*, 85 Conn. 159, 82 Atl. 233.

[3] The plaintiffs in their requests to

charge asked for instruction to the effect that a promise to do an act in the future cannot be untrue at the time that it is made, and therefore cannot be a fraudulent representation. The presiding judge, after giving appropriate instructions to the jury as to the burden of proof upon the issues raised upon the alleged fraudulent representations set forth in the defendants' answers, instructed them that "a promise to do an act in the future cannot be untrue at the time it is made, and therefore regarded as a mere promise cannot be a false representation, for, gentlemen, there is no doubt that this doctrine is correct. But in applying it to this case something more must be said, and that is that if at the time these promises to do something in the future were made by the plaintiffs or their agents, and they were made in bad faith, and they did not intend to perform them, then such promises would be fraudulent." These instructions, when read together, were sufficient for the guidance of the jury in the determination of the issues upon this part of the case. A promise is sometimes the very device used for the purpose of accomplishing a fraud, and the most effectual means to that end. Such is the case in the purchase of goods with the intention not to pay for them. It is the fraudulent promise to pay that accomplishes the wrong. In such a case it would be a singular defense for the purchaser to make that he had only failed to perform his promise. *Cooley on Torts*, pp. 569, 570. The beneficiary in a will when the maker thereof was on his deathbed, and about to make a codicil to give a certain benefit to another, said to him that he need not trouble himself, for he, the beneficiary, would make the conveyance according to the wishes expressed, was held to this promise as a fraud upon proof of an intention not to perform. *Dowd v. Tucker*, 41 Conn. 197, 203, 204, 205. See, also, *Buckingham v. Clark*, 61 Conn. 204, 209, 23 Atl. 1085; *Sallies v. Johnson*, 85 Conn. 77, 80, 81 Atl. 974.

[4] Complaint is made because the court did not instruct the jury as requested that, "In order to avoid a contract on the ground of fraud, the repudiation must take place within a reasonable time after the fraud was discovered." In reply to this request, the court said to the jury: "This is correct, but it is for you to say whether the defendants did take any steps within a reasonable time to repudiate the contract, or to give notice of it to the plaintiffs. I think that you may well consider whether the failure of these defendants or either of them to appear at the meeting, after notice, or to sign the notes, or refuse to accept the horse, or to do anything further about the matter, was not a sufficient repudiation of the contract, and notice to the plaintiffs." The court properly left the consideration of these questions to the jury as a question of

fact. *Fox v. Tabel*, 66 Conn. 397, 400, 34 Atl. 101.

[5] It directed the attention of the jury to the evidence upon this subject and commented upon the weight of it. This is permissible. *State v. Cabaudo*, 83 Conn. 163, 76 Atl. 42, and cases cited therein.

[6] In one passage of the charge, the jury were told: "But the burden of proof is upon the defendants to prove by a fair preponderance of the evidence all of the affirmative allegations set up by them in their answers. While those who have alleged fraud are bound to prove it, yet it is not necessary that it should be proved directly but fraud may be inferred from the facts and circumstances surrounding the transaction. Such facts and circumstances ought, however, to be such as to lead fairly and reasonably to the inference, for fraud is not otherwise to be presumed." Objection is made to the last portion of this passage as being in violation of the elemental rule that fraud will never be presumed. The words criticized were not happily chosen, but it is impossible to interpret them when read with their context as the appellant does, or to conceive that the jury could have understood the court as instructing them that fraud could be presumed or found, except upon proof affirmatively establishing it, either directly or by fair and reasonable inference from the facts and circumstances surrounding the transaction. The manifest purpose of the court was to emphasize the fact that, while it might be inferred as indicated, it could not be presumed.

[7] Testimony was offered by the defense from James B. Ryan, one of the parties to the writing, as to a conversation which he had with the plaintiffs' agents leading up to his signing of the writing. This was offered to support the allegation of fraud set forth in the answer of the two Enos. In *Lincoln v. Clafin*, 7 Wall. 182, 19 L. Ed. 106, an action was brought for fraudulently obtaining property, and evidence of other frauds of a like character, committed by the defendants at or near the same time, was held to be admissible. "Its admissibility," said the court, "is placed on the ground that, where transactions of a similar character executed by the same parties are closely connected in time, the inference is reasonable that they proceed from the same motive. The principle is asserted in *Cary v. Hotailing*, 1 Hill (N. Y.) 311 [37 Am. Dec. 323], and is sustained by numerous authorities. The case of fraud, as there stated, is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge." In *Butler v. Watkins*, 13 Wall. 456, 464 (80 U. S.) 20 L. Ed. 629, 630, speaking on the same subject, the court said: "In actions for fraud large latitude is always given to the admission of evidence. If a motive ex-

ists prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at or about the same time and in relation to a like subject, was actuated by the same spirit." See, also, *Hoxie v. Home Ins. Co.*, 32 Conn. 21, 37, 39, 85 Am. Dec. 240; *Luckey v. Roberts*, 25 Conn. 486, 491; *Stockwell v. Silloway*, 113 Mass. 384. The evidence of Ryan that the plaintiffs obtained his signature to this pretended contract at or near the same time and substantially in the same manner as the Enos under these authorities was clearly admissible.

What we have already said concerning the admissibility of parol evidence to vary the terms of a written contract, and as to the effect of a promise to do an act in the future, applies to and disposes of several other assignments of error respecting the admission of testimony.

There is no error. The other Judges concurred.

JOLLIMORE v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut. Dec. 19, 1912.)

1. NEGLIGENCE (§ 122*)—INFANTS—CONTRIBUTORY NEGLIGENCE—PRESUMPTIONS.

In an action against a street railway for the killing of a boy of the age of 11 years, it cannot be presumed that he was incapable of contributory negligence, where it appeared that he was bright for his years, and consequently, if no evidence is offered upon this subject, judgment must go against the plaintiff.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. § 122.*]

2. NEGLIGENCE (§ 85*)—CONTRIBUTORY NEGLIGENCE—INFANTS.

In determining the question of contributory negligence of an infant who was killed by a street car, it is necessary to take into consideration the age of the infant, his experience, intelligence, and capacity to understand and avoid the danger to which he exposed himself.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 121-128; Dec. Dig. § 85.*]

3. STREET RAILROADS (§ 114*)—ACTIONS—PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action against a street railway for the wrongful killing of an infant on its tracks, evidence held to establish contributory negligence on the part of deceased.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

Appeal from Superior Court, New Haven County; William H. Williams, Judge.

Action by Annie Jollimore, as administratrix, against the Connecticut Company. From a judgment setting aside a verdict in favor of plaintiff, she appeals. Affirmed.

Robert J. Woodruff, of New Haven, for appellant. Thomas M. Steele and Harrison T. Sheldon, both of New Haven, for appellee.

RORABACK, J. The allegations of negligence relied upon by the plaintiff were that the car was going at a high rate of speed, that no warning was given of its approach, and that the motorman did not take proper steps to avoid the accident after he saw, or should have seen, the danger of the deceased. The accident occurred on October 30, 1911, on Ferry street between Wolcott and Chambers streets in the city of New Haven. Ferry street runs north and south and is 50 feet in width. There is a sidewalk on each side of the street. The distance from curb to curb is 30 feet. The distance from the curb to the track where the accident occurred is 7½ feet. Ferry street is practically straight for several blocks to the north of Wolcott street. Neither Wolcott nor Chambers streets cross Ferry. Wolcott street runs into Ferry street from the west and a short distance to the south; Chambers street runs into it from the east. The defendant operates a double track trolley line through Ferry street, and the car concerned in the accident was running south on the westerly track and on a down grade. It was a double truck closed car, about 40 feet long, equipped with air brakes. It had just left the car barn only a few blocks away for its regular run, and had taken on no passengers up to the time of the accident.

The plaintiff's intestate at the time of his death was 11 years and about two months old. He had attended school since he was 7 years old and was a bright boy. At the end of each year he had passed into a higher grade, and at the time of the accident was in the fifth grade. He had attended three different schools during this period, all so situated that in going to and from school he was required to cross trolley tracks, and during the four years had had no escort other than his sister who was a year and a half older, except that on one occasion his mother had gone with him. He also delivered newspapers and had a route which took him around on several different streets through which the trolley cars were operated. For a year and a half before the accident he had lived on Pierpont street, a short block northerly of Wolcott, and had been accustomed during this year and a half to play around with other boys of his age in the streets at and near the place where the accident happened.

The time of the accident was shortly after half past three in the afternoon. During all the earlier part of the afternoon the plaintiff's intestate had been playing with other boys about the streets in the vicinity, frequently crossing and recrossing the tracks on Ferry street. The boys were engaged in a game which they called "playing horse" or "playing policeman." The testimony indicated that at the time the accident occurred part of the boys had run up Chambers

street, and that the plaintiff's intestate, who was acting the part of a horse and being driven by another boy, had gone up Wolcott street to give the other boys a start, and that the game was for the plaintiff's intestate and the boy driving him to run after and try to catch the others. When the Jolli-more boy and his companion started to run after the other boys they ran along Wolcott street to the corner and immediately started to run across Ferry street in the direction of Chambers street. There was some conflict in the testimony whether the boys ran straight into Ferry street from the corner of Wolcott street, or whether they ran south and then turned onto the track. All the witnesses agree that the boy was running across the track when he was hit near the southerly crosswalk from Wolcott street. It also appeared that the deceased was struck immediately as he reached the defendant's track.

[1] In the present case it cannot be presumed that this boy of the age of 11 years was incapable of contributory negligence, and the burden was upon the plaintiff to show that the deceased was free from negligence contributing to his injury. If no evidence was offered upon this subject, the judgment would necessarily be against the plaintiff. *Rohloff, Adm'r v. Fair Haven & Westville Railway Co.*, 76 Conn. 689, 693, 58 Atl. 5.

[2] To determine the question of contributory negligence it was necessary to take into consideration the age of the boy, his experience, intelligence, and capacity to understand and avoid the danger to which he exposed himself.

[3] The evidence clearly refutes the claim of due care on the part of the deceased when he was injured. It appears that he voluntarily and thoughtlessly put himself in a position of great and obvious danger. His age, intelligence, and experience were such that he must have understood and appreciated the danger of being struck and injured by a trolley car in crossing the tracks. His view of the street for a long distance in the direction of the approaching car was unobstructed. The distance from the curbstone to the nearest rail was only about 7½ feet. There is no dispute that he ran from the curb to the track in front of the car, and that he was hit instantly upon reaching the track. He was engaged in a dangerous sport, and his injury was a natural result of his own carelessness. Whether there was sufficient evidence to justify the jury in finding that the defendant was negligent it is unnecessary for us to decide.

Assuming that the plaintiff established the alleged negligence of the defendant, the burden which lay on the plaintiff of proving the absence of contributory negligence on the part of his intestate was not satisfied. *Elliot v. New York, New Haven & Hartford*

Railroad Co., 84 Conn. 444, 447, 80 Atl. 283; *Cottle v. New York, New Haven & Hartford Railroad Co.*, 82 Conn. 142, 144, 145, 72 Atl. 727. The jury could not have reasonably found that the proximate cause of the accident was because the motorman might have avoided the injury by exercising reasonable care after the peril of the deceased should have been known to him.

The evidence leaves no rational ground for any conclusion other than that the final act of negligence which was the proximate cause of the accident was that of the plaintiff's intestate in running upon the track in front of the car when it must have been within a very few feet of him, and when the motorman was helpless to avert the result.

There is no error. The other Judges concurred.

GALLUP v. THOMAS B. JEFFERY CO. et al.
(Supreme Court of Errors of Connecticut.
Dec. 19, 1912.)

1. ATTACHMENT (§ 349*)—ACTION ON BOND—PLEADING—COMMON COUNTS.

Recovery cannot be had under the common counts for a breach of an attachment bond, where the only obligation assumed by the defendant was a conditional one.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 1257-1271; Dec. Dig. § 349.*]

2. JUDGMENT (§ 17*)—PROCESS TO SUSTAIN—PLEADING—SUBSTITUTED COMPLAINT.

A default judgment rendered on a substituted complaint, which set up a different cause of action from the complaint served with the summons, is irregular, in that it is, in effect, the institution of an action by the service of a summons alone.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 25-33; Dec. Dig. § 17.*]

3. JUDGMENT (§ 102*)—PLEADING—DEFAULT—AMENDMENT.

Where a default judgment was entered on a substituted complaint, which was, in effect, a new cause of action, the judgment should be set aside.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 171-173; Dec. Dig. § 102.*]

4. JUDGMENT (§ 151*)—DEFAULT—SETTING ASIDE—MOTIONS.

Where a judgment was entered by default upon a substituted complaint, where no recovery could be had on the original complaint, it was entirely bad, and could be set aside by the court unasked; hence could be set aside on a motion which asserted a defense which would not defeat nominal damages.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 296-298; Dec. Dig. § 151.*]

5. PLEADING (§ 246*)—AMENDMENT—COMMON COUNTS—CONDITIONS.

A cause of action for the breach of a penal bond, founded on a condition, could not be joined with the common counts, under Gen. St. 1902, § 627, relating to joinder of actions; hence could not be inserted in a complaint under the common counts as an amendment.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 676-683; Dec. Dig. § 246.*]

6. APPEARANCE (§ 26*)—VOLUNTARY APPEARANCE AFTER DEFAULT—RIGHTS.

A defendant was not precluded by the fact that its appearance was voluntary, and, after

setting aside a default judgment against its co-defendant, from objecting to the wrongful action which the court had taken, by moving to strike out a substituted complaint improperly filed, and asking that the proceedings be set into a rightful course.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 154-159; Dec. Dig. § 26.*]

Appeal from Court of Common Pleas, New London County; Charles B. Waller, Judge.

Action by Henry H. Gallup against the Thomas B. Jeffery Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

The plaintiff brought his action upon the so-called common counts against two defendants, both corporations. One was that named in the title of the cause, and the other the American Bonding Company. Service was obtained upon the latter only. There being no appearance by either defendant within the statutory period, the plaintiff filed a substitute complaint, which set out the execution by the defendants of an attachment bond in the form prescribed by statute, its delivery to the plaintiff in substitution for an attachment made in an action brought by the plaintiff against a third party, and the breach of the condition of the bond. Plaintiff's counsel thereupon filed his affidavit that the facts stated in the substitute complaint were true, and that by reason thereof \$475 was justly and equitably due from the defendant Bonding Company to the plaintiff, and upon the same day took judgment against said company for said sum, which judgment was duly entered up.

On the following day the Bonding Company appeared, and filed a motion that the default be opened, the judgment set aside, and the cause reinstated on the docket. This motion was granted. In the motion it was stated that the defendant had a good defense, to wit, that at the time demand upon execution was made upon the judgment debtor named in the bond set out in the substitute complaint the value of his interest in the property attached was nothing. At this stage the Jeffery Company voluntarily entered its appearance. A few days thereafter counsel for both defendants moved that the substitute complaint be stricken from the files, and this was done. Subsequently the plaintiff filed a motion for leave to amend his complaint by filing as a substitute complaint the same complaint which had been stricken from the files. This motion was denied. The plaintiff thereupon stated that he should plead no further, and judgment was rendered in favor of the defendants.

The appeal assigns as error the action of the court in opening the default and setting aside the judgment, in not limiting its order in this matter, so that the defendant be only entitled to be heard in the assessment of damages, in striking the substitute complaint from the files, and in denying the motion for leave to amend as stated.

Donald G. Perkins and Allyn L. Brown, both of Norwich, for appellant. Arthur M. Brown, of Norwich, for appellees.

PRENTICE, J. (after stating the facts as above). [1, 2] The only right of action which the plaintiff claimed to have against either of the defendants was one for which recovery could not be had under the so-called common counts. It was one arising from the breach of a penal bond with condition. The only obligation which the defendants assumed in executing that instrument was a conditional one, and not such a one as permitted the use of the common counts in an action for its breach. *Goodrich v. Stanton*, 71 Conn. 418, 424, 42 Atl. 74. This fact plaintiff's counsel apparently recognized when, before a default was taken, a substitute complaint was filed. The proceedings by which judgment was thus obtained were entirely irregular.

In the first place, the course pursued was, in practical effect, the institution of an action by the service of a summons alone, and thus an evasion of the requirements of our practice. "A complaint * * * must accompany a writ of summons or attachment. The writ is void if there is no complaint, and it is sheer oppression if the facts stated in the complaint are admittedly false. For this reason the plaintiff should not be permitted to bring the defendant into court or attach his property under a false statement of claim which he intends wholly to abandon, and then, by way of amendment, compel the defendant to litigate a different claim without being brought into court in the manner required by statute. Such an amendment is not an amendment, within the meaning of section 1023." *Dunnett v. Thornton*, 73 Conn. 1, 14, 46 Atl. 158, 162.

[3] Again, the procedure had brought about the rendition of a judgment by default upon a cause of action in respect to which there had been no default, and therefore no admission by default. A judgment by default rests upon the legal assumption that the default, like a demurrer, is a constructive admission of the truth of the allegations of the complaint. *Shepard v. New York, N. H. & H. R. Co.*, 45 Conn. 54; *East India Co. v. Glover*, 1 Strange, 612; *Ames Cases on Pleading*, 66, and note. The defendant against whom this judgment was rendered had been notified, through the service made upon it, that the plaintiff was asking for a judgment for a cause of action embraced within the limits of the permitted use of the common counts. It was entitled to regulate its action in the matter of appearance in the light of this notice. Presumably it did so, and quite possibly it, as it reasonably might, withheld its appearance upon the strength of its knowledge that a judgment could not be rightfully entered against it under the rules governing the use of the form of pleading

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

resorted to by the plaintiff. An exercise of the right of amendment involving the incorporation of a new cause of action into the complaint is one thing when the defendant or defendants are in court, and thus in a position to be informed, and quite another when they are not in court, and are not duly notified. To permit the latter procedure would be to open the door for the gravest injustice. The law does not permit it.

Under the conditions existing at the time of the Bonding Company's appearance, it might well have continued to withhold it, and secure a reversal of a judgment upon the substitute complaint upon a writ of error. It chose the course of appearing and asking that the default be erased and the judgment set aside. In granting this motion the court not only acted within the limits of its discretion, but also did what the plain requirements of justice demanded, to the end that what had been wrongfully done be undone. *Goodrich v. Alfred*, 72 Conn. 257, 260, 43 Atl. 1041.

[4] The plaintiff's contention that the court erred in not limiting its order upon the motion to one permitting the defendant to be heard upon the assessment of damages is not well founded. Such a limited order would not have righted the real wrong. That wrong could not be righted until the record was purged of not only the completed judgment, but also of any and all entry of judgment, whether final or interlocutory, which might help to fasten upon the defendant a liability under the substitute complaint, which had acquired no lawful standing in the case. It matters not that the defense, which the defendant, acting in conformity with section 748 of the General Statutes, asserted in its motion that it had, was not one which would defeat a judgment for nominal damages upon a cause of action such as the substitute complaint contained. The fault to be remedied lay deeper than that which the statute referred to was designed to reach, and justice could only be done by the unqualified action which the court took, and which it had the power to take unasked.

[5] It follows from what has already been said that the court did not err, as charged, in granting the Bonding Company's motion to erase the substitute complaint, and later in denying the plaintiff's motion for leave to file the same as an amendment. This complaint could claim no rightful place in the action. As was said in the passage already quoted from *Dunnett v. Thornton*, 73 Conn. 1, 14, 46 Atl. 158, 162, it could not be considered in any true sense as an amendment. It is essential to an amendment of a complaint adding to its averments that it either amplify or make more adequate or perfect the statement of a cause of action already, although, perhaps, imperfectly and insufficiently, made, or add some new cause of ac-

tion which may be joined with those already set up. General Statutes, § 639; *Kelsey v. Punderford*, 76 Conn. 271, 276, 56 Atl. 579; *Will's Gould on Pleading*, 136. The present substitute complaint set up neither a cause of action of which any one of the common counts was a general statement, nor a cause of action which could have been joined with the common counts. The causes of action which may be so joined are specified in section 627 of the General Statutes, and this belongs to neither class there described.

[6] The plaintiff further contends that whatever view be taken of the court's action as related to the Bonding Company, it was erroneous as touching the other defendant who was not served, but volunteered to appear subsequent to the time when the substitute complaint had been filed. We are unable to concur in this proposition. This defendant, when it came into court, was not precluded, by the fact that its appearance was voluntary and late, from objecting to wrongful action which the court had taken, and from asking that the proceedings be set into a rightful course.

There is no error. The other Judges concurred.

HOLCOMB CO. v. CLARK et ux.

(Supreme Court of Errors of Connecticut. Dec. 19, 1912.)

1. NEW TRIAL (§ 162*)—CONDITION—REDUCTION OF RECOVERY.

The court may grant a motion to set aside a verdict unless a remittitur of a certain amount be filed, and, on such amount being remitted, enter judgment for the balance.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 324-329; Dec. Dig. § 162.*]

2. APPEAL AND ERROR (§ 934*)—REVIEW—PRESUMPTION.

It cannot be assumed that the judgment for defendants was otherwise than as warranted on their counterclaim.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3777-3782; Dec. Dig. § 934.*]

3. SET-OFF AND COUNTERCLAIM (§ 21*)—PAYMENT ON CLAIM—EFFECT—ESTOPPEL.

Plaintiff's claim against defendants, and defendants' claim against plaintiff, furnishing bases for entirely independent actions, though they relate to the same subject-matter and gather about one general transaction, payment by defendants to plaintiff on its claim, at a time when an adjudication of their claims would have shown nothing was due plaintiff, does not estop defendants to assert their claim, but is at most only evidence on the question of the substantial and bona fide character of their claim for damages arising before the payment in so far as they then knew the situation.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. § 25; Dec. Dig. § 21.*]

4. APPEAL AND ERROR (§ 171*) — REVIEW — CLAIM NOT MADE BELOW.

Plaintiff's contention below being that defendants by making a payment on plaintiff's claim were estopped to assert that they then had a greater claim against it, it is too late for it to claim that such payment should be con-

sidered on the question of bona fides of their claim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

5. TRIAL (§ 343*)—VERDICT—CONSTRUCTION.

A verdict in the form of a finding of the ultimate sum due does not show the jury did not, as was its duty, pass on each and every claim of the parties and adjudicate thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809-812; Dec. Dig. § 343.*]

6. APPEAL AND ERROR (§ 933*)—REVIEW—PRESUMPTION.

It cannot be presumed that the court, in passing on a motion to set aside a verdict, predicated its conclusion on any unwarranted assumption or otherwise than as was its duty on a review of the testimony to discover what the jury might or might not reasonably have found in respect to the several matters involved in the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. § 933.*]

7. APPEAL AND ERROR (§ 930*) — REVIEW — PRESUMPTION.

Exclusion by the jury from their consideration of an item in issue, not being apparent, cannot be presumed; the verdict having been for the ultimate sum due defendants, who had denied the propriety of certain of plaintiff's charges and counterclaimed for various items of damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

8. TRIAL (§ 59*)—RECEPTION OF EVIDENCE—ORDER OF PROOF—DISCRETION.

Order of proof on a trifling matter is within the discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 138-140, 142, 143, 145; Dec. Dig. § 59.*]

9. EVIDENCE (§ 533*)—OPINIONS—EXPERTS.

Opinion of an expert as to the cost of repainting defendants' automobile and renewing certain woodwork and trimmings, claimed to have been rendered necessary by plaintiff's negligent treatment of it, and so properly chargeable to it, is competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2341; Dec. Dig. § 533.*]

Appeal from Court of Common Pleas, New Haven County; Earnest C. Simpson, Judge.

Action by the Holcomb Company against John C. Clark and wife. From a judgment for defendants, who counterclaimed, plaintiff appeals. Affirmed.

In the early spring of 1910 the plaintiff, a keeper of a public garage, and the defendants, owners of an electric automobile, entered into an agreement whereby the former undertook to repaint and refurbish the automobile and to supply and install therein new batteries capable of a prescribed mileage for the sum of \$250, and to store and care for it, to keep its batteries charged as required for use, and to deliver and call for it at the defendants' house when requested for the further sum of \$30 per month. The plaintiff seeks to recover a balance of \$291.73, claimed to be due for services rendered and supplies furnished under this contract from the time it was made to the early part

of November. The charges upon the bill of particulars amount to \$498.23; the credits to \$188.60.

The defendants in their answer admit the correctness of certain of the charges, amounting to \$100.45, and the credits, but deny the propriety of the remaining charges. They also set up by way of counterclaim that the batteries installed did not comply with the guaranty, that the care given to the car after its renovation was so careless and negligent, and the lack of attention in its care and the recharging of its batteries such that it became greatly damaged, its parts, paint, and batteries greatly injured, and it rendered unfit for use, so that by reason of these results of the plaintiff's careless and negligent conduct they were compelled to, and did, expend large sums amounting to \$600 in repair work to put and keep the automobile in proper condition for use, and to correct the errors and shortcomings of the plaintiff in respect to that which it had undertaken to do, and the further sum of \$100 for other conveyances in place of it when it was unfit for use.

The jury returned a verdict in favor of the defendants for \$264.51. Upon the plaintiff's motion to set it aside, the court entered its order that it be set aside unless the defendants filed a remittitur of \$100. Such remittitur was thereupon filed, and judgment entered for \$164.51.

Henry G. Newton and Ward Church, both of New Haven, for appellant. Robert C. Stoddard, of New Haven, for appellees.

PRENTICE, J. (after stating the facts as above). The plaintiff complains of the refusal of the trial court to set aside the verdict and its rendition of judgment thereon after a remittitur of \$100 had been filed. Several reasons are assigned in support of this position, to wit: (1) That the court in allowing the verdict to stand, provided a remittitur of \$100 was filed, assumed the province of the jury; (2) that there was no possible way in which the sum of \$164.51 could have been arrived at without reckoning a return of sums which had been paid, no claim for which was made in the counterclaim; (3) that "the court undertook to assume that the jury found all the claims of the defendants to be justified, whereas their general verdict shows that they did not pass or agree upon any particular claims"; and (4) that a verdict for the amount of the judgment would not have been justified by the evidence.

[1] That the court acted within its province in granting the motion to set aside the verdict unless a remittitur should be filed, and in entering up judgment upon the amount of the verdict, less the portion of it remitted, is well settled. *Allen v. New London*, 85 Conn. 611, 612, 83 Atl. 1021; *Noxon v. Remington*, 78 Conn. 296, 300, 61 Atl. 963.

[2] The second of the claims stated above is not tenable. The defendants were not seeking the return of any payment they had made, and there is not the slightest indication in the record either that the jury in their original verdict undertook to make, or that the court in its judgment made, any such return. The total amount of the defendants' payments, a matter upon which there was no dispute, was \$188.60. The record makes it quite inconceivable that the plaintiff's claim for services rendered and supplies furnished, amounting to \$398.23, was not allowed to the extent of the payments. It is evident that the plaintiff prevailed upon his cause of action set up in the complaint, and that but for the counterclaim it would have had a judgment. The judgment for the defendants necessarily implies a recovery by them upon the independent cause of action for breaches of contract obligation which they set up in their counterclaim. It would be quite unwarranted for us to assume that it was brought about in any other way, and there is nothing in the record to suggest that it was. The evidence which they offered in support of their claim for damage suffered was such that it is not difficult to discover therein a reasonable basis for a recovery upon the counterclaim of more than the amount of the judgment.

[3, 4] The plaintiff, however, appears to conceive that a recovery of damages by the defendants for a period prior to a payment by them upon the plaintiff's account could not be had under the counterclaim, if at the time of such payment an adjudication of the claims of the parties against each other, whether embraced under the complaint or the counterclaim, would show that nothing, or a less sum than the payment, was then due, and this idea apparently lies at the foundation of its contention as to the return of payments. This theory implies a connection between the plaintiff's claim for services rendered and supplies furnished and the defendants' for breaches of contract, which does not exist. The two have it in common that they relate to the same subject-matter and gather about one general transaction, but they furnish bases for entirely independent actions. Hence they appear in complaint and counterclaim. A payment upon account of one does not preclude recovery upon the other. Doubtless a payment made by the defendants in excess of what they would at the time have been obligated to pay upon an adjustment of the respective claims of the parties, as now made, would be a pertinent fact as bearing upon the substantial and bona fide character of a present claim on their part for damages arising prior to the time of such payment in so far as the situation at that time was known to them. But such fact would be evidential only, and not conclusive, and it would not create an estoppel. Had such a claim been made at the trial, it would, without doubt, have received appro-

priate treatment at the hands of the court. It was not made, and it is now too late for the plaintiff to take advantage of it.

[5, 6] We must confess ourselves unable to appreciate the force of the next claim that the court in its action "undertook to assume that the jury found all the claims of the defendants to be justified, whereas their general verdict shows that they did not pass or agree upon any particular claima." Perhaps we fail to understand what was attempted to be expressed. The verdict was in the customary form of a finding of the ultimate sum due. Although in that form, it does not show that the jury did not pass upon each and every claim of the parties and adjudicate thereon, and there is nothing in the record to indicate that it did not act in consonance with its duty in that respect in arriving at the final result announced. We have, moreover, looked in vain for authority for the statement embodied in the assignment that the court undertook to assume that the jury found all of the claims of the defendants to be well founded, and none has been pointed out to us. It may be that an examination of the evidence led to that conclusion. But, whether so or not, the court's duty in passing upon the motion was to review the testimony to discover what the jury might or might not reasonably have found in respect to the several matters involved in the issues, and there is no basis for an assertion that it acted otherwise and predicated its conclusion upon an assumption of any sort.

[7] The brief of appellant's counsel says that it appealed for the reason, among others, "that if the verdict was too large it was because some sum justly due the plaintiff must have been omitted from the computation made by the jury, and an error of this kind could not be cured by the court reducing the verdict to an amount which included items which the jury might or might not have allowed, and left it mathematically possible for the jury to have applied the correct (incorrect?) rule." Here, apparently, is an attempt to state what was meant by the assignment under discussion. If the statement which forms the premise of this proposition be assumed, the conclusion certainly would not follow that the error could not be fully and adequately corrected by a reduction of the verdict unless the omitted item was larger than the verdict which the defendants obtained. The difficulty with the position taken is that the exclusion of such an item by the jury from their computation is by no means apparent. The last reason is one which calls for a review of the evidence. Giving the court's decision the weight to which it is entitled, we are unprepared to say that there was error in the action which the court took in refusing to set the verdict entirely aside.

[8, 9] The remaining assignments of er-

ror involve three rulings admitting testimony offered by the defendants. One concerned the order of proof upon a trifling matter, and so was within the discretion of the court. Another, which permitted the defendants to show that repairs done by the plaintiff were improperly done and had to be done over at the defendants' expense, was clearly correct. The third admitted the testimony of an expert as to the cost of repainting the automobile and renewing certain woodwork and trimming, all of which work it was claimed was rendered necessary by reason of the plaintiff's negligent treatment of it. The judgment of the witness was competent upon the subject, and whether or not the work upon which the estimate given was based was required or properly chargeable to the plaintiff were questions for the jury.

There is no error. The other Judges concurred.

HAYWARD v. MARONEY.

(Supreme Court of Errors of Connecticut.
Oct. Term, 1912.)

1. LIBEL AND SLANDER (§ 114*)—DAMAGES.

The slanderous words being actionable per se, and found false and malicious, claim that plaintiff was entitled to only nominal damages was properly overruled.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 352; Dec. Dig. § 114.*]

2. LIBEL AND SLANDER (§ 103*)—DATE—EVIDENCE.

Testimony as to the speaking of the slanderous words being properly received, over objection that it did not appear they were uttered before the bringing of the action; witness fixing the date as of the day of a certain event, and that being otherwise shown to having been before the action was brought.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 281; Dec. Dig. § 103.*]

3. LIBEL AND SLANDER (§ 104*)—BIAS—EVIDENCE—DAMAGES.

Testimony of the repetition by defendant of the slanderous words concerning plaintiff is admissible to prove actual bias, and thus lay the foundation for enhanced damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284-291; Dec. Dig. § 104.*]

4. LIBEL AND SLANDER (§ 103*)—DATE—EVIDENCE.

As tending to fix the time when the slander was uttered, and show that it was before the bringing of the action, a letter written by defendant to plaintiff is properly admitted, in connection with testimony that it was the one referred to by witness R., that it was received three days before the bringing of the action, and that plaintiff at once telephoned R. she had received it; R. having testified that defendant spoke the slanderous words the day R. learned that plaintiff had received a certain letter from defendant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 281; Dec. Dig. § 103.*]

5. WITNESSES (§§ 350, 372*)—BIAS—CREDIBILITY—EVIDENCE.

Cross-examination of plaintiff in slander as to her previous arrest for damaging defend-

ant's property, and her settling for such damage, is not proper as tending to show bias of plaintiff in giving her testimony, and, not showing a contradiction of her former statements is not proper to affect her credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1140-1149, 1192-1199; Dec. Dig. §§ 350, 372.*]

6. EVIDENCE (§ 194*)—DEMONSTRATIVE EVIDENCE—CONDITIONS PRECEDENT.

It is not error to overrule the objection to the introduction of Exhibit B, claimed to have been sent by defendant to plaintiff, that it had not been shown defendant sent it; the court having before it Exhibit A, acknowledged to have been written by her, and the address on the wrapper of Exhibit B, and the opinions of witnesses that the address was her writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 679; Dec. Dig. § 194.*]

Appeal from Court of Common Pleas, Hartford County; John Coats, Judge.

Action by Gertrude Hayward against Elizabeth Maroney. Judgment for plaintiff. Defendant appeals. Affirmed.

Andrew J. Broughel, Birdsey E. Case, and Joseph L. Barbour, all of Hartford, for appellant. Sidney E. Clarke, of Hartford, for appellee.

THAYER, J. [1] This is an action for slander. The slanderous words alleged were actionable per se, and the court found that they were false and malicious. It therefore properly overruled the defendant's claim that the plaintiff was entitled to only nominal damages.

[2] The evidence of Mrs. Reed as to the speaking of the words was properly received. She stated, it is true, that they were spoken some time in February, the month in which the suit was commenced, and the ground of objection was that it did not appear that the words were uttered before the bringing of the action. But she fixed the date as being on the day that she learned that the plaintiff had received a certain letter from the defendant, and there was evidence offered tending to prove that this was on the 20th of February. The action was commenced on the 23d of February.

[3] The testimony of the same witness to prove a subsequent repetition of the same words by the defendant concerning the plaintiff was properly received for the purpose for which they were offered, to prove actual malice, and thus lay the foundation for enhanced damages.

[4] The letter from the defendant to the plaintiff (Exhibit A) was properly received in evidence in connection with testimony showing that it was the one referred to by Mrs. Reed, that it was received by the plaintiff on February 20th, and that she at once notified Mrs. Reed by telephone that she had received it. The evidence tended to fix the time when the slander was uttered, and show that it was prior to the bringing of the action.

[5] The questions asked the plaintiff on

cross-examination as to her previous arrest for damaging the defendant's property and her having settled for such damage were properly excluded. Neither of them tended to show a contradiction of the witness' former statements, and thus affect her credibility, and they were not admissible as tending to show bias on the part of the plaintiff in giving her testimony; these being the grounds upon which they were claimed. Similar questions asked of the defendant for the same purpose upon direct examination were also properly excluded.

[8] The admission of the package (Exhibit B), a package claimed to have been sent by the defendant to the plaintiff, was objected to upon the ground that it had not been shown that the defendant sent it. The court had before it Exhibit A, acknowledged by the defendant to have been written by her, and the address upon the wrapper of Exhibit B. There was also the testimony of witnesses that in their opinion the writing on the wrapper of the package was the defendant's. We cannot say that the court erred in overruling the objection and admitting the exhibit.

The correctness of the court's action in refusing to find certain facts and in finding others improperly is raised on the appeal. We have examined the evidence, and find no ground for changing the finding as made.

There is no error. The other Judges concurred.

TEMPLE v. GILBERT.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1912.)

1. PROCESS (§ 31*)—SUMMONS—SUFFICIENCY.

A writ was not insufficient to confer jurisdiction because it described defendant as "now of parts unknown, county of New Haven, state of Connecticut," on the theory that it described defendant as a nonresident of the state; the effect of the specific words being merely to qualify the general recital, and to show that the residence in the county named was unknown.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 25; Dec. Dig. § 31.*]

2. NEW TRIAL (§ 70*)—GROUNDS—EVIDENCE.

Where, in an action against a locomotive engineer for injuries from a boiler explosion, the evidence reasonably sustained a verdict for plaintiff on the ground of defendant's negligence, and there was no indication that the jury made any mistake of law or were influenced by prejudice, corruption, or partiality, the court properly refused a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

3. NEGLIGENCE (§ 1*)—DEFINITION.

"Negligence" is the failure to use that degree of care for the protection of another which the ordinarily reasonably careful and prudent man would use under like circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

4. STEAM (§ 6*)—EXPLOSION OF BOILER—LIABILITY OF ENGINEER.

The liability of an engineer for injury to another from a boiler explosion due to an insufficient water supply depends on whether he has exercised that degree of care to keep the water at the proper point in the boiler which the ordinarily careful engineer would use under like circumstances.

[Ed. Note.—For other cases, see Steam, Cent. Dig. §§ 4-11; Dec. Dig. § 6.*]

5. TRIAL (§ 260*)—REQUESTED CHARGE—INSTRUCTIONS GIVEN.

Where, in an action against an engineer for injuries from a boiler explosion, the court charged that there was no evidence that defendant knew anything about the condition of the boiler when he received it, and that he had a right to assume it to be then in good working order, it was not error to refuse to instruct that he was not responsible if the boiler was delivered to him in such a weakened condition that it could not stand the strain of ordinary use.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. TRIAL (§§ 194, 252*)—INSTRUCTIONS—PROVINCE OF JURY—CONFORMITY TO EVIDENCE.

Requested instructions which ask the court to pass upon contested questions of fact, and contained hypothetical propositions unsupported by the evidence, were properly refused in a negligence case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466, 505, 596-612; Dec. Dig. §§ 194, 252.*]

7. TRIAL (§ 194*)—BOILER EXPLOSION—INSTRUCTION—WEIGHT OF EVIDENCE.

In an action against an engineer for injuries from a boiler explosion, an instruction that plaintiff claimed the explosion was caused by negligence of the defendant was not objectionable as an instruction that the explosion was caused by defendant, though coupled with a statement that the evidence conclusively showed plaintiff's injury to have been caused by the explosion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

8. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMING FACTS.

An instruction is not erroneous in assuming a state of facts about which there was no controversy.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

9. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION TOGETHER.

In an action against an engineer for injury from a boiler explosion, it was not error to instruct that, "starting, of course, with the assumption that the engine is in good order, and delivered in good order" to the engineer, and then something happens to it which it was within his duty to control, the "engineer is responsible for it," where the court in other instructions carefully explained the claims of defendant and fully instructed on the burden of proof, and stated that defendant's negligence could not be presumed because the boiler exploded, and where the jury could not, from the instructions as a whole, have thought they were to assume that the engine was all right when defendant took it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

10. EVIDENCE (§ 380*)—PHOTOGRAPHS—PRELIMINARY PROOF—SUFFICIENCY.

A photograph of plaintiff in a perambulator was admissible in a personal injury case,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

though not vouched for by the photographer, where a witness, familiar with the appearance of the objects shown, stated that the photograph was a correct representation of them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1657; Dec. Dig. § 380.*]

11. EVIDENCE (§ 382*)—ADMISSION OF PHOTOGRAPH—DETERMINATION.

The sufficient verification of a photograph is a preliminary question of fact for the trial judge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1658, 1659; Dec. Dig. § 382.*]

12. EVIDENCE (§ 514*)—EXPERT TESTIMONY—SUBJECT-MATTER.

In an action against an engineer for injuries from a boiler explosion due to an insufficient supply of water, the question whose duty it is to watch the glass and keep the proper amount of water in a locomotive boiler was a proper subject for expert testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2319-2323; Dec. Dig. § 514.*]

13. TRIAL (§§ 186, 193*)—INSTRUCTIONS—COMMENT ON EVIDENCE.

It was not ground for reversal in a negligence case that the trial judge commented on the evidence, and even indicated his opinion upon certain controverted questions, where he did not withdraw any controverted facts from the jury's consideration, or lead them to suppose that the determination of such facts was not wholly with them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 409, 410, 436-438; Dec. Dig. §§ 186, 193.*]

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Action by John F. Temple against Frank Gilbert for personal injuries. From a judgment for plaintiff, defendant appeals. No error.

Action to recover damages for personal injuries caused by the explosion of a steam locomotive boiler owned by the New York, New Haven & Hartford Railroad Company, and operated by the defendant as an engineer, brought to the superior court in New Haven county, when the defendant pleaded in abatement to the jurisdiction. The court, Gager, J., found the plea in abatement insufficient, and thereupon ordered that the defendant answer over, and the cause was afterwards tried to the jury before Gager, J. Verdict and judgment for the plaintiff of \$5,000, and appeal by the defendant for alleged errors in the rulings and charge of the court. No error.

Levi N. Blydenburgh and Charles S. Hamilton, both of New Haven, for appellant. David E. Fitzgerald and Walter J. Walsh, of New Haven, for appellee.

RORABACK, J. [1] The defendant's plea to the jurisdiction was properly held insufficient. The cause of abatement relied upon was that the defendant was described in the writ as a nonresident of the state, and that the residence of the defendant was described in the writ as follows: "Now of parts unknown, county of New Haven, state of Connecticut." General words may sometimes be

explained or qualified by special words which follow the general recital. In the case before us the last clause of the description of the residence of the defendant, the "county of New Haven, state of Connecticut," can have no other purpose than to qualify and limit the general clause immediately preceding. It is not to be assumed that this part of the description was inserted without a purpose, and that just suggested is the only one that can be fairly assigned. When so read in connection with the words "now of parts unknown," it seems clear that it is not a description of a nonresident of the state, but simply that the plaintiff or scrivener drafting the writ did not know where the defendant was "in New Haven county, state of Connecticut."

About 3 o'clock in the morning on April 9, 1900, the plaintiff was seriously injured by the explosion of the boiler of a locomotive engine. The plaintiff at this time was in the employ of the railroad company as head brakeman, and was riding in the cab of the engine with the defendant. The defendant was in charge of the engine, which was drawing a freight train from Bridgeport to Winsted, when the boiler of the engine suddenly exploded with terrific force, and the plaintiff was seriously injured. The plaintiff alleged and claimed that the explosion was due to the carelessness of the engineer in failing to keep a sufficient supply of water in the boiler. The jury found the issues in favor of the plaintiff, and rendered a verdict for him to recover \$5,000 which the court refused to set aside.

The court's action in denying the motion to set aside the verdict, in refusing to charge as requested, in the charge as given, and in its rulings upon the admission of evidence were assigned as error by the defendant.

[2] The main question controverted in the court below was the alleged negligence of the defendant, which necessarily involved the question as to the cause of the explosion.

The plaintiff introduced evidence tending to prove these facts. This engine came into the Bridgeport roundhouse early in the evening of the night of the explosion, when it was examined by an engine inspector, who found nothing to indicate but that the boiler and its connections were safe and in good order. The next morning after the explosion the fire box and crown sheet of the boiler were examined by three experts, who testified that the explosion was caused by the failure to keep a sufficient supply of water in the boiler. Evidence was also introduced to show that the engine was in good order when it went out of the roundhouse in Bridgeport, when it was under the charge and control of the defendant, and so continued until about the time of the explosion. There was also other evidence of a circumstantial nature pointing to the defendant as being responsible for the explosion.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The defendant claimed and offered evidence to prove that he did not allow the water to get down in the engine boiler; that when the explosion occurred the boiler was working at about a normal pressure; that he was not bound to account for the accident; and that the trouble apparently was that the boiler at some time prior had been overheated, burned, and weakened; and that the boiler gave way without any warning, and without fault or negligence on his part.

"A trial court should not set aside a verdict as being against the evidence where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they, or some of them, were influenced by prejudice, corruption, or partiality." *Steinert v. Whitcomb*, 84 Conn. 262, 79 Atl. 675.

Tested by this rule, the evidence in the present case was such as would justify the trial court in denying the motion for a new trial, upon the ground that the verdict was against the evidence.

There is nothing in the evidence to indicate that there was a mistake made by the jury in the application of some legal principle, or to justify the suspicion that the jury were influenced by prejudice, corruption, or partiality. On the contrary, it is apparent that the jury, from the testimony now before us, might reasonably have reached the conclusion embodied in their verdict.

Thirteen assignments of error relate to the court's refusal to charge as requested by the defendant.

The first, second, and sixth requests to charge relate to the issues between the parties and to the burden of proof. The court did not charge in the language of these requests, but its instruction upon these points was unexceptionable. The issues between the parties were clearly stated and the burden of proof fairly explained in the charge.

The defendant, in the third, fourth, and fifth requests, asked the court, in effect, to charge that if the jury should find from the evidence that an accident happened, which could not have been prevented by the use of ordinary care and skill by the defendant, he would not be liable.

[3, 4] In this connection the court said: "The complaint says 'negligently and carelessly.' Negligence is the failure to use that degree of care for the protection of another that the ordinarily reasonably careful and prudent man would use under like circumstances. The defendant in this case was an engineer. So, as applied specifically to this case, negligence would be the failure on his part to use that degree of care and caution to keep the water at the proper point in the boiler which the ordinarily careful and pru-

dent engineer would use under those circumstances under which he was situated. The defendant in this case is liable or not according as he came up, in the management of that engine, to the standard of care that the law imposes. Did he, in managing that engine at the time the explosion happened, and at the time just prior to the time that it happened, exercise that degree of care and caution that the ordinarily prudent and careful engineer, under similar circumstances, was bound to exercise?" These remarks were not open to objection, and were a proper statement of the law which governed this branch of the case.

[5] The defendant, in his seventh request, asked the court to instruct the jury that if this boiler, before it was delivered to him, had become weakened and in such condition that it could not stand the strain of ordinary use he was not responsible for the accident. The judge did charge: "Had that boiler, before it was delivered into the hands of the engineer on that morning, ever been overheated as to weaken it, and was it delivered into his hands in that condition? There is no testimony that he knew anything about this himself. It was a new engine to him. He had not been running it. He had the right to assume, when he took that engine at the roundhouse that morning, that the boiler was in good and sound working order. He had the right to go ahead and handle that engine on the presumption that it was properly constructed and in proper repair to do that kind of work that it was delivered to do, which was to pull that train of 35 cars up the road to Winsted." While the court did not adopt the phraseology of counsel for the defendant yet these instructions were an accurate statement of the law under the circumstances.

[6] The remainder of the requests to charge were erroneous in form and substance. They occupy five pages of the printed record; and, while some of them contain correct statements of law which the court should and did, in effect, charge, yet, on the other hand, these requests contained improper matter which fully justified the trial court in refusing to charge them in their entirety. They asked the court to pass upon contested questions of fact rather than upon questions of law. They also contained hypothetical propositions unsupported by the evidence. The jury would have been confused and misled rather than enlightened if these requests had been given as the defendant presented them.

[7, 8] Error is assigned to a passage in the charge, in which the court stated, "But there is no question on the evidence here, that I can find, but that you would be bound to find that the reason why he fell upon the ground and received the injury that he did was the explosion that happened. I do not think there is any evidence that makes it worth while to discuss anything else, so we will

say that is agreed; and the claim is that that explosion was caused by the negligence of the engine driver, the defendant in the case, Mr. Gilbert."

Upon this point the defendant contended that the jury must have understood the court to instruct them that the explosion was caused by the defendant. Such is not a fair construction of the remarks of the court questioned by this assignment. The court, in using this language, was merely reciting the claim of the parties, and trying to impress upon the jury that the defendants could only be held liable for the negligence alleged in the complaint.

The judge stated to the jury that there was no dispute about the explosion of the boiler, the duty of the defendant as an engineer, and that the plaintiff was seriously injured in consequence of the explosion. In making these statements the court was fairly borne out by the testimony. This assumption of facts about which there had been no controversy was not error; nor did it improperly prejudice the defendant's case.

[9] Exception is taken to a part of the charge in which the jury were told that, "starting, of course, with the assumption that the engine is in good order, and delivered in good order into the hands of the engineer, and then something happens to it, and that something is of such a character that it was within the control and within the duty, within the line of the engineer's duty to control, if something happens within that line, why, of course, the engineer is responsible for it." These statements, when taken alone, appear objectionable; but they did not stand alone upon this branch of the case, and they must be read and interpreted with the instructions upon this subject taken as a whole. An examination of them shows that the law relating to the burden of proof was fully explained. It also shows that the court expressly called the attention of the jury to the fact that there was no presumption of negligence on the part of the defendant because the boiler exploded. The court carefully and in detail explained the claims of the defendant in this connection.

The jury, as men of intelligence, could not have derived from the charge the impression that they were to assume that the engine was all right when the defendant took it.

[10, 11] The plaintiff, as a part of his case, introduced evidence to prove that he has been permanently injured and rendered lame and unable to walk by reason of the accident, and as a part of his evidence he introduced the testimony of one Dr. Keegan, who minutely described a wooden machine, called a perambulator, which the plaintiff, with the assistance of this witness, learned to use in moving about the New Haven Hospital, where he was staying for treatment of his injuries. A photograph of the perambulator with the plaintiff in it was admitted in evidence after it had been shown to Dr. Kee-

gan, and he had stated that it was a correct representation of the matters in question. The accuracy, sufficient for the admission of a photograph as evidence, is a preliminary question of fact to be determined by the trial judge. *McGar v. Bristol*, 71 Conn. 655, 42 Atl. 1000; *State v. Cook*, 75 Conn. 287, 53 Atl. 589. In the present case it appears that the witness Keegan had the opportunity of becoming familiar with the appearance of the objects represented in the photograph, and was competent to speak of their accuracy from personal observation.

No claim was made by the defendant that the photograph did not correctly portray the things then under investigation. The principal objection to its admission was that the photograph must be vouched for by the photographer who took it before it could be admitted. Such a contention is not in harmony with the declarations of this court. *McGar, Adm'x, v. Bristol*, 71 Conn. 652, 655, 42 Atl. 1000.

[12] The plaintiff called as a witness one Harry C. Oviatt, who stated that he was a locomotive fireman from 1889 to 1894, locomotive engineer from 1894 to 1900, yard track master from 1900 to 1903, master mechanic from 1903 until 1910, and general inspector of the mechanical department of the New York, New Haven & Hartford Railroad Company from 1910 until his testimony was given in April, 1912. The witness was then asked the following questions: "Q. Whose duty is it to keep the crown sheet covered with water in operating the engine? Q. Whether or not any circumstances in regard to the grade or change of position of the engine changes that duty in any way? Q. Whose duty is it to examine the glass and see it is in proper order in the proper operation of a steam engine?" To these questions counsel for the defendant objected, on the ground that they were incompetent, immaterial, and irrelevant. The trial court permitted the questions to be put, and the defendant excepted.

These inquiries related to material matters, which were not the subject of general knowledge, but dependent on facts which, from their nature, it would be difficult to place before the jury. The statements embodied in the answers of Oviatt were necessarily facts drawn from his peculiar knowledge, practical experience, and skill in the operation and control of locomotive engines. "The rule as to experts is that, 'in cases involving questions of science and skill, or relating to some art or trade, experts are permitted to give opinions; the principle embraces all questions except those the knowledge of which is presumed to be common to all men. So the business which has a particular class devoted to its pursuit is an art or trade within that rule.'" *Taylor v. Town of Monroe*, 43 Conn. 36, 43, 44. There was no occasion to question the competency of Oviatt as an expert to testify upon the sub-

ject-matter brought to his attention by these interrogatories. It clearly appears that he must have been experienced in the business relating to the questions propounded.

The criticism upon the charge of the trial judge, that it was not a competent and adequate statement of the issues between the parties and of the questions of law arising thereon, that it was argumentative, and unduly magnified a part of the evidence which was favorable to the plaintiff and minimized that which was favorable to the defendant, is not well founded.

[13] The record discloses that the instructions given presented the issues in a plain, concise, and accurate manner. They could not have been misunderstood. The law adapted to these issues was correctly stated and sufficient for the guidance of the jury. That the trial judge commented upon the evidence, and in some expressions indicated his opinion upon the questions controverted before him, is not a subject for reversal, so long as he did not invade the province of the jury by withdrawing from their consideration any of the controverted facts with evidence to support them, or lead them to suppose that the determination of such facts was not wholly with them.

We have read the entire charge with care, and are unable to agree with the contention of the defendant that it was an unfair or an improper presentation of the case.

The other assignments of error are of such a nature that the defendant has no reason to complain of the action of the trial court thereon.

There is no error. The other Judges concurred.

CRAFTS v. LIZOTTE.

(Supreme Court of Rhode Island. Dec. 26, 1912.)

On petition for rehearing. Petition denied. For former opinion, see 84 Atl. 1081.

PER CURIAM. The respondent, Lizotte, was disbarred by this court after a full hearing upon the charges against him by an order duly entered on the 20th day of November, 1912. He now petitions the court that such order may be vacated or modified, and that he may be reinstated as a member of the bar, basing such request upon the following grounds:

"First. That the conclusions and findings upon which decree was based are contrary to the evidence and the weight thereof.

"Second. That the evidence in said cause does not disclose such moral delinquency as to unfit the said respondent to practice as an attorney and counselor at law.

"Third. That the evidence disclosed does not show that the said respondent betrayed any trust or violated any duty which he

owed to his clients or to any of the courts of this state.

"Fourth. That the evidence does not show that the respondent is lacking in common honesty and veracity in his character as attorney and counselor at law, in his intercourse with the court, his clients, or the general public with whom he dealt.

"Fifth. That the punishment inflicted on the respondent was excessive, and was out of proportion to the offense charged or proven.

"Sixth. That the evidence does not show or indicate that the respondent was guilty of such want of integrity as to disqualify him from practicing as an attorney and counselor of this court."

This petition amounts to a motion for a rehearing upon the original charges and may be so considered. The grounds upon which the respondent's motion or petition is based do not embrace any new question, or any question, which has not been already fully, carefully, and at length considered by this court. We were satisfied from the testimony and admissions of the respondent himself, together with other undisputed testimony and facts, that an order of disbarment would not only be fully justified, but that any other punishment would be inadequate.

Under all of these conditions, we cannot see how a rehearing could be profitable to the respondent, and his petition is therefore denied and dismissed.

HUDSON STRUCTURAL STEEL CO. v. SMITH & RUMERY CO. et al.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. CONTRACTS (§ 93*) — MISTAKE — CONSTRUCTIVE NOTICE.

Where a contractor's bid for steel roof framing was many hundred dollars less than the actual cost of furnishing roof framing for two buildings, and the owner was an experienced contractor and bidder on contracts for iron and steel structural work, and knew that another contractor had interpreted the specifications as covering only one building, he was put on inquiry as to whether the contractor misunderstood the specifications as to the number of buildings.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 415-419; Dec. Dig. § 93.*]

2. NOTICE (§ 6*) — CONSTRUCTIVE NOTICE — FACTS PUTTING ON INQUIRY.

Notice sufficient to put a person on inquiry imposes on him such a degree of diligence as will enable him to ascertain the truth, and in failing to do so he will be charged with the knowledge he ought to have obtained by reasonable investigation.

[Ed. Note.—For other cases, see *Notice*, Cent. Dig. §§ 4-7; Dec. Dig. § 6.*]

3. WORK AND LABOR (§ 10*) — MISTAKE — RELIEF.

Where a contractor in making a bid for steel roof framing understood the specifications to cover only one building, instead of two, and the owner knew facts putting him on inquiry as to whether the contractor was mistaken, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

contract will be treated as canceled, and the contractor permitted to recover on a quantum meruit, since a mistake by one party only justifies cancellation of a contract where the other is guilty of inequitable conduct, concealment of facts, or has deceived or misled the first party by active or passive representation or conduct.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 25; Dec. Dig. § 10.*]

Report from Supreme Judicial Court, Cumberland County, at Law.

Action by the Hudson Structural Steel Company against Smith & Rumery Company and another. On report. Judgment for plaintiff.

Argued before SPEAR, CORNISH, KING, BIRD, and HALEY, JJ.

Robert T. Whitehouse, of Portland, and Whipple, Sears & Ogden, of Boston, Mass., for plaintiff. Payson & Virgin, of Portland, for defendants.

SPEAR, J. This case comes up on the following stipulation: "It is hereby stipulated and agreed that the above-entitled cause shall be reported to the law court for final decision upon the facts as reported by the referee; that the record of the case on report shall include the pleadings, the rule of reference, the report of the referee, and this stipulation, that the evidence need not be printed, but that the official stenographer's typewritten transcript of the same may be used before the law court by either party in the manner and to the extent stated in the referee's report." In view of the findings of fact by the referee, but one of the questions of law need be considered, and this will be referred to in its application to the contention of the parties when reached. There is no controversy that the contract provided for the materials and work for the structural steel for the roof framing for the School for Feeble Minded, and that the buildings were to consist of two dormitories. The specifications bore upon the outside of the cover the words "Specifications for Two Brick Dormitory Buildings for the Maine Home for Feeble Minded." As the specifications were made a part of the contract, as before suggested, the contract provided for a roof for each dormitory, while the referee found "there was nothing in the iron and steel items to indicate that the specifications were intended to cover more than one building." The contract was made on the 18th day of August, 1909.

[1] The referee finds that when the contract was signed the plaintiff understood it to call for one building only; that the defendant understood it to call for two buildings; that until some time in November, several months after the contract was made, the plaintiff did not understand that the specifications called for two buildings or that defendant was expecting more than one roof; "that the plaintiff was not negligent in not

discovering that the plans and specifications covered two buildings before it executed the contract," and defendant did not know that plaintiff understood that only one building was embraced in the contract. The referee also says: "I find, subject to the opinion of the court, in view of the fact that the defendant had knowledge before executing the contract that at least one other contractor had misinterpreted the plans and specifications as to the number of buildings, and in view of the smallness of the amount which plaintiff proposed to furnish the steel roof framing, it being many hundred dollars less than it would actually cost to furnish roof framing for two buildings, that the defendant, an experienced contractor and bidder on contracts embracing iron and steel structural work, ought to have been put upon inquiry as to whether the plaintiff was not acting under a mistake as to the number of the buildings." It is the opinion of the court that this finding should be sustained.

[2] But notice sufficient to put one upon inquiry imposes upon him such a degree of diligence as will enable him to ascertain the truth, and in failing to so do he will be charged with the knowledge he ought to have obtained by reasonable investigation. *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, in which it is said: "The means of knowledge are the same thing in effect as knowledge itself." *Vredenburg v. Burnet*, 31 N. J. Eq. 229; *Gale v. Morris*, 30 N. J. Eq. 285. "Notice sufficient to put a person on inquiry need not contain complete information on every fact material to his knowledge." *Barnes v. McClinton*, 3 Pen. & W. (Pa.) 67, 23 Am. Dec. 62; *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Germain, etc., v. Western, etc., Co.*, 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575; *Furman v. Union Pac. R. Co.*, 106 N. Y. 579, 13 N. E. 537.

[3] Being put upon inquiry, it was the duty of the defendant to have informed the plaintiff of its apprehension, if not knowledge, as to the plaintiff's misunderstanding. The rule touching this duty is forcibly stated in the *Harvard Law Review* for June, 1910, p. 622. See, also, *Cyc.* 34, 921, 922; *Webb v. Morrison*, 157 N. Y. 712, 53 N. E. 1133; *Essex v. Day*, 52 Conn. 483, 1 Atl. 620; *Welles v. Yates*, 44 N. Y. 525; *James v. Outler*, 54 Wis. 172, 10 N. W. 147; *Venable v. Burton*, 129 Ga. 537, 59 S. E. 253; *Motherway v. Wall*, 168 Mass. 333, 47 N. E. 135.

While under the circumstances not chargeable with positive fraud or actual misrepresentation, in failing to do so, it nevertheless put the plaintiff to the disadvantage of being deceived and misled by the silence or passive conduct of the defendant. Under the finding of the referee that "the plaintiff understood it to call for one building only," thereby laboring under the mistake with regard to a material matter, while the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 85 A.—25

defendant, put upon inquiry, understood the contract to call for two buildings, it is the opinion of the court, the contract being subject to cancellation, that the plaintiff should be permitted to recover upon quantum meruit.

But upon this issue the defendant contends that a unilateral mistake cannot avoid a contract. But in view of the facts found by the referee, this contention cannot be sustained. While this view may be correct as to the reforming of a contract, it is not of universal application as to the cancellation of one. *Andrews v. Andrews*, 81 Me. 337, 17 Atl. 166, a bill in equity, to reform a deed, holds that, with no allegation of fraudulent or other inequitable conduct, the plaintiff must prove a mutual mistake. The converse is that, if inequitable conduct was proved, that might be sufficient. It further holds: "If the parties differently understood the original agreement as to the identity of the premises, the relief would take on the form of cancellation rather than reformation." *Young v. McGown*, 62 Me. 56, notes the distinction with respect to the application of the law to the reformation and cancellation of contracts. The court say: "It must be a mistake on both sides, for, if it be by one party only, the altered instrument is still not the real agreement of both. A mistake on one side may be a ground for rescinding a contract, or for refusing its specific performance; but it cannot be a ground for altering its terms." This case is cited with approval in *Andrews v. Andrews*. In *Bidder v. Carville*, 101 Me. 59, 63 Atl. 303, 115 Am. St. Rep. 303, a bill was brought for the cancellation of a deed. In discussing this case the court say: "In this case the court is asked to cancel a deed which expressed just what the plaintiff intended it should. The mistake was unilateral on the part of the grantor alone, induced by no fraud, falsehood, misrepresentation, or concealment of the grantee, relating to the grantor's own title, the true state of which ordinary care and diligence on his part should have revealed to him. It does not appear that the grantor will obtain an unconscionable advantage by the deed." Conversely, if the court had found "concealment" of facts or an unconscionable advantage, by the party who ought to have communicated them, it might be sufficient to warrant the cancellation of the deed. In *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413, the court say: "Having made a contract explicit in its terms, as to which he has been in no wise deceived or misled by the active or passive representations or conduct of the plaintiff, he must abide by its terms." In other words, if the party was deceived or misled by the active or passive representation or conduct of the plaintiff, he might be relieved. 24 Enc.

of Law, p. 618, upon this subject says: "Where a contract in writing is executed under a mistake by only one of the parties as to a fact which is of the essence of the contract, the mistake constitutes the ground for the court of equity to rescind and cancel the apparent contract as written, and place the parties in statu quo, but does not constitute a ground for reformation." Also: "That the court may treat the case as though no writing ever existed and restore the parties to their original positions." In 9 Cyc. 396, is found this principle: "One is not permitted to accept a promise which he knows that the other party understands in a different sense from that in which he understands it. In such a case there is no agreement, although equity sometimes rectifies the contract so as to make it express the real intention." Under this quotation is cited *Lapish v. Wells*, 6 Greenl. (6 Me.) 175, which contains an elaborate opinion upon this subject.

In referring to this matter generally, the court quoted with approval the following language: "The fraud, said the counsel, consists, in such cases, in dealing with the party in ignorance and leaving him so. It is not necessary that the other party should have created the false impression or intended it; it is sufficient that he knows it, and takes advantage of it." Also: "The laws of morality can never give sanction to such a proceeding; and it surely cannot be the duty of a court of justice to be more indulgent in its judgment." If this apparent contract then could be "canceled," or treated "as though no writing ever existed" or as "no agreement," because the plaintiff, upon a material matter, understood it one way, and the defendant understood it another, and was charged with knowledge of the plaintiff's mistake, then the minds of the parties did not meet, and no contract between them was ever consummated. It therefore follows that the plaintiff can recover upon quantum meruit. *Cobb v. Stevens*, 14 Me. 472; *Long v. Athol*, 196 Mass. 508, 82 N. E. 665, 17 L. R. A. (N. S.) 96; *Sexton v. City of Chicago*, 107 Ill. 323; *Vickery v. Ritchie*, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810; *Turner v. Webster*, 24 Kan. 38, 36 Am. Rep. 251. The referee has found that the plaintiff upon a quantum meruit is entitled to recover judgment for \$1,789.29 and interest from December 28, 1909, and cost of reference tax at \$25.86 and costs of court to be taxed by the court. In accordance with the stipulation, the entry must be:

Judgment for the plaintiff for \$1,789.29 and interest from December 28, 1909, and costs of reference \$25.86, and costs of court to be taxed by the court.

CHENEY v. CHENEY et al.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. STATUTES (§ 181*)—CONSTRUCTION—INTENTION OF LEGISLATURE.

The intent of the Legislature is the law, when such intent can be declared without doing violence to the clear and unambiguous language of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

2. DOWER (§ 4*)—NATURE OF ESTATE—STATUTORY PROVISIONS.

Pub. Laws 1895, c. 157, amending Rev. St. 1883, c. 75, § 1, relating to title by descent, and establishing the rights of widows and widowers in the real estate of deceased husbands and wives, which provided by section 1, par. 1, that where there was a widow and issue the widow should take one-third, and if no issue one-half, and if no kindred the whole, and that the same shares in a wife's real estate should be taken by the widower, and that a widow or widower should take the same share in all such real estate of which the deceased was seized during coverture, and which had not been barred or released by section 3, that such right should not be lost by levy or sale of the real estate on execution, and by section 4 for the waiver of specific provisions of a will similar to the dower right of waiver, was a substitute for the old provision for dower as at common law, and enlarged the widow's estate from a life estate to an estate in fee; but thereunder she took as widow, and not as heir.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 6, 7; Dec. Dig. § 4.*]

3. DESCENT AND DISTRIBUTION (§ 53*) — RIGHTS OF WIDOW—STATUTORY PROVISIONS — PERSONAL ESTATE.

Pub. Laws 1897, c. 221, as amended by Pub. Laws 1903, c. 160, which provided that a widow might waive a bequest under the will of her husband and thereupon be entitled to the same distributive share of his personal estate as that provided by law in intestate estates, and that a widow for whom no provision was made by will should receive the same distributive share of the husband's personal estate as provided by law in case of intestacy, was not an amendment or modification of Pub. Laws 1895, c. 157, which enlarged a widow's distributive rights in the real estate of her husband from an estate for life to a fee, but related only to personal estate, and was intended solely to confer upon the widow additional rights in the personal estate of her husband by an allowance, and by the absolute right to the same interest as she had in his real estate, and so make the distribution of personal property in harmony with the descent of real property; and, as found in Rev. St. 1903, c. 77, § 13, a statute of descent, consolidating the former acts relating solely to a widow's right of inheritance in the real estate of her husband, is limited in its operation to personal estate; and hence a widow for whom no provision was made by will took one-half of the real estate in fee.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 141-143; Dec. Dig. § 53.*]

Report from Supreme Judicial Court, Oxford County, at Law.

Partition by Emma J. Cheney against George F. Cheney and others. On report. Judgment for plaintiff.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Newell & Skelton, of Lewiston, for petitioner. John P. Swasey, of Canton, Aretas E. Stearns, of Rumford Falls, and H. H. Hastings, of Bethel, for respondents.

SPEAR, J. This is a petition for partition, brought by Emma J. Cheney of Rumford, in Oxford county, under the provisions of chapter 90 of the Revised Statutes of Maine, to have set off to her in severalty her alleged share of certain real estate situated in said Rumford, and in which the said petitioner claims that she is the owner in fee of one-half interest, held in common, undivided, and in tenancy in common with the respondents named in said petition. The basis of the petitioner's claim is that she is the widow of Charles J. Cheney, late of said Rumford.

The question presented by this petition is solely that of the rights of Emma J. Cheney in the real estate of her deceased husband, Charles J. Cheney, who died testate, and in whose will no provision was made for his widow.

The matter under consideration is an enactment of the Legislature obviously intended to abrogate the old rule of dower regarding the interest of the widow in her late husband's lands, and to confer upon her an estate of inheritance, instead of an estate for life.

[1] The solution of this problem involves a construction of R. S. c. 77, § 13, in which is found a consolidation of the previous statutes relating to this subject. It is now an established rule of construction that the intent of the Legislature is the law, when such intent can be declared without doing violence to the clear and unambiguous language of the statute. With this end in view, it becomes necessary to interpret section 13 with an effort to discover (1) the intent of the Legislature in changing the law, and (2) if that intent is consistent with the language of the enactments calculated to accomplish the desired result.

[2] The title of the act which initiated this legislation is found in the Public Laws of 1895, c. 157, and reads as follows: "An act to amend section 1 of chapter 75 of the Revised Statutes (1883), relating to title by descent, and to establish the rights of widows and widowers in the real estate of deceased husbands and wives." It may here be said that only those sections of the chapter which relate to the right of widows and widowers are involved in this case, and consequently relate solely to lands or real estate. It was, then, evidently the primary intention of the Legislature, in enacting this chapter, to change the quality of the estate to which a widow was entitled under the law of dower from a life estate to an estate in fee, and in other respects neither to increase nor diminish the attributes of the estate.

Whether the phraseology of the statute does more than this is the question.

R. S. 1883, c. 103, provided for dower at common law. This was a right of which the widow could not be deprived by the husband by will or otherwise, except as hereinafter noted. If he made no will, she received her interest as a matter of course, upon petition. If he made a will and devised to her less than her dower interest, she could waive the devise and obtain her dower. R. S. 1883, c. 65, § 5; chapter 103, § 10. If he made a will without provision, her right was preserved. Chapter 103, § 1. Dower, then, was an absolute right, unless barred or released. It was, however, but a life interest.

In 1895 the Legislature proceeded to the enactment of a statute the sole purpose of which seems to have been to change dower from a life interest to an estate in fee. It did not pretend to affect the quantity of the estate, nor the nature of the right. Its absolute character for the protection of the widow was not intended to be disturbed, as will appear from the following analysis. Section 1, par. 1, Public Laws of 1895, reads as follows: "If he leaves a widow and issue, one-third to the widow. If no issue, one-half to the widow. And if no kindred, the whole to the widow. And to the widower shall descend the same shares in his wife's real estate. There shall likewise descend to the widow or widower the same share in all such real estate of which the deceased was seized during coverture, and which had not been barred or released as herein provided." The latter part of this paragraph is a substitute for the old provision for dower. It vests in the widow an absolute estate, if not barred or released, as hereinafter provided. In other words, the substitute clothes the new estate with all the attributes of dower, except the quality of the estate.

It will now be noted that the provisions for bar or release (sections 3, 4, and 5) have adopted, in a little different phraseology, the rules of defeasance that are found in the Revised Statutes relating to dower. Section 3 provides precisely as in case of dower: "But shall not be deprived of such right and interest by levy or sale of the real estate on execution." This would seem to prove that this new estate was to vest in the widow, precisely as dower did, as a right of which she could not be deprived, except in one of the ways mentioned as a bar or release. Section 4 provides for the waiver of a specific provision of a will, which is also identical with the right under the rule of dower. The other provisions for bar and release are immaterial to the issue here. It therefore appears from an analysis of the statutes of descent touching a widow's rights that the properties and characteristics of the new estate are practically the same as those of the dower estate. All the bars and releases are identical in meaning, although changed in phraseology in condensing. This

leaves the positive rights in the new estate equivalent to the positive rights in the old. Our court, in *Golder v. Golder*, 95 Me. 259, 49 Atl. 1050, has so construed the statute, in which it is held: "The statute does not change the status of the widow with reference to her deceased husband's estate. It enlarges her interest by giving her an estate in fee instead of an estate for life. She still takes not as heir, but as widow." At this juncture the status of the widow in relation to her inheritance in her husband's estate is precisely as it was with reference to dower. Up to this point her rights in the personal estate of her husband are not affected, or even referred to.

It would appear, then, that when the statute of 1895 became a law the only change the Legislature intended to make, or, in the use of the language employed, did make, was to enlarge the interest of the widow by giving her an estate in fee instead of an estate for life. In all other respects, whether there was a will or no will, or a will with no provision for her, her interest in the lands of her husband was not affected; nor were her rights in the personal estate of her husband altered in the least, or even referred to in this act. If, therefore, this case was to be decided upon the act of 1895, no controversy could arise respecting the right of the widow to share one-half the real estate of her late husband.

[3] But the defendants claim that the phraseology of section 13, as consolidated in the Revision of 1903, if considered, in clear and unequivocal terms confines the right of the widow, when no provision is made for her in the will, to personal estate only. But the provision which confines the right of the widow to personal estate, when no provision is made in the will, is incorporated from chapter 221 of the Public Laws of 1897 and chapter 160 of the Public Laws of 1903. Now, in order to arrive at a proper interpretation of section 13, it becomes necessary to refer to these statutes and discover, if possible, their bearing upon the construction already given to the statute of 1895. It has been noted that the act of 1895 in no way related to the rights of the widow in the personal property of her husband's estate. The act of 1897, therefore, is not in any way an amendment of chapter 157 of the Laws of 1895, but an entirely new section having no relation to that chapter, or to the subject-matter of it. It pertains wholly to personal estate. The first paragraph of section 1 of chapter 221 is a provision that the widow may waive a bequest under the will of her husband, and upon such waiver be entitled to the same distributive share of his personal estate as is provided by law in intestates' estates. By the second paragraph, if no provision is made in the will of the testator for his widow, she may receive the same distributive share of the personal

estate of such testator as is provided by law in intestate's estate, upon filing a written notice that she claims such share. Even from a casual observation, it is apparent that this section in no way did, or was intended to, affect the right of descent provided for in the act of 1895. But it is the last paragraph of this section as found in the consolidation of section 13, c. 77, R. S. 1903, which the respondents invoke as limiting the right of descent, when no provision was made in the will of the husband, to personal estate only. It was undoubtedly the purpose of the Legislature, in enacting this independent statute, to bring the provision for the distribution of personal property, in the two instances named, in harmony with the law governing the descent of real estate; for an examination of our statutes will show that, previous to the enactment of chapter 221, there was no law providing that the widow, in either of these contingencies, should receive one-third or one-half the personal property, as the case might be. Under the old statute, if there was no will, the widow received one-third or one-half, as the case might be, of the personal estate. R. S. c. 75, § 9. If a will, without provision for her, she could petition for an allowance. Chapter 65, § 21. If a will with provision for her, she could waive the provision and petition for an allowance. Chapter 65, § 21. By section 2 of chapter 221 the rights above enumerated are not molested. It therefore appears that the two contingencies provided for in section 21 of chapter 65, R. S., are identical with the contingencies provided for in chapter 221, Laws of 1897, and that by the latter chapter, in addition to the right of an allowance, is given to the widow the absolute right to one-third or one-half of the personal property of her late husband—precisely the interest she had been allowed in his real estate. It therefore seems to be established beyond cavil that the sole intention of the Legislature in the enactment of chapter 221 was to confer upon the widow the additional rights, in the personal estate, prescribed, and to do nothing more. At this point we think it may be said that chapter 221, when it became a law, in no way amended or modified the provisions of the act of 1895.

The only other statute relating to this matter is chapter 160 of the Public Laws of 1903, which is an amendment of chapter 221, *supra*, that places the widower, with reference to his personal estate, in the same category with the widow, and need not be further noticed.

Our conclusion, therefore, is that upon an analysis and comparison of these various statutes the Legislature, by the act of 1907,

did neither intend to enact a statute repealing or modifying the widow's rights by descent in the contingencies named, nor, by the use of the language employed, did it do so; and that the provisions of 1897, although incorporated into a section of the statute relating to title by descent, must be construed to mean just what their language conveys, and be confined to personal estate only. It will be observed, also, that there is nothing in the phraseology of these two provisions, as they are read in section 13, c. 77, R. S., that connects them with the widow's right of inheritance.

An examination of the composition of this section confirms this view. The first part of section 13, to the point where chapter 221 is inserted, is a consolidation of section 5 of chapter 157 of the Laws of 1895, which is but a restatement of R. S. c. 103, § 10, and of chapter 88, Public Laws of 1887, relating solely to widows' dower, and so much of chapter 75, Public Laws 1903, as related to the time when the election must be made; all pertaining to the rights of the widow in the real estate of her husband.

If section 13, comprising a consolidation of these acts relating solely to the widow's right of inheritance in the real estate of her husband, had been permitted to complete the section, it would have accomplished precisely what the Legislature intended to have enacted. But instead of stopping here it adds to the end of the consolidation of these acts, verbatim, chapter 221, relating to the widow's additional rights in the personal estate of her husband, created by this act, with so much of the act of 1903 as relates to the time when waiver of petition must be filed. This, we think, should have been a section by itself among those provisions of the statute relating to the rights of a widow in personal estate. However that may be, the mere fact that this act was added to a consolidation of the acts relating to descent cannot be accorded the effect of defeating the plain intent of the Legislature with regard to the former enactments.

In 1909 (Public Laws, c. 260) the Legislature amended section 13 by inserting the proper words and phrases to make the last paragraphs include real as well as personal estate, but by so doing simply made clear what was left obscure in the act of combining the different statutes in one section. The amendment did not affect the interpretation of the section as it stood. It did, however, in harmony with one of the objects of legislation, remove ambiguity and doubt.

In accordance with the stipulation in the report, the entry must be:

Judgment for partition.

TOLMAN v. CARLETON.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. FIXTURES (§ 15*)—LANDLORD AND TENANT—MACHINERY.

Five heavy machines which the owner has placed in a building on which he has a lease, two of them bolted to the floor, are not exempt from attachment on the ground that they are real property, the rules between landlord and tenant relating to fixtures applying, and there being strong presumption that the machines, being removable, are not intended as part of the realty.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 23-29; Dec. Dig. § 15.*]

2. ATTACHMENT (§ 328*)—PROPERTY SUBJECT—REMOVABLE PROPERTY—DISCRETION OF OFFICERS.

While Rev. St. c. 83, § 27, providing that, where attached property is not removable owing to its size or bulk, the attaching officer may file his return with the town clerk, leaves the question of removability to the judgment of the officer, his determination is not conclusive.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1170-1173; Dec. Dig. § 328.*]

3. ATTACHMENT (§ 164*)—PROPERTY NOT SUBJECT TO REMOVAL.

Heavy machinery which cannot be removed from the building in which it is installed without dismantling and unbolting from the floor is property not subject to removal, under the provisions of Rev. St. c. 83, § 27, providing that, when attached property cannot be removed owing to its size or bulk, the attaching officer may serve a copy of his return on the town clerk.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 464-479; Dec. Dig. § 164.*]

Report from Supreme Judicial Court, Knox County, at Law.

Trover by A. J. Tolman against Guy Carleton on report. Action to stand for trial.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Reuel Robinson and M. T. Crawford, both of Camden, for plaintiff. J. H. Montgomery and Oscar H. Emery, both of Camden, for defendant.

SAVAGE, J. Trover for the conversion of personal property attached by the plaintiff as sheriff. The case comes up on report, with the stipulation that, if the action is maintainable upon the evidence, the action is to stand for trial; otherwise, a nonsuit is to be entered.

The evidence warrants a finding of the following facts: On a writ against the Eastern Coupling Company the plaintiff attached three lathes, a drill press, and a hand milling machine, all of which were then in the shop of the Eastern Coupling Company at Camden. Instead of removing these machines, or otherwise retaining physical possession of them, he filed within the town clerk's office within five days an attested copy of his return. He claimed the right to do so under R. S. ch. 83, § 27, which provides that, "when any personal property is attach-

ed which by reason of its bulk or other special cause cannot be immediately removed, the officer may within five days thereafter, file in the office of the clerk of the town an attested copy of so much of his return on the writ as relates to the attachment, * * * and said attachment is as effectual and valid, as if the property had remained in his possession and custody."

One of the machines weighed 1,200 pounds, two others 800 pounds each, one 400 pounds, and one 100 pounds. They were all belted to the main shaft. The three heavier ones were not fastened to the floor. The other two were bolted to the floor to keep them "steady." There were two entrances to the shop, through one of which the machines could have been removed only with great difficulty, perhaps not at all. Through the other they could have been removed, and were in fact removed later; the heaviest one being taken apart. The plaintiff did not know of the existence of the latter entrance.

The defendant was the manager of the Eastern Coupling Company. He was not present at the time the attachment was made. There is no evidence that he knew of the attachment, unless knowledge may be inferred from the circumstances. Afterwards, and before judgment in the action against the Coupling Company, the defendant caused the machines to be removed to his own shop in Rockport, and to be used there by his own employes. After judgment and issue of execution, the plaintiff demanded the machines of the defendant, and gave him a copy of the original return. The result of the demand is shown by the following excerpt from the plaintiff's own testimony: "Q. And as a result of that demand did you get the machinery? A. I did not. Q. Whether or not he would give it to you? A. He did not." This is all the evidence there is on that point. The demand was made at the defendant's "home" in Rockport. The machines were then in his "shop, back of his residence."

[1] The defense is threefold: First, that the machines were a part of the realty, and not attachable as personal property; secondly, if the machines were personal property, that the plaintiff did not retain possession of them, and so lost the attachment; and, lastly, that the evidence does not show any conversion by the defendant.

1. We think the first point clearly is not tenable. None of the cases cited by the defendant apply to the facts of this case. They are all cases of annexations made by the owner of the fee, and the controversies were between vendor and vendee, or attaching creditor and the owner of the fee attached, or on partition proceedings. It is well settled that an article may constitute a part of the realty, as between vendor and vendee, or owner of the realty and attaching credi-

tor, mortgagor, and mortgagee, which would not under similar conditions and circumstances be so treated as between landlord and tenant. *Parsons v. Copeland*, 88 Me. 537; *Young v. Hatch*, 99 Me. 465, 59 Atl. 950, 2 Ann. Cas. 374; *Young v. Chandler*, 102 Me. 251, 66 Atl. 539. It was conceded at the argument of this case that the Eastern Coupling Company was not the owner of the building in which the machines were, but was merely a tenant. So the rule to be applied in this case is that of landlord and tenant. That rule was very clearly stated in the recent case of *Hayford v. Wentworth*, 97 Me. 347, 54 Atl. 940. As between landlord and tenant, a chattel does not merge into the realty unless there is physical annexation, at least by juxtaposition, and an adaptability for use with the realty to which it is annexed, and an intention of the party annexing it to make it a permanent accession. And the burden is on him who claims a merger. There is a very strong presumption that a tenant, when he installs a removable machine in the shop which he has hired, does not intend to make it permanently a part of the real estate. And that presumption warrants a finding in this case that the machines attached were not a part of the realty, but were attachable as the personal property of the tenant.

[2, §] 2. It is true that an attachment of personal property is dissolved unless the attaching officer retains possession of the property attached. And in this case the plaintiff did not retain actual physical possession. But the statute quoted above permits the filing of a copy of the officer's return in the town clerk's office as a substitute for retention of possession, when the property attached cannot be immediately removed by reason of bulk or other special cause. *Perry v. Griefen*, 99 Me. 420, 59 Atl. 601. The plaintiff here filed a copy of his return. The only point made is that there was no reason, for bulk or otherwise, why the machines could not have been immediately removed, and therefore that the officer was not justified in filing the copy as a substitute for possession.

The statute furnishes no standard. The nature of the property, its situation and expense of removal, are to be considered. The officer is left to use his judgment. His judgment is not conclusive. *Thompson v. Baker*, 74 Me. 48. Still, his decision fairly exercised is entitled to some weight. Attachments have been upheld where copies of return were filed in case of hay in mow (*Wentworth v. Sawyer*, 76 Me. 434); of logs (*Parker v. Williams*, 77 Me. 418, 1 Atl. 138; *Stevens v. Thatcher*, 91 Me. 70, 39 Atl. 282); of a wooden building (*Lewiston Steam Mill Co. v. Foss*, 81 Me. 593, 18 Atl. 288); of bark (*Grant v. Albee*, 89 Me. 299, 36 Atl. 397); of a temporary track and sleepers (*Field v.*

Maine Central R. R. Co., 62 Me. 77); of charcoal and cordwood (*Reed v. Howard*, 2 Metc. [Mass.] 36); of pig iron (*Scovill v. Root*, 10 Allen [Mass.] 414). In the latter case the court, construing a statute like our own, said: "If the statute applies to such property as cordwood and charcoal piled up, millstones, logs, timber, and wood, hewn stones and hay in a barn, the court cannot judicially see that it does not apply to 50 tons of pig iron stored in a foundry." And we are led to say that we cannot see why it does not apply to machines of the bulk and weight of those under consideration, and situated as they were. The statute does not mean that the property must be so bulky or so heavy that it cannot be moved at all. Hay can be moved by the pitchforkful, or by the load; wood and bark can be moved a little at a time; logs one at a time; pig iron a piece at a time. These machines could have been moved. The heaviest one might have been taken apart to facilitate removal, as was afterwards done, when it was removed by the defendant. But we think that machines like these, and situated as these were, fairly come within the meaning of the statute.

3. The plaintiff contends that conversion by the defendant is shown by an invasion of the defendant's right by such interference, use of, and dominion over the property, as against the plaintiff's right, as would itself be conversion. He also contends that there was a demand and refusal, which would be sufficient evidence of conversion to maintain the action on that ground.

We conclude that there was sufficient evidence to go to a jury on the question of conversion, but, since the case must be tried again, it is inexpedient to discuss the effect of the evidence, which is a question for the jury.

In accordance with the stipulation, the certificate will be:

Action to stand for trial.

GOODING v. NORTHWESTERN MUT. LIFE INS. CO.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. EVIDENCE (§ 448*)—PAROL EVIDENCE.

Where the employment contracts upon which an insurance agent relied in an action for commissions on renewal premiums were unambiguous, parol evidence of interpretations placed upon them by acts of the parties was incompetent to vary their terms.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 448.*]

2. CUSTOMS AND USAGES (§ 17*)—INSURANCE—AGENT'S CONTRACT—EVIDENCE OF CUSTOM.

In an insurance agent's action for commissions, evidence of customs governing the relations between the insurance company and its agents could not be considered to vary the terms

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of plaintiff's plain and unambiguous employment contracts and entitle him to commissions on renewal premiums contrary to such contracts.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 84; Dec. Dig. § 17.*]

3. INSURANCE (§ 84*) — AGENCY CONTRACT—CONSTRUCTION.

Where an insurance solicitor's subagency contract stipulated that, in case of the death or retirement of the general agent while the contract was in force, the subagent should be entitled to two years' renewal commissions on business already placed by him, "provided he continues during such two years to act as an agent for the company," the proviso did not extend the period during which the commissions on renewal premiums were to be paid, but merely imposed additional conditions during the period.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 111-114; Dec. Dig. § 84.*]

4. INSURANCE (§ 84*)—AGENT—COMMISSIONS ON RENEWAL PREMIUMS.

An insurance agent is not entitled to commissions on renewal premiums after termination of his employment, in the absence of an express contract to the contrary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 111-114; Dec. Dig. § 84.*]

5. INSURANCE (§ 84*)—COMMISSIONS ON RENEWALS.

The fact that a mutual life insurance company fixed its rates on the assumption that commissions on renewal premiums would be paid the agent as long as the policy remained in force did not entitle an insurance agent to a commission on renewals contrary to the terms of his employment contract after the termination of his employment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 111-114; Dec. Dig. § 84.*]

Report from Supreme Judicial Court, Cumberland County, at Law.

Action by John M. Gooding against the Northwestern Mutual Life Insurance Company. Judgment for defendant on report of referee.

Argued before WHITEHOUSE, O. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Fred V. Matthews, of Portland, for plaintiff. H. & W. J. Knowlton, of Portland, for principal defendant and trustee Smith. Ver-rill, Hale & Booth, of Portland, for trustee United States Trust Co.

BIRD, J. This action of assumpsit was referred to Mr. Chief Justice Emery who reported his findings of fact and referred to the court the question of law whether, upon the facts reported, the plaintiff is entitled to recover. The contention of the parties is clearly and succinctly set forth in the opening statement of the report of the referee.

"The plaintiff brought this action to recover commissions on the renewal premiums collected by the company from policy holders obtained for the company by the plaintiff while in the employ of the company as general or subagent. The claim is only for commissions on renewal premiums collected after the expiration of two years from the date

of the last service of the plaintiff to the company; he having been paid such commissions on renewals up to the end of that two years. In his declaration are two counts. In the first he claims the commissions as due under a contract to pay them. In the second he claims them as money collected by the defendant company of its policy holders which it ought in equity and good conscience to pay over to him. The company claims that all the services of the plaintiff were rendered under express contracts, by the terms of which the payment of commissions on renewal premiums was to cease at the end of two years after the expiration of the contract, if not renewed, and that it has collected no money he should have received."

The case is now before this court upon report for determination upon the facts found by, and the written evidence made part of, the report of the referee, the stipulation of the parties under which the reference was made, the rule of reference, and the writ and pleadings.

The plaintiff's first connection with the company was in September, 1888, when he and one Merry became the general agents of the company for certain counties of the state. They were constituted such agents under a written contract signed by them as well as the company, dated September 18, 1888. "In this contract [we quote from the findings of the referee] it was stipulated that their full compensation for services and work and expenses in procuring applications and collecting and remitting the first year's premiums should be a commission on the first year's premium. It was also stipulated that they should collect and be entitled to 'collect the renewal premiums on all policies obtained by themselves and their agents under this contract during the term thereof within the limits of said agency, for which collections the said agents shall receive 7½ per cent. of such renewal premiums while they retain such agency, but not longer, as to any policy, than the person thereby insured remains resident within the territory of said agency.' There was also in the contract this stipulation: 'In case this contract is not renewed at the end of the term upon as favorable terms regarding commissions as the said company is at that time contracting for similar agents, the said company will pay said agents two years' renewal commissions, less 2 per cent. on the premiums collected on all policies obtained under this contract and then in force within the limits of this contract; said renewal commission to be paid quarterly as premiums are paid and reported to the company. It is further agreed that, in case of disability by sickness or death of either of said agents, the company will pay two years' renewal commissions, less 2 per cent. of the premiums collected on all the policies obtained under this contract and then in force within the limits of this con-

tract, in the same manner as above mentioned.'

"There was finally this stipulation: 'It is further understood and agreed that, upon the discontinuance of this contract in any way, all interest of said agents in this contract in commissions on premiums shall revert back to the company, except as above mentioned, and upon the deferred premiums on new business unless otherwise specially agreed.'

"The above contract by its terms was to continue till September 15, 1893; but, Merry having withdrawn, Gooding, the plaintiff, December 29, 1891, made a new written contract with the company by which he was appointed sole agent for the same territory, with like stipulations as to compensation and payment of commissions on renewal premiums. This contract was by its terms to continue till November 17, 1896; but on September 30, 1893, the company appointed Mr. Wright general agent for the same territory by written contract to continue till October 1, 1896, containing like stipulations as to compensation and commissions on renewals. Mr. Gooding, the plaintiff, acquiesced in this appointment, surrendered his contract, and accepted a subagency under Mr. Wright, under which subagency his service was not continuous; there being an interval when he was not acting under it nor for the company. Wright died in March, 1896, and May 12, 1896, the company appointed the plaintiff Gooding and Mr. C. C. Chapman as general agents for the same and other territory. This contract by its terms was to continue until May 1, 1897, and contained stipulations similar to those in the prior contracts as to compensation and payments of commissions on renewals.

"This last contract was not renewed at its expiration May 1, 1897, but Mr. Gooding continued for a time to act as the general agent, expecting to be reappointed under a renewal of the written contract of May 12, 1896.

"In November, 1897, however, the company appointed Mr. Blanchard general agent in the place of Mr. Gooding, by the usual written contract, but requested Mr. Blanchard to retain the services of Mr. Gooding as subagent under him, and so advised Mr. Gooding, who continued to work for the company with the expectation of a favorable arrangement with Mr. Blanchard, as verbally proposed. Mr. Blanchard did not take charge till January 1, 1898. Some friction or misunderstanding arose between the two, and the draft of a contract of subagency under Mr. Blanchard, and prepared by him and submitted to Mr. Gooding, was deemed by the latter unreasonable and impracticable, and he refused to sign it. Mr. Blanchard refused to modify it, and after a little while requested Mr. Gooding to give up his keys and leave the office, which he did March 8, 1898.

"Throughout his employment, Mr. Gooding's work was generally satisfactory to the company itself; the only criticisms made being that he was sometimes slow in reporting and remitting collections. The relations, however, between Mr. Blanchard and Mr. Gooding became strained, and Mr. Blanchard became convinced that Mr. Gooding would not work faithfully and efficiently under him. I do not pass upon the question whether such was the fact, as I deem it immaterial. I only find that Mr. Blanchard became convinced that such was the fact, and from his information had some reason for so believing.

"The company only dealt with its general agents, holding them responsible for their subagents, and leaving them free to select their subagents and make such contracts with them as they could agree upon.

"The company has paid Mr. Gooding the agreed commissions on renewal premiums on all the business secured by him for the company from the time of the first application obtained by him in 1888 down to the last in 1898, and for two years after the date of the last. It continued these payments without reference to any intervals in service or between the successive contracts.

"The company, however, has refused to pay commissions on any renewals since the expiration of two years from the last service."

Considering the first count of the declaration in which plaintiff claims commissions as due under a contract to pay them, the report shows that, during the time covered by the first count, there were periods during which plaintiff acted as general agent under written contracts made by defendant, other periods during which plaintiff acted as subagent under written contracts entered into by general agents with plaintiff, and still other periods when plaintiff acted as agent or subagent without contract, either written or oral. The contracts of general agency provide that the full compensation of the agent for labor and disbursements in procuring applications and collecting and remitting the first year's premiums was to be a commission on such premiums; that, as to commissions on renewal premiums on policies procured by him and his subagents during the term of the contract, the agent shall receive 7½ per cent. while he retains such agency; and that, upon the discontinuance of the contract in any way, all interest of the agent in commissions on premiums should revert back to the company "except as above mentioned." The only exception "mentioned" necessary to be considered is, "In case this contract is not renewed at the end of the term upon as favorable terms regarding commissions as the said company is at that time contracting for similar agents," the company will pay "said agents two years' renewal commissions, less 2 per cent. on the

premiums collected on all policies obtained under this contract."

[1] In all this the contracts are clear and unambiguous. The plaintiff, however, urges that another interpretation has been placed upon the contract in view of the payment and receipt of renewal premiums by defendant and plaintiff, respectively, until two years had elapsed after the latter ceased to act in any capacity for the defendant. But, if the acts of the parties in question are evidence of an interpretation of the contracts by the parties, the evidence cannot be permitted to vary their terms, since they are clear and unambiguous. *Clarke v. Eastern Advertising Co.*, 106 Me. 59, 61, 75 Atl. 303; *Bishop v. White*, 68 Me. 104, 107; *Railroad Co. v. Trimble*, 10 Wall. (77 U. S.) 367, 377, 19 L. Ed. 948; *Pollock on Contracts* (3d Am. Ed.) 572.

[2] We understand the plaintiff to invoke custom to sustain his contention. While the report of the referee is silent as to custom, there may be evidence as to custom in the evidence taken before the referee, but it is sufficient to say that custom cannot be taken into account where the contract is express, clear, and unambiguous. *Stagg v. Insurance Co.*, 10 Wall. (77 U. S.) 580, 19 L. Ed. 1038; *Partridge v. Insurance Co.*, 15 Wall. 573, 579, 21 L. Ed. 229; *Spaulding v. Life Ins. Co.*, 61 Me. 329, 332; *Norton v. University of Maine*, 106 Me. 436, 440, 76 Atl. 912; *Marshall v. Perry*, 67 Me. 78, 83. See, also, *Park v. Piedmont, etc., Ins. Co.*, 48 Ga. 601.

[3] The contracts of general agents with plaintiff by which he became subagent make substantially the same provisions as to compensation, *mutatis mutandis*, as the contracts already considered. Each stipulates that "nothing herein contained shall make or be so construed as to make the said company liable to the said agent under any of the provisions of this contract, or in any manner whatever anything herein contained to the contrary notwithstanding." Each contract also provides "that in the event of the death, resignation, or removal from office, of the said general agent, the said Gooding, this contract being then in force, shall be entitled to two years' renewal commissions on business already placed by him, provided he continues during such two years to act as an agent for the company."

The later subagency contract bears a rider executed by a general official of defendant approving the contract, in the event of the death, etc., of the general agent, in so far as to protect the plaintiff in the enjoyment of the renewal premiums specified therein, provided and so long as said Gooding continues to work satisfactorily and exclusively for the company. It is clear that this proviso does not extend the period during which the commissions on renewal premiums are to be paid, but imposes additional conditions during the same period.

We can come to no different conclusion regarding the claim of plaintiff under the subagency contracts from that reached upon the contracts for general agency above considered.

[4] The remaining period of his service the plaintiff acted under no contract. There could therefore during this period have been no express contract entitling plaintiff to commissions on renewal premiums, and it has been held that, "in the absence of express stipulation to the contrary, an agent is not entitled to commissions on renewal premiums paid after the termination of the agency." *Spaulding v. Insurance Co.*, 61 Me. 329; *Phoenix, etc., Ins. Co. v. Holloway*, 51 Conn. 310, 50 Am. Rep. 21; *Park v. Piedmont, etc., Ins. Co.*, 48 Ga. 601; *Frankel v. Insurance Co.*, 158 Ind. 304, 62 N. E. 703; *Jacobson v. Insurance Co.*, 61 Minn. 330, 63 N. W. 740; *Mutual, etc., Ins. Co. v. Charles*, 17 Fed. Cas. No. 9975; and other cases. See 22 Cyc. 1441.

[5] The second count of the declaration is a count for money had and received, and as to this count the referee finds the following additional facts:

"The defendant company is a mutual life insurance company located in Wisconsin, and doing a large business all over the United States and Canada. It fixes and did fix the rates, the amount of the initial and annual renewal premiums, at such sums as it deemed necessary to provide for the payment of policies as they might become payable, for the salaries of officers and compensation to agents, for office and other expenses, and in addition a surplus fund for investment as security for policy holders. In providing for compensation to agents, the rate or amount of premium was fixed on the assumption that commissions on annual renewal premiums would be paid the agent as long as the policy remained in force. If, however, the payment of these commissions upon any policy ceased before the maturity or expiration of the policy, the premium upon that policy was not reduced pro tanto, but continued to be collected in full, and the saving was carried to the general surplus or distributed with other savings in the form of dividends to all the policy holders of that class."

The payment of renewal premiums by policy holders to defendant was coupled with no promise or agreement on the part of defendant to pay any one to whom the policy holders were indebted. They were under no obligation to the plaintiff. If upon receiving payment of renewal premiums from policy holders there was any agreement by defendant, it was to pay its own indebtedness, if such existed. Such payment by the policy holders was primarily for the benefit of defendant, and but incidentally for that of plaintiff, if the defendant was under obligation to pay him. *Keene v. Sage*, 75 Me. 138, 140. But as we have seen, in considering

the first count of the declaration, defendant was under no obligation to pay plaintiff commissions. If any suit may be maintained against defendant for the commissions included, with other estimated expenses of defendant's business in the renewal premiums paid by a policy holder and not paid to any one because of the absence of contract for such payment, it would seem that a policy holder alone can institute it.

We think the plaintiff cannot recover upon the second count. To hold otherwise would be a denial to defendant of liberty to make its own contract and maintain uniform premium rates. The fact that commissions are included in the estimate of its expenses upon which the premiums are based, cannot, in itself, entitle an agent thereto any more than it would entitle a lessor to the defendant of real estate to rent after the expiration of the lease or to the continued payment of the same rent, although by agreement of defendant and lessor the rent had been reduced.

Judgment for defendant, with costs of reference taxed at \$20.40, and costs of court to be taxed by the clerk.

CARLETON v. FLETCHER et al.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. NEW TRIAL (§ 70*)—HEARING BEFORE LAW COURT—VERDICT—EVIDENCE.

Where, in a race horse owner's action against race track judges for willfully and maliciously suspending his horse, the evidence reasonably sustained his contention, the law court on motion for new trial could not set aside a verdict for plaintiff as insufficiently supported, though defendant's liability was not free from doubt.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

2. DAMAGES (§ 94*)—EXCESSIVE RECOVERY—SUSPENSION OF RACE HORSE.

A recovery of \$708.15 against race track judges for willfully and maliciously suspending plaintiff's horse was not excessive, considering that plaintiff's expenses to obtain reinstatement amounted to \$50 and that he was entitled to exemplary damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 218-221; Dec. Dig. § 94.*]

Report from Supreme Judicial Court, Sagadahoc County, at Law.

Action by Frank W. Carleton against Herbert E. Fletcher and others. Verdict for plaintiff, and the case comes to the Law Court on motion for new trial. Motion overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

A. J. Dunton, of Bath, and Frank A. Morey, of Lewiston, for plaintiff. Pattangall & Plumstead, of Waterville, for defendants.

PER CURIAM. The plaintiff brought this action against the defendants to recover

damages alleged to have been directly caused by their willful and malicious conduct as judges of the horse races in September, 1911, in suspending the plaintiff's horse, Baron Sidnut, from competing over any track of the National Trotting Association, and also the consequential damages resulting from such suspension. The jury returned a verdict in favor of the plaintiff for \$708.15.

The case comes to the law court solely on a motion to set aside the verdict as against the evidence. No exceptions were taken to the admission or exclusion of evidence, or to any instructions given to the jury by the presiding justice.

In the 2:20 race three horses were entered, viz., Katherine Kohl, Baron Sidnut, and Roanbird. The plaintiff was the owner of Sidnut, and F. H. Wiggin, superintendent of the horse department of the society, was the owner of Roanbird. A. E. Russell was the driver of Sidnut, and Robert Waite the driver of Roanbird. In the fourth heat, according to the testimony for the plaintiff, Katherine Kohl had the pole with Sidnut next and Roanbird outside. As they went down the turn, Waite driving Roanbird touched her with the whip and swung up against Sidnut's wheel and onto his legs, causing him to break and run. Thereupon Waite pulled away, and Russell got Sidnut back to his stride and finished second. But the defendants, as judges of the race, set Baron Sidnut back for "foul driving and interfering" on the part of Russell, his driver. Russell appeared before the judges and attempted to explain the incident according to the facts, as claimed by him, when he was knocked down by Waite, in the presence of the judges, and beaten and bruised until he was unconscious.

For this flagrant violation of the rules, the judges not only failed to impose upon Waite the penalty prescribed by the association or even to administer a reprimand, but rendered their decision as above stated.

It appeared that in this heat the plaintiff's horse, Baron Sidnut, cast the larger part of one of his shoes; but, owing to the fact that his driver had been temporarily disabled by the assault committed upon him by Waite, the loss of the shoe was not discovered for 10 or 15 minutes after the heat. Prompt inquiry and search were then made for a blacksmith, but when one was found only five minutes remained before the fifth heat was to be started. The judges thereupon required the plaintiff to have his horse shod in that time, or race him without being shod. The blacksmith declared that it was impossible to put on a shoe in five minutes, but the judges ordered the fifth heat to go on without Baron Sidnut; and the plaintiff claimed that the heat was started and raced after sunset, in violation of the rules, Waite being allowed to drive Roanbird without

censure for the past or warning for the future.

The next day the plaintiff "protested" this action of the judges in terms which reflected upon their good faith. Thereupon, by order of the judges, the plaintiff's horse, Baron Sidnut, and his driver, A. E. Russell, "were suspended for 60 days for foul driving in the fourth heat."

But after learning that they had no authority to suspend the plaintiff's horse for foul driving, the judges informed the plaintiff that if he would withdraw his protest they would withdraw the suspension of his horse and driver. The plaintiff declined to accept this proposition, and 10 days later, on the plaintiff's application, Baron Sidnut and his driver, A. E. Russell, were temporarily reinstated by the president of the National Trotting Association, and December 14th, following, this action was confirmed by the board of review.

The plaintiff also calls attention to the fact that F. H. Wiggin, the owner of Roanbird, by virtue of his position as superintendent of the horse department, appointed the defendants judges of the races, and then bought pools on his own horse for the 2:20 trot the night before the race.

It is claimed in behalf of the plaintiff that these facts and circumstances are clearly established by the evidence. It is contended that in setting back Baron Sidnut for "foul driving," in ignoring the violent assault committed upon the driver, in refusing to give the plaintiff an opportunity to have his horse shod for the fifth heat, and in ordering the heat to be raced that evening with Sidnut left out, the defendants were acting in pursuance of a preconceived purpose to favor Roanbird to the disadvantage of Sidnut and the detriment of the plaintiff; and it is further contended that, in suspending the plaintiff's horse and driver for 60 days for foul driving, the defendants not only acted illegally, but willfully and maliciously in order to punish the plaintiff for presuming to file a protest against their action.

[1] The defendants deny all of the material allegations against them, and insist that in all respects they acted in good faith according to their best judgment. As might be expected, there was a conflict of testimony in regard to facts and circumstances connected with the 2:20 race in question. It was not in controversy that with respect to those performing quasi judicial duties, like the defendants, the legal rule of judicial immunity is limited by the principle of good faith and honest purpose. But the evidence to prove that they acted willfully and maliciously and in a vindictive spirit should be clear and convincing. Upon a careful examination of the printed testimony, the liability of the defendants does not appear to be entirely free from doubt. But the jury had the advantage of hearing the witnesses and observing their

manner and bearing on both direct and cross examination. It was a question which they were peculiarly qualified to determine, and their decision does not appear to be so manifestly wrong as to require the interposition of the law court to set it aside.

[2] The plaintiff was subjected to substantial damages in the expenditure of time and money required to obtain a reinstatement of his horse. According to the plaintiff's evidence, this item alone was at least \$50. But the plaintiff was entitled to recover punitive or exemplary damages in addition to the actual damages sustained. If the jury awarded the entire balance of the verdict above \$50 as exemplary damages, it cannot be deemed excessive. It is therefore unnecessary to consider the question of the probable winnings of the plaintiff's horse in subsequent races.

The certificate must be:

Motion for new trial overruled.

BIGELOW v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

FOOD (§ 25*)—SALE ON DINING CAR—LIABILITIES FOR INJURIES.

A carrier of passengers is not an insurer of the quality of canned goods furnished on its dining cars, and where it serves canned goods of a high brand, sold by a reliable dealer, guaranteed under the Pure Food Law (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]), and without defect discoverable to the eye, smell, or taste, it is not liable for injuries to a passenger eating the goods, which are poisonous.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 18; Dec. Dig. § 25.*]

Report from Supreme Judicial Court, Somerset County, at Law.

Action by Catherine Bigelow against the Maine Central Railroad Company. Cause reported. Judgment for defendant.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, HALEY, and HANSON, JJ.

George H. Morse, of Portland, for plaintiff. Forrest Goodwin, of Skowhegan, for defendant.

SPEAR, J. This is an action on the case brought by the plaintiff against the Maine Central Railroad Company to recover damages for injury to her health alleged to be caused by unwholesome and poisonous food served to her by the defendant in its dining car on the 25th day of February, 1910. The case comes to the law court on report. The food specifically complained of was canned asparagus served on toast, upon the consumption of which the plaintiff was soon after taken violently ill. Upon the assumption that the asparagus was poisonous, and was the proximate cause of the injuries of which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the plaintiff suffered, is the defendant then, under the evidence in the case, liable? The undisputed evidence shows that the train crew on the dining car was experienced and intelligent. The conductor had had a long experience, and the chef had served 15 years as a cook. The can of asparagus from which the plaintiff was served was purchased by the commissary agent of the company, who was at the time handling the dining car service upon the Boston & Maine and Maine Central Railroads. He purchased this particular can with others either on February 15th or 17th of the month in which it was served of S. S. Pierce Company, Boston. It was a well-known brand, called "The Red Label Brand," and the only kind used upon the dining car. It was guaranteed by the S. S. Pierce Company as pure, under the Pure Food and Drug Act of 1906. It was bought by S. S. Pierce Company of a dealer, who packed it expressly for that company. It was the highest grade, and bore the S. S. Pierce label. This company sells a quarter of a million of this label every year, and has done so for the last 10 or 15 years, and in that time no case of poisoning has arisen. After this can was purchased, it was properly kept for either eight or ten days until the morning of the accident, when it was placed in the custody of the officials of the dining car. This can, with others, was sealed. None had been opened. There was apparently no defect in the can or any other indications of imperfection. It was opened by the chef and prepared in the usual manner. The dining car was inspected that morning, and found perfect in every department. The chef in opening the can and preparing the asparagus discovered nothing in the appearance, taste, or odor that was not right. He says it appeared perfect in every particular; nor did the waiter who served it, or the conductor who saw it, notice anything. The plaintiff also testified that it looked all right and tasted all right; that there was nothing whatever to indicate any trouble with it. No evidence is offered tending to show negligence on the part of the defendant company in the purchasing, preparation, or serving of this asparagus. The allegation in the plaintiff's writ is that it was negligently prepared, unwholesome, and poisonous, and that the defendant ought to have known these facts.

The plaintiff, however, contends, admitting all these things to be true, that the strict rule of law which prevails in this class of cases will hold the defendant responsible. It is claimed, under the plaintiff's declaration, that it is not necessary for her to show privity of contract or negligence, and due care is no defense; that scienter need not be alleged, and, if alleged, need not be proved; negligence need not be alleged, and, if alleged, need not be proved; that the defendant from the nature of its business and calling was bound to know; that it impliedly represented

and guaranteed that the food was wholesome and fit for consumption, and if it was not, and the party eating it was injured, it was liable. In other words, the plaintiff's contention is that the defendant in this class of cases is an insurer of the quality of the food product which it serves. We are unable to believe that this is a sound rule, when confined to the sale or use of canned goods.

It has been the boast of the common law that it was able to adjust itself to the inevitable vicissitudes and changes that occur in the development of industrial life, business methods, social progress, and scientific invention. Within the last century has appeared from time to time the discovery of devices that have revolutionized the methods and accomplishments of human effort. The subjugation of steam and control of electricity, and the consequent inventions for their practical use, have become instrumental in introducing an epoch in the history of science. Industrial, commercial, and financial projects have also assumed new forms and employed new methods. Yet, to the adjustment of all the new and varied relations arising from the adoption, application, and use of these new agencies and new methods, the principles of the common law have adapted themselves so aptly as to render almost imperceptible the radical transitions that have taken place.

Of little less importance than the appearance of the great achievements referred to is the establishment and development of the canning industry in this country and in other parts of the world. It may be said that the art of canning, if not invented within the last century, has, at least, assumed the vast proportions which it has now attained, within a comparatively few years. It involves a unique and peculiar method of distributing, for domestic and foreign use, almost every product known to the art of husbandry. The wholesaler, the retailer, and the user of these goods, whether in the capacity of caterer, seller or host, sustain an entirely different duty, respecting a knowledge of their contents and quality, than prevails with regard to knowing the quality of those food products, which are open to the inspection of the seller or victualer. With reference to these it may well be considered, as has been held, that having an opportunity to investigate, and thereby to know the quality of their merchandise, they are charged with a responsibility amounting to a practical guaranty.

The early rules of law were formulated upon the theory that the provision dealer and the victualer, having an opportunity to observe and inspect the appearance and quality of the food products they offered to the public, were accordingly charged with knowledge of their imperfections. *Winsor v. Lombard*, 18 Pick. (Mass.) 57; *Bishop v. Webber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715.

But, upon the state of facts in the case at bar, a situation arises that cannot in the practical conduct of the canning business fall within these rules. No knowledge of the original or present contents of a perfect appearing can is possible in the practical use of canned products. They cannot be chemically analyzed every time they are used. Accordingly, the reason for the rule having ceased, a new rule should be applied to the sale and use of canned goods that will more nearly harmonize with what is rational and just.

The statement of facts before us shows that the asparagus served to the plaintiff was of a very high brand, sold by a most reliable firm, guaranteed under the Pure Food Law, and without fault or blemish discoverable to the eye, to the smell, or taste. It was apparently a perfect can of what it purported to contain. The plaintiff in February must have known it was a canned product when she ordered it. *Winsor v. Lombard*, 18 Pick. (Mass.) 57. Upon her order she was entitled to a reputable brand, packed and inspected in accordance with approved methods, and the law implied a warranty on the part of the defendant to furnish it. This obligation was fully met. But what was the legal relation sustained by the plaintiff and defendant with respect to their knowledge, and means of knowledge, of this can of asparagus? It seems to us they were absolutely mutual. To make this relation clear, suppose, by way of illustration, this identical can of asparagus had been shown by the defendant to the plaintiff. Then what are the necessary inferences? The defendant knew it was a can of asparagus. The plaintiff knew it was a can of asparagus. The defendant knew it was the Red Label Brand. The plaintiff knew it was the Red Label Brand. The defendant knew it was put up by the S. S. Pierce Company. The plaintiff knew it was put up by the S. S. Pierce Company. The defendant knew it was guaranteed by the Pure Food Act. The plaintiff knew it was guaranteed by the Pure Food Act. The defendant could discover no imperfection about the can. The plaintiff could discover none. The defendant observed no fault with the contents. The plaintiff found none. It therefore appears that it was utterly impossible for the defendant to know anything more about the contents of this can of asparagus than did the plaintiff. With regard to this knowledge, or means of obtaining it, they were upon a perfectly equal footing. The plaintiff and the defendant necessarily understood the situation precisely alike. There could be no mistake. The plaintiff knew, or should be charged with knowledge, that the defendant could have no possible information concerning the contents of that can which she did not have. We know of no rule of law which will imply a warranty of that of which it is impossible for a defendant to know by the exercise of any skill, knowledge, or investiga-

tion, however great. In other words, neither law nor reason require impossibilities. As was said by Chief Justice Shaw in *Winsor v. Lombard*, 18 Pick. (Mass.) 57, with reference to the inference of an implied warranty in a sale of fish: "In applying this rule to the present case, the question is what did the parties mutually understand by their contract, as it was reduced to writing." If we apply this rule to the case at bar, the only possible conclusion is that the parties understood the matter precisely alike, and that the defendant sold, and the plaintiff bought, exactly what she ordered. She therefore assumed the risk of its imperfections, as there was no possible way, either for her or the defendant, consistent with the practical use of the product, to test its quality.

But in this same case the rule which we invoke seems to be sustained by analogy of reasoning, and the distinction made between a sale of provisions, which are open to inspection, and a sale of food products, which are packed under inspection, and calculated to be offered in the markets for sale in the inspected packages. On page 62 of 18 Pick., it is said: "In a case of provisions, it will readily be presumed that the vendor intended to represent them as sound and wholesome, because the very offer of articles of food for sale implies this, and it may readily be presumed that a common vendor of articles of food, from the nature of his calling, knows whether they are unwholesome and unsound or not. From the fact of their being bad, therefore, a false and fraudulent representation may readily be presumed. But these reasons do not apply to the case of provisions, packed, inspected, and prepared for exportation in large quantities as merchandise. The vendee does not rely upon the supposed skill or actual knowledge of the vendor, but both rely upon the skill and responsibility of the inspector, as verified by the brand, for all qualities which the brand indicates; and for damage which may happen afterwards, and against which, therefore, the brand offers no security, the vendee must secure himself by the terms of the contract, and unless he does so, or unless he is deceived by a false representation of the present and actual condition of the commodity, on which he would have a remedy of a different character, he must be supposed to have been content to take the risk on himself."

Whatever may be the rules of law, and they are not uniform, pertaining to the liability of caterers, victualers, hotel-keepers, or retailers of provisions, with respect to the warranties implied from the transaction of their various kinds of business, there can be little doubt that in the class of cases now under consideration the rule laid down by Chief Justice Shaw with respect to packed and branded products is the prevailing and correct one, and should apply with increased force to the sale of canned goods.

What duties the law may impose upon manufacturers of food products, which turn out defective, we do not assume to decide.

But in the case at bar, upon the assumption that the plaintiff was made sick by the asparagus furnished her by the defendant company, it is the opinion of the court that in the absence of an express warranty the defendant is not liable.

Judgment for the defendant.

WHITTAKER v. SANDFORD.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. APPEAL AND ERROR (§ 930*)—QUESTIONS REVIEWABLE—PRESUMPTIONS.

The court, in reviewing an exception to the admission of evidence limited by the trial court in its instructions to a specific issue, must assume that the jury followed the instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

2. FALSE IMPRISONMENT (§ 23*)—EVIDENCE—ADMISSIBILITY.

A plaintiff suing for false imprisonment may show when and how he obtained his liberty, and may show that he was discharged from restraint by habeas corpus as a part of the history of the transaction.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 100; Dec. Dig. § 23.*]

3. FALSE IMPRISONMENT (§ 23*)—EVIDENCE—ADMISSIBILITY.

In an action for false imprisonment based on the wrongful detention by defendant of plaintiff on a yacht, evidence that plaintiff obtained her liberty on habeas corpus on application to a justice of the Supreme Court by a third person, without service of the writ on defendant or the commanding officer of the yacht, was admissible as bearing on the facts surrounding plaintiff at the time as tending to show that she was restrained of her liberty, though defendant was not bound by the adjudication.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 100; Dec. Dig. § 23.*]

4. FALSE IMPRISONMENT (§ 25*)—EVIDENCE—ADMISSIBILITY.

Where, in an action for false imprisonment based on the wrongful detention by defendant of plaintiff on a yacht, the evidence showed that defendant was the leader of a religious sect, that plaintiff's husband was a minister thereof, that defendant induced plaintiff, who had formerly been a member of but who had left it, to take passage on a yacht under a promise that she would not be detained after it reached port, that defendant on two or three occasions refused to furnish plaintiff with a boat to leave the yacht at port, and that he then said that the question was for her husband, and defendant claimed that the captain and other officers of the yacht were in control of the boats, independent of defendant, plaintiff, in support of the claim that by virtue of the peculiar religious character attributed to defendant by members of the sect he possessed and exercised supreme control over the members on sea and on land, could prove that defendant had represented himself as the second Elijah preparing the way for the coming of Christ, and that it was believed by the members that he was the David spoken of as the character

that was to appear in the last days to prepare for the coming of Christ.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 102; Dec. Dig. § 25.*]

5. FALSE IMPRISONMENT (§ 6*)—PHYSICAL RESTRAINT—ACTS CONSTITUTING.

A plaintiff, suing for false imprisonment based on her wrongful detention by defendant on a yacht, and alleging an unlawful restraint by force and against her will, must show an actual physical restraint, and not merely a moral influence; but the refusal of defendant to furnish her a boat to transfer her from the yacht to land was physical restraint sufficient to support a recovery.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 3, 4; Dec. Dig. § 6.*]

6. FALSE IMPRISONMENT (§ 31*)—EVIDENCE—SUFFICIENCY.

In an action for false imprisonment based on a wrongful detention by defendant of plaintiff on a yacht, evidence held to justify a finding that defendant wrongfully detained plaintiff on the yacht.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 108; Dec. Dig. § 31.*]

7. FALSE IMPRISONMENT (§ 36*)—DAMAGES—EXCESSIVE DAMAGES.

Where plaintiff, suing for false imprisonment based on her wrongful detention by defendant on a yacht, showed that defendant refused to furnish her with a boat to leave the yacht, though he had power so to do and had promised not to detain her on the yacht, and there was evidence that she was afforded the liberties of the yacht and was taken ashore by her husband to do shopping and transact business at a bank, and visited neighboring islands with her husband and children, and she was treated as a guest, except that she was restrained from finally quitting the yacht, a verdict for \$1,100 was excessive and must be reduced to \$500.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 110, 113-115; Dec. Dig. § 36.*]

Exceptions and Motion from Supreme Judicial Court, Cumberland County, at Law.

Action by Florence W. Whittaker against Frank W. Sandford. There was a verdict for plaintiff, and defendant brings exceptions and moves for a new trial. Exceptions overruled, and motion conditionally overruled.

Argued before SAVAGE, SPBAR, CORNISH, KING, and HALEY, JJ.

Connellan & Connellan, of Portland, for plaintiff. H. B. Coolidge, of Lisbon Falls, and Oakes, Pulsifer & Ludden, of Auburn, for defendant.

SAVAGE, J. Action for false imprisonment. The plaintiff recovered a verdict for \$1,100. The case comes up on defendant's exceptions and motion for a new trial.

The case shows that for several years prior to 1910, at a locality called "Shiloh," in Durham, in this state, there had been gathered together a religious sect, of which the defendant was at least the religious leader. They dwelt in a so-called colony. There was a similar colony under the same religious leadership at Jaffa, in Syria. The plaintiff was a member of this sect, and her husband was one of its ministers. For the promotion

of the work of the "movement," as it is called, a Yacht Club was incorporated, of which the defendant was president. The Yacht Club owned two sailing yachts, the "Kingdom" and the "Coronet." So far as this case is concerned, these yachts were employed in transporting members of the movement, back and forth, between the coast of Maine and Jaffa.

The plaintiff, with her four children, sailed on the *Coronet* to Jaffa in 1905. Her husband was in Jerusalem, but came to Jaffa, and there remained until he sailed, a year later, apparently to America. The plaintiff lived in Jerusalem and Jaffa, as a member of the colony, until March, 1909. At that time she decided to abandon the movement, and from that time on ceased to take part in its exercise or to be recognized as a member. She made her preparations to return to America by steamer, but did not obtain the necessary funds therefor until December 24, 1909. At that time the *Kingdom* was in the harbor at Jaffa, and the defendant was on board. On Christmas day he sent a messenger to ask the plaintiff to come on board. She went, first being assured by the messenger that she should be returned to shore. The defendant expressed a strong desire that she should come back to America on the *Kingdom*, rather than in a steamer, saying, as she says, that he could not bear the sting of having her come home by steamer; he having taken her out. The plaintiff fearing, as she says, that if she came on board the defendant's yacht she would not be let off until she was "won to the movement" again, discussed that subject with the defendant, and he assured her repeatedly that under no circumstances would she be detained on board the vessel after they got into port, and that she should be free to do what she wanted to the moment they reached shore. Relying upon this promise, she boarded the *Kingdom* on December 28th and sailed for America. She was treated as a guest, and with all respect. She had her four children with her. The defendant was also on board.

The *Kingdom* arrived in Portland Harbor on the afternoon of Sunday, May 8, 1910. The plaintiff's husband, who was at Shiloh, was telephoned to by some one, and went at once to Portland Harbor, reaching the yacht about midnight of the same day. The *Coronet* was also in Portland Harbor at that time. Later both yachts sailed to South Freeport, reaching there Tuesday morning, May 10th. From this time until June 6th following the plaintiff claims that she was prevented from leaving the *Kingdom*, by the defendant, in such manner as to constitute false imprisonment.

The Exceptions.

[1-3] 1. The first exception relied upon related to the admissibility of the record of

habeas corpus proceedings, by virtue of which the plaintiff was removed from the *Kingdom* by a sheriff on June 6th, and under which she was discharged later. This record was admitted subject to the defendant's objection and exception. Further, the presiding justice was requested to instruct the jury that the habeas corpus proceedings were inadmissible and must be entirely disregarded by them. The presiding justice declined to give the requested instruction, saying: "I have said all that I desire in regard to the habeas corpus. You have the right to consider the fact as bearing on the conduct of the plaintiff and the situation under which she had applied for it." The presiding justice in his charge had already said: "It is my duty to say to you that that (the discharge of the plaintiff on habeas corpus) is not a judicial determination of the question involved here. The defendant would not be bound by that adjudication of a single justice under the circumstances of this case; there being no notice to him, and he having no opportunity to be heard upon it. You have a right, I say to you, for the purposes of this trial, to consider the fact that she did resort to this petition of habeas corpus to obtain her release as bearing upon the testimony and all the circumstances surrounding her at that time as tending to show that she was restrained of her liberty." To this refusal to instruct, the defendant took an exception. These exceptions will be considered together.

The case shows that on June 4, 1910, application was made to a justice of this court for a writ of habeas corpus to take, and bring the court, the plaintiff and her four minor children, who it was alleged were restrained of their liberty on a certain yacht named *Kingdom* by the defendant, or by the captain or commanding officer of said *Kingdom*, or by the person or persons in charge of said *Kingdom*. The application was made by one Harriman, under the provisions of R. S. c. 101, § 4, which provides that application may be made "by any person." The justice ordered "writ to issue as prayed for, returnable before me at the courthouse in Auburn, and to be heard on Wednesday, June 8, 1910, 2 p. m." The form prescribed by statute for such a writ contains the following direction to the officer: "And summon the said A. B. (the person alleged to be holding the party in restraint) then and there to appear before our said court, to show cause for taking and detaining said C. D. (the party restrained)." R. S. c. 101, § 18. The order for the writ to issue therefore necessarily embraced the direction in the writ to the officer to "summon the defendant." No further order of notice was necessary. But in the writ, as issued by the clerk, the clause commanding the officer to "summon" the defendant was omitted. The officer took the writ and proceeded to the *Kingdom*, then lying about three miles

off shore. He exhibited the writ to the plaintiff's husband, to whom, it is now claimed by the defendant, he had committed the care of, and responsibility for, the plaintiff. Mr. Whittaker read it. The commanding officer asked to take the writ, in order that the stenographer could make a copy of it. This request was complied with. But no service of the writ was made on either the defendant or the commanding officer. The defendant himself was not then on board the Kingdom, but was on the Coronet, lying not far away. The officer took the plaintiff and children, and carried them before the justice, who after hearing discharged them. The defendant did not attend the hearing. But Mr. Whittaker, the plaintiff's husband, went to Auburn, and was in the courthouse when the hearing was had, but did not go into the room where it was being held.

It is not necessary now to consider the propriety or legality of the discharge, in the absence of notice to the defendant. The presiding justice correctly instructed the jury that it was not a judicial determination of the question involved in this case, which was whether the defendant had wrongfully restrained the plaintiff of her liberty. He expressly instructed the jury also that the defendant was not bound by the adjudication. In considering the exception we must assume that the jury heeded the instruction. Limited in its application as it was by the presiding justice, we think the record was admissible. In the first place, it was proper for the plaintiff to show when and how she obtained her liberty. It is so closely connected with the question of restraint as to be practically inseparable. It was a part of the history of the transaction, the concluding part. Besides, the pith of the proposition lies, not in the discharge, concerning the effect of which the jury were instructed favorably to the defendant, but in the fact that the situation was such that resort was had to habeas corpus. It was a part of the conduct of the parties. It had a tendency to show an improbability that the plaintiff was free to leave the yacht when she should choose. The probative force of it was well stated by the presiding justice in his charge, in stating the differing contentions of the parties. "It is argued on the part of the plaintiff," he said, "that it is unreasonable and improbable to assert that she was not restrained of her liberty when you find her resorting to a writ of habeas corpus; that if she could have had at any time a boat to go on shore and be taken on shore, that she would not in all human probability have resorted to, or even acquiesced in, the resort of any of her friends to a writ of habeas corpus, for there was no necessity for it." We think the argument is not devoid of merit. How much weight should be given to it was for the jury to say. It will be noticed that this evidence, as the case was submitted by

the court to the jury, was applied to the question of restraint of liberty by some one, and not to the responsibility of the defendant for it. We think the rulings were right.

[4] 2. The plaintiff claimed and testified that on two or three occasions the defendant personally refused to furnish her with a boat so that she could leave the Kingdom; that when she wanted to go ashore "they," evidently referring to the defendant and her husband, "had talked against it"; that the defendant "had spoken plainly that it was out of the question"; that when she spoke to him about it he said he would leave it to her husband to do what he wanted to, that he would not take the responsibility of separating families, but that, when she asked her husband to take her ashore, he replied, "We will see Mr. Sandford about it and see what he says." The plaintiff contended that in this way the defendant and her husband in effect played into each other's hands, and shifted the responsibility from one to the other, while she was the victim of this play of battledore and shuttlecock. It was contended that by virtue of the peculiar religious character attributed to the defendant by those who were in the movement, of whom the plaintiff's husband was one, being a minister of that faith, he possessed and exercised supreme control over the members, both on sea and on land, and that his wish was law both to their wills and consciences, and that the plaintiff's husband, whatever part he took in the matter, was either merely the defendant's instrument, or else was colleague with him.

It therefore became pertinent for the plaintiff to show the nature and extent of the defendant's authority and power. This, of course, was only one step; but it was a step. Another would be to show that the defendant exercised that authority and that it was effective in restraining the plaintiff of her liberty.

And the plaintiff was permitted to testify, subject to exception, to the following effect: Several years ago the defendant said that God gave him a message that Elijah was here, that he was the second Elijah, and had come to prepare the way for the coming of Christ; that he talked that to the people in the movement for years, and that they knew him as Elijah; that later he said God gave him messages and made him know that the Kingdom of God was established again on earth, and that God made him know that he was to be king among the people, the twelve tribes of Israel scattered out over all the earth, that God scattered them when they were in Palestine, for he had brought them out of the land of Egypt, that they sinned and he scattered them, but he said that in the last days they should be restored and brought back to Palestine, and Palestine should be made a glorious land again as God intended it to be, and these

people should be gathered up and brought back and restored to the true religion of Jesus Christ, and that God said in the Bible among the prophecies that when these days come and the people are restored He is going to give them a king; he said that a king shall reign and rule in righteousness; he said that God made him know that he was King David, and that he was to reign and rule in righteousness, and that all the earth was going to bow to him. And the witness testified further that all the people in the movement at Shiloh, which seems to have been the original home of the movement, and the place where the plaintiff's husband was minister, know him as King David, and call him so.

In connection with this exception, it may be noticed that one of the defendant's witnesses, a member of the movement, and apparently a frank and intelligent man, being asked on cross-examination to explain why the defendant is sometimes called King David, testified without objection: "We believe that Mr. Sandford is the David that is spoken of as the character that is to appear in the last days to prepare God's people for the coming of Christ."

Under the circumstances of this case, we think that the evidence objected to was admissible. We think it is a fair inference that a person believed by his followers to possess the character thus attributed to the defendant would be very likely to obtain the power and influence over them, which it is claimed the defendant had. This is not a religious question, but a question of law. We are not concerned in this case with the beliefs of the defendant and those connected with him. We do not seek to impugn in the slightest degree the grounds of their beliefs. But, whether right or wrong, we think that it is clear that to the trusting and devout followers of such a leader, his influence, his will, his wish, might easily, and probably would, become paramount over their minds, and would control their actions. Besides, the question of the nature and extent of the defendant's control was made relevant by the defendant's contention that the captain and other officers of the yacht, and not the defendant, were in control of the small boats, and that the control was practically independent of the defendant. It must be remembered that this discussion goes only to the admissibility of the evidence, and not to its effect. If in fact the power was not used by the defendant to keep the plaintiff on board the yacht against her will, the possession of the power cannot count against the defendant.

[8] 3. The plaintiff's writ was brought in a plea of the case, but the defendant contends that the declaration in her writ was in its effect a declaration for trespass to the person. The defendant requested the court to instruct the jury that "to maintain

her action the plaintiff must show some actual physical force exercised by the defendant or by some one acting as his agent and by his authority to restrain her of her liberty."

We think the defendant's assumption in his request that the action in effect is trespass to the person is without warrant. In argument, stress is laid upon the use of the words "with force and arms." These words appear only in the first and fourth counts. But the record shows that the court at the defendant's request instructed the jury that the plaintiff could not recover under either of these counts. They are out of the case now. In the remaining counts it is alleged that the unlawful restraint was "by force and against the will of the plaintiff." The court instructed the jury that the plaintiff to recover must show that the restraint was physical, and not merely a moral influence; that it must have been actual physical restraint, in the sense that one intentionally locked into a room would be physically restrained but not necessarily involving physical force upon the person; that it was not necessary that the defendant, or any person by his direction, should lay his hand upon the plaintiff; that if the plaintiff was restrained so that she could not leave the yacht Kingdom by the intentional refusal to furnish transportation as agreed, she not having it in her power to escape otherwise, it would be a physical restraint and unlawful imprisonment. We think the instructions were apt and sufficient. If one should, without right, turn the key in a door, and thereby prevent a person in the room from leaving, it would be the simplest form of unlawful imprisonment. The restraint is physical. The four walls and the locked door are physical impediments to escape. Now is it different when one who is in control of a vessel at anchor, within practical rowing distance from the shore, who has agreed that a guest on board shall be free to leave, there being no means to leave except by rowboats, wrongfully refuses the guest the use of a boat? The boat is the key. By refusing the boat he turns the key. The guest is as effectually locked up as if there were walls along the sides of the vessel. The restraint is physical. The impassable sea is the physical barrier.

There are other exceptions, but the points involved are all covered by the foregoing discussion. The exceptions must all be overruled.

The Motion.

[9] A careful study of the evidence leads us to conclude that the jury were warranted in finding that the defendant was guilty of unlawful imprisonment. This, to be sure, is not an action based upon the defendant's failure to keep his agreement to permit the plaintiff to leave the yacht as soon as it should reach shore. But his duty under the circumstances is an important

consideration. It cannot be believed that either party to the agreement understood that it was his duty merely to bring her to an American harbor. The agreement implied that she was to go ashore. There was no practical way for her to go ashore except in the yacht's boats. The agreement must be understood to mean that he would bring her to land, or to allow her to get to land, by the only available means. The evidence is that he refused her a boat. His refusal was wrongful. The case leaves not the slightest doubt that he had the power to control the boats, if he chose to exercise it. It was not enough for him to leave it to the husband to say whether she might go ashore or not. She had a personal right to go on shore. If the defendant personally denied her the privilege, as the jury might find he did, it was a wrongful denial.

It is shown that on several occasions the defendant told the plaintiff she could have a boat when she wished; but it is also shown by testimony which the jury might believe that, each time she made a request for a boat to be used at the time, she was refused. The plaintiff did not ask the captain or other officers of the yacht for a boat. These officers testified that they had authority to let any one have the use of a boat, and that, without consulting the defendant. We do not think the defendant can justly claim that she should have asked the officers under him, if he had himself denied her a boat. And in the one specific case shown in the evidence, when she did ask the captain for a boat to go on shore, he referred the discussion of the matter to the defendant. This was at Malta. She apparently believed that an appeal to the officers would be useless. It was not an unreasonable belief.

The defendant did not become a witness, but it is claimed for him that after Tuesday, May 10th, he assumed no responsibility whatever for the plaintiff, and left her in the care of her husband, specifically saying that he would leave it to her husband to say whether she could leave the yacht. From that date, he stayed on the *Coroner*, only coming aboard the *Kingdom* once, though on that occasion she says he refused her the use of a boat. From that date she was in the company of her husband, though they were not living in marital relations. She went ashore with him. She visited neighboring islands with him. She was trying to persuade him to leave the movement and make a home for her and their children. He was trying to persuade her to become again a member of the movement. When on shore with him she made no effort to escape. She says she believed it would be useless, and thus went back to the yacht

with him. She says that when she did ask her husband to put her ashore to leave, he replied, "We will see Mr. Sandford about it and see what he says." She further says that the defendant had told her that "he" (her husband) "couldn't do it" (put her on shore).

Besides the evidence of express personal refusal on the part of the defendant, we think that a jury might well find upon the evidence that the defendant was strongly desirous that the plaintiff should not leave the yacht, probably for the reason that he hoped her husband's influence might lead her back into the movement, that the husband was strongly desirous of the same end, that if she left the yacht she would be beyond the influence of her husband, that the subject was a matter of conversation between the defendant and the husband, that in view of the relation which the defendant bore to the movement and to the husband, in view of the mystical character attributed to him, in view of the manifest power possessed by him over the minds of the members, growing out of a belief which we have already stated, and which the husband shared in, the husband, if not acting by express mutual understanding with the defendant, was the minister of his known will, with the result that the plaintiff was prevented from leaving the yacht, that the defendant was the superior, the controlling factor, by an influence intentionally used, in keeping her there, that he possessed the key that would unlock the situation, and that in violation of his duty he refused to use it, and thus restrained her of her liberty. If all this was true, the defendant is liable to the plaintiff. The verdict should not be set aside on that ground.

[7] But the damages awarded seem to us manifestly excessive. The plaintiff, if imprisoned, was by no means in close confinement. She was afforded all the liberties of the yacht. She was taken on shore by her husband to do shopping and transact business at a bank. She visited neighboring islands with her husband and children, on one of which they enjoyed a family picnic. The case lacks the elements of humiliation and disgrace that frequently attend false imprisonment. She was respectfully treated as a guest in every way, except that she was restrained from quitting the yacht for good and all.

The certificate will be:

Exceptions overruled.

If the plaintiff remits all of the verdict in excess of \$500, within 30 days after the certificate is received by the clerk, motion overruled; otherwise, motion sustained.

LINN WOOLEN CO. v. BROWN.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. TRESPASS (§ 20*)—“TRESPASS QUARE CLAUSUM”—GIST OF ACTION.

The gist of an action of “trespass quare clausum” is the injury to the possessory right, and the action will not lie unless plaintiff was in possession at the time of the alleged trespass.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 32-47; Dec. Dig. § 20.*]

For other definitions, see *Words and Phrases*, vol. 8, p. 7093.]

2. LANDLORD AND TENANT (§ 142*)—TRESPASS QUARE CLAUSUM—PARTY ENTITLED TO SUE—POSSESSION BY TENANT.

Where a tenant is in possession, the landlord may not maintain an action of trespass quare clausum, except in case of a permanent injury to the freehold, but the action must be brought by the tenant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 509-515; Dec. Dig. § 142.*]

3. TRESPASS (§ 20*)—QUARE CLAUSUM—PARTY ENTITLED TO SUE.

A tenant may not maintain an action of trespass quare clausum against one in possession under a sublease from him.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 32-47; Dec. Dig. § 20.*]

4. LANDLORD AND TENANT (§ 104*)—BREACH OF COVENANT AGAINST SUBLETTING—FORFEITURE—WAIVER.

The action of a tenant in subletting a part of the premises without the consent of the landlord, in violation of the lease, renders the lease voidable at the option of the landlord, who may re-enter for covenant broken, or may waive the privilege and treat the lease as subsisting.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 328; Dec. Dig. § 104.*]

5. LANDLORD AND TENANT (§ 112*)—BREACH OF COVENANT AGAINST SUBLETTING—RE-ENTRY—FORFEITURE.

A tenant in a lease, covenanting against subletting without the consent of the landlord, sublet a part of the premises without the landlord's consent. The subtenant took possession and made repairs. The treasurer and managing officer of the landlord knew that fact, but it took no steps to regain possession and recognized the subtenant as the one in possession. It purchased from him lumber sawed out in the mill on the premises and gave him credit therefor on its books and continued to treat its lease with the tenant as subsisting for many months. *Held*, that the landlord waived its right to re-enter for breach of covenant against subletting.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

6. LANDLORD AND TENANT (§ 112*)—FORFEITURE FOR NONPAYMENT OF RENT—WAIVER.

A landlord in a lease giving him the right to re-enter for failure to pay rent, who assigned to a third person rent due and unpaid, thereby recognized the lease as effective for the term covered by such rent and waived the right to re-enter for nonpayment of rent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

7. LANDLORD AND TENANT (§ 112*)—FORFEITURE FOR NONPAYMENT OF RENT—WAIVER.

Where a landlord, indebted to a subtenant in excess of the rent about to mature, agreed with the tenant to accept the subtenant's order for the rent, and three days after the maturity

of the rent the subtenant gave the order, but the landlord refused to accept it, not on the ground that it had not been given on the day of the maturity of the rent, the landlord could not forfeit the lease for nonpayment of rent at maturity.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

8. TRESPASS (§ 20*)—POSSESSION OF TENANT—NOTICE TO QUIT—CHANGE OF POSSESSION.

A notice to a tenant to quit does not of itself change possession, and trespass may not be maintained against the tenant before his right of possession is actually disturbed.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 32-47; Dec. Dig. § 20.*]

Report from Supreme Judicial Court, Somerset County, at Law.

Action by the Linn Woolen Company against C. O. Brown. Cause reported for final determination. Judgment for defendant.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

J. H. Haley, of Hartland, and George H. Morse, of Portland, for plaintiff. Merrill & Merrill, of Skowhegan, for defendant.

CORNISH, J. This is an action of trespass quare clausum.

The plaintiff corporation is the owner of two large woolen mills situated on what is known as the “lower dam” across the Sebasticook river in Hartland village. It is also the owner of a dam situated about one-half mile further up the river, known as the “upper dam,” on which is a sawmill and connected with which are a piling ground, yard, and a novelty mill; all constituting what is known as the “Moore property.”

On June 7, 1909, the plaintiff leased all this upper estate to Ira W. Page, Jr., for seven years at an annual rental of \$400, payable quarterly. The lease contained a covenant that the lessee should not assign or underlet the premises, or any part thereof, without the consent of the lessor in writing on the back of the lease, and also provided that the lessor might enter to expel the lessee if he should fail to pay the rent, whether demanded or not, or if he should violate any of the covenants in the lease.

Page went into possession of the property and operated the novelty mill, but it does not appear whether he ever operated the sawmill or not.

On September 14, 1910, he sublet a portion of the premises, consisting of the sawmill and machinery and a certain portion of the yard, to the defendant for the term of one year from November 14, 1910, at a rental of \$400 a year, payable quarterly. This subletting was without the written consent of the plaintiff, and it appears that the defendant at the time he took this sublease had knowledge of the covenants in the original lease and said he would take his chances. During

the following spring and summer there was more or less complaint on the part of the plaintiff of the manner in which the defendant was handling the water at the upper dam; the result being, as the plaintiff claims, that the work at its woolen mills was seriously interfered with.

The plaintiff contends that it did not know that the defendant was a sublessee until about the 1st of June, 1911, having assumed up to that time that he was merely foreman for Page, the lessee; that it took advantage of Page's failure to make his quarterly payment of rent on June 7, 1911, to claim a forfeiture; that on July 14, 1911, it gave Page a written notice to quit the premises at the expiration of 30 days from July 17th, or on August 16, 1911; that on July 16th, or 17th, Page voluntarily surrendered the premises to the plaintiff, but defendant continued to operate the sawmill until the 28th of August, when a deputy sheriff acting for the plaintiff boarded it up and prevented further occupation. On the same day, August 28, 1911, this action of trespass *quare clausum* was brought, claiming damages from November 14, 1910, the date when the defendant entered into possession under his sublease.

At the trial, the jury made a special finding of fact, to the effect that the plaintiff knew on February 12, 1911, of the lease of the sawmill from Page to Brown, and with that finding the case was reported to the law court for final determination.

The rights of the parties depend upon certain well-settled principles of law, somewhat technical in their nature and yet resting on reason as well as authority. A logical treatment of the case works out as follows:

[1, 2] This being an action of trespass *quare clausum*, the gist of the action is the injury to the possessory right, and the plaintiff cannot maintain the suit unless it was in possession at the time of the alleged trespass. If a tenant was in possession, the plaintiff as landlord cannot prevail, except in case of permanent injury to the freehold. *Moody v. King*, 74 Me. 497; *Perry v. Bailey*, 94 Me. 50, 46 Atl. 780. Such permanent injury is not claimed here.

[3] It follows therefore that, if the lease to Page was in force when this suit was brought, he and not the plaintiff would be the party entitled to bring an action of trespass, and Page could not bring it because the defendant was in possession under a sublease from him. He certainly could not treat his own lessee as a trespasser.

Now the lease to Page did not expire by its terms until June 7, 1916, and it was still in force unless it had been forfeited and the plaintiff had entered for breach of covenant and was in possession.

What is the legal situation on this point?

[4] It cannot be disputed that in the first instance Page had no legal right to sublet a portion to Brown without the consent of the lessor in writing on the back of the lease,

but his act in doing so rendered the lease voidable at the option of the plaintiff and not void. The plaintiff could avail itself of the privilege, and treat the lease as at an end, and re-enter for covenant broken if it saw fit, or it could waive this privilege and treat the lease as still subsisting. *Dumpors Case*, 4 Coke, 119, 1 Smith, Lead. Cas. and note; *Webster v. Nichols*, 104 Ill. 160; *Shattuck v. Lovejoy*, 8 Gray (Mass.) 204; *Porter v. Merrill*, 124 Mass. 534. And see *Small v. Clark*, 97 Me. 304, 54 Atl. 758.

[5] Waiver is a question of fact, and it is clear that the plaintiff waived this forfeiture.

All the circumstances combine to prove it. The defendant went into possession of the sawmill and made repairs upon it in November, 1910, and the evidence fairly leads us to believe that Mr. Linn, the treasurer and managing director of the plaintiff corporation, must have known the fact, especially as the defendant had previously talked with Mr. Heinze, the plaintiff's superintendent, in regard to leasing it.

But the jury have found specially that the plaintiff knew of the sublease on February 12, 1911, by reason of a conversation that took place on that day between Mr. Linn and the defendant; and the evidence warrants the finding. Yet the plaintiff took no steps to regain possession of the property. It virtually recognized Brown as the party in possession of the sawmill property. It complained to him, not to Page, of his manner of using the water. It purchased from him lumber sawed out in the mill to the amount of \$160 and gave him credit therefor on its books. There is evidence to the effect that it sent Page to learn from Brown on what terms he would surrender his rights. In short, having knowledge of the sublease, it treated the sublessee as the party rightly in possession of the portion under that sublease.

Moreover, it continued to treat its lease with Page as still subsisting. It made no move to the contrary, and on April 14, 1911, it assigned to Geo. M. Lancey its charge for rent from March 7, 1910, to March 7, 1911, which at that time remained unpaid, thereby recognizing the tenancy of Page up to March 7, 1911, for on no other basis could the rent be due.

The proof of waiver of the breach of covenant for subletting is abundant, and when asked on cross-examination what covenant he relied upon when he gave the notice to quit on July 14, 1911, Mr. Linn replied, "On account of his forfeiture to pay rent."

The plaintiff therefore cannot successfully rely in this action upon the breach of covenant against subletting because it never availed itself of its rights thereunder.

This brings us to the alleged re-entry for nonpayment of rent.

[6] On March 7, 1911, four quarters remained unpaid, and it was then the right of the plaintiff, as it had been at the expira-

tion of each of the preceding quarters, to enter for breach of covenant, without making previous demand; it being so specified in the lease. But no such step was taken, and more than one month later, namely, on April 14, 1911, two days after Brown began his season's sawing, as has already been stated, it assigned the bill against Page for the year's rent to George M. Lancey. This was as effective a recognition of Page's tenancy to March 7, 1911, as if the plaintiff had received the money therefor from Page. And the acceptance of rent by the owner from either lessee or sublessee, after knowledge of the fact, is regarded as strong if not conclusive evidence of waiver. *Dendy v. Nicholl*, 4 C. B. N. S. 376; *Hartford Wheel Club v. Travelers' Ins. Co.*, 78 Conn. 355, 62 Atl. 207; *Murray v. Harway*, 56 N. Y. 337. Page's possession up to March 7th is therefore secure.

[7] The next quarter day fell on June 7th. It appears that within a day or two prior to June 7th Page went into the plaintiff's office, and, finding Linn and Heinze there, asked them if they would accept Brown's order for \$100 for the rent falling due on that date, as the company then owed Brown \$160 for lumber bought of him. Mr. Heinze replied that he thought there would be no doubt but that they would accept it. On the strength of that promise, Brown gave Page the order on June 10th, and Page took it to the plaintiff; but the plaintiff refused to accept it, not, however, on the ground that it had not been paid on the exact quarter day. Under these circumstances, we think the court should be slow to declare that there had been a breach of covenant for nonpayment of rent; the money on the 7th of June being in the plaintiff's hands, due primarily to Brown and by him on the 10th ordered to be retained by the plaintiff in payment of the Page rent, in accordance with the previous arrangement. Forfeiture is not a favorite with the law, and under circumstances like these we decline to recognize it.

[8] But even if there was a breach which gave the plaintiff a right of re-entry, it was not availed of by the plaintiff. The defendant was still in the occupation and operation of the sawmill with its appurtenances, and Page in the occupation and operation of the novelty mill. This continued until July 14th, when the plaintiff served a written notice upon Page "to quit and deliver up to me at the expiration of thirty days from July 17, 1911, the possession of the following described premises now occupied by you and belonging to me," etc. Then follows a description of the entire property covered by the original lease. This notice does not claim any possession by virtue of forfeiture, but, on the contrary, by its very terms concedes the possession to be then in Page, and asks him to surrender it, for no stated reason, on August 16th.

Two or three days later, Linn appeared upon the premises, and Page, in his presence at the novelty mill and in the presence also of Brown at the sawmill, said that he surrendered and forfeited all claims that he had upon the property to the Linn Woolen Company. Linn then ordered the defendant to "vacate," and the defendant replied, "Very well," and Linn said, "Vacate at once," and the defendant answered, "That is impossible." It is apparent that some arrangement had been made by the plaintiff with Page to go through this farcical performance in order to get rid of Brown, so that Page could retain the novelty mill and the plaintiff regain possession of the sawmill. This is shown by the new lease given by the plaintiff to Page on August 17, 1911, covering the novelty mill alone.

There was no real intention on Page's part to surrender the whole property. In fact, he never did surrender it, for he continued to occupy the novelty mill the same after this declaration as before, and Brown continued to occupy the sawmill. When the notice to quit expired on August 16th, the situation remained the same. A notice to quit does not of itself change possession, and there was no change here and no bona fide re-entry until August 28th, when the sawmill was boarded up and the defendant practically evicted.

On the evening of that day this writ was brought.

Page's right of possession therefore was not actually disturbed under the original lease until August 28, 1911, and trespass could not have been maintained against him before that time.

So much for Page's right under the lease.

What of the defendant's, under his sublease? It is this: As the lease subsisted until that time in full force, the defendant's estate existing under it continued according to the terms of its creation. *Shumway v. Collins*, 6 Gray (Mass.) 227-230.

The defendant was not a dispossessor. He was rightfully in possession, unless the original lessor saw fit to assert his legal rights in a legal way. Whether this was done on August 28th might well be questioned, but certainly it was not done at any time prior to that, and therefore the defendant was not a trespasser at the date of the writ, and had not been previous thereto.

Judgment for defendant.

OSCAR HOLWAY CO. v. BAILEY.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence and sustained by evidence not in itself inherently improbable and incredible will not be disturbed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by the Supreme Judicial Court on motion to set it aside as against the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. SALES (§ 52*) — CONTRACTS — EVIDENCE — SUFFICIENCY.

In an action for the price of a car load of cotton seed meal alleged to have been sold by plaintiff to defendant, evidence held to support a finding that defendant had not contracted to buy.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.*]

On Motion from Supreme Judicial Court, Androscoggin County, at Law.

Action by the Oscar Holway Company against Edward G. Bailey. There was a verdict for defendant and cause brought to the Supreme Judicial Court on motion to set aside the verdict as against the evidence. Motion for new trial overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

M. S. Holway, of Augusta, for plaintiff. Charles W. Hayes, of Foxcroft, and John A. Morrill, of Auburn, for defendant.

PER CURIAM. In this action the plaintiff sought to recover the value of a car load of cotton seed meal alleged to have been sold to the defendant, a retail dealer at Silver's Mills in the town of Dexter, Me. The jury returned a verdict for the defendant, and the case comes to this court on a motion to set aside as against the evidence.

The plaintiff's contention is that in July, 1910, it sold to the defendant four car loads of cotton seed meal, viz., two car loads on July 7th, one for October shipment, and one for December shipment, and two car loads on July 9th, both for November shipment; and it is claimed that the payments made by the defendant were for one of the car loads sold July 7th for October shipment and for one of those sold July 9th for November shipment. A third car load was forwarded to the defendant January 16, 1911, and, immediately after the invoice of the third shipment was received by the defendant, he wrote a letter to the plaintiff stating that he had purchased only two car loads of cotton seed meal, and, having already received those, he refused to accept the third shipment. The plaintiff replied, reviewing the negotiations between them, and insisting that the defendant had purchased four car loads and that there was one more due him besides the one then on the track at Silver's Mills.

Thereupon, as the plaintiff claims, immediately after the letter to the defendant of January 19th, there was a conversation by telephone between Jones and Arnold, the business managers of the plaintiff and defendant, respectively, in which Jones finally proposed that, if the defendant would accept the third car load at Silver's Mills, the plain-

tiff would cancel the fourth car for the December shipment; and the plaintiff contends that this proposition was accepted without qualification, and that nothing further was heard in regard to the matter until several weeks later the plaintiff learned that the defendant had stored this car load in a potato warehouse, which had been burned and the cotton seed meal destroyed. The plaintiff says that the defendant then claimed, for the first time, that, in receiving this car load and storing it in the warehouse, he was acting as agent of the plaintiff, by virtue of an agreement made with Nelson Holway, the plaintiff's salesman. Nelson Holway denies that the defendant was acting for the plaintiff in storing that car load. The plaintiff insists that the reasons which induced the defendant to repudiate the third shipment were that the demand for cotton seed meal did not prove to be as large as he expected, and that the price had in the meantime declined \$20 on a car load, and that the satisfactory adjustment of the matter effected by the conversation over the telephone would never have been disputed if the cotton seed had not been burned.

On the other hand, the defendant strenuously insists that he bought only two cars in all, and never agreed to purchase or accept any more, and is not liable to pay for any more. The orders of July 6th for two car loads for October and December shipments, respectively, were signed only by the plaintiff's salesman and not by the defendant. It is contended that these were not absolute and complete sales, but propositions to be further considered by the parties, and that this is clearly shown by the defendant's letter of July 12th in which he stated the result of all prior negotiations by ordering "one car of cotton seed in addition to one car previously ordered." It is said that this claim is confirmed by the defendant's prompt refusal to accept the third car load shipped to him January 16th on the ground stated in his letter that "this is an error, as we have got both cars of cotton seed ordered of you through Mr. Holway, one to be shipped October and one December." The defendant's manager, Mr. Arnold, denies that he ever agreed with the plaintiff's Mr. Jones to accept the shipment of January 16th in consideration that the fourth car load should be canceled, and denies that he ever had any conversation with him after January 19th, or at any other time, by telephone or otherwise, in relation to such a proposition. Furthermore, the defendant and Mr. Arnold both testify that an arrangement was made with plaintiff's salesman, Nelson Holway, to store the car load in question in the potato house as the property of the plaintiff under circumstances from which it is fairly to be inferred that he had authority to do what it is claimed he did do, and that he went there with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the plaintiff's knowledge for the purpose of making such an adjustment.

Finally the defendant calls attention to a fact which he claims to be conclusive evidence in his favor, and that is that, while the other sales and orders made and given by telephone, or in personal interviews, were subsequently confirmed by letter, this alleged agreement by telephone to accept the car load on the track January 16th was never confirmed by letter or other writing, and was never afterwards mentioned in any correspondence between the parties.

[1, 2] The testimony was conflicting, and the question now before the court is not whether the justices, sitting in the place of the jury, would have reached the same conclusion as the jury did, but whether there was evidence, not in itself inherently improbable and incredible, which, if believed by the jury, was sufficient to support the verdict in favor of the defendant. It is the opinion of the court that this question must be answered in the affirmative, and that the certificate must be:

Motion for new trial overruled.

FRANKLIN TP. v. CRANE.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1912.)

(Syllabus by the Court.)

1. ACCOUNT (§ 12*)—COLLECTION OF TAXES—ACCOUNTING BY TAX COLLECTOR—EQUITY JURISDICTION.

The legal relation of a tax collector toward the township which he serves in respect to tax moneys collected by him for its use is not of such a fiduciary character as to be the subject of equity jurisdiction, but is rather that of a debtor toward his creditor, and a court of equity will not entertain jurisdiction of a suit brought by the township against the collector for an accounting by him and the collection of tax moneys unlawfully appropriated or wasted by him, for the reason that adequate remedies against him to enforce such accounting and collection are available at law.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 62-70; Dec. Dig. § 12.*]

2. DISCOVERY (§ 20*)—GROUNDS OF EQUITABLE JURISDICTION—ACCOUNTING.

Discovery alone will not sustain a bill for an accounting.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 27; Dec. Dig. § 20.*]

3. DISCOVERY (§ 8*)—PROCEEDINGS IN EQUITY—GROUNDS OF EQUITABLE JURISDICTION.

The discovery prayed for by the bill of complaint is not such as will give jurisdiction to a court of equity. It relates solely to matters of defense which the complainant anticipates the defendant will set up as to the disbursements by him of tax moneys shown by the bill to have been received by him, and is not matter sought for in aid of the facts necessary to establish complainant's case.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 8, 9; Dec. Dig. § 8.*]

4. EQUITY (§ 29*)—GROUNDS OF EQUITABLE JURISDICTION—TRUSTS.

The trusts which equity administers and enforces are principally private trusts arising from contracts express or constructive, exhibited generally in writings, or verbal only, except

where prohibited by statute. A public office does not rest upon contract, but on duty, and the appropriate forum for the enforcement of official duties is primarily a court of law—by mandamus if the duty be clear and the amount involved is not fairly disputable, or by action at law upon the common counts if the amount claimed be not certain or fixed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 89-92; Dec. Dig. § 29.*]

5. TOWNS (§ 59*)—LIABILITIES OF TAX COLLECTOR—NATURE AND FORM OF PROCEEDINGS.

The township records show how much money came originally into its officer's hands, and, while the moneys he may have illegally disbursed may be unknown, yet he does not cease to owe them to the municipality. He is its debtor to that extent, and the proper remedies against him for their recovery are those which the courts of law afford. The effect of holding the relation of the defendant to the township to be that of a trustee and cognizable in equity is to deprive him of the right of a trial by jury and the protection of the statute of limitations.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 101, 102; Dec. Dig. § 59.*]

Appeal from Court of Chancery.

Bill by the Township of Franklin, in the County of Gloucester, against Mathias F. Crane. From an order overruling defendant's demurrer, he appeals. Reversed.

Austin H. Swackhamer, of Woodbury, for appellant. Harvey F. Carr, of Camden, for respondent.

VREDENBURGH, J. The bill of complaint in this case is filed by the township of Franklin, N. J., against its former tax collector, to obtain a decree for money charged to have been collected and received by him by virtue of his office during the years 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, and 1906, aggregating the sum of \$153,413.64. It charges that after this tax money was so received the defendant made many disbursements thereof without proper or lawful warrant or authority and to divers persons unknown to the complainant. The prayer of the bill is that the defendant discover to what persons, and for what purposes, and upon what warrant and authority he paid out and disbursed the funds of the complainant from time to time, and that he may discover all vouchers or warrants for the payment of funds; that he may account to complainant for the moneys by him received and disbursed, and may be decreed to pay over and refund to complainant all moneys paid out and disbursed by him for the payment and disbursements of which there was no lawful or proper warrant or authority. The bill does not charge that a fiduciary relation of any sort existed between the complainant and defendant with regard to any of the matters set up in the bill respecting the tax moneys sought to be recovered in this suit, nor that such moneys were received or disbursed by the defendant as a trustee for complainant, nor under any relation partaking of the character of either a public or private trust.

Demurrer to the bill was filed by defendant setting up, among the causes of demurrer, that the complainant had not by its bill stated such a case as entitled it in a court of equity to any discovery from defendant, or any relief against him as to the matters contained in the bill; that the facts stated in the bill did not bring the cause under any head of equity jurisdiction, and that the complainant had an adequate remedy at law. The demurrer was overruled by the learned Vice Chancellor in an opinion advising an order to that effect. In it he said that the defendant was an officer of the complainant municipality intrusted with duties of a fiduciary nature—that the relation between such an officer and the municipality is essentially the relation of trustee and cestui que trust, and that this relation affords ground for equity jurisdiction.

[1] We think this conclusion of the Vice Chancellor is based upon an unsound premise, and that the relation of the defendant toward the township in respect to tax moneys collected by him in the performance of his official duties, is not of such a fiduciary nature as to be the subject of equity jurisdiction, but is that rather of a debtor toward his creditor. The Vice Chancellor in his opinion says that few cases of bills in equity against such public officers for an accounting are to be found, but that in the case decided in this court of the Borough of Rutherford v. Alyea, 54 N. J. Eq. 411, 34 Atl. 1078, no suggestion was made of want of jurisdiction of the court to require an accounting from an officer of a municipal corporation and that he was unable to distinguish that case from the present. The silence of the opinion of this court upon the point of jurisdiction in that case cannot I think be regarded as having the significance or effect attributed to it above. The preliminary and controlling question in that case was the manifestly multifarious character of the bill as framed, and this court met that question at the very threshold, and, deciding that it was clearly multifarious, ordered (of its own motion) the dismissal of the bill. It is true that this court in so deciding also found other reasons why the bill should not be entertained, holding *inter alia* that a bill for an account would not be retained when it shows on its face the complainant is informed of all the items of the account, and no relief is prayed with reference to the balance. It was nowhere intimated in the opinion that the nature of the relation of the defendant-collector with the township was fiduciary, but, quite to the contrary, the court evidently regarded such relation as only that of a debtor to his creditor, the distinguished author of the opinion remarking (on page 413 of 54 N. J. Eq., on page 1079 of 34 Atl.) that "an ordinary action for money had and received would seem to afford the complainant an ample remedy." An examination of the reports of that case, both in the Court of Chancery (53 N. J. Eq. 580, 32 Atl. 70) and in this court

(54 N. J. Eq. 411, 34 Atl. 1078) will make it apparent that this jurisdictional question was neither presented nor argued by counsel, and presumably for that reason the opinion of the courts do not advert to such a question.

[4] The trusts which equity administers and enforces are mainly private trusts arising from contracts express or implied in law, exhibited generally in writings, or verbal only, except so far as forbidden by the statute of frauds. 1 Pom. Eq. Juris. § 152; 2 Id. 987. A public office does not rest upon contract, but on duty, and the appropriate forum for the enforcement of official duties is primarily a court of law—by mandamus if the duty be clear, and the amount involved is not fairly disputable (*State ex rel. Meinzer v. Disbrow*, 42 N. J. Law, 141), or by action at law upon the common counts if the amount claimed is not certain or fixed. All the tax money the defendant has paid out without authority of law he still holds in legal contemplation to the use of the township, and for that he is liable to respond in an action at law for money had and received. He cannot successfully defend that he has paid the moneys of the township to others than those lawfully entitled to them. Manifestly he had no more right to disburse the tax funds without the authority of the township, or to persons not legally entitled to them, than to throw the money into the sea. The defendant held toward the township no trust relation of any kind with respect to tax moneys collected by him. As to these, he was neither a public nor private trustee. While in a popular sense a public office is often called a public trust, it is not so in any proper legal sense, and there is certainly no room for the position that the relation of the collector to the township was that of a trustee administering a private trust.

[5] The records kept by the township show precisely how much money came originally into its officer's hands, and, while the sums of money he may have illegally disbursed may be unknown, yet he does not cease to owe them to the municipality. He was its debtor to that extent, and the remedies against him for their recovery are those which the courts of law fully afford. The effect of holding that the relation of the defendant to the township was that of a trustee and cognizable in equity is to deprive him of the right of a trial by jury, as well as to take away from him the protection of the statute of limitations. In an early leading case—*Foley v. Hill*, 2 H. L. Cas. 28—it was held by the House of Lords that the relation of banker and customer is not fiduciary in its character, but was regarded by the able equity judges who decided the case (including Lords Campbell and Brougham) as that of debtor and creditor. The doctrine of this decision—that the relation of the banker and its customer is not fiduciary in its character—is applicable, I think, to the situation of the tax collector who is a cus-

today of the tax moneys of the township. He is a debtor to the township to the extent of its money in his keeping, precisely as is the banker a debtor to his depositor to the extent of the deposits in the hands of the former. For default in their payment to the depositor upon his demand, it is not open to dispute that the banker would be liable for them in a suit at law. Prof. Pomeroy in 1 Eq. Jurisprudence, par. 178, states the general rule thus: "Where the primary right of the plaintiff is purely legal, arising either from the nonperformance of a contract, or from a tort, and the money sought to be recovered as a debt or as damages, and the right of action is not dependent upon or connected with any equitable feature or incident, such as fraud, mistake, accident, trust, accounting, or contribution, and the like, full and certain remedies are afforded by actions at law, and equity has no jurisdiction. These are cases especially within the sole cognizance of the law." Respecting the feature of accounting above excepted from the general rule, he adds, as follows, viz.: "Whenever an action at law will furnish an adequate remedy, equity does not assume jurisdiction because an accounting is demanded, or needed, nor because the case involves or arises from fraud, nor because a contribution is sought from persons jointly indebted, nor even to recover money held in trust, where an action for money had and received will lie." That the courts of law will furnish the complainant the adequate relief just indicated by Pomeroy can, I think, be easily displayed. Among the official duties required by our statute of the township collector (4 Comp. Stat. 1910, p. 5578, § 17) are the following: "The collector shall on or before the fifth day of February, annually make to the township committee and file with the township clerk, a full and detailed account of his receipts and disbursements as such collector for the next preceding fiscal year, the names of all persons delinquent in the payment of their taxes at the close of such fiscal year together with the amount of taxes due from them respectively, which account shall be in writing and verified by his oath." The township, by force of this statute, has certainly a clear remedy by a writ of mandamus issuing out of the Supreme Court to compel its collector (in the event he has neglected or refused to perform his duty) to file with its clerk in writing under oath the account of his receipts and disbursements of tax moneys which it is now seeking to obtain by a resort to equity. Not only so, but (unless there is a fair question of dispute as to the amount) to also compel him to perform his further duty to pay over to the township the amount of the tax funds which either are, or should be, in his hands. *State v. Disbrow*, supra. If in such a mandamus proceeding it should appear there exists a fairly disputable question as to the amount of such

moneys due from him, and the mandamus proceeding should, for that reason, fall short of complete relief, the township has the additional and adequate remedy to recover from him what may be due it by an action at law against him for money had and received. I think the adequacy of these two remedies, supplementing each other, must be conceded, and that further discussion on this head is uncalled for, except to quote from the case of *Smith (Appellant) v. Chosen Freeholders of Essex (Respondent)* 48 N. J. Eq. 627, 23 Atl. 268, where Chancellor Magie, expressing the opinion of this court, said: "The line of division between legal and equitable remedies is fixed in this state by a long course of precedents, and even legislative authority is forbidden to intermingle these remedies by the constitutional prohibition against interference with the ancient jurisdiction of the courts. * * * The result is that respondent on its own statements has an adequate and complete remedy at law and may not, therefore, maintain this bill against appellant."

[2] It is urged that the complainant's bill should have been sustained because of the discovery prayed for, but it is well settled that discovery alone will not sustain a bill for an accounting. The opinion below concedes that the bill cannot be entertained as a bill for an accounting upon the sole ground that it sought a discovery, and the case there cited of *Daab v. N. Y. Cent. Ry.*, 70 N. J. Eq. 489, 62 Atl. 449, fully supports that view. The decision of the Court of Chancery in that case holds that, where the primary rights of the complainant for the enforcement of which a suit in equity is brought are strictly legal, the mere fact that the bill prays for a discovery presents no ground for extending the jurisdiction of equity to compel the defendant to account. This principle is fully sustained by the numerous authorities referred to on page 491 of the cited opinion, and is in accord with the views we entertain and which we have above intended to express.

[3] The discovery especially prayed for by the bill is not, we think, such as will give jurisdiction to a court of equity. It relates entirely to matters of defense which the complainant anticipates the defendant will interpose as to the payments and disbursements by him of tax funds charged by the bill to have been received by him, and is not matter sought for in aid of the facts necessary to establish complainant's case. The right of discovery is thus expressed in 1 *Daniell's Ch. Pl. & Prac.* p. 606, viz.: "The principle upon which the cases proceed is that the right of a plaintiff in equity to the benefit of a defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established, or to any discovery of the defendant's evidence." *Daniell's*, su-

pra, p. 606, and authorities cited in note (2) on that page; 2 Story's Equity Jur. § 1497; Gelston v. Hoyt, 1 Johns. Ch. (N. Y.) 548. The bill does not show that the facts, discovery of which is sought, are necessary to complainant's case, and not facts by which the defendant intends to establish his case. They should relate to the case of the party presenting them, and are not to be used for the mere purpose of prying into the case of the adversary. 14 Cyc. 313, 354, and cases there cited; Wolters v. Fidelity Trust Co., 65 N. J. Law, 130, 132, 46 Atl. 627.

The order overruling the demurrer is for the reasons given reversed.

FRANKLIN TP. v. TRAMMELL. SAME v. LOWDER. SAME v. DOWNS.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1912.)

Appeal from Court of Chancery.

Actions by the Township of Franklin against one Trammell, one Lowder, and one Downs. Judgment for plaintiff overruling demurrers, and defendants appeal. Reversed.

Austin H. Swackhamer, of Woodbury, for appellants. Harvey F. Carr, of Camden, for respondent.

PER CURIAM. The pleadings in those three suits are essentially the same as those in No. 75, between Mathias F. Crane, appellant, and the same township, respondent (85 Atl. 408), and were argued together under written stipulations of counsel.

The orders overruling the demurrers in each case under review in above appeals should be reversed for the reasons expressed in the opinion of this court filed at this term in the appeal of said Crane.

OLDENBURG & KELLEY, Inc., v. REGESTER et al.

(Court of Appeals of Maryland. June 13, 1912.)

1. MORTGAGES (§ 369*)—TRUSTEE'S SALE—DEFECT IN TITLE—RESCISSION BY PURCHASER.

Where trustees in a deed of trust sold the land for \$10,600, the existence of an un-released mortgage on the land for \$15,000, discovered by the purchaser after the sale, afforded such purchaser ground for rescission, since the incumbrance could not be satisfied from the purchase money.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1093-1100; Dec. Dig. § 369.*]

2. MORTGAGES (§ 373*)—TRUSTEE'S SALE—DEFECTS IN TITLE—TAXES AND INTEREST.

The purchaser at a sale by a trustee in a deed of trust of land, which had been destroyed by fire, agreed that May 8, 1910, should be the date for final ratification of the sale, and that he would pay interest on the balance of the purchase price from that date, the parties to adjust taxes, and ground rent from that date. Before the time for ratification, an un-released mortgage for \$15,000 was discovered, and a creditor's exception to ratification was filed, and, while the purchaser endeavored to complete the sale, the trustees made no effort to have a release of the mortgage entered of record, and thereby delayed the final ratification of sale until October, 1910. The purchase price was \$10,600. *Held*, that on the equities of the case the trust estate, rather

than the purchaser, should bear the interest, taxes, and ground rent after the date first fixed for ratification.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1104; Dec. Dig. § 373.*]

Appeal from Circuit Court of Baltimore City; Carroll T. Bond, Judge.

Action by Oldenburg & Kelley, Incorporated, against Samuel W. Regester and another, trustees. From an order disallowing their claim, plaintiff appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

George Washington Williams and John H. Richardson, both of Baltimore, for appellant. George R. Gaither, of Baltimore, for appellees.

URNER, J. In March, 1910, the appellants purchased for the sum of \$10,600 from the appellees, as trustees under a deed of trust for the benefit of the creditors of the grantor, a lot of ground in Baltimore upon which were the ruins of a business building which had been destroyed by fire. The sale was reported by the trustees to the circuit court for Baltimore City, whose jurisdiction in the premises had been previously invoked. The date fixed by order nisi for final ratification was May 8, 1910. A deposit of \$500 was made by the purchasers, and there appears to have been an agreement that they should pay interest on the balance of the purchase money from the day of sale and that the taxes and ground rent on the property should be adjusted as of that date. Before the time for the final ratification arrived, an examination of the title was made by counsel for the purchasers, and it was found to be subject to a recorded mortgage for \$15,000. An exception to the sale was filed by the vendees on account of this incumbrance, and one of the creditors of the estate also excepted on the ground that the sale had been made for an inadequate price. The mortgage had been paid prior to the sale, and a release had been executed and was ready to be recorded; but the appellants were not informed of these facts until some time in July, 1910. Both the exceptions referred to were voluntarily dismissed, and the sale was ratified, in October, 1910, and the balance of the purchase money was paid early in the following month. At the time of the settlement the appellants objected to paying interest for the period of the delay in the ratification and claimed the right to deduct from the purchase price proportionate amounts of the taxes and ground rent for the same period. The trustees insisted upon a settlement in conformity with the original terms of sale, and the purchase money was accordingly paid in full with interest from May 8th; the right being reserved to the appellants to claim reimbursement for the disputed charges out of the fund when audited for distribution. A claim for that purpose was duly filed. Its items were \$257.55 for interest, \$218.65 for ground rent, and \$396.78 for taxes, covering the period in

question. The claim was disallowed by the auditor, and exceptions filed by the appellants to his report were overruled by the circuit court.

The only testimony upon the exceptions was that given by Mr. Oldenburg, one of the purchasers, and by Mr. Richardson, their counsel. It appears that, after discovering the mortgage and excepting to the ratification of the sale for that reason, Mr. Richardson made repeated but unsuccessful efforts to obtain some further information on the subject. On July 5th he wrote counsel for the trustees that the purchasers "have had this money ready since the sale should have been ratified in the early part of May, 1910, and we do not propose to be held for any expense or interest that has accrued since that time. We are ready to settle this matter at any time you put the title in shape. I would thank you to give this matter your attention, as we want to make some improvements in the building, and we can do nothing as long as it is in present shape." Some days later Mr. Richardson was informed that the mortgage was satisfied; but there is nothing to show that it was released of record prior to the time of the ratification of the sale. Upon learning that the mortgage was paid, the counsel for the purchasers directed his attention to the creditors' exceptions to which we have referred. The disposition of these exceptions was delayed by the absence of the president of the corporation in whose behalf they had been filed. They were dismissed on October 10, 1910.

The testimony of Mr. Oldenburg shows that he was urging an early confirmation of the sale so that he might proceed to improve the property. He said: "The whole place was in ruins, and to do anything with it the property would have to be improved." The purchasers did not obtain possession until the sale had been ratified. It is evident that they were seriously prejudiced by the delay.

[1, 2] In view of the special circumstances which interfered with the ratification of the sale in due course and thus prevented the prompt beginning of the improvements which had to be made before any return could be realized from the investment, we think it equitable that the appellants should be reimbursed for the interest, taxes, and ground rent in controversy. When the examination of the title disclosed the existence of an unreleased mortgage for \$15,000 on property which had been bought for \$10,600, it was apparent that, if the lien were subsisting, the trustees could not protect the title with the proceeds of sale, and that, unless the incumbrance were removed in some other way, the purchase would not be consummated. In such a situation the appellants would have been clearly entitled to have the sale rescinded. *Brillhart v. Mish*, 99 Md. 447, 58 Atl. 28. The objection of the vendees was therefore entirely reasonable, and, until it

was satisfactorily met, they could not safely incur any expense in preparing for the improvement of the property. The trustees might at any time have obviated this difficulty by causing the existing release of the mortgage to be recorded. If this had been done, the only remaining obstacle to the ratification of the sale would have been the exceptions of the creditor, and these might have been pressed to an early disposition. But the appellants could not be expected to manifest any active interest in having the exceptions dismissed so long as they were left in doubt as to the title. Their uncertainty as to its real condition was not relieved, according to the undisputed evidence, until some time in July, notwithstanding the efforts of their counsel to ascertain the facts; and, when they finally obtained the information as to the payment of the mortgage, the attempts which were then begun to secure a disposition of the other exceptions encountered delays which appear to have been unavoidable. The record does not indicate any action by the trustees, or the excepting creditor, to have the question of the confirmation of the sale brought to an early conclusion, but shows affirmatively and without contradiction that the appellants earnestly endeavored to accomplish that result so as to be in a position to begin the improvements upon which they were absolutely dependent for any return from their purchase.

The appellees rely upon the general rule as stated in *Wagner v. Cohen*, 6 Gill, 97, 46 Am. Dec. 660, *Brown v. Wallace*, 2 Bl. 587, Id., 4 Gill & J. 479, and *Latrobe v. Winans*, 89 Md. 655, 43 Atl. 829—that the purchaser is ordinarily liable for interest from the time the sale is to be effective. The cases cited were concerned with conditions altogether different from the present, and the rule invoked is not one of absolute and unvarying application. In a very recent case this court has manifested its disposition to be governed by equitable considerations in dealing with such questions. *Leviness v. Consol. Gas Co.*, 114 Md. 573, 80 Atl. 304.

In the case before us the equities require that the trust estate rather than the purchasers should bear the charges in dispute. The order will, accordingly, be reversed, and the cause remanded to the end that the audit may be restated in accordance with this opinion.

Order reversed, and cause remanded; the costs to be paid out of the estate.

FIRST NAT. BANK OF DOVER v. COLLINS.

(Superior Court of Delaware. Kent. July 3, 1912.)

PLEADING (§ 301*)—JUDGMENT ON PLEADINGS—AFFIDAVIT OF DEMAND—OFFICER AUTHORIZED TO ADMINISTER OATH.

Under Act April 6, 1905, entitled "An act providing salaries for certain state offi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cials," and recognizing the office of deputy prothonotary, and raising the office to a salaried office, and authorizing the prothonotary in each county to select deputies to assist in the performance of the duties of his office, a deputy prothonotary may perform such acts within the office of the prothonotary as are ministerial, and such other acts as are warranted by the occasion and directed by the court, and may administer the oath to the affiant in an affidavit of demand as a ministerial act.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 318, 892-897, 904-906; Dec. Dig. § 301.*]

Action by the First National Bank of Dover against William H. Collins. On motion that judgment be refused notwithstanding affidavit of demand, on the ground that the affidavit of demand was taken before an officer not authorized by law to administer oaths. Denied.

Argued before WOOLLEY and RICE, JJ.

George M. Jones, of Dover, for plaintiff.
John B. Hutton, of Dover, for defendant.

WOOLLEY, J., delivering the opinion of the court:

The plaintiff in this action filed an affidavit of demand, made by its cashier before the deputy prothonotary for Kent county, and moved for judgment at the first term. The authority of the deputy prothonotary to take affidavits in matters pending in the office of the prothonotary is questioned by the motion of the defendant that judgment be refused notwithstanding the affidavit of demand.

The office of deputy prothonotary was recognized by the statutes prior to the Code of 1852, but the duties of the officer were not there defined. By the act of April 6, 1905, entitled "An act providing salaries for certain state officials," the office of deputy prothonotary was again recognized, and while the duties of the officer received little further definition, the office was raised to the dignity of a salaried office, and the prothonotary of each county was authorized to select deputies to assist in the performance of the duties of his office.

Obviously the law that first recognized the office of deputy prothonotary, because of its failure to express a broader view, must be construed as having restricted the official duties of that officer to acts that were strictly ministerial, but the act of 1905, making the office a state office, and providing for the selection of a deputy to assist the prothonotary in the performance of the duties of his office, when considered in connection with the radically changed condition in the business of that office and of the litigation of the courts, must be construed as enlarging the authority of the deputies prothonotary and extending the scope of their duties. We therefore hold that the deputy prothonotary, by virtue of the statutes that create or recognize his official position, may perform such

acts within the office of the prothonotary as are ministerial, and may perform such other acts as are warranted by the occasion and directed by the court.

In this particular case we consider the administering of the oath to the affiant by the deputy prothonotary was a ministerial act and within the authority of his office.

The motion that judgment be refused notwithstanding the affidavit of demand is therefore refused.

COMMONWEALTH ex rel: McDOWELL v. McAFEE.

(Supreme Court of Pennsylvania. July 2, 1912.)

MUNICIPAL CORPORATIONS (§ 124*) — OFFICERS—ALDERMEN.

Act Feb. 7, 1906 (P. L. 7), consolidated the cities of Pittsburgh and Allegheny. Before that time Pittsburgh had 44 wards and Allegheny 15. The old wards were abolished in 1908 and the consolidated city divided into 27 new wards under Act April 24, 1905 (P. L. 307), which provided by section 4 that all aldermen should continue in office till the expiration of the terms for which they had been elected. Const. art. 5, § 11, provides that aldermen shall be elected in the several wards by the qualified electors, and that no person shall be elected to the office unless he shall have resided in the ward for one year preceding his election, and that in cities of over fifty thousand inhabitants not more than one alderman shall be elected in one ward. Act March 2, 1911 (P. L. 8), provides for the adjustment of terms of office affected by certain amendments to the Constitution. Within the new Third ward of Pittsburgh were four aldermen elected under the old plan, one of whose terms expired in December, 1911, and the others in May, 1912, and 1913, respectively. Held, that there was no authority to elect an alderman at the general election in November, 1911, to fill the place of the alderman whose term expired in December of that year.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 290-297; Dec. Dig. § 124.*]

Appeal from Court of Common Pleas, Dauphin County.

Mandamus proceedings by the Commonwealth, on the relation of Heber McDowell, against Robert McAfee, Secretary of the Commonwealth, to compel him to lay the returns of the relator's election before the Governor, so that a commission to him as alderman might issue. From a judgment vacating the writ, relator appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Charles B. Prichard, of Pittsburgh, for appellant. William M. Hargest, Asst. Deputy Atty. Gen., of Harrisburg, and John C. Bell, Atty. Gen., for appellee.

MOSCHZISKER, J. Prior to the consolidation of the cities of Pittsburgh and Allegheny under the act of February 7, 1906 (P. L. 7), the former had 44 and the latter 15

wards. In 1908 these old wards were abolished, and the united city was divided into 27 new wards, created pursuant to the act of April 24, 1905 (P. L. 307), which provides in section 4 that "all aldermen * * * of the ward or wards affected by the creation, division or consolidation * * * shall continue in office until the expiration of the terms for which they have been elected." Article 5, § 11, of the Constitution, provides that aldermen shall be elected in the several wards by the qualified electors thereof, and then directs as follows: "No person shall be elected to such office unless he shall have resided within the — ward — for one year next preceding his election. In cities containing over fifty thousand inhabitants not more than one alderman shall be elected in each ward." The relator was chosen an alderman in 1906 by the electors of an old ward which now forms a part of the present Third ward of the city of Pittsburgh, and his term, by virtue of the constitutional amendments of 1909, expired on the first Monday of December, 1911. At the November election of that year he was a candidate for a new term of five years to commence on the day of the expiration of his former term, and he received a majority of the votes cast; but the court below decided that "there was no authority for attempting to elect an alderman in the Third ward of the city of Pittsburgh at the general election in November, 1911, and said relator was not then lawfully elected to the said office," and entered an order that "the writ of alternative mandamus heretofore granted is therefore now vacated." This is assigned for error.

No matter how this case may be viewed, it will be found to contain inherent difficulties. But after study and consideration we conclude that the learned court below fell into no error when it refused the relief asked by the relator; and, since we adopt the view of the law entertained by that tribunal, we cannot do better than quote from its opinion. It is there well said: "The Constitution clearly contemplates that there shall be but one alderman in each ward. * * * At the time of the consolidation of the wards of the city of Pittsburgh, as above stated, there were three aldermen in commission within the limits of the new Third ward, to wit, Heber McDowell, whose term was to expire in May, 1912, and Samuel Frankel, whose term was to expire in May, 1912, and Louis Alpern, whose term was to expire in May, 1913. Under the provisions of the act of April 24, 1905 (P. L. 307), these three aldermen are all continued in office until the expiration of their respective terms. Their terms, being fixed by the Constitution, could not be lessened by the Legislature, and therefore this provision was written in the act of 1905. The result is that the Third ward had three aldermen within its limits at the time

of its creation. * * * It was undoubtedly the intention of the Legislature that there should be no election or appointment of an alderman in this ward until, by reason of the expiration of the terms of the aldermen in commission at the time of the creation of the ward, the number was reduced to the constitutional limit of one. It is conceded that the term of Alderman Alpern continued until May, 1913, and, until the expiration of this term, the ward is assured of its constitutional number of aldermen. * * * The attempt to elect an alderman in this ward at the general election on November 7, 1911, appears to us to have been without any authority of law. No act of the Legislature can increase the constitutional number of aldermen in any ward. * * * It is contended, however, that the act of March 2, 1911 (P. L. 8), authorized and required the holding of an election for alderman in the ward in question on November 7, 1911. In our opinion this act does not aid the relator in any way."

We cannot accept the view contended for by the appellant to the effect that the law, while permitting all the old officers to serve out their terms, created a vacancy and required an alderman to be elected immediately upon the erection of the present Third ward. If such were the case, there would be a similar vacancy in each of the other new wards of the united city, and with the aldermen continuing in office, this would give the citizens of Pittsburgh 86 aldermen distributed over 27 wards. Neither the Constitution nor the legislation upon the subject contemplates or requires a construction that would countenance such a situation.

The assignment of error is overruled, and the judgment of the court below is affirmed.

COMMONWEALTH v. G. W. ELLIS CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

TAXATION (§ 397*)—FOREIGN CORPORATIONS—INCREASE IN CAPITAL STOCK.

Bills and accounts receivable of a foreign corporation do not necessarily indicate capital employed wholly within the state, and are not a basis for a settlement of a bonus due the commonwealth on increase of capital under Act May 8, 1901 (P. L. 150).

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 672; Dec. Dig. § 397.*]

Appeal from Court of Common Pleas, Dauphin County.

Action by the Commonwealth against the G. W. Ellis Company. Judgment for defendant, and plaintiff appeals. Affirmed.

McCarrell, J., filed the following opinion in the court below:

"The accounting officers of the commonwealth on September 3, 1909, settled an account under the act of May 8, 1901, against the defendant company for bonus on increase of its capital. The defendant company ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

pealed. Trial by jury has been waived in pursuance of the provisions of the act of April 22, 1874 (P. L. 109). From the testimony submitted, we find the following:

"Statement of Facts.

"The defendant was incorporated in the state of New Jersey, January 5, 1905, and began business in Pennsylvania May 1, 1905. Its principal place of business is in Pennsylvania, and it transacts in New Jersey only such business as is necessary to comply with the provisions of its charter. It paid bonus on \$60,000, being the amount of capital employed wholly within the state. On August 10, 1909, the defendant company, by its president, returned an increase in the amount of capital employed in Pennsylvania during the year ending November 1, 1908, of \$10,069.90. It had previously reported the capital employed at \$50,681.05, making a total of \$60,750.95. Having paid a bonus on \$60,000, the defendant company contended before the Auditor General that it was liable to bonus only upon \$750.95. The Auditor General by reference to the capital stock report of the defendant company for the same year, found an item of bills and accounts receivable amounting to \$135,303.78, and settled a bonus tax against the corporation defendant on \$74,303 as an increase of capital invested wholly within the state, over and above the former \$60,000. From this settlement the defendant company has appealed. The question to be determined here is: Are bills and accounts receivable by the defendant corporation capital employed wholly within the state of Pennsylvania so as to render the defendant company liable for payment of bonus thereon?

"Discussion.

"The defendant company, by its bonus report for 1908, stated that the amount of its capital wholly employed in the state of Pennsylvania was \$60,750.95. It had already paid a bonus upon the sum of \$60,000, and admitted its liability to pay a bonus on \$750.95. The commonwealth contended that it was liable for a bonus on \$74,303, in addition to the amount upon which the bonus had previously been paid. Mr. Hause in his testimony says: 'The basis for the bonus settlement is found in the capital stock report for 1908. It is made up of bills and accounts receivable almost entirely amounting to \$135,000. The company having paid on \$60,000, the settlement was made on the difference between \$60,000 and \$135,000, and afterwards resettled for reasons set forth in an affidavit by counsel for the corporation on \$74,303.' This also appears from the report and bonus settlement originally made September 3, 1909.

"The capital stock report for 1908 to which Mr. Hause refers states the bills and accounts receivable to be \$135,303.78. It also states that the bills and accounts payable amount to \$122,134.53. The settlement for capital

stock tax made upon the same day as the bonus settlement shows that the actual value of the entire capital stock was fixed at \$60,750. The bonus report, and capital stock report as well, show that the authorized capital of the company was \$100,000, and the amount actually paid in thereon \$75,000. This bonus settlement for an increase on capital wholly employed in Pennsylvania indicates that the entire amount of capital thus employed is \$134,303, or more than double the actual value of the company's entire capital stock.

"The bills and accounts receivable certainly do not represent capital actually employed wholly within the state of Pennsylvania. This may indicate to some extent the volume of business done by the corporation in the state, but the bonus is not payable upon the volume of business from year to year, but on capital actually employed within the state. Bills payable, as already stated, appear from the same report to have been \$122,134.53, which is \$13,169.65 less than the amount of bills and accounts receivable. These figures indicate that its income from bills and accounts receivable or from business done, is slightly in excess of bills and accounts payable, and do not indicate in any way the amount of capital actually employed in the conduct of the business. Money due the defendant company either upon note or open account is not money or capital actually employed. When collected, it can be used or employed for any corporate purpose, but not until it has been actually collected. If the settlement made for that year, based upon the actual cash value of the capital of the company, is accurate, and it must be so assumed, then, as already stated, the conclusion that the company has actually employed wholly within the state capital amounting to \$134,303 must be erroneous.

"Defendant is a corporation of the state of New Jersey and the situs of its bills and accounts receivable would legally be in that state, and not in the state of Pennsylvania. There is nothing to indicate whether or not the persons owing the several items included in the bills and accounts receivable are residents of Pennsylvania or nonresidents. The money due thereon is apparently being used by the debtors of the defendant company for their own purposes, and not by the defendant company in any way.

"It seems to us manifest that the bills and accounts receivable, which have been made the basis for the settlement of the bonus in this case, do not necessarily indicate capital actually employed wholly within the state, and that the settlement of the accounting officers is erroneous. From the testimony submitted, including the reports for bonus and in regard to capital stock, it seems to us clear that the defendant company is not liable to the payment of any additional bonus, excepting only on the sum of \$750.95. We have, therefore, reached the following:

"Conclusions.

"(1) The commonwealth is not entitled to recover the amount of bonus fixed by the settlement in this case upon the alleged increase of capital actually employed within the state amounting to \$74,303, and is therefore entitled to judgment against the defendant therefor.

"(2) The defendant company admits that it has not paid the bonus upon \$750.95 of its capital actually employed in the state, and we therefore direct that judgment be entered in favor of the commonwealth and against the defendant for one-third of 1 per cent. upon that amount, viz., for the sum of \$2.51, unless exceptions be filed within the time limited by law."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Wm. M. Hargest, Asst. Deputy Atty. Gen., and John C. Bell, Atty. Gen., for the Commonwealth. Ehrman B. Mitchell, of Harrisburg, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of Judge McCarrell.

POWELL v. S. MORGAN SMITH CO.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. APPEAL AND ERROR (§ 1052*)—REVIEW—HARMLESS ERROR—RULINGS ON EVIDENCE.

Judgment will not be reversed because of the inadmissibility of an offer, where the testimony subsequently admitted thereunder was clearly competent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

2. APPEAL AND ERROR (§ 1048*)—REVIEW—HARMLESS ERROR—RECEPTION OF EVIDENCE.

A refusal to strike out an objectionable reply elicited by the appellant on cross-examination is not ground for reversal where the answer did him no harm.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

3. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTIONS FOR JURY—NEGLIGENCE OF MASTER.

In an action for personal injuries to a servant, evidence held to present a question for the jury as to defendant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 245*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—RELIANCE ON CARE OF MASTER.

A servant directed by a foreman to ascend a ladder in performance of his duties has the right to assume that the foreman would not direct the operator of a crane to move it in such manner as to injure the servant, though, if the service had been part of the servant's general employment without direct instructions from the foreman, it would have been his duty

to notify the crane operator not to run the crane while he was at work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 778-788; Dec. Dig. § 245.*]

5. TRIAL (§ 296*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action for injuries to a servant, an instruction that if a foreman directed plaintiff to shorten certain belting, and directed a crane to be moved in plaintiff's direction while he was thus engaged, and thereby caused the injuries complained of, the plaintiff had made out a case which must be submitted to the jury, was not error where the court proceeded to state defendant's side, and added that if the jury found the case as it was presented by the plaintiff, before the defendant produced its evidence, the verdict should be for the plaintiff, but that, if they found the theories of defendant sustained by the evidence, the verdict should be for it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

6. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a servant, evidence held to present a question for the jury as to plaintiff's contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

7. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Though standing alone a charge might bear a construction which would render it erroneous, the charge must be read and considered as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-717; Dec. Dig. § 295.*]

8. TRIAL (§ 256*)—INSTRUCTIONS—NECESSITY FOR REQUESTS.

The inadequacy of instructions as to the measure of damages is not ground for reversal, where fuller and plainer instructions were not asked for.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

Appeal from Court of Common Pleas, York County.

Action of trespass by William H. Powell against the S. Morgan Smith Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

At the trial while the plaintiff was on the stand under direct examination, the following offer of testimony was made:

"Q. When you had taken these bolts out, and Lookingbill had taken his out, and gone to the western end of the shop, did you have a conversation with Mr. George Schlaan-stine? A. Not at that time. But there was a conversation before that time. There was a man who had got hurt at the stone, and bursted the belt off, and torn it down in addition; and of course, I couldn't finish my job.

"Mr. Cochran: I do not understand the relevancy of this.

"The Court: Please give an offer, Mr. Niles.

"Mr. Niles: We offer to show that Schlaan-stine instructed the witness, when the wit-

ness told him that the western emery wheel was broken down, and that Lookingbill had been hurt, to fix those bolts at the other emery wheel, which was further east in the shop, and that the witness replied to Schlaanstine that that emery wheel was out of repair, and had been for a long time, and that Schlaanstine asked him: 'What was the matter?' And he said that the belt, as he understood it, was too loose; and Schlaanstine instructed him to fix it. That the witness asked Schlaanstine how he could get up there in order to fix the belt running to the main shaft up above these I-beams. He instructed him to get a ladder, and to get the ladder used for that purpose, and fix it. That he repeated the order several times. That in pursuance of those instructions, the witness did what he did, which will be the subject of another offer.

"Mr. Cochran: The offer as a whole is objected to as including matter which is irrelevant and immaterial, and not evidence for any purpose in the case—I mean as to what happened at another emery wheel, or is alleged to have happened at another emery wheel—and we ask for that reason that the offer be rejected and the testimony objected to, as taken, be stricken out.

"The Court: We think it is evidence. We will admit the offer, and seal an exception for the defendant.

"Q. By Mr. Niles: Now, then, tell us the conversation with Schlaanstine—the first one about emery wheels? A. Well, I went after Lookingbill got hurt, who went away to get his hand dressed—

"The Court: That is not in the offer.

"Mr. Niles: Yes.

"Q. Do not tell that. A. I left there then, and came back, and just finished the job I was working on, and I met Schlaanstine. And I said, 'George, a man got hurt up there.' And I says, 'Those guards are bad.'

"Mr. Cochran: I object to what happened at some place else.

"The Court: This is not in the offer.

"Mr. Niles: This offer is to have the conversation in which the foreman directed this plaintiff to do the work in which he was hurt; and this part leads to it.

"The Court: That he can testify to. But what happened to another man is not evidence in this case.

"Mr. Niles: No; but what he said in that conversation, which is a necessary part of the order, is the only thing. I cannot see that this is objectionable."

Subsequently, while the plaintiff was under cross-examination, the following question was asked:

"Q. And you didn't talk to him, or ask this young man about this, or to do anything there? A. Yes; I had him up there to get the bolts that he had taken up. I didn't want to lose them. By that he came out of the superintendent's office, and I says, 'Well, that wheel is broken down.' That is

all—and 'you ought to get that guard fixed down there.' I says, 'A man has got his hand busted there.' And he didn't pay much attention to that.

"Mr. Cochran: I objected awhile ago to this outside conversation, and ask to have it stricken out.

"The Court: Yes; but we cannot have it stricken out. You brought it out.

"Mr. Cochran: It was not in answer to my question at all, and he volunteered all this.

"The Court: We will give you an exception to this."

In reference to measure of damages the court instructed in part as follows: "Now, if you find a verdict for the plaintiff, you must find damages for those injuries to the extent of the earning capacity (based upon the evidence which has been adduced before you) that he would have if he would live out the reasonable time of life."

The jury found a verdict for the plaintiff in the sum of \$4,000, upon which judgment was entered. Defendant appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Richard E. Cochran, Smyser Williams, and George Hay Kain, all of York, for appellant. H. C. Niles, C. W. A. Rochow, and M. S. Niles, all of York, for appellee.

MESTREZAT, J. [1] The first assignment alleges error in the admission of certain testimony, and the second in refusing to strike out certain testimony. Neither of these assignments can be sustained. If it be conceded that the offer complained of in the first assignment was inadmissible, the testimony subsequently admitted under the offer was clearly competent. The court excluded the testimony as to the accident to another person, and admitted only that which showed what the foreman said to the plaintiff at the time he ordered the latter to repair the belting which operated the emery wheel.

[2] The testimony asked to be stricken out was in reply to questions on cross-examination by the counsel of the appellant company, but, if the motion to strike out should have been allowed, we think the answer of the witness did the appellant no harm.

[3] The third, fourth, fifth, and sixth assignments allege error in the court's instructions to the jury. The negligence complained of was the action of the defendant's foreman in permitting and directing the crane to be run on the track and to strike the plaintiff while he was shortening the belting as he was ordered to do by the foreman. That was the negligence relied on by the plaintiff, and it was clearly a question of fact under the evidence submitted, and could not have been withdrawn from the jury. If the plaintiff's witnesses were credible, the foreman gave him positive orders to perform the service, and after he had ordered the plaintiff

to ascend the ladder for the purpose he directed the crane to move the crane in an easterly direction to the place where the plaintiff was employed and where he received his injuries by reason of the crane crushing his hand. There was also evidence which, if believed, showed that, after the crane was instructed to move the crane, the foreman was within a short distance of the plaintiff at the time the accident occurred.

[4] If these facts were established, there can be no question that the defendant's negligence was for the jury. The plaintiff had a right to assume that while engaged in the service directed by the foreman he would not be endangered by the crane put in motion by the order of the foreman himself. *Wessel v. Steel Co.*, 28 Pa. Super. Ct. 332. Having ordered the plaintiff to ascend the ladder for the purpose of performing the service, it was the duty of the foreman, who had charge of the work, to see that the place was reasonably safe, and that the plaintiff was protected while he was engaged in the service. This the foreman did not do; on the contrary, he not only failed to protect the plaintiff, but gave instructions for moving the crane which, under the circumstances, necessarily resulted in endangering the plaintiff's safety.

[5] We do not agree with the learned counsel for the appellant that the language complained of in the third assignment was equivalent to binding instructions for the plaintiff. What the court meant, and what the jury must have understood, was that, if the foreman had directed him to shorten the belting and had directed the crane to be moved eastwardly while the plaintiff was thus engaged thereby causing his injuries, the plaintiff had made out a case which the court would have to submit to the jury. The learned judge, however, proceeded to state the defendant's side of the case, and to direct attention to the facts as the defendant claimed them to be, and then said: "If you find from all of the evidence and the verity of the case as it was presented to you by the plaintiff, before the defendants produce their evidence, then your verdict should be for the plaintiff, but, if you find the theories as I have explained to you of the defendant sustained by the evidence, then your verdict should be for the defendant." We think there is no ground for the contention that the jury could have understood the court to mean that they were compelled to find for the plaintiff.

[6] Whether it was negligence for the plaintiff to ascend the ladder and perform the service required of him without giving notice to the operator of the crane was clearly one of fact under the evidence, and not to be determined as a matter of law by the court. The injury to the plaintiff was caused by moving the crane eastwardly while he was at work. Of course, the plaintiff knew that

the crane could be moved eastwardly, and that danger would likely result to him if he were engaged at the time that it was moved. Had it been a part of the plaintiff's general employment to perform this service and he had not been performing it by the direct instructions of the foreman, it would have been his duty to notify the operator not to run the crane while he was at work. We so held in *Parks v. Lewis Foundry & Machine Co.*, 234 Pa. 463, 83 Atl. 363. If, however, the foreman instructed him to perform the work, he could assume that the crane would not be moved while he was obeying the foreman's order, and in that event he would be relieved from the duty of giving the notice to the operator. He could not anticipate that the foreman would not do his duty in protecting him from the danger, and hence the fact that he did not give notice to the operator of the crane was not necessarily negligence.

[7] The excerpt from the charge which constitutes the fourth assignment of error quoted in the appellant's printed brief when read in connection with the other parts of the charge does not justify the contention that it was an instruction that, if the jury found the foreman guilty of negligence, it would justify a verdict for the plaintiff notwithstanding the latter was guilty of contributory negligence. Standing alone, it might bear that construction, but the charge must be read and considered as a whole. What the learned court said, and what we have no doubt the jury understood, was that the plaintiff would have been guilty of contributory negligence in attempting to perform the work without giving notice to the crane operator, if the foreman who ordered him to do the work had not also ordered the operator to move the crane which caused his injuries. The statement is not erroneous in view of what was said by the court in the other parts of the charge. Of course, it was the duty of the plaintiff to use care while engaged in repairing the belting notwithstanding he had been ordered to do the work by the foreman, and the latter had directed the operation of the crane. If he failed in this duty, he could not recover, although the defendant's foreman had been negligent, and the learned judge so instructed. He said: "If you find that the accident occurred because of the volunteered carelessness, or the contributory negligence, as I have described it to you of the plaintiff himself, then your verdict, of course, must be for the defendant."

[8] In the charge, the court directed the attention of the jury to the testimony showing the plaintiff's injuries, his earning capacity, the character of the work he had been engaged in, and what wages he had received, and then used the language as to the measure of damages complained of in the fifth

assignment of error. The learned judge should possibly have instructed the jury more explicitly on the subject, but, in view of what he had already said, we cannot say there is reversible error in the language used. As said by the present Chief Justice in *Irwin v. Pennsylvania Railroad Co.*, 226 Pa. 156, 75 Atl. 19: "This was a correct statement of the rule, although perhaps not so clear and explicit as desirable to insure its full understanding by the jury. It was, however, satisfactory to counsel at the time, and, if fuller and plainer instructions were desired, they should have been asked for."

The judgment is affirmed.

LEBANON COUNTY v. FRANKLIN FIRE INS. CO. OF PHILADELPHIA.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. INSURANCE (§ 326*)—AVOIDANCE—BREACH OF CONDITION.

A provision in a fire policy which prohibits the keeping or use of gasoline on the premises without the consent of the insurer will not be strictly construed, and, where a fire occurs from the use of gasoline in a gasoline torch in the burning off of old paint on the building insured, and not from any explosion of gasoline stored on the premises, the mere use of gasoline in the torch will not prevent a jury from returning a verdict for the insured.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 782; Dec. Dig. § 326.*]

2. INSURANCE (§§ 318, 668*)—AVOIDANCE—BREACH OF CONDITION.

A provision in a fire policy that the working of carpenters, roofers, etc., in building, altering or repairing the premises without permission of the insurer, will avoid the policy, does not apply to repairs which are necessary for the proper care and preservation of the property, and the question of what repairs are necessary therefor is for the jury.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 744-747, 1556, 1732-1770; Dec. Dig. §§ 318, 668.*]

Appeal from Court of Common Pleas, Lebanon County.

Assumpsit by Lebanon County against the Franklin Fire Insurance Company of Philadelphia. From a judgment for plaintiff, defendant appeals. Affirmed.

At the trial the defendant presented, among others, the following points:

"The uncontradicted evidence in the case showing that the risk on the insured property was increased with the knowledge of the assured, during the continuance of said insurance, by the use of a painter's torch in burning off the paint at the cornice of the insured building, from which the fire resulted, without the consent of the company to such increased hazard indorsed on said policy, this was a violation of an express condition of the policy, and there can be no recovery. Answer. Refused."

(3) "The uncontradicted evidence in the case shows that the insured used, or permit-

ted to be used, on the insured premises, gasoline, benzine, spirit gas, or burning fluid, or some of them, to wit, gasoline, and did use and apply the same by means of a painter's torch in burning off the paint at the cornice of the insured building, without the consent of the company indorsed on the policy, which was such a violation of an express condition of the contract as avoids the policy, and the verdict of the jury must be for the defendant. Answer. Refused."

(5) "The uncontradicted evidence in the case being that the assured used or permitted to be used a painter's torch burning gasoline, to burn off the paint on the cornice of the insured building, from which the fire resulted, without the consent of the company indorsed on the policy, this was such a violation of the contract as avoided the policy, and your verdict must be for the defendant. Answer. Refused."

Verdict and judgment for plaintiff for \$6,276.02. Defendant appealed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

S. P. Light, of Lebanon, for appellant. Howard C. Shirk and Eugene D. Siegrist, both of Lebanon, for appellee.

POTTER, J. In this action of assumpsit the county of Lebanon sought to recover from the Franklin Fire Insurance Company, under a policy insuring the courthouse in Lebanon, its proportionate amount of a loss by fire. The fact and the amount of the loss were not disputed. But the defendant denied liability on the ground that certain conditions of the policy had been violated. Upon the trial binding instructions for the defendant were refused by the trial court, and the case was submitted to the jury. The verdict was in favor of the plaintiff for \$6,276.02. Motions for a new trial and for judgment non obstante veredicto were made by the defendant, but were overruled by the court below, and judgment was entered on the verdict. Defendant has appealed, and contends that, under the undisputed testimony, there was nothing which the court should have properly submitted to the jury, and that binding instructions should have been given in favor of the defendant.

The defense was based upon certain conditions of the policy in suit, which it is claimed were violated. These were: "(1) If the risk shall be increased from any cause whatever within the knowledge of the assured, during the continuance of the insurance, notice thereof shall be given to the company, and consent to such increased hazard be indorsed hereon, or this policy shall be of no force. * * * (8) This company shall not be liable for loss * * * if the assured shall keep or use, or permit to be kept or used on the premises * * * gasoline, * * * without written consent in this policy, and if

so kept or used on the premises by the assured, without consent indorsed hereon, this policy shall be void. (9) The working of carpenters, roofers, tinsmiths, gasfitters, plumbers, or other mechanics, in building, altering, or repairing the premises named in this policy, will avoid the policy, unless permission for such work be indorsed in writing hereon."

In its opinion on the motions for a new trial and judgment non obstante veredicto the court below states the following facts: "Immediately prior to the fire the commissioners had repaired the roof, placed a concrete floor in the corridor, replacing tiling which had become loosened, and it was claimed dangerous, had done some plastering and papering, had taken out one radiator in the corridor, replaced wooden wainscoting with enameling, placed new doors with transoms in the corridor on first floor, plaintiff claiming the old doors were worn out, and made some other minor repairs. The cupola had been painted, the old paint having been burnt off with the painter's torch, using gasoline as fuel, and the main building was in course of preparation for painting at the time of the fire. The paint was being burnt off by the contractor, using a painter's gasoline torch. In the course of this work two slight fires had occurred in the cornice. The painters had stopped work shortly before the fire, which started at the place where they had been working on the cornice. The painter's torch, such as here used, was in general use for removing the paint on the exterior of the building and was admittedly the most practicably effective and satisfactory instrument and means to accomplish this end. The woodwork was old and in some places decayed. The county commissioners presented evidence tending to show they had instructed the contractor that if, in the course of the work, he met with decayed wood, it was to be marked off and repaired by the county commissioners."

Whether or not the risk was increased in any way by the work which was done was under the authorities a question of fact for the jury. In *Heron v. Insurance Co.*, 180 Pa. 257, 261, 36 Atl. 740, 742 (36 L. R. A. 517, 57 Am. St. Rep. 638), Chief Justice Sterrett said: "If the policy had contained only the clause relating to increased 'hazard' above quoted, the case should have gone to the jury." In *Girard Fire & Marine Ins. Co. v. Stephenson*, 37 Pa. 293, 298 (78 Am. Dec. 423), Mr. Justice Strong said: "Whether a risk has been increased or not is a question for the jury, not the court." The principle involved is broadly stated in 2 Cooley on Insurance, 1495, as follows: "It cannot be said as a matter of law that any particular change in the condition of the property insured, or the doing or omission of a particular act, increased the risk. What constitutes an increase of risk is essentially a question of fact."

[1] It appears that in preparing for the work of repainting the old paint was softened for taking off by the use of gasoline torches. It was shown that such a torch is operated by compressed air and sends out a flame some 18 inches in length generated by gasoline contained in a chamber of the torch. The flame is directed against the paint until it softens. The torch is simply a tool which owes its efficiency to the heat it is able to supply to the purpose at hand. The fire for which recovery is here sought did not result from any explosion of the gasoline, but was caused apparently by the impact of the flame which was intended merely to burn off the paint. It is a matter of common knowledge that it is the peculiarly inflammable or explosive qualities of gasoline, which cause it to be justly regarded with suspicion, and make its use the subject of restriction in policies of insurance; but these qualities resulted in no injury in this case. The gasoline neither exploded nor took fire. The flame operated merely as it would from any outside source. It is contended, however, that the use of gasoline torches was a breach of the literal terms of the eighth condition of the policy, which prohibited the keeping or using of gasoline on the insured premises. The weight of authority is to the effect, however, that such provisions are not to be strictly construed. In considering a similar clause in a policy in the case of *Mears v. Humboldt Fire Ins. Co.*, 92 Pa. 15, 20 (37 Am. Rep. 647), this court said: "What is intended to be prohibited is the habitual use of such articles, not their exceptional use upon some emergency. The strict rule claimed by defendant would prevent the insured from painting his house or cleaning his furniture, as it would be difficult to do either without using some of the prohibited articles." See, also, the discussion in the opinion in *Lancaster Silver Plate Co. v. Fire Insurance Co.*, 170 Pa. 151, 32 Atl. 613, where, in construing a similar restriction in a policy, it was held proper to refuse to charge that there could be no recovery if gasoline was used on the premises during the life of the policy.

The decision in *Smith v. Insurance Co.*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368, presents a state of facts closely resembling those in the case at bar. In that case the insured building was a courthouse, and the fire occurred, as in this instance, while painters were burning off old paint with gasoline torches. In the opinion of the court in that case the authorities were collected and reviewed, and the right of the insured to recover was sustained. In *First Congregational Church v. Insurance Co.*, 158 Mass. 475, 33 N. E. 572, a similar state of facts was also shown. There a naphtha torch was used to burn off old paint from a church building. The work had been in progress for a month, and was not completed when the fire occurred. It was held that it was a question for

the jury whether such a use of naphtha was a reasonably safe and proper way of making repairs to the building, under the circumstances.

In the present case no gasoline was stored on the premises, and the only use of it was of the small quantity contained in the painter's torch. As above suggested, the fire was not caused by the use of gasoline, as such, as it was merely the fuel which supplied the flame, and any fuel which would have produced a similar flame would have brought about the same result. It was the negligent or accidental misuse of the flame which caused the fire. We do not feel, therefore, that the use of gasoline in the manner shown can be said to be so clearly in violation of the terms of the policy in this respect as to have made it proper for the court to have so pronounced as a matter of law. The question was, we think, for the jury.

[2] So, too, with regard to the matter of repairs. The court left it to the jury to find whether or not the repairs made by the county commissioners were reasonably necessary for the preservation and maintenance of the building. He went into the matter in considerable detail, recalling to the jury one feature after another of the work which had been done, as shown by the evidence, and left them all for the consideration of the jury, for them to determine whether or not the work which was done was reasonably necessary for the proper maintenance and preservation of the building. In all this we see no error. Counsel for appellant cites the case of *Robb v. Insurance Co.*, 230 Pa. 44, 79 Atl. 150, as sustaining the contention that the policy became void by reason of the employment of mechanics upon the premises without the written consent of the insurer. But in that case there was a specific provision limiting the time of the employment of such mechanics, which was violated. In the present case the working of mechanics is prohibited in general terms, but such a provision has been quite generally held not to apply to such repairs as are necessary for the proper care and preservation of the property. The principle is thus set forth in 1 May on Insurance, § 240: "Working of Carpenters: Repairs. Upon the same general principles, when, from the character of the building insured, and the use made of it, it is necessary to have workmen constantly engaged in repairing, in order to keep it in proper condition for the business done therein, the employment of such workmen is not a breach of the condition that 'working of carpenters,' etc., altering or repairing will vitiate the policy." The same principle is recognized in *Flanders on Fire Insurance*, 532, as follows: "It is not to be presumed, in the absence of any express agreement on the subject, that, when the owner effects an insurance on his building, he deprives himself of

the right to use it in the common and ordinary mode, including the right to make all proper and reasonable repairs. These repairs, indeed, may be so extensive as to amount to an alteration, and in that case the question will be whether such alteration materially increased the risk; but the substitution of a new bulkhead for one that had become useless by decay is not an alteration. It is a repair, and not the less so because the old material is discarded, and a more durable material employed in its stead. The risk, therefore, arising from ordinary repairs, is covered by a policy."

In making the contract of insurance the parties must be regarded as having had in contemplation the proper care and preservation of the premises insured.

We think the issues involved in this case were such as to require their submission to the jury, to be determined as questions of fact; and in the manner in which they were submitted we see no error.

The assignments of error are overruled, and the judgment is affirmed.

HOPKINS MFG. CO. v. KETTERER.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. SUBROGATION (§§ 17, 31*)—JUNIOR MORTGAGEES OR LIENORS—ASSIGNMENT OF SECURITY.

Though generally a mortgagee need not, on payment of the indebtedness, assign or transfer the mortgage, but need only satisfy it, yet, if a junior mortgagee of a judgment creditor or other incumbrancer pay a prior incumbrance to protect his own interest, he will, as a general rule, be subrogated to all the rights of the mortgagee, and, if necessary, may compel an assignment of the security.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 44-46, 70-81; Dec. Dig. §§ 17, 31.*]

2. SUBROGATION (§ 31*)—JUNIOR INCUMBRANCERS—ASSIGNMENT OF SECURITY.

Where plaintiff, on September 1, 1907, became lessee of property on which it erected buildings to carry on its business, so that eviction from the premises would result in irreparable injury, and defendant received an assignment of a mortgage which was a first lien on November 25, 1908, and issued sci. fa. thereon December 19, 1908, and obtained judgment, and plaintiff, on January 23, 1909, after the issue of a writ of *levari facias*, notified defendant, who was not a resident of the state, by a letter that it stood ready to pay the amount due on the mortgage, with costs, on assignment thereof to it, and on March 28, 1909, the defendant entered judgment on a judgment note for an amount exceeding the value of the property, after which plaintiff tendered to the mortgagee's attorney of record the deed, interest, costs, etc., and demanded an assignment of the mortgage to it, which tender was refused, plaintiff is entitled to compel such assignment by bill for subrogation.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 70-81; Dec. Dig. § 31.*]

3. MORTGAGES (§ 244*)—ASSIGNMENT—NOTICE OF LEASE.

Where a lease of mortgaged premises was recorded, an assignee of the mortgage took it

with constructive notice of the contents of the lease and of the conditions existing as a result thereof at the time of the assignment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 633-655; Dec. Dig. § 244.*]

4. ATTORNEY AND CLIENT (§ 98*)—TENDER TO ATTORNEY.

The tender by a lessee of mortgaged property to the attorney of record of the mortgagee in the scire facias on the mortgage, the mortgagee being a nonresident of the state, was sufficient to preserve the lessee's rights.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 190-194, 206-208; Dec. Dig. § 98; * Tender, Cent. Dig. § 10.]

5. SUBROGATION (§ 41*)—ACTION—PAYMENT INTO COURT—NECESSITY.

On a bill for subrogation, it is not necessary to bring into court the money tendered, where the bill avers readiness and ability of the plaintiff to pay, and tenders payment of the amount due.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 109-118; Dec. Dig. § 41.*]

6. SUBROGATION (§ 31*)—ASSIGNMENT OF SECURITY.

Where a judgment note was not executed for more than a year and a half after the lease of premises owned by the maker, and the lease contained a provision that the lessor was not to sell the premises during its continuance without giving the lessor, or its successors, the option to become the owner in fee simple, the holder of the note acquires no superior equity which would justify him in withholding the assignment to the lessee of a mortgage on the premises, in order to protect his subsequent judgment.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 70-91; Dec. Dig. § 31.*]

Appeal from Court of Common Pleas, York County.

Bill in equity by the Hopkins Manufacturing Company against Percival C. Ketterer to stay writ and compel the assignment of a mortgage. From a decree granting subrogation, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Chas. A. Hawkins, of York, and Ehrehart & Bange, of Hanover, for appellant. Allen Wiest and J. W. Gitt, both of York, and C. J. Delone, of Hanover, for appellee.

MESTREZAT, J. This is a bill for subrogation, filed by the assignee of a lessee to compel the assignee of a mortgagee to receive the debt and assign the mortgage which secures it.

Charles P. Ketterer, being the owner of certain real estate in the borough of Hanover, York County, gave a mortgage thereon, dated March 24, 1896, to the Hanover Savings Fund Society to secure the payment of \$10,000 in six months after date. On April 18, 1899, Ketterer leased the real estate to the Ketterer Manufacturing Company for ten years, with the option of a second term of like tenure, at an annual rental of \$1,000 payable semiannually, which was applicable by the tenant (a) to payment of taxes on the property, (b) to interest on the mortgage, (c) to principal of the mortgage. The company took possession under the lease, and

continued in possession until it was adjudged a bankrupt in March, 1907. In pursuance of an order of the United States District Court, the trustee, on September 25, 1907, sold its leasehold right to one Lebzelter, who, on December 1, 1907, sold and delivered possession of the premises to the Hopkins Manufacturing Company, the plaintiff.

The Hanover Savings Fund Society, the mortgagee, on November 25, 1908, assigned the mortgage to Percival C. Ketterer, the defendant. The assignee of the mortgage issued a scil. fa. thereon December 19, 1908, and obtained judgment. He issued a levavi facias January 21, 1910, on the judgment, and, the proceedings being suspended by order of court, he subsequently issued an alias levavi facias and levied on the lands described in the mortgage and held by the plaintiff under the lease.

The plaintiff company, by a letter dated January 23, 1909, addressed to Percival C. Ketterer at his residence in New York City, and duly received by him, notified him that it stood ready to pay the amount due on the mortgage, with costs, upon assignment thereof to it. On August 12, 1909, the plaintiff tendered to the mortgagee's attorney of record in the proceedings thereon the debt, interest, costs, and attorney's commission, with the request for the assignment of the mortgage to the plaintiff. The tender was refused, because the counsel for the mortgagee had no express authority to make an assignment. Percival C. Ketterer entered judgment in the common pleas of York county on March 28, 1909, for \$15,245 on a judgment note dated March 16, 1909. The judgment is unsatisfied. The real estate covered by the mortgage and on which this judgment was a lien is worth \$13,000. The balance due on the mortgage when assigned to Percival C. Ketterer was \$7,500. Ketterer was then and is now a resident of the city of New York.

The plaintiff company erected on the leased premises the necessary buildings and appliances, with railroad switches, etc., for carrying on the business of manufacturing wagons and similar vehicles, and there are no premises with suitable buildings in the borough of Hanover or vicinity adapted for the purpose. If the plaintiff company should be evicted from the premises, its loss, expenses, and the depreciation in value of its property would be an irreparable injury to it.

The plaintiff paid on its rent account on December 30, 1908, \$833.33, and on September 20, 1909, \$500.

The above facts are summarized from the findings of the court below, and are all that are material to the disposition of the case here. This bill was filed September 16, 1909, praying the court to stay the writ of alias levavi facias issued on the mortgage, and for an order directing the defendant to assign and transfer to the plaintiff company the mortgage upon payment to him of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

balance due thereon. The learned court below granted the decree as prayed for, and the defendant has taken this appeal.

[1] We have no disposition to interfere with the findings of fact by the court below which are complained of in the first and second assignments of error. We think the findings are supported by the evidence, and that the objections are not well taken. The plaintiff company presented a case which entitles it to equitable relief. The mortgagee was entitled to his money when it became due by the terms of his contract. If it were not paid, he could proceed and collect it. The mortgage is security for the indebtedness, and furnishes the legal means of enforcing payment. When, however, the debt is tendered to the mortgagee, he must receive it; and he is prevented from taking any proceedings on the mortgage to collect. Generally speaking, he is not required, on receipt of the indebtedness, to assign or transfer the mortgage. He can only be required to satisfy it. The circumstances, however, may be such that when the debt is paid he may be required to assign the instrument for the protection of the party making the payment. If a junior mortgagee, judgment creditor, or other incumbrancer pay a prior incumbrance in order to protect his own interest in the incumbered estate, he will, as a general rule, be subrogated to all the rights of the senior incumbrancer, and, if necessary for his protection, may compel an assignment of the security. 27 Am. & Eng. Ency. of Law (2d Ed.) 243. We have ruled that the same relief should be afforded, under similar circumstances, to a lessee for years. *Wunderle v. Ellis*, 212 Pa. 618, 62 Atl. 106, 4 Ann. Cas. 806.

[2] In the case before us, therefore, the only question is whether the plaintiff company has shown such ground as would warrant a chancellor in granting the relief prayed for in the bill, and in compelling the holder of the mortgage to assign it on payment of the debt, interest, and attorney's commissions due thereon.

[3] In view of the tender made by the plaintiff, it is immaterial, as correctly said by the learned court, what rent was unpaid at any subsequent date. The contention that the plaintiff was guilty of laches cannot be sustained. The facts found by the court and summarized above show that the company proceeded with due speed to protect its interests by taking up the mortgage. The lease was recorded; and hence the assignee of the mortgage had constructive notice of the contents of the lease when he took the assignment. He not only knew that the lease had been in existence for more than nine years, but must be presumed to know what was a fact that the lessee had erected a valuable plant on the leased premises, and that it had been in operation since the construction of the plant. It must be

further assumed that he knew what the court finds to be a fact that the collection of the mortgage by legal process and the consequent eviction of the plaintiff company from the premises would result in irreparable loss and injury to it. He must therefore be regarded as having full knowledge of the conditions existing at the time he took the assignment of the mortgage in 1909.

The plaintiff company was not required to tender payment of the mortgage immediately upon its assignment to the present defendant. It was not required to anticipate that he would attempt to collect by legal process the mortgage, and thereby deprive it of the valuable manufacturing plant erected upon the premises. The company did, however, within two months after the assignment of the mortgage, notify the assignee that it would pay him the indebtedness when the mortgage was assigned to him. This notice was followed by a tender of the debt, interest, and costs due on the mortgage to the record attorney of the owner of the mortgage, with the request for an assignment to the plaintiff. This was sufficiently prompt to rebut any inference of laches on the part of the plaintiff, and gave the holder of the mortgage an opportunity to receive the debt in full. We are at a loss to see what more he was entitled to, either at law or in equity; and it is not apparent how he could be injured in any way by accepting the money and assigning the instrument. The assignment would be without recourse; and hence no liability would attach to the assignor on failure to collect. In view of these and the other facts in the case, it is apparent that the equities were clearly with the plaintiff, and that its rights should be protected by an appropriate decree. The plaintiff company manifestly did equity, and was therefore entitled to demand that the defendant do equity.

[4] It is contended by the appellant that the tender made to his counsel of record in the mortgage proceeding was not effective, and that it should have been made to him personally. As a general rule, one who seeks to take advantage of a tender of payment in discharge of an obligation must see that it is unconditional and made to the individual himself; but the circumstances may be such as to justify a qualified tender made to the representative of the party. The purpose of the plaintiff company in the present case was to protect itself against a sale of the premises on the mortgage, which, as the court found, would occasion it irreparable injury. The mortgage was prior to the lease, and a sale on the mortgage would have destroyed the lease and evicted the tenant. On the other hand, the tenant could not have protected his interests by payment and satisfaction of the mortgage. The subsequent judgment of the defendant, as will be ob-

served, exceeded the value of the property more than \$2,000; and the satisfaction of the mortgage would therefore have probably resulted in the loss to the plaintiff company of the amount paid by it in satisfaction of the mortgage. Equity imposes no such conditions in granting its relief, and it has been so held in numerous cases. *Wunderle v. Ellis*, 212 Pa. 618, 62 Atl. 106, 4 Ann. Cas. 806; *Lyon's Appeal*, 61 Pa. 15; *Hamilton v. Dobbs & Robinson*, 19 N. J. Eq. 227.

The tender was not insufficient or ineffective by reason of having been made to the record counsel of the holder of the mortgage. The latter was a resident of the city of New York at the time he purchased the mortgage and up to the time of the trial. The counsel to whom the tender was made had, as his attorney of record, authority to receive payment of the judgment recovered on the mortgage; and a payment to him would have been as effective in discharging the claim as if made to his client. This is settled by numerous adjudicated cases. It is contended, however, that, conceding the authority of the attorney to receipt for the money in discharge of the liability, he had no authority to assign the judgment and the mortgage on which it was obtained. If, however, under the facts presented to the court, the holder of the mortgage would have been compelled, on the receipt of the debt, to assign the judgment and the mortgage, the tender made to the attorney of record was sufficient to justify the court in prohibiting any further proceedings on the mortgage or the judgment entered thereon. Having made such tender, the plaintiff had done all it could do, and hence all it was required to do, to prevent its interests being jeopardized by a sale of the premises on the judgment. The company was not required to follow the holder of the mortgage into another state or foreign country and tender the money to him. This would impose a task which very frequently could not be performed, and hence would necessarily result in disastrous consequences to innocent parties. Lord Coke wrote that a debtor need not seek his creditor out of the realm, and such is the law of the present day, and applies to the states of this country. *Santee v. Santee*, 64 Pa. 478; *Smith v. Smith*, 25 Wend. (N. Y.) 405; *Hale v. Patton*, 60 N. Y. 233, 19 Am. Rep. 168; 22 Am. & Eng. Ency. of Law (2d Ed.) 533; 30 Cyc. 1185. As the holder of the mortgage was not a resident of Pennsylvania during his ownership of it, the tender of payment to his attorney of record in the *scire facias* on the mortgage, if any tender were necessary, was all that was required to entitle the plaintiff to the relief he sought, and to justify the court in granting it. In such case all that equity demands is that the party seeking the relief is ready and able to pay, and that the defendant has notice of the fact. His money

is then at his command, and by refusing to accept it he cannot prevent the granting of the relief.

[5] The averment in the bill of the readiness and ability of the plaintiff to pay and the proffered tender therein of payment of the amount due on the judgment and mortgage rendered unnecessary the bringing of the money into court. Such a prerequisite is not necessary to the granting of relief in equity. The decree which is entered will fully protect the party from whom the relief is sought. The assignment of the judgment and mortgage will not be required until the money is paid, and the decree will so provide. The holder of the mortgage is therefore amply protected without the money being brought into court to await its decree. This practice is recognized in numerous adjudicated cases, as well as in the leading text-books on equity jurisprudence.

[6] There is no merit in the contention that the defendant should be permitted to protect his subsequent judgment by withholding the assignment of the mortgage. As appears in the statement of facts, the judgment note on which he entered judgment was not executed for more than a year and a half after the lease of the premises, of which he had record notice. His good faith in taking the note, under the circumstances, may well be questioned. When he took the note, he knew that there was a mortgage debt against the real estate within \$3,000 of its value, yet he accepted a judgment for more than \$15,000. Manifestly he could not have expected to have obtained payment from the real estate. In addition to this, however, an examination of the record of the lease disclosed to him the stipulation therein that the lessor was not to sell the premises during its continuance "without first giving the lessee, or its successors, the option to become the owner of said fee, or otherwise, under and subject to the same conditions and covenants as may be offered to any other person or persons." With the knowledge of this stipulation, it is not apparent that the defendant has any superior equity which would justify the enforcement of his judgment to the detriment of the plaintiff's lease. The stipulation in the lease was an optional agreement to sell to the plaintiff, and of this the defendant had record notice. Its rights, therefore, to the possession of the leased premises were manifestly superior to those of the defendant. They existed at the time the judgment was entered, and were in no wise affected by it. The judgment creditor, as well as any purchaser under proceedings on the judgment, took subject to all rights and equities created by the stipulation. Neither the judgment nor its lien can give the defendant any standing to defeat the equitable rights of the plaintiff company, assignee of the lease, to have a chancellor control the mortgage to protect its interests.

The decree is affirmed.

HILL v. WHITESIDE.

(Supreme Court of Pennsylvania. July 2, 1912.)

INSANE PERSONS (§ 38*)—GUARDIAN OF INCOMPETENT—REMOVAL.

The guardian of an incompetent will be removed, where he is also administrator of an estate in which his ward has an interest antagonistic to his own.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 57, 58, 60; Dec. Dig. § 38.*]

Appeal from Court of Common Pleas, Lancaster County.

Action by John T. Hill, by his next friend, the Lancaster Trust Company, against William C. Whiteside, as guardian. From an order making rule for removal absolute, defendant appeals. Affirmed.

Landis, P. J., filed the following opinion in the court of common pleas:

"In this case the petition of John T. Hill sets forth that on January 20, 1902, William C. Whiteside was appointed his guardian, as a weak-minded person; that the said guardian has never filed an inventory; that he has had charge of a farm belonging to the petitioner, and has received the proceeds, but has rendered no account thereof; that he has, in addition, not properly maintained and supported the petitioner. It is also asserted that Whiteside is the administrator d. b. n. of the estates of Mary C. Hill and Winfield S. Hill, and as such has long had in his possession moneys belonging to John T. Hill, which he should have collected, turned over, and invested. Numerous other charges are made in the petition, and a supplemental petition has been filed; but we do not think they are necessary for the determination of the real question involved.

"It appears that the estates of Mary C. Hill and Winfield S. Hill have been adjudicated in the orphans' court, and that exceptions have been filed to that adjudication by the accountant. John T. Hill seems also to have filed exceptions; but, whether he did or not, his interest appears plainly to be adverse to that of his guardian. The thirteenth exception filed by the guardian alleges that, 'the said John T. Hill having been decreed by the court of common pleas a weak-minded person, and a guardian having been appointed by said court, he has no legal standing to file said exceptions.'

"We have, therefore, the following incongruous situation: John T. Hill has an interest in the estates of Mary C. Hill and Winfield S. Hill, of which William C. Whiteside is the administrator. At Hill's instance, Whiteside has been surcharged with certain amounts in those estates by the orphans' court. Whiteside claims that Hill has no legal standing to file exceptions to his accounts, as there is a guardian appointed by this court, and the inference is that it is the duty

of that guardian to do so. But Whiteside is the guardian also, and, of course, he will not file exceptions to his own accounts as administrator. Such a situation should not be permitted.

"In Kellberg's Appeal, 86 Pa. 129, it was held that, 'where it is clear that the relations between the administrator and the legal representatives of a decedent are not harmonious, and it is manifest the interest of the administrator is adverse to those of such representatives, nothing but some controlling necessity will justify his retention as administrator.' Mr. Justice Woodward, delivering the opinion of the court, said: 'It is clear that the relations between the administrator and the legal representatives of the decedent are not harmonious. It may or may not be that a continuing liability for the quarterly payments stipulated for in the agreement of the 4th of April, 1874, survived Kellberg's death. Whatever the event, the question is one which the appellant has a right, in a proper forum, to have tried. The manifest interest of the administrator is on the side of the company, and there would be not only incongruity, but hazard of delay, mistake, or wrong, in leaving him to represent a claim to which his business relations render him directly adverse. Nothing but some controlling necessity would justify his retention in his position, and no such necessity is indicated by the facts presented.' In Bryson v. Wood, 187 Pa. 366, 41 Atl. 473, it was held that a person to whom a judgment has been confessed in trust for creditors should not be continued as a trustee after the confidence of the creditors in him is withdrawn. It is not material that he is innocent of actual misfeasance. His conduct ought to meet the approval of those whose interests are to be promoted; for his whole duty is to them. In Marsden's Estate, 166 Pa. 213, 31 Atl. 46, it was held that the power of the court, under the act of April 9, 1868 (P. L. 785), to appoint a new trustee did not depend alone upon the misconduct of the trustee, but that it was enough to show that, by reason of his retention, the hostile relations between him and the cestui que trust would work disadvantages and inconvenience to the latter. See, also, Lafferty's Estate, 198 Pa. 433, 48 Atl. 301; Job's Estate, 23 Pa. Super. Ct. 611. In Schmidt's Estate, 183 Pa. 129, 38 Atl. 464, a son claimed securities under his father's will, while his two sisters alleged that the securities were a part of their mother's estate, in which they had a share. As there was unfriendly feeling between the brothers and sisters, and both sons were disqualified to administer upon the estate, letters of administration on the mother's estate were granted to a stranger rather than to the daughters.

'It matters not how valuable were the services which the guardian rendered to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.' Indexes

estate, nor, on the other hand, need we consider whether there have been delinquencies on his part. Sufficient for us is it that the situation is one that ought not to be tolerated. No man can serve two masters. No one can properly serve a trust when his personal interests are antagonistic to it. Therefore, without going further into the merits of the controversy, we think that the interest of John T. Hill demands that his present guardian be removed from the trust, and that some disinterested person be appointed in his stead."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHISKER, JJ.

B. F. Davis, of Lancaster, for appellant.
W. U. Hensel, of Lancaster, for appellee.

PER CURIAM. The order appealed from is affirmed, at the cost of the appellant, on the opinion of the learned president judge of the common pleas.

PURITAN COAL MINING CO. v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

1. CORPORATIONS (§ 202*)—STOCKHOLDERS—REPRESENTATION OF COMPANY.

Where an incorporated coal company, all of whose stock is owned by three stockholders, brings an action against a railroad company for unlawful discrimination, and thereafter the three stockholders sell the stock, reserving the right to continue the action and to appropriate any pecuniary results therefrom, this does not deprive the corporation of the right to continue the action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 770-780; Dec. Dig. § 202.*]

2. CORPORATIONS (§ 398*)—STOCKHOLDERS—REPRESENTATION OF COMPANY.

Shareholders of a corporation have no authority, from the mere fact of being shareholders, to act as agents for the corporation, or to convey or assign its property, though all unite, unless through formal action of the corporation they have been made its agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1592-1594; Dec. Dig. § 398.*]

3. COURTS (§ 489*)—CONFLICTING JURISDICTION—RIGHT OF STATE.

Where a railroad engaged in transporting coal groups mines for purposes of service and for the equitable distribution of cars, a state court has jurisdiction, in the absence of any order of the Interstate Commerce Commission, affecting the system adopted in its relation to the distribution of cars engaged in interstate commerce, over a suit by a shipper against the railroad for a departure from the system adopted, resulting in an unlawful discrimination against plaintiff, whether the cars are intended for interstate or intrastate shipment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

4. COURTS (§ 489*)—CONFLICTING JURISDICTION—STATE AND FEDERAL COURTS.

Where Congress proscribes a particular act in reference to interstate commerce, which

is not in itself an offense at common law, jurisdiction over it attaches to the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1341, 1372-1374; Dec. Dig. § 489.*]

5. COURTS (§ 489*)—CONFLICTING JURISDICTION—STATE AND FEDERAL COURTS.

Where an act is an offense at common law, and is also made one by state statute, there is concurrent jurisdiction of it in the state and federal courts, except as other reasons may be shown limiting the jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1341, 1372-1374; Dec. Dig. § 489.*]

6. COMMERCE (§ 85*)—REGULATION—INTERSTATE COMMISSION.

The interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1284), does not attempt, any more than the common law, to define what particular acts shall constitute unlawful discrimination, but commits that to the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

7. COURTS (§ 489*)—CONFLICTING JURISDICTION—STATE AND FEDERAL COURTS.

When the Interstate Commerce Commission declares any particular practice or regulation of an interstate commerce corporation unreasonably discriminating, it is as though Congress has specially legislated with respect thereto, and the federal tribunals have exclusive jurisdiction of the offense.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1341, 1372-1374; Dec. Dig. § 489.*]

8. CARRIERS (§ 34*)—REGULATION—DISCRIMINATION—STATE COURTS.

Except as to those things which the Interstate Commerce Commission has defined and denounced as undue discrimination, a discrimination complained of may be dealt with by the state courts according to their own statute or the common law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 91-93; Dec. Dig. § 34.*]

9. CARRIERS (§ 199*)—DISCRIMINATION—SUPPLY OF CARS.

Where a railroad divides mines along its line into two districts, and rates the mines in each district according to their producing capacity to determine a just distribution of cars in case of shortage, and in such a case gives to one coal company in one of the districts an excess of cars daily, the railroad will be liable in damages to a coal company in the other district which has been deprived of its fair share of cars.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 901-905; Dec. Dig. § 199.*]

10. CARRIERS (§ 32*)—DISCRIMINATION—SUPPLY OF CARS.

Where a system of distribution of cars, acquiesced in by all parties as proper, disregarded private cars in violation of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1284), the court will be justified, in an action against the railroad for departure from its system of distribution resulting in discrimination against a customer, in ignoring the private cars owned by the shippers as affecting the

number of cars to which each shipper is entitled.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 88-95; Dec. Dig. § 32.*]

11. APPEAL AND ERROR (§ 230*)—PRESENTING QUESTIONS IN TRIAL COURT—NECESSITY.

In an action against a railroad for unlawful discrimination in the distribution of coal cars, where the only question considered at the trial was the distribution of the railroad's own cars, without reference to private cars owned by operators, the railroad cannot for the first time, on exceptions to the court's findings and conclusions of law, claim error in the failure to take into account private cars in determining the extent of the discrimination.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 230.*]

12. CARRIERS (§ 201*)—DISCRIMINATION—DAMAGES.

The court hearing a case against a railroad for unlawful discrimination, without a jury, may include in the general damages additional damages for delay in the settlement of plaintiff's claim.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 915; Dec. Dig. § 201.*]

13. LIMITATION OF ACTIONS (§ 127*)—COMPUTATION OF PERIOD—COMMENCEMENT OF ACTION—AMENDMENT OF PLEADINGS.

Where the statement of claim against a railroad for unlawful discrimination in the distribution of cars alleges two discriminatory acts, the statement may be amended after the running of limitations by charging that the plaintiff, as a consequence of the two acts, was prevented from shipping a larger amount of tonnage, and was therefore entitled to a larger amount of damage than claimed in the original statement; no new cause of action being thereby introduced.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

Appeal from Court of Common Pleas, Clearfield County.

Action by the Puritan Coal Mining Company against the Pennsylvania Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Trespass to recover damages for unlawful discrimination in the distribution of coal cars. The case was tried by Smith, P. J., without a jury, under the act of April 22, 1874 (P. L. 109). On April 13, 1911, more than six years after the period covered by the action, the plaintiff moved to amend its statement so as to charge that it had been prevented from shipping because of the discrimination alleged in the original statement a larger amount of tonnage than was claimed for in the original statement, and that it was therefore entitled to a larger amount of damages.

The material portions of the plaintiff's original statement were as follows: "(3) That the mines of the plaintiff and the mines of other shippers of bituminous coal, especially those of the Berwind-White Coal Mining Company, are situated along or near the line or branch line of the defendant company in the county of Cambria, and that a large part of the coal mined and shipped

from the premises controlled by the plaintiff during the period from the 1st day of April, A. D. 1902, to the 1st day of January, A. D. 1905, was shipped over said main line and branch of the defendant company by continuous carriage or shipment, and under the control and management of the defendant company, to points and places within the state of Pennsylvania. (4) That the defendant company during all of the period aforesaid arbitrarily assumed the right to estimate and determine the capacity of the plaintiff to produce coal from its mines, and did in fact estimate, fix, and determine, and published the capacity of its mines, and did estimate, fix, and determine the percentage of coal cars plaintiff was to receive each and every working day at its mines for use in the carriage and transportation of its product, and did in like manner estimate, fix, and determine the producing capacity of all other mines upon its main line and branch lines, and did so fix and determine the percentage of coal cars the said several operators and owners of mines were entitled to have and receive for the carriage and transportation of the product of their mines. (5) That the duty and obligation of the defendant company as a common carrier and a public highway was to furnish coal cars to the plaintiff upon a basis of equality in proportion to its rated capacity to mine and produce coal, and according to the measure of duty fixed by itself in determining the percentage of the number of coal cars to which plaintiff was entitled out of the whole number the defendant had for daily distribution; but the defendant company, disregarding its duty and obligation which it owed to the plaintiff, did unduly and unreasonably, as well as unlawfully and unjustly, neglect and refuse to furnish the plaintiff with its pro rata share of coal cars it had for daily distribution, and did subject the plaintiff to undue and unreasonable disadvantage and prejudice in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company in that it did, in the daily distribution of its coal cars, distribute and give to said company 500 cars before distributing to the plaintiff any cars, and did thereby unjustly and unlawfully deprive the plaintiff of the just and fair amount of cars each day, to which the percentage fixed by the defendant company entitled the plaintiff to receive and would have received except for said unjust, undue, and unreasonable discrimination in favor of said Berwind-White Coal Mining Company. (6) That the defendant company did also unduly and unreasonably discriminate against the plaintiff and in favor of said Berwind-White Coal Mining Company, to the prejudice and disadvantage of the plaintiff, in that the said defendant did cause to be transferred from its ownership,

custody, and control 1,000 steel cars of large capacity, which it had purchased for use in the transportation of bituminous coal into interstate markets and places of interstate commerce to the said Berwind-White Coal Mining Company, and did by said transfer and sale deprive the plaintiff from receiving its pro rata percentage of said 1,000 cars for use in hauling and transporting the product of its mines to points and places within the state of Pennsylvania. (7) That during all of said period of time, to wit, from the 1st day of April, A. D. 1902, to the 1st day of January, A. D. 1905, the plaintiff had a large and growing demand for the soft coal which it was mining and producing; that it had during all of said time constant demand and orders for its coal, in excess of the supply of coal cars furnished by the defendant company for transportation of the same to its customers, and could and would have mined and shipped a large amount of coal in excess of what it did mine and ship, to wit, 64,587 tons, which it would have sold to its customers therein at a price aggregating f. o. b. cars above costs of producing same the sum of \$49,936.07, but was prevented from so doing by reason of the aforesaid undue and unreasonable discrimination in favor of the aforesaid Berwind-White Coal Mining Company. That, because of said undue and unreasonable discriminatory acts, the plaintiff suffered damage and loss in its business of mining and selling its product in the markets of the soft coal trade and in points and places and to consumers of soft coal within the lines of the state of Pennsylvania, and it therefore brings this action to recover compensation for said loss and damage in the sum of \$49,936.07, with such additional amount as will compensate plaintiff for the delay on part of the defendant company."

On the motion to amend, Smith, P. J., filed an opinion which was in part as follows: "The principal objection made by the learned counsel for the defendant to the statement is that a new cause of action is introduced by the amended section 8, corresponding to section 7 of the original statement. A careful examination of both statements convinces us that no new cause of action is in fact declared on. In both two particular acts of discrimination are alleged, namely, first the distribution to Berwind-White Coal Mining Company daily of 500 cars before any distribution made of a pro rata to the plaintiff company, and, second, the sale by the defendant company to Berwind-White Coal Mining Company of 1,000 steel cars of large capacity, thereby depriving the plaintiff of its pro rata percentage of said cars. Both statements cover the same period of time and allege identically the same discriminatory acts. In the original statement, however, plaintiff alleges a certain definite number of tons of coal which

it could have shipped in excess of what it did ship, being prevented so to do by reason of the alleged two undue and unreasonable acts of discrimination in favor of Berwind-White Coal Mining Company. In the amended statement, although in somewhat different language, the same allegation is made; that is, that it could have mined and shipped a large amount of coal in excess of what it did mine and ship, and claims for the profit thereon as in the original statement, except that it claims for a very much larger amount of tonnage which it was deprived from shipping by reason of the discriminatory acts of the defendant and in consequence declares for a much larger sum of money. We are of opinion, therefore, that all that portion of the amended statement exclusive of section 3 is allowable. The cause of action, in our judgment, is the same; that is, two certain alleged discriminatory acts. The amendment appears to declare merely on the consequences of those discriminatory acts, and alleges aggravation of the injury in that they were prevented from shipping a larger amount of tonnage, and therefore entitled to a larger amount of damage than was claimed for in the original statement.

"Knapp v. Hartung, 73 Pa. 290, 294, is a case almost identical in principle with the case in hand. In that case the Supreme Court reversed the lower court for striking off amendments declaring for a number of additional items on the ground that both statements were based on the same cause of action, namely, the breaking of the close. The case also lays down the principle that the amendment acts must receive a liberal construction. In a number of cases in Pennsylvania, where the amended statement did not vary from the original statement in an allegation as to the particular language, action, or acts alleged as the basis of recovery, but where the mode of stating the complaint or of setting out the circumstances, together with a statement of the consequences and aggravation of the injury sustained, has been modified or amended, such amendments have been allowed by the lower courts and sustained by higher courts. Jackson v. Gunton, 26 Pa. Super. Ct. 203; Herbstritt v. Lackawanna Lumber Co., 212 Pa. 495, 61 Atl. 1101; Fredericks v. Penna. Canal Co., 148 Pa. 317, 23 Atl. 1067. Very recent cases recognizing this principle are Coll v. Westinghouse Elect. & Mfg. Co., 230 Pa. 86, 79 Atl. 163; First National Bank v. Slate Co., 229 Pa. 27, 77 Atl. 1100. Amended statements increasing claim for damages are permitted. See Tassey v. Church, 4 Watts & S. 141, 39 Am. Dec. 65; Clark v. Herring, 5 Bin. 33; Stainer v. Insurance Co., 13 Pa. Super. Ct. 25.

"The cases relied on by the learned counsel for defendant are clear cases where the amended statement introduced new or different causes of action barred by the statute. Allen v. Tuscarora Valley Railroad Co., 229

Pa. 97, 78 Atl. 34, 30 L. R. A. (N. S.) 1096, 146 Am. St. Rep. 714, was where the original declaration alleged negligence of the defendant company in failing to comply with its duty of furnishing car couplers of reasonable safety, while the amended declaration alleged that the defendant corporation was engaged in interstate commerce, and, as a common carrier so engaged, failed to equip its cars as required by an act of Congress. This was held to be introducing a new cause of action barred by the statute, and of that there can hardly be two opinions. In *Philadelphia v. Railroad Co.*, 203 Pa. 38, 52 Atl. 184, cited by counsel, the suit was by the city against the railroad company to recover the cost of paving streets occupied by the tracks of the company. The original statement did not aver any charter contractual of statutory obligation on the railroad company to pay the cost of paving the streets, and hence when the city, after the statute of limitations had run against its claim, attempted to amend its statement so as to aver that the defendant company had by lease or merger acquired the franchises and assumed the burden of another railway company which had the obligation of paving the streets, it was held that such averment introduced an entirely new cause of action. In *Mitchell Coal & Coke Co. v. Pennsylvania Railroad Co.*, manuscript opinion by Ferguson, J., July 13, 1910, in the court of common pleas No. 3, of Philadelphia, to No. 545, March term, 1905, the attempted amendment was the introduction of other and different names of companies or corporations in favor of whom the defendant company had discriminated as against the plaintiff company, and hence is not this case. Here, as before stated, two distinctive alleged discriminatory acts are averred, exactly similar in both the original and amended statements. The effect, consequences, or results of those acts is made a matter of amendment, and of an enlarged claim for damages. We fail to see where any new cause of action is alleged. The amendment is therefore allowed, striking out clause 3 therefrom, and the same directed to be marked filed."

Defendant made the following requests for findings of law: "(1) The plaintiff is not entitled to recover because the evidence has established that it has parted with its ownership of the claim which forms the basis of the action, is not now the owner thereof, and is not entitled to the proceeds of any recovery that may be had thereon. Answer: Refused. This point is based on the effect of a contract between the stockholders of the Puritan Coal Mining Company and John C. Martin, as shown in defendant's Exhibit No. 1. That contract does not justify a finding that the Puritan Coal Mining Company, acting as a corporation, either by its stockholders or directors, ever assigned or attempted to assign this claim. In fact, there

is no evidence of any corporate action on the subject. The contract is fairly construed as one by which the stock and property of the Puritan Coal Mining Company was vested in John C. Martin, the price for which without this claim against the railroad company was on a fixed basis for said stock. The Puritan Coal Mining Company as a corporate entity was preserved in its existence for the purpose of carrying on this case against the defendant company, then already brought to its conclusion, and the price of the stock of the said company was to be increased by whatever amount should be recovered from the defendant corporation in this litigation. To our minds there is nothing illegal in such contract and nothing to destroy its validity or to destroy the claim as against the defendant corporation, being a valid and subsisting claim at the time of this contract. (2) The plaintiff is not entitled to recover because this court is without jurisdiction to entertain the cause of action asserted; exclusive jurisdiction over actions of this character having been vested by the acts of Congress, commonly known as the 'Interstate Commerce Acts' in the federal tribunals. Refused. (3) Under the law and the evidence, the plaintiff is not entitled to recover. Refused."

Among the exceptions filed to the conclusions of the court were the following:

"(33) The court erred in failing to take into account the private or individual cars, so called, which were delivered to the plaintiff during the period of the action in determining the number which it would have been entitled to receive of the additional cars which the court has found should have been allotted to the region or district in which the plaintiff's mines were located.

"Ruling: This exception raises a question not before considered by the court and never suggested by counsel. The method by which the court calculated the damages of the plaintiff left out of consideration the individual cars placed in both the Mountain division and the Scalp Level division. This method was adopted by the court for the reason that individual cars were not charged against owners in making distribution until 1906, as shown by the testimony of Mr. Trump on pages 200 and 201. This date was long after the period of the action. The defendant company, therefore, as a matter of law and morals, should be bound by the position it made for itself, and should be estopped from repudiating the rule it enforced, even if later it is found that such rule was technically wrong. This for the principle that no suitor may come into court and assert a principle or maintain a position that would enable it to profit by its own wrong. Prior to and at the trial of the case the defendant never presented a claim that individual cars should be taken into consideration, and never before these exceptions were

filed made any claim that by excluding individual cars a different amount of damage would be ascertained. Without great labor at this time, we are wholly unable to determine whether the amount of damages found by the court would be changed by taking into consideration individual cars. The theory, however, on which the railroad acted in distributing cars to its patrons by excluding or not charging against such patrons the individual cars placed, during the period of the action, is, we believe, the true measure of damages as set out in the schedule adopted by the court. The defendant company should be estopped from claiming any other measure, even if in its favor, on the same principle or feature of the doctrine of estoppel expressed in *Railway Co. v. McCarthy*, 96 U. S. 258, 268 (24 L. Ed. 693). In that case Justice Swayne says: 'Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.' To the same effect is *Honesdale Ice Co. v. Improvement Co.*, 232 Pa. 293, 300, 81 Atl. 306, 308. Moreover, to adopt any other theory after the fact and policy of the method of distribution followed by the defendant would work a manifest hardship against a shipper suing for damages, who had no individual cars. This is especially true if the method of calculating and scheduling damages adopted by the court is the correct theory in this case, because the Mountain division did have a certain proportion of individual cars just as did the Scalp Level division. But if some unfortunate individual shipper of the Mountain division had no private or individual cars during the period of his action, he would be charged with his proportion of individual cars placed in his division, manifestly to his injury, on the theory of damages adopted by the court. This of itself proves its falsity. Moreover, it is apparent from the tables obtained from the distribution sheets that the individual cars of the Mountain division were less than those of the South Fork and Scalp Level division; the former being 67,395 and the latter 81,031. Of what avail, then, would be the present claim of the defendant that the method adopted by the court was not the true method? Again, the kind, character, and size of the individual cars placed, either to the Mountain division or to the South Fork and Scalp Level division, were not scheduled in the case, for which reason alone no equitable basis of calculation could have been made by the court. As shown in the testimony, the favored shipper, namely, Berwind-White Coal Mining Company, obtained from the defendant company as its own individual cars at least 1,000 steel cars

counted as two in our calculation, while the testimony also shows that whatever of individual cars the plaintiff company had were of a lesser capacity. Manifestly, therefore, the court could not have made, and cannot now make from any data in the case, an equitable schedule of damages on the theory now for the first time presented in this exception. That theory might have been of some consequence had the court adopted the theories of damages claimed by the plaintiff, in which only the respective car supplies of the plaintiff company and the Berwind-White Coal Mining Company were considered. Not having adopted the plaintiff's theory of damages, the court is of the opinion that the defendant railroad company should be bound by its own course of conduct and method of distribution in dealing with both the individual cars of the plaintiff company as the party discriminated against and as to the Berwind-White Coal Mining Company, the favored shipper.

"In connection with this exception, defendant's counsel submitted a schedule of damages alleged to have been based on the court's theory of the case, which shows injury to the extent of \$33,797.69, without damages in lieu of interest. The vice of this schedule is that it starts with the sixth column of the schedule adopted by the court, showing 'net shortage in cars, steel as two.' The results in the sixth column are obtained by comparison between the Mountain division and the Scalp Level division of all cars other than individual cars placed in both regions. No individual cars in either region enter into the equalization shown in the court's first column. The result of the defendant's schedule, therefore, is that the plaintiff company is charged with its proportion of individual cars twice, while the individual cars furnished to the favored shipper have never been considered in the calculation. This schedule it is presumed was intended to be attached and made a part of this exception, and is so treated. From it thus attached, the truth of the above objections can be readily ascertained. For the above reasons, therefore, this exception is hereby overruled."

"(34) The court erred in including the damages which it found had been sustained by the plaintiff a sum equal to interest at 6 per cent. for 7½ years as damages for delay.

"Ruling: This exception raises the question of the allowance by the court of a specific sum as compensation for the delay in the payment of damages assessed. The allowance by the court of that sum is based upon the principle laid down in many decisions. In the syllabi to *Richards v. Citizens' Nat. Gas Co.*, 130 Pa. 37, 18 Atl. 600, it is held: '(3) In actions for unliquidated damages, whether sounding in tort or in contract, whenever the damages are to be assessed on the principle of compensation and with the

reference to a definite standard such as market value, the jury may give additional damages in the nature of interest. (4) Such additional damages are not properly interest, nor are they recoverable of right as interest is; they are simply compensation for delay measured by the rate of interest, and their allowance depends upon the circumstances of each case and is to be determined by the jury.' A number of cases prior thereto are cited by the learned court in support of that position. The same principle is affirmed in a recent case (*Wayne v. Pennsylvania Railroad Co.*, 231 Pa. 512, 80 Atl. 1097). In *Pierce v. Lehigh Valley Coal Co.*, 232 Pa. 170, 81 Atl. 142, one of the latest utterances of the Supreme Court on the subject is in a case where the allowance by the jury of a sum as compensation for delay was stricken off by the lower court and sustained by the higher court. The opinion of Mr. Justice Mestrezat states the principle underlying the whole subject: 'The right to compensation for delay in the payment of damages, arising out of a tort, depends upon the circumstances of the case. It is therefore usually a question for the jury under the evidence submitted. If the fault of nonpayment of the claim rests with the defendant, he cannot complain if he is required to compensate for the delay. If, on the other hand, the fault lies with the plaintiff by reason of an excessive and unconscionable demand, one which the defendant is required to protect himself against by litigation, he should not be penalized for the unwarranted conduct of the plaintiff and required to pay damages for the delay in settlement of the claim.'

"Applying these principles to the case in hand, was the court justified, acting as he was as the jury in this case, in assessing 45 per cent. as compensation for the delay? The law, the facts, and the justice of this case, as we believe, justify the allowance. To determine this, a brief review of the case and the claim is necessary. The original *præcipe*, filed March 26, 1908, claimed for damages not exceeding \$75,000. Plaintiff's statement, filed November 21, 1908, claimed the right to recover \$49,936.07, with an additional amount to compensate for delay. About the same time plaintiff brought suit in the Circuit Court of the United States against the same defendant, claiming the right to recover \$242,999.65 for the same alleged discrimination based on identically the same facts, claiming, however, to recover in that court because of the jurisdiction of said court over interstate commerce. On April 3, 1911, plaintiff in this case was allowed to amend its *præcipe* by substituting a statement for damages to the amount of \$300,000, instead of \$75,000, and a declaration was filed in this court claiming the right to recover \$260,777.96 on exactly the same alleged discriminatory acts as in the original statement. As appears in the testimony in this

case, the larger claim by the later statement was based by plaintiff, by advice of counsel, upon their belief that the law gave plaintiff the right to recover in the jurisdiction of the state courts for coal sold f. o. b. cars at the mines as a Pennsylvania delivery, without regard to the question of the ultimate destination of the coal. The question thereby raised was merely one of jurisdiction as to the proper court in which such damages could be recovered, and the theory of the plaintiff was sustained in the trial of the cause by this court. At the trial plaintiff contended the right to recover upwards of \$200,000, without any allowance of compensation for delay, and by their exceptions still persist in such claim, while the court took a different theory of the elements of damage based on car distribution to the Mountain region, of which the plaintiff was a part, rather than on a comparison between the plaintiff and the preferred shipper. The question involved therein is purely one of law so that, as we look at it, the claim of the plaintiff for a very much larger amount than that allowed by the court does not indicate that said claim was an excessive and unconscionable demand, although considerably in excess of that allowed by the court. The amount allowed by the court, as shown in the table, is a carefully worked out calculation of the coal tonnage of which the plaintiff company was deprived from shipping by the discriminatory acts of the defendant. This coal tonnage is based on the net shortage of cars of which plaintiff was deprived by the defendant in discrimination in favor of the Berwind-White Coal Mining Company, and these cars, if we are right in our theory, the plaintiff was entitled to have placed for loading daily during the period of the action. If this theory of damages is correct, why is not plaintiff also entitled to the several sums, calculated monthly as in said table, from the actual time when it was so deprived? The sum of \$51,257.85 represents the damages as of the date when those damages occurred, from seven to nine years prior to the calculation and determination of this suit. The court allowed compensation for delay for only 7½ years, although over one-half of the \$51,257.85 was incurred more than nine years prior to the determination of this suit. Moreover, there is no testimony in the case going to show that the plaintiff is at fault in claiming damages against the defendant company. The facts in the case disclose a rank case of discrimination against the verbal, written, and telegraphic protests of the manager of the plaintiff company. The attorney for the plaintiff company, in a personal interview with an officer of the defendant corporation in March, 1903, called attention to the discriminatory acts and demanded fair treatment, and impliedly, at least, called attention to the defendant's liability for such acts, and was told by the officer of the defendant company

that said company was going to take care of Berwind and run all chances in doing it. At the trial of the case no defense in the nature of a denial of the discriminatory acts, or even of the legal view that such acts were discrimination, was presented by defendant's counsel. Defendant company, therefore, must be considered as knowing that the plaintiff company had a bona fide claim against said company, although suit was not brought or evidence of formal demand made until in the spring of 1908. No evidence was offered on either side to show that either plaintiff or defendant attempted to adjust this case out of court. The defendant has contended from start to finish of the case, so far as the evidence discloses, that there is absolutely no liability whatever, not because they deny or show by evidence that there was no discrimination, but because of legal technicalities set up as a bar to the right of recovery. These they still maintain. The loss of profit per ton allowed by the court on the tonnage of which plaintiff was deprived was calculated with all of the elements favoring the defendant for which they could reasonably ask. Moreover, the amount as found by the court leaves out of view and calculation altogether the actual loss which the testimony would indicate the plaintiff suffered on the coal actually mined and shipped, amounting from five to ten cents per ton. If the testimony on that subject is to be believed, the plaintiff's mines were equipped for a very large tonnage, as much as 1,200 tons a day. By reason of the discrimination against them, in shortage of cars as well as by irregular car service, they were hampered and prevented from operating their mines, so that even the coal which they were able to ship cost 10 cents per ton more than it should have cost had they been allowed their proper pro rata in car distribution. This element of damages alone would amount to more than the amount awarded by the court as damages for delay. While not specifically claimed by plaintiff as an item of damages on their theory of the case, it could have been allowed under the general declaration of plaintiff as one of the elements going to make up its claim and distinctly growing out of the discrimination practiced.

"Considering, therefore, all the facts and circumstances of this case as proven by the evidence, together, also, with the method of calculation by which the court fixed the damages at \$51,257.85, we are of the opinion that we were clearly justified in adding 45 per cent. to that amount as compensation for the delay in paying it. The exception is therefore overruled."

Judgment was entered by the court against the defendant for \$74,323.88.

Argued before FELL, C. J., and MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

Francis I. Gowen and John G. Johnson, both of Philadelphia, and Thomas H. Murray, James P. O'Laughlin, and Hazard Alex. Murray, all of Clearfield, for appellant. A. M. Liveright, of Clearfield, and A. L. Cole, of Du Bois, for appellee.

STEWART, J. This was an action brought by the Puritan-Coal Mining Company against the Pennsylvania Railroad Company to recover damages for alleged undue and unlawful discrimination against the plaintiff in the matter of the distribution of cars for shipment of coal during a period beginning April, 1, 1902, and ending December 31, 1904. By agreement between the parties, a trial by jury was waived, and the case was heard by the court resulting in a judgment for the plaintiff in the sum of \$74,323.88. In discussing the points put in issue by this appeal as indicated by the several assignments of error, we shall observe the order followed by counsel for appellant in their submitted brief of argument, and confine the discussion to those questions which are there urged upon our attention.

[1] "(1) The first proposition advanced in support of the appeal is that, even if the plaintiff had at any time a claim of the character asserted in the present action, it had voluntarily transferred it to others prior to the trial of the case, and had thereby deprived itself of the right to maintain the action or to recover damages claimed therein."

Briefly the facts are these: During the period covering the alleged discrimination, and at the commencement of the action, three individuals owned the entire capital stock of the plaintiff corporation. Subsequently, by a written agreement, these persons sold the stock, reserving to themselves individually the claim covered by the present action, with the right of access to the books and papers of the company and the right to continue the present action in its name, with the further stipulation that, in case of settlement by the coal company, the money received therefor was to be paid over to the three selling the stock, who were to have the entire control of any adjustment or settlement. The objection urged in the court below, and here renewed, is that the transaction was a virtual assignment by the coal company of its claim for damages to the individuals so parting with their stock, and that because of the character of the claim recovery cannot be had therefor in the name of the assignor. The argument in support of the contention falls to distinguish between the corporation and its shareholders. They are not one and the same. The latter are not owners of the property of the corporation, but the title to the property rests exclusively in the entity called the corporation.

[2] It follows that shareholders of a corporation have not, by mere fact of being shareholders, any agency for the corporation

or any authority to act for it; nor can they convey or assign its property although all unite, unless through formal action of the corporation they have been made its agents to that end. 10 Cyc. 374. None of the stipulations in the contract for the sale and purchase of this stock bound the corporation in the remotest way. It could have refused the use of its name in an action for the recovery of this specific claim, and it could have denied the vendors of the stock access to the books of the company without incurring corporate liability. The claim remained the claim of the corporation notwithstanding the fact that the individual shareholders had agreed that others, ceasing to be shareholders, should receive the benefit of it. With the rights and equities of these parties as between themselves, we have here no concern; nor does it concern us to anticipate what the corporation may or may not do with the damages in the event it recovers.

[3] The second proposition which appellant seeks to maintain is as follows: "(2) That the court below was without jurisdiction to entertain the action, due to the fact that the only subsisting obligations to which the defendant was subject, in respect to the distribution of its cars during the period of the action, were those imposed upon it by the acts of the Congress of the United States known as the 'interstate commerce acts,' which acts prescribe and designate the forums in which actions for nonobservance of the obligations thereof may be brought; these being either the commission created by these acts or the federal courts and not the state courts."

For a correct understanding of the point involved, a fuller statement of the facts is here necessary. That we may do no injustice to appellant in this regard, we recite the facts as they are stated in the history of the case furnished by itself, and we accept these with the single qualification that it nowhere appears that the shortage of cars, the subject of plaintiff's complaint, was due to the delivery of an excessive number to the Berwind-White Coal Mining Company. "The defendant, during the period of the action, was engaged in the transportation of bituminous coal, and the plaintiff was a shipper over its lines. The coal transported by the defendant was transported to points both within and without the state of Pennsylvania, and this was true of that shipped by the plaintiff. To facilitate the distribution of its coal cars among the operators on its lines, the coal territory tributary to the defendant's lines had been divided by it into several regions or districts. The mines of the plaintiff, three in number, known as 'Puritan Nos. 1, 3, and 5,' were located in a district known as the 'Pittsburg, East End,' or 'Mountain' district. The Berwind-White Coal Mining Company owned and operated a large number of mines also located on the line of the defendant, which were situated

in a district known as the 'Scalp Level' district. All of the mines on the defendant's lines were given certain ratings based upon their shipping capacity, and the distribution of the cars in times of shortage was, as a rule, made in accordance with these ratings. In the period of the action, however, which included the period of the anthracite coal strike of 1902, the distribution of cars in accordance with the ratings was largely departed from, and that actually made was controlled, more or less, by what were known, and are referred to in the testimony as 'special orders.' The distribution made to the Berwind-White Coal Company's mines was largely of this character. Separate distributions of its cars were not made by the defendant for shipments to points within and without the state, respectively; but one distribution was made, and no control was exercised or was attempted to be exercised by the defendant over the use which should be made of the cars as between the two classes of shipments, this being left optional with the operator to whom the cars were delivered, who could use them entirely for shipments to points within the state, or part for one and part for the other purpose. The plaintiff, upon the theory that, having regard to their respective ratings, the Berwind-White Coal Mining Company, under and by virtue of the special orders in its favor, had secured a larger number of cars than it had received, instituted the present action, and by its statement alleged and charged that it had been unjustly deprived of a portion of the cars which the ratings of its mines entitled it to, due to the delivery of an excessive number to the Berwind-White Coal Mining Company."

From this statement of the facts, and the claim of the plaintiff based thereon, it is quite apparent that nothing was involved but the single question whether, in the matter of the distribution of its cars, the defendant unduly and unreasonably discriminated against the plaintiff, to the latter's loss and injury, by furnishing to a competitor shipping facilities for transportation to a measure and degree denied, and refused the plaintiff under like conditions. If the case was with the plaintiff on its facts—and it is so found—then we have an offense threefold in character: First, an offense against common law; second, an offense against the federal statute regulating interstate commerce, which by the third section provides that it shall be unlawful for any common carrier, subject to its provisions, "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any way whatsoever, or to subject any particular person, company, firm, corporation, or any locality, or any particular description of traffic, to any undue or unreasonable prejudice or dis-

advantage in any respect whatsoever"; and, third, an offense against our own state statute of June 4, 1883 (P. L. 72), which declares that "any undue or unreasonable discrimination by any railroad company, or other common carrier * * * in charge, for or in facilities for, the transportation of freight within the state, or coming from or going to any other state," shall be unlawful. For injury so sustained, to what tribunal may the injured party look for redress? Are the courts of his own state closed against him, and must his only recourse be to a federal tribunal? Were the question an untried one, its determination would necessarily involve a study and consideration of those principles and rules which are applied to questions arising out of the dual character of our government. This, however, may here be avoided, since, as we view the case, its determination may be rested on express authority defining and determining the scope and effect of the federal statute. By repeated decisions of the Supreme Court of the United States within recent years, the boundary line limiting state jurisdiction in matters which may affect interstate commerce has been so clearly indicated that, when a question such as this arises, we have but to decide whether the particular offense complained of falls on the hither side of the boundary line or beyond, not that federal jurisdiction is thereby correspondingly limited, but, when the latter invades the limits allowed the state, the jurisdiction becomes concurrent. We refer specially to the case of *Missouri Pacific Ry. Co. v. Larabee Flour Mills*, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352, wherein it is distinctly held that, where exclusive jurisdiction is claimed for the federal courts under the interstate commerce act, the primary and, if answered affirmatively, the only question must be, Has Congress legislated with respect to the particular act of discrimination complained of by regulation or otherwise? If it has, then exclusive jurisdiction results to the federal courts; if it has not, then, and only then, is the question whether the state act conflicts with the federal statute by imposing burdens and hindrances upon interstate commerce to be considered. In the case cited, the controversy arose from the refusal of the railroad company to make transfer of empty cars from a transfer track maintained by the offending road to another connecting road to the mills and elevator of the plaintiff. The two roads had held themselves out as ready to do such transferring. The ground of refusal to make the transfer was that the shipper had refused to pay certain demurrage charges against it. It was replied to this that the detention of the cars for which demurrage was charged was occasioned solely by the inadequate and defective service of the railroad company. The contention of the plaintiff in this regard was sustained, and the case, as so resolved, pre-

sented the same question we have here—whether for discrimination in furnishing facilities for transportation the carrier was amenable solely to federal law.

In the opinion delivered by Mr. Justice Brewer we have such an explicit statement of the facts, and such a clear exposition of the law governing, that nothing will adequately supply what a liberal quotation therefrom will furnish. On page 620 of 211 U. S., page 217 of 29 Sup. Ct. (53 L. Ed. 352), he says: "But the main contention on the part of the Missouri Pacific runs along an entirely different line. It is that the Missouri Pacific and the Santa Fé are common carriers engaged in interstate commerce, and as such are subject to the control of Congress, and therefore in these respects not amenable to the power of the state. It appears from the findings that about three-fifths of the flour of the mill company is shipped out of the state, while the other two-fifths is shipped to points within the state. In addition, the hauling of the empty cars from the Santa Fé track to the mill was, if commerce at all, commerce within the state. The roads are therefore engaged in both interstate commerce and that within the state. In the former they are subject to the regulation of Congress, in the latter to that of the state; and, to enforce the proper relation between Congress and the state, the full control of each over the commerce subject to its dominion must be preserved. *Fairbank v. United States*, 181 U. S. 283 [21 Sup. Ct. 648, 45 L. Ed. 862]. How the separateness of control is to be accomplished it is unnecessary to determine. Its existence is recognized in the first section of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154] as well as that of June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1284], for each provides: 'That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid.' This case does not rest upon any distinction between interstate commerce and that wholly within the state. It is the contention of counsel for the mill company that it comes within the oft-repeated rule that the state, in the absence of express action of Congress, may regulate many matters which indirectly affect interstate commerce, but which are for the comfort and convenience of its citizens. Of the existence of such a rule, there can be no question. It is settled and illustrated by many cases. Thus in *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. (53 U. S.) 299, 319 [13 L. Ed. 996], it was held that a regulation of pilots and pilotage was a regulation of commerce within the grant of the power of Congress, but fur-

ther that: 'The mere grant of such a power to Congress did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power of the states, and the states may legislate in the absence of congressional regulations. *Sturges v. Crowninshield*, 4 Wheat. (17 U. S.) 122, 193 [4 L. Ed. 529]; *Houston v. Moore*, 5 Wheat. (18 U. S.) 1 [5 L. Ed. 19]; *Wilson v. Blackbird Creek Co.*, 2 Pet. 27 (U. S.) 245, 251 [7 L. Ed. 412].' In *Cleveland, etc., Ry. Co. v. Illinois*, 177 U. S. 514, at pages 516, 517 [20 Sup. Ct. 722, at page 723 (44 L. Ed. 868)], is a collection by Mr. Justice Brown, speaking for this court, of a number of these cases. We quote from the opinion: 'Few classes of cases have become more common of recent years than those wherein the police power of the state over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employes, persons crossing railroad tracks, and adjacent property owners, as well as other regulations intended for the public good.' * * * On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has intrusted power to that Commission does not, in the absence of action by it, change the rule which existed prior to the creation of the Commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this had not been held to interfere with the power of the states in these incidental matters. A mere delegation by Congress to the Commission of a like power has no greater effect, and does not of itself disturb the authority of the state. It is not contended that the Commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the Commission does not of itself and in the absence of action by the Commission interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens."

[4-8] We derive from this opinion these inevitable conclusions: (1) That where Congress proscribes a particular act, not in itself an offense at common law, jurisdiction with

relation thereto attaches to the federal courts; (2) where the act is an offense at common law, and made so as well by state statute, in such case, except as other reasons may be shown, there is concurrent jurisdiction of it in the state courts; (3) that the interstate commerce act does not attempt, any more than does the common law, to define what particular acts shall constitute unlawful discrimination, but commits that to the Interstate Commerce Commission; (4) that, when this Commission has by its orders declared any particular practice or regulation observed by an interstate corporation as unreasonably discriminating, it is as though Congress had specially legislated with respect thereto, and such circumstance draws exclusive jurisdiction of the offense to the federal tribunal; (5) that, except as to the thing the Commission has defined and denounced as undue discrimination, the discrimination complained of may be adjudged by the state courts according to their own statute or the common law, as the case may be.

It is only necessary to quote the following extract from the opinion in the later case of *Southern Ry. Co. v. Reid*, 222 U. S. 424, at page 436, 32 Sup. Ct. 140, at page 142 (56 L. Ed. 257), to show how the doctrine declared in the earlier case from which we have quoted at length is there reasserted and applied. We quote from the opinion of Mr. Justice McKenna: "It is well settled that, if the state and Congress have a concurrent power, that of the state is superseded when the power of Congress is exercised. The question occurs: To what extent and how directly must it be exercised to have such effect? It was decided in *Missouri Pacific Railway Co. v. Larabee Flour Mills*, 211 U. S. 612, at page 623 [29 Sup. Ct. 214, at page 218 (53 L. Ed. 352)], that the mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not, in the absence of action by it, change the rule that Congress by nonaction leaves power in the states over merely incidental matters. 'In other words,' and we quote from the opinion, 'the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens.' * * * Until specific action by Congress or the Commission, the control over those incidental matters remains undisturbed.' The duty which was enforced in the state court was the duty of a railroad company engaged in interstate commerce to afford equal local switching service to its shippers, notwithstanding the cars concerning which the service was claimed were eventually to be engaged in interstate commerce.

This duty was declared (211 U. S. 624, 29 Sup. Ct. 218, 53 L. Ed. 352) to be a common-law duty which the state might, 'at least in the absence of congressional action, compel a carrier to discharge.' The principle of that case, therefore, requires us to find specific action either by Congress in the interstate commerce act or by the Commission covering the matters which the statute of North Carolina attempts to regulate. There is no contention that the Commission has acted, so we must look to the act. Does it, as contended by the plaintiff in error, take control of the subject-matter and impose affirmative duties upon the carriers which the state cannot even supplement? In other words, has Congress taken possession of the field?"

In the light of these express authorities, all other questions may be eliminated from the present discussion except this governing one: Has Congress specifically legislated with respect to the offense complained of? That is to say, has it, either by the interstate commerce act in terms or by any decree or order of the agency created thereunder, the Interstate Commerce Commission, declared that the matters here complained of as the foundation of plaintiff's case shall constitute an undue or unreasonable preference? For very evident reasons the federal statute is most general in its terms, dealing specifically with few matters. Because it is only with respect to very few matters affecting interstate commerce that conditions are so universally alike as to admit of one uniform system or plan of regulation with respect thereto, Congress has committed to the Interstate Commerce Commission the task of definition; and this the latter may perform in any case upon complaint of any one claiming to have been damaged by unjust discrimination at the hands of a common carrier under the ninth section of the act. Under this provision the Commission has exercised a wide jurisdiction; it has adjudged isolated and peculiar cases; and in others, where the adjudication was not dependent upon local and other peculiar conditions, it has formulated general rules for the observance of all. It is needless for our purpose to cite instances of the former, and a single instance of the latter will suffice. We cite it as much because it is a case upon which the appellant relies as supporting its present contention. Our reference is to the case of Interstate Commerce Commission v. Ill. Cent. R. R. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280. There the controversy began with the complaint of a collieries company filed with the Interstate Commerce Commission complaining that the Illinois Central Railroad Company was unduly discriminating in the matter of car distribution in not taking into consideration the foreign railway fuel cars and private cars in determining the distribution of coal cars among the various operators along the line of the railroad or interstate shipments of coal. The Commission held that the com-

plaint was well founded, and awarded relief through an order so interpreting the interstate commerce act as to require the railroad company to desist from such practice and establish regulations providing for the accounting of all such cars. Unwilling to comply with the order so made, the Illinois Central Railroad commenced this action to enjoin the enforcement of the order of the Commission, alleging that the order was unjust and unreasonable for various reasons, and that in making the order the Commission exceeded its power. The Commission replied, traversing the allegations in the complaint, and asserting that the subject of the distribution of coal cars as dealt with by the order was within the administrative power delegated to the Commission by the terms of the act regulating interstate commerce. From a decree enjoining the company from enforcing its order, an appeal was sustained, and it was held that it is within the delegated power of the Interstate Commerce Commission to regulate railroad companies doing interstate business in the distribution of their cars, and required them to take into account its own fuel cars in order not to create a preference of the mines to which such cars are assigned over other mines.

It is impossible to conceive of any local or other conditions which would prevent such order with respect to the fuel cars of the carrier from operating generally with the same measure of justice and equity to all, and hence we conclude that not only does the rule announced govern in the regulation of the Illinois Central Railroad Company, but that it applies to and governs, upon the authority of the cases above cited, all railroads; that it is as much the law of the land as though written in the lines of the interstate commerce act, and that, having been legislated upon by the Commission, exclusive jurisdiction with respect thereto vests in the federal tribunal. It is only necessary to distinguish between the subject of the complaint in that case and this. There, by the action of the Commerce Commission, again using the language of Mr. Justice McKenna in the latter case above referred to, Congress had taken possession of this particular field, and had declared the refusal to take into account the fuel cars of the carrier unlawful. Here it is not complained that defendant had disregarded any order of the Commission; nor has any order of the Commission even remotely regulating the subject of the complaint here been shown. What is complained of is that the defendant, having voluntarily adopted a system for the distribution of its cars which it must have regarded as just and equitable, and from which it makes no claim to be released, openly and flagrantly disregarded it by daily distributing to the Berwind-White Coal Company a much larger number of cars than its rating called for, while furnishing complainant with less than it was entitled to under its rating.

The grouping of plaintiff's mines in a class with others for purposes of service, the determination of the total number of cars to be devoted to such service, the ratings of the several mines within the group and the pro rata of distribution were not matters regulated by the order of the Commission, but matters decided upon by the defendant company with a view to avoid prejudice to the shipper. Had the plaintiff been dissatisfied with the regulation, it could have appealed to the Commission to correct it; had its appeal been sustained and followed by an order of amendment or correction of the regulation, then, upon subsequent disregard of the regulation as amended, plaintiff's only forum for relief would have been the federal court, since in that case again Congress would have taken possession of the field. But there is nothing of that kind here; nothing but a case of discrimination pure and simple; not a specific offense created by the express terms of the federal statute, not an offense against any order of the Commerce Commission, but an offense which could fall within the federal statute and the common law as well, and so be held to have been legislated upon by Congress, only as the Interstate Commerce Commission has so declared. Our own state statute rests for its authority on the police power of the state, and its sole object is to prohibit common carriers which derive all their powers from the state, and have been granted these to the end that they may serve public necessity and convenience from practicing undue and unreasonable discrimination between shippers in the service they are created to render. The exercise of this power in the way indicated is not interfered with by the interstate commerce act in the absence of action by the Commerce Commission specifically directed against the particular matter complained of. The thing condemned by our state statute and by the common law was a purely incidental matter indirectly affecting interstate commerce, just as was the discrimination in the case of the Missouri Pacific Ry. Co. v. Larabee Flour Mills, 211 U. S. 612, 29 Sup. St. 214, 53 L. Ed. 352. The two cases on principle cannot be distinguished, and we but follow the plain guidance of that case in holding that the power of the state with respect to the subject-matter of the present controversy remains undisturbed. It was not a question in the case whether the cars denied the plaintiff were intended for shipment within the state or beyond. It was sufficient that the offense was committed within the state. For the reasons stated, we must decline to sustain the defendant's second proposition.

[9] The third and fourth propositions are simply derived from the second; they call for no further discussion of the point raised, and we pass them. The fifth is as follows: "(5) That upon the assumption that the state act of 1883 applied to the distribution by the defendant of cars used for intrastate ship-

ments, and that the evidence had established that in making such distribution the defendant had unjustly discriminated against the plaintiff, the method adopted by the court below for ascertaining the number of cars which the plaintiff was thereby deprived of, and the proportion of these which would have been used for intrastate shipments, was erroneous and hurtful to the defendant." This contains but a single feature which calls for consideration, viz., that the method adopted by the court for ascertaining the number of cars the plaintiff was deprived of was erroneous. We shall consider this in connection with the sixth, which is as follows: "(6) That in the ascertainment of damages sustained by the plaintiff, due to its inability to mine and sell additional coal, which the court below found it could have shipped had cars therefor been available, an assumed cost of production was adopted by the court which the evidence did not warrant, and certain payments which the plaintiff would have been obliged to make, had the additional coal been mined, were ignored and disregarded, and the assumed profits thereby materially enhanced."

To facilitate the distribution of its own cars, the defendant company determined by its own action to group into one the coal-producing districts over which the Berwind-White Company mines were located, known as the Scalp Level district, and the district in which the plaintiff's mines were located, known as the Mountain district. It rated the several mines in each according to their respective producing capacity, with a view to determine a fair and just distribution of the cars which it allowed to be available during the continuance of the shortage. The court found that the aggregate distributive rate of the two divisions for the purpose of distribution was about equal, and adopted this fact for the determination of the measure of damages. In this connection we recite the fifth finding of fact by the court. The effect of it can be understood only as it is given entire: "Fifth. That beginning in the summer of 1902 the defendant company, by virtue of telegraphic orders issued from the general officers in charge of the operation of the defendant company and carried out by the officers and train crews of the said company, gave to the Berwind-White Coal Mining Company a preference in the distribution of cars on the defendant company's line, for use in the coal trade, over the mines of the Mountain division, and this preference, both directly and indirectly, affected the distribution of cars to the plaintiff company. These telegraphic orders for preference, as shown by the testimony, began June 28, 1902, from Superintendent Wallis of said company, located at Altoona, to subordinate officers, and direct that a preference up to 500 cars daily shall be given to the mines of the Berwind-White Coal

Mining Company at Scalp Level, and in addition thereto that from 100 to 250 cars be kept standing over each night so that the mines at Scalp Level shall be served early in the morning. That this preference in distribution affected the ratio of cars distributed to the plaintiff company as a part of the Mountain division appears in various telegrams, as follows: In that of J. M. Wallis to R. L. O'Donnel, under date of October 16, 1902, as follows: 'Commencing at once please arrange to see that the mines of the Berwind-White Coal Mining Company at Scalp Level receive equal to 500 cars daily, counting steel cars as two, before placing at any other operation in the Scalp Level region or on Mountain.' In telegram of October 21, 1902, from Wallis to O'Donnel: 'In addition to having 500 cars at Scalp, in order to protect it I will be glad if you will make a special effort to have from 150 to 200 cars standing over there each night, even if you do not place cars on the Mountain for coal. The mines of the Berwind-White Coal Mining Company must be supplied with equal to 500 cars each day in order that there may be no difficulty as result of accident or the cars being late. We are not prepared to take any chances on getting the cars to Scalp, and in addition to having 500 at their mines in time for loading daily, in order to protect ourselves we should have an extra 150 or 200 standing over each evening to start them in the morning. Please so arrange.' Another telegram of the same date, from Wallis to O'Donnel, reads as follows: 'We are not meeting with the success necessary to get 500 cars to Scalp daily. Will you please refer to my telegram last week requesting that equal to 500 cars daily be placed at the mines of the Berwind-White Coal Mining Company at Scalp, in addition to the cars placed at Yellow Run mine, in preference to placing cars at any other operation on the Mountain or in the South Fork district and see that instructions are carried out. Special efforts should be made to get the cars to the mines in ample time for loading each day. The Berwind-White Coal Mining Company have not been able to coal the mail steamers in New York harbor last week and this week. Most positive instructions should be issued and the arrangements carried out that equal to 500 cars will be at Scalp Level region each and every day before any attempt is made to supply cars to the mines on the Mountain, South Fork district or South Fork Railroad. Please advise if understood.' And under date of November 22, 1902, from J. M. Wallis to R. Pitcairn, Pittsburg: 'Please give Berwind's mines at Scalp all the cars you have in the territory for to-morrow, cutting the other operations.' That this preference continued and that it was a preference that affected particularly the mines on the Mountain division appears

later in a telegram from G. W. Creighton, then superintendent at Altoona, to S. C. Long, superintendent at Pittsburg, in the following language: 'Our efforts this week in keeping Scalp supplied with cars have not been successful. Please renew the instructions to all parties interested that before placing cars for other operations on the Mountain or on the South Fork Railroad, equal to 500 cars must be placed for the Berwind-White Coal Mining Company each and every day until further notice, and it is important that sufficient cars should be placed early each morning so that all of the mines will have a supply to start with and there will be no danger of any operations being idle on account of not having cars. To protect ourselves on this arrangement I would be glad if you will arrange to accumulate and have standing over daily equal to 175 to 225 cars in addition to the 500 that are required for loading. This is absolutely necessary in order that the requirements of the Berwind-White Coal Mining Company can be met and the wishes of the management in the East carried out. The only exception that should be made to this order is for the Dunlo drift mine to have sufficient cars daily to protect the N. Y. P. & N. supply coal order, which I think is 200 tons per day. Acknowledge receipt.' Said special orders were not rescinded during the period of action."

That cars greatly in excess of its aggregate rating were given to the Scalp Level division during the period covered by the action is beyond dispute. It was not alleged that any mines in the division so favored shared in the excess other than the mines of the Berwind-White Company; nor was it averred that of those actually distributed to the Mountain division the plaintiff company did not receive its ratable proportion. This was, perhaps, not so direct a way of showing how many cars in excess of their rating the Berwind-White Company received, but it was none the less certain; not only did it furnish a correct basis for calculation, but the Berwind-White Company being the only party preferred so far as the evidence shows, this is in itself a sufficient answer to the objection that plaintiff's allegata and probata did not agree.

[10] The complaint that the court did not take into account the private or individual cars in determining the extent of the discrimination against the plaintiff introduces matter foreign to the issue in the case. The issue had regard to the cars owned by the defendant company. The period of discrimination complained of antedated the decision in the cases of *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280, where it was held to be the duty of the interstate carrier in making distribution of its cars in times of shortage to include in the compu-

tation private cars in addition to its own. In making distribution of its own cars, exclusive of those owned by private parties, the defendant company was observing not only its own practice but that which had up to that time been prevailing. However general the practice, it was, as held in the case referred to, in plain violation of the interstate commerce act. In making the present objection, the defendant company would set up its own disregard and violation of law in mitigation. It had its own purpose to serve in excluding private cars from the computation. Whatever the purpose was, the scheme was acquiesced in by all shippers in the district as fair and equitable, with full knowledge of all facts, since, so far as appears, none made complaint. Now that it has been made to appear that the defendant company disregarded its own basis of distribution, not because it was inequitable for the reason that the private cars had not been included in the computation, but solely with a view of giving a particular shipper an unlawful preference, it seeks to mitigate the consequences of its own dereliction by having applied a rule it defied when it established the basis of distribution upon which all acted throughout the entire transaction.

[11] Apart from this, while proper deference to the Interstate Commerce Commission would require our state courts to regard the furnishing of private cars as a fair equivalent of the same number of company cars, the fact that such cars were furnished, as the pleadings stood in this case, would be purely a substantive matter of defense. If the facts were as here alleged by the defendant, it was its duty to establish them by evidence. It does not appear that in any of the requests for findings the court was asked to derive from the evidence anything that would support the present contention. The point itself was not raised or even distantly referred to in the course of the trial, but was indicated first in an exception to the court's conclusion. We accept the learned trial judge's reasons for dismissing the exception as entirely sufficient. He says, among other things, with respect to the matter: "Again, the kind, character, and size of the individual cars placed either to the Mountain division or to the South Fork and Scalp Level divisions were scheduled in the case, for which reason alone no equitable basis of calculation could have been made by the court. As shown in the testimony, the favored shipper, viz., the Berwind-White Coal Mining Company, obtained from the defendant company as its own individual cars at least 1,000 steel cars counted as two in our calculation, while the testimony also shows that whatever of individual cars the plaintiff company had were of a lesser capacity. Manifestly, therefore, the court could not

have made, and cannot now make, from any data in the case, an equitable schedule of damages on the theory now for the first time presented in this exception."

It is further contended under this proposition that the cost per ton of mining the coal as it enters into the calculation of the plaintiff's damage is erroneous. A manifest error appears in the calculation submitted in support of this contention. The plaintiff's mines are there given a rated capacity of 47,476 cars, whereas the finding is that their rated capacity was 39,148 cars. That this difference seriously impairs the conclusion based thereon is manifest; to what extent exactly could be determined only by a calculation which we do not feel called upon to make. Still another contention is that the court erred in not taking into account the royalty per ton or net share of the net profits which, under its agreement, plaintiff would have had to pay to the lessor of its mines in determining the cost of production to the plaintiff. The thirteenth finding of the court is as follows: "Thirteenth. That the evidence shows that the fair average cost of producing coal at the plaintiff's mines during the period of the action, including royalty, had they been treated by the defendant company with a fair distribution of cars, was \$1.10 per ton from April, 1902, to March, 1903, inclusive, and \$1.15 per ton from April, 1903, to March, 1904, inclusive, and \$1.12 per ton for the period of the action thereafter." This finding is directly contrary to what is here alleged. An appeal such as this brings up only questions of law on bills of exception to the rulings of the court, and its conclusions on the facts of the case are to be regarded in the same manner as a verdict of the jury. *Gonser v. Smith*, 115 Pa. 452, 8 Atl. 770.

[12] We see nothing in the facts of this case that should exempt the defendant from its liability for the damages assessed against it for the delay in the settlement of the plaintiff's claim. The question of damages for delay in settlement of such cases is ordinarily for the jury under the evidence submitted. The court here discharging the function of the jury found the defendant in default in this regard without sufficient excuse on its part. We see no reason to interfere with that conclusion.

[13] The final objection is to the allowance of plaintiff's amended statement. We are of opinion that the amendment introduced no new cause of action. The opinion of the learned trial judge fully sustains his action in that regard. In what we have said, all the assignments of error which have been brought to our attention in the argument submitted have been considered and passed upon.

The assignments are overruled, and the judgment is affirmed.

WALNUT COAL CO. v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

1. PLEADING (§ 369*)—ELECTION—WAIVER.

Where a statement of claim sets out two causes of action, and defendant fails to demur, but pleads generally, it cannot thereafter compel plaintiff to elect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.*]

2. CARRIERS (§ 19*)—DISCRIMINATION—SUPPLY OF CARS.

Plaintiff coal company applied to defendant for permission to purchase and use on defendant's line a number of wooden coal cars of a kind used by other coal operators, which plaintiff then had an executory contract to purchase. *Held*, that defendant's refusal to grant such application did not constitute discrimination in the supply of cars in violation of Act June 4, 1883 (P. L. 72), so as to entitle plaintiff to recover damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 33-49; Dec. Dig. § 19.*]

3. STATUTES (§ 241*)—DISCRIMINATION—PENAL STATUTES.

Act June 4, 1883 (P. L. 72), prohibiting discrimination by carriers in the matter of the supply of cars, is a highly penal statute and must be strictly construed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

4. COURTS (§ 489*)—DISCRIMINATION—STATE LAW—INTERSTATE COMMERCE ACT.

The interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), does not deprive state courts of jurisdiction of actions at common law, or under Act June 4, 1883 (P. L. 72), to recover damages caused by discrimination of carriers, though the discrimination relates to supply of cars used in interstate commerce, so long as Congress has not legislated specifically with reference thereto.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

Appeal from Court of Common Pleas, Clearfield County.

Action by the Walnut Coal Company against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

At the trial the court overruled a motion made by the defendant to require the plaintiff to elect upon which count it would proceed to trial, the statement of claim including a claim for penalties under the act of June 4, 1883 (P. L. 72), prohibiting unjust discrimination, and a claim based upon the alleged failure of the defendant to comply with the common-law obligation to have and maintain an adequate equipment for the transportation of traffic tendered to it. The facts are stated in the opinion of the Supreme Court. Verdict and judgment for plaintiff for \$78,468. Defendant appealed.

Argued before FELL, C. J., and MESTREZAT, ELKIN, STEWART, and MOSCH-ZISKER, JJ.

Francis I. Gowen and John G. Johnson, both of Philadelphia, and Thomas H. Murray, James P. O'Laughlin, and Hazard Alex. Murray, all of Clearfield, for appellant. A. M. Liveright, of Clearfield, and A. L. Cole, of Du Bois, for appellee.

STEWART, J. [1] The statement of claim filed in this case sets out two distinct causes of action: One the alleged failure of the defendant to furnish the plaintiff with sufficient cars required for its business; the other that the defendant had unlawfully discriminated against the plaintiff in transporting over its lines the private cars of other coal producers, as well as its own cars employed in like traffic, while denying like service to the plaintiff under the same conditions. Since none of the rulings of the court with respect to the first complaint are assigned for error, it calls for no consideration at our hands. If the joinder of the two was not in accord with the rules of practice, such circumstance might have availed the defendant on demurrer; but, with the general plea entered, the right to object was gone, and the plaintiff could not thereafter be compelled to elect as between the two. This disposes of the first assignment of error, and brings us directly to the more serious question in the case, arising upon these facts.

[2] The plaintiff, being without cars of its own, was entirely dependent upon the defendant railroad company for cars in which to transport its coal to market, differing in this respect from many other operating companies in the same region, which, while entitled to a ratable allotment of cars owned by the railroad company, had in addition their own private cars which they were permitted by the railroad company to employ. Beginning with the period covered by the action, the plaintiff company, not because the defendant had discriminated against it in the matter of the distribution of its own cars, but solely with a view to enlarge its facilities for shipment in cars furnished by itself, made application through its president to the Huntingdon & Broad Top Railroad Company for the purchase from it of 200 cars of like character and description with those employed by other operators on the lines of defendant and by defendant itself. The negotiation was between the president of the plaintiff company and the superintendent of the Huntingdon & Broad Top Company in the latter's office at Huntingdon. The president's testimony on this branch of the case was as follows: "Q. State whether or not you arranged to buy any private cars on condition that the Pennsylvania Railroad Company would permit them on the line? A. I did. Q. When was that done and where? A. That was in Mr. Gage's office at Huntingdon. Q. How many cars? A. Two hundred cars. Q.

What kind and class? A. Sixty thousand capacity wooden cars. Q. Where were those cars that you bargained for? A. They were, I presume, on the road at the time, and Mr. Gage said they could be inspected on the long siding as they came in. Q. Was there any price struck? A. Yes, sir. Q. How much? A. \$300 a car. Q. What condition did Mr. Gage attach to a sale to you? A. No particular condition, except the price. Q. Any condition with reference to the railroad company other than the one you have stated? A. Yes, sir; he told me he could not sell them without the Pennsylvania Railroad Company's permission. That might have been his words. Q. With the consent of the railroad, what did he say he would do? A. Sell them."

Immediately following, the president of the plaintiff company wrote the general manager of the Pennsylvania Railroad Company as follows, under date of July 25, 1904: "Dear Sir: We beg to ask whether or not the purchase of either one hundred or two hundred standard 60,000 capacity hopper gondola cars for individual use would be agreeable to your company, and, if so, what arrangement can be made for handling the same? These cars are now being operated on your system and will be subject to your inspection before purchase." To this letter the general manager replied as follows, under date of July 26, 1904: "Dear Sir: Referring to your letter to me on July 25, we would not care to consider the operation on our line of any 60,000 pounds capacity hopper gondola cars. If the present owners desire to sell, it should be with the understanding that these cars would not be operated on our lines. You will understand that this is a position we are taking in regard to our own cars; that is, we are selling as many as it is possible for us to do, but in every case it is with the distinct understanding and by agreement that they shall not be operated on the Pennsylvania lines." There was no further correspondence between these parties until December 3, 1904, when the president of the coal company wrote the general manager complaining that other operators were making their usual shipments, while the plaintiff company was practically eliminated from the business for want of proper facilities. The following extract from the letter gives all that is here pertinent: "We had the opportunity to purchase and operate ourselves a certain number of individual cars. You declined to grant this privilege, but, notwithstanding this fact, the same cars are being operated all over your system to-day. Not only are these cars being operated, but identically the same cars are being operated by the Berwind-White Coal Mining Company, the Pennsylvania Coal & Coke Company and others whom I might mention."

The proposed purchase of the cars was never concluded because, as plaintiff alleges,

of the refusal of the defendant company to permit their use upon its lines. It is complained that this was an undue and unreasonable discrimination, offending against the act of assembly of June 4, 1883 (P. L. 72), which provides as follows:

"Section 1. That any undue or unreasonable discrimination by any railroad company or other carrier, or any officer, superintendent, manager or agent thereof, in charges for or in facilities for the transportation of freight within this state, or coming from or going to any other state, is hereby declared to be unlawful.

"Sec. 2. Nor shall any such railroad company or common carrier make any undue or unreasonable discrimination between individuals, or between individuals and transportation companies, or the furnishing of facilities for transportation. Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble that of the injury suffered."

We will assume, without deciding, that, under the circumstances disclosed by the evidence, if the plaintiff had in its control and subject to its exclusive use a given number of cars corresponding in make and condition to those which the defendant was transporting for others, the defendant would have been without justification in refusing the service demanded of it. We will further assume, without deciding, that the negotiation between the plaintiff and the Huntingdon & Broad Top Railroad Company amounted to a contract for the sale and purchase of 200 such cars. These concessions yield points which were earnestly contended for on one side, and as earnestly disputed on the other. We make the concessions for the purpose of the argument. Notwithstanding their liberality, it may readily be seen how incomplete they leave the plaintiff's case with respect to that branch of it we are now considering. Except as supplemented by facts which not only do not appear, but which evidently have no existence, the plaintiff's case must rest upon a purely hypothetical basis. With nothing more in the case than we have conceded, a recovery by the plaintiff would necessarily assume, without the slightest evidence, that the plaintiff could and would have complied with the terms of the contract with the Huntingdon & Broad Top Railroad Company, and, what is equally important, that the Huntingdon & Broad Top Railroad Company would not have failed to deliver the cars. In either event, what would have legally resulted? Simply a claim for damages against the party in default. Specific performance of the contract between the parties could not have been enforced by either. What stronger position, then, did the plaintiff occupy because of its contract than it would have been in had it simply shown that the same kind of cars were procurable

in the general market? The case, as exhibited, presents this situation: Plaintiff, having no cars of its own, inquired of the defendant whether, in case it obtained some answering a certain description, the defendant would permit of them being used in plaintiff's service upon its lines; the defendant company refused, accompanying its refusal with reasons which may or may not have been a justification of its action—a question which the parties were alike qualified to decide, each for itself—thereupon, the question between them at this point being one of rights, for reasons left entirely to conjecture, plaintiff surrendered whatever advantage it had under its contract without having once reached a position with respect to the cars that would have enabled it to exercise the right it demanded had the right been conceded by the defendant. It is not with abstract rights we are here dealing but with a question of injury which is made the basis of the present action. What is complained of is injury that resulted from undue and unreasonable discrimination in denying plaintiff facilities for the transportation of freight which defendant had extended to others. The reference is to the fact that some shippers were employing their own cars in the transportation of coal, and that plaintiff was denied the privilege of using its privately owned cars in like business. If plaintiff had no such cars, where was the discrimination and where was the injury? A mere refusal to admit or recognize a right in another cannot in itself be made the subject of a legal action for damages. There must be injury to redress before the law will take cognizance of the dispute. Especially so when the claim is under the specific act we are considering, which makes the offending party liable to the party injured for damages treble the amount of the injury suffered. The mere assertion by the defendant of its right to exclude from its tracks the cars which plaintiff proposed to buy entailed no loss or injury.

[3] Until the plaintiff was in actual possession of the cars it proposed to offer for service, it was open to the defendant to retreat from the position it had taken if it so desired; it was equally open to the plaintiff to abandon its scheme of providing itself with private cars; and so we repeat that the claim for damages in this case rests on nothing better than a pure hypothetical basis, since the injury complained of was never actually realized, certainly not through any discrimination by the defendant. If loss resulted to the plaintiff, it is to be referred to its own failure to put itself in position where it would have had a right to demand equal facilities. If it failed to do this because of greater confidence in the strength of defendant's position than its own, with regard to their respective rights in the matter, it was a case of *damnum absque injuria*.

[4] Not only does the case as exhibited fail to show violation of the letter of the statute of June 4, 1883, but we fail to see anything in it that offends against the spirit of that act. Even were it contended otherwise, a sufficient answer would be that the statute is a highly penal one and is to be strictly construed. "The purpose of this rule of construction," as was said in *Commonwealth v. Cooke*, 50 Pa. 201, "is to prevent acts from being brought within the scope of punishment, because courts may suppose they fall within the spirit of the law, though not within its terms. To create offenses by mere construction is not only to entrap the unwary, but to endanger the rights of the citizens."

The ninth assignment of error complains of the answer of the court to defendant's tenth point, as follows: "That there is no evidence in the case which would warrant the jury in finding that, had defendant agreed to accept the Huntingdon & Broad Top wooden cars of the capacity of 60,000 pounds as the private or individual cars of the plaintiff, the latter would have purchased 200 of these cars, and, in the absence of evidence to warrant such a conclusion, the plaintiff is not entitled to recover." The answer of the court was: "This is refused as stated, because the question, as we look at it, is for the jury as to whether or not there was a contract entered into in good faith by Mr. Fraser for the plaintiff company." The error in this answer has been sufficiently indicated in what we have already said. The point should have been affirmed. The ninth assignment of error is therefore sustained.

Another feature of the case that calls for expression of view, since another trial must result, is that which assails the jurisdiction of the court on the ground that it was disclosed by the evidence that the greater part of the cars, if not all of them, had been acquired by plaintiff, would have been employed in interstate shipments. In an opinion just handed down in the case of *Puritan Coal Mining Co. v. Pennsylvania Railroad Co.*, 85 Atl. 426, we have given full expression to our views, holding in that case that federal and state jurisdictions were concurrent for the reason that Congress had not legislated specifically with reference to the offense there charged. It is unnecessary to repeat here what was there said. This case is ruled by that. In the absence of specific legislation by Congress of the offense here charged, whether in the first or second complaint, the jurisdiction of our own courts remains undisturbed. We see no reversible error in the refusal of the court to allow a continuance of the case on defendant's motion because of the withdrawal of the receiver as party plaintiff.

For the reasons we have stated, and appellant's ninth assignment of error having been sustained, the judgment is reversed and a *venire facias de novo* awarded.

HERR v. LANCASTER TRUST CO. et al.
(Supreme Court of Pennsylvania. July 2, 1912.)

1. EXECUTION (§ 326*)—LIEN—PRIORITIES.

Where judgments held by a creditor constitute first and second liens on the debtor's real estate in one county, and first and third liens on his real estate in another county, and the proceeds of an execution in the first county are sufficient to pay the first judgment except a small balance, he cannot apply the proceeds of execution in the other county, after payment of the balance on his first judgment, to the second judgment, to the exclusion of the person holding the second lien in the latter county.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 966-973; Dec. Dig. § 326.*]

2. EXECUTION (§ 326*)—PROCEEDS—APPLICATION.

The payment to an execution creditor of the proceeds of a sheriff's sale being involuntary, the creditor cannot apply the proceeds to whatever lien he pleases, but the law applies them to such liens as are divested in the order of their priority.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 966-973; Dec. Dig. § 326.*]

Appeal from Superior Court.

Action by Henry E. Herr against the Lancaster Trust Company and another. From a judgment (47 Pa. Super. Ct. 63) for plaintiff on case stated to determine priority of liens, defendants appeal. Affirmed.

See *Herr v. Lancaster Trust Co.*, 47 Pa. Super. Ct. 63. The case stated was as follows:

"On January 14, 1909, the Lancaster Trust Company issued execution upon its judgment to August term, 1907, No. 229, against Milton Kindig, in the court of common pleas of Lancaster county, to April term, 1909, No. 1, execution docket, and levied upon certain real estate belonging to the defendant, situated in the city of Lancaster. By virtue of said writ the sheriff sold said real estate on April 24, 1909, for \$20,050. The amount due on said judgment was \$20,000, with interest at — per cent. from October 1, 1907. The sheriff on May 10, 1909, paid to the Lancaster Trust Company \$19,900.14, net proceeds of said sale. The liens upon the real estate so sold, in order of their priority, were as follows: (1) Lancaster Trust Company, August term, 1907, No. 229, for \$20,000, entered October 1, 1907. (A revival of the judgment entered on October 2, 1902, to August term, 1902, No. 255.) (2) Lancaster Trust Company, November term, 1905, No. 253, for \$10,000 (collateral), entered January 8, 1906. (3) Henry E. Herr, April term, 1908, No. 274, for \$3,000, entered June 9, 1908, the amount due on said judgment being \$1,274.47, with interest from June 16, 1908.

"On December 11, 1909, the Lancaster Trust Company issued execution in the court of common pleas of York county upon its judgment entered in said county to October term, 1906, No. 358, against said Milton Kin-

dig, and by virtue thereof the sheriff of York county levied upon, and on January 3, 1910, sold, certain real estate of said Milton Kindig, situate in York county, for \$7,750; the net proceeds of said sale over and above costs amounting to \$7,617.66. The liens upon said real estate in York county, according to their priority at the time of said sale, were as follows: (1) Lancaster Trust Company, October term, 1907, No. 310, entered October 2, 1907, for \$20,000. (A revival of the judgment entered October 2, 1902, to August term, 1902, No. 317, which was a transcript from Lancaster county of the judgment entered to August term, 1902, No. 255.) (2) Lancaster Trust Company, October term, 1906, No. 358, for \$3,000, entered December 31, 1906. (3) Henry E. Herr, April term, 1908, No. 417, entered June 10, 1908, for \$3,000, on which there is due \$1,274.47, with interest from June 16, 1908. (A transcript from the court of common pleas of Lancaster county to April term, 1908, No. 274.) (4) The Lancaster Trust Company, April term, 1909, No. 305, entered May 14, 1909, for \$10,000. (Transcript from Lancaster county, November term, 1905, No. 253.)

"The entire indebtedness of Milton Kindig to the Lancaster Trust Company on January 3, 1910, was \$14,842.20. The amount due on the \$20,000 judgment to October term, 1907, No. 310, if the entire net proceeds of the sheriff's sale of Milton Kindig's real estate in Lancaster county is under the law properly credited thereon, is \$2,117.30. The net proceeds of the sheriff's sale of said real estate in York county, by agreement of the parties interested, has been paid to J. T. Brene-man, trustee, to be distributed by him to the parties legally entitled to the same.

"The Lancaster Trust Company, defendant, claims the right to apply so much of the proceeds of the said sale of real estate of Milton Kindig, which was situated in Lancaster county, to the payment of the judgment for \$10,000, entered to November term, 1905, No. 253, which was a second lien at the time of said sale, as may be necessary to pay and satisfy said judgment. The plaintiff, Henry E. Herr, denies this right, and claims that the proceeds of said sale must be applied on account of the payment of the first lien for \$20,000 entered to August term, 1907, No. 229, in which case the judgment of Henry E. Herr, to April term, 1908, No. 417, York county, would be entitled to be paid out of the proceeds of the sale of the real estate in York county as aforesaid.

"If, under the foregoing statement of facts, the court be of opinion that the judgment of Henry E. Herr to April term, 1908, No. 417, is entitled to be paid out of the proceeds of the execution issued in York county, then judgment to be entered in favor of Henry E. Herr and against the defendants for \$1,274.47, with interest from June 16, 1908, to Janu-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ary 3, 1910, \$118.53, and attorney's commissions, \$65, making a total of \$1,458. But, if the court be not of that opinion, then judgment to be entered for the defendants, costs to follow the judgment, either party reserving the right to take an appeal from such judgment. The court entered judgment for defendant on the case stated."

The opinion of the superior court by Porter, J., was as follows:

"This case involves the distribution of the proceeds of a sale by the sheriff of York county of certain real estate situate in that county, as the property of Milton Kindig, under an execution upon a judgment held by the Lancaster Trust Company. The said trust company and Herr, the plaintiff, each held judgments in both Lancaster and York counties against Kindig, who owned real estate in each of the counties, but the order of priority of lien of such judgments was not the same in both counties. The case stated agreed upon, which will appear in the report of this case, fully recites the facts and obviates the necessity of reciting them at length in this opinion. The liens upon the real estate of Kindig in Lancaster county stood in the following order: First, a judgment for \$20,000 held by the Lancaster Trust Company; second, a judgment for \$10,000 held by said trust company; and, third, a judgment held by Herr, the appellant, for \$3,000, upon which there remain due \$1,274.47, with interest from June 16, 1908. The trust company issued an execution upon its \$20,000 judgment, which was a first lien, and under that execution the property of Kindig in Lancaster county was sold for \$20,050, and the sheriff on May 10, 1909, paid to the Lancaster Trust Company \$19,900.14 net proceeds of said sale. Transcripts of the Lancaster county judgments above referred to had been entered in York county, and the \$20,000 judgment of the trust company was also the first lien upon the land in that county; but the lien of the \$3,000 judgment held by Herr was in that county prior to that of the \$10,000 judgment held by the trust company. On December 11, 1909, seven months after the trust company had received the proceeds of the sale of the Lancaster county real estate, it issued upon the \$20,000 judgment, which was the first lien, in York county, and the sheriff of that county sold the land of Kindig there situated; the net proceeds of said sale being \$7,617.66, which amount was by agreement of the parties paid to Joseph T. Breneman, trustee, and the case stated submitted to the court below to determine the rights of the parties in distribution. The point at issue between the parties is made clear by the following quotations from the case stated: 'The amount due on the \$20,000 judgment to October term, 1907, No. 310, if the entire net proceeds of the sheriff's sale of Milton Kindig's real estate in Lancaster county

is under the law properly credited thereon, is \$2,117.30. * * * The Lancaster Trust Company, defendant, claims the right to apply so much of the proceeds of the said sale of real estate of Milton Kindig, which was situated in Lancaster county, to the payment of the judgment for \$10,000, which was a second lien at the time of such sale, as may be necessary to pay and satisfy said judgment.' 'The plaintiff, Henry E. Herr, denies this right, and claims that the proceeds of said sale must be applied on account of the payment of the first lien for \$20,000, in which case the judgment of Henry E. Herr to April term, 1908, No. 417, York county, would be entitled to be paid out of the proceeds of the sale of the real estate in York county.' The agreement as to the entry of judgment is that, 'If, under the foregoing statement of facts, the court be of opinion that the judgment of Henry E. Herr to April term, 1908, No. 417, is entitled to be paid out of the proceeds of the execution issued in York county, then judgment be entered in favor of Henry E. Herr and against the defendants for the sum of \$1,458.' The learned judges of the court below sustained the contention of the appellees, held that the trust company had the right to apply the proceeds to the sheriff's sale of real estate in Lancaster county first to the payment of the \$10,000 judgment, which was a second lien, and then apply the remainder of the fund upon account of the \$20,000 judgment, which was a first lien, thus leaving unpaid on that judgment an amount more than sufficient to absorb the proceeds of the sale of the York county real estate, and entered judgment for the defendants in the case stated.

[1] "The court below, in entering judgment in favor of the appellees, relied upon the authority of *McDevitt & Hays' Appeal*, 70 Pa. 373. We are of the opinion that the authority does not control and is not applicable to the facts here presented. In that case the lands of a judgment debtor in Philadelphia county had first been sold, but the proceeds remained in the hands of the sheriff undistributed, his lands in Chester county were then sold, and the question arose upon the distribution of the fund there realized. The judgment of Claghorn, Herring & Co. had been a first lien upon the lands in both Philadelphia and Chester counties, and the holder of that judgment asserted the right to payment out of the Chester county fund. The appellants in that case contended that the sale of the land in Philadelphia county and the receipt by the sheriff of the judgment money worked, per se, a satisfaction of the first judgment, and that the holder of that judgment was not entitled to participate in the distribution of the fund arising from the sale of the land in Chester county. The court held that this contention was not well founded, that a sale of property, and receipt

by the sheriff are not, per se, satisfaction of any particular incumbrance, although its lien upon the land may be extinguished. It was further held in that case, as it has been in many others, that a creditor, having two funds subject to his incumbrance, may pass by the first and come upon the second, dependent, however, upon the equities amongst the junior lien creditors. The difference between that case and this is marked. There the creditor had two funds, neither of which had been distributed, to either of which he had the right to resort, for his claim had not been paid. In the present case the land of the debtor in Lancaster county has not only been sold by the sheriff, but the sheriff has actually paid to the trust company, the holder of the first and second liens, the proceeds of the sale; that fund has been distributed by process of law. The opening paragraph of the opinion in *McDevitt & Hays' Appeal* clearly discloses that the decision was made to turn upon the fact that there had been no distribution of the fund raised from the sale of the land of the debtor in Philadelphia county. 'Primarily the decision of this case rests on the question whether the sale of the property of Edward Devlin in Philadelphia, under the judgment of James Kitchenman, was a satisfaction of the judgment of Claghorn, Herring & Co.' 'When the property of the defendant in the judgment, real or personal, is sold under execution, and the proceeds paid into the hands of the sheriff, it is a discharge of the debtor's estate to that amount; but what creditor's debt it will extinguish is a question to be settled only by the final distribution and appropriation. It is that alone which determines what creditor shall be thrown upon the fund or shall suffer the loss if he passes by it.' When the trust company caused the land of Kindig in Lancaster county to be sold under its execution, it took no steps to postpone the lien of its \$20,000 judgment to that of its \$10,000 judgment, which was a second lien. This was the condition at the time the property was sold, and also at the time it received from the sheriff the proceeds of that sale. It is not necessary here to determine whether the trust company might, after it had caused the land to be sold under an execution upon that judgment, have waived its right of lien upon the fund, for this the trust company did not do. Had it waived its right of lien upon the \$20,000 judgment, which was the first lien, the judgment of this appellant would have been paid in Lancaster county. The trust company accepted from the sheriff \$19,900.14, the net proceeds of the sale, an amount greatly in excess of what it would have been entitled to receive if it had waived the right of its

\$20,000 judgment to participate in the distribution.

[2] "The payment made to the trust company by the sheriff of Lancaster county was an involuntary one, so far as the debtor was concerned. It was made to the trust company by the law, through the sheriff, and to the extent of such payment extinguished the debt, of which the lien upon the land had been an incident. *Bergdoll v. Sopp*, 227 Pa. 363, 76 Atl. 64. We are not free to consider or discuss the question whether the trust company had the right, after receiving the money from the sheriff, to apply the payment to its several liens in the manner which might best subserve its interests. That question has been authoritatively settled. 'The payment to an execution creditor of the proceeds of a sheriff's sale of real estate is not a voluntary payment by the debtor, but a payment in invitum. An execution creditor, having several liens upon the real estate sold, cannot apply such proceeds to whatever lien he pleases, but the law will apply them to such liens as are divested by the sale in the order of their priority.' *Pennsylvania Co. for Insurance on Lives & Granting Annuities' Appeal*, 7 Atl. 70. When the trust company received the proceeds of the sale of the Lancaster county land from the sheriff, the law applied it to the first lien, the judgment for \$20,000, which was to that extent paid, leaving the amount due thereon \$2,117.30. This is not the case of a creditor having a lien on two funds, and another having a lien on only one, within the same jurisdiction. The amount due on the \$20,000 judgment having been reduced to \$2,117.30 in Lancaster county, no greater amount could, in the condition of the record, be collected upon that judgment in York county, upon the theory that the trust company should be subrogated as to its \$10,000 judgment, the second lien in Lancaster county, to the rights which it had held under the \$20,000 judgment, which had been partly paid by the sale in that county. *McGinnis' Appeal*, 16 Pa. 445. The specifications of error are sustained.

"The judgment is reversed, and judgment is now entered in favor of the plaintiff and against the defendant for the sum of \$1,458, with costs."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. U. Hensel, of Lancaster, for appellants. William H. Keller and John A. Coyle, both of Lancaster, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the superior court.

CORNELL v. SEDDINGER et al.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

1. CORPORATIONS (§ 310*)—DIRECTORS—BREACH OF DUTY.

Directors of a corporation are trustees or quasi trustees of the capital of the company, and are liable as such for any breach of duty with respect to the application thereof, and hence are liable for the distribution of capital as dividends.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1352-1362; Dec. Dig. § 310.*]

2. CORPORATIONS (§ 310*)—DIRECTORS—DUTIES.

Where directors of a corporation accepted the report of the treasurer, which on its face called for explanation and analysis, and, after seeing that it purported to show profits, proceeded after further investigation to declare dividends when the corporation had not earned any profits, the directors were guilty of misfeasance.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1352-1362; Dec. Dig. § 310.*]

3. CORPORATIONS (§ 310*)—DIRECTORS—MISCONDUCT—DIVIDENDS—DECLARATION OUT OF CAPITAL—DEFENSES.

Where reports of the treasurer of a ship-building corporation if investigated with ordinary care would have shown glaring inflations of value, serious impairment of capital, and shortage of working capital, but, notwithstanding this, the directors declared a dividend because the reports purported to show profits, they were not excused from liability because they were not practical shipbuilders and were not personally familiar with the processes of construction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1352-1362; Dec. Dig. § 310.*]

4. APPEAL AND ERROR (§ 734*)—ASSIGNMENT OF ERROR—SUFFICIENCY.

Assignments of error to the dismissal of exceptions to an adjudication in equity are defective if neither the exceptions nor the order of the court dismissing them are set forth totidem verbis in the assignments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2997; Dec. Dig. § 734.*]

Fell, C. J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Suit by Howard E. Cornell, as receiver of the Neafie & Levy Ship & Engine Building Company, and others, against Mathias Seddinger and others. Judgment for defendants, and plaintiff appeals. Reversed.

Bill in equity for an accounting. The opinion of the Supreme Court states the case.

The court below entered the following decree: "And now, to wit, this 28th day of November, 1910, the above case coming on to be heard upon bill, answer, and proofs, and the exceptions filed to the original opinions having been dismissed, and for the reasons set forth in the said opinion, it is now ordered, adjudged, and decreed as follows: (1) That as to the defendants John H. Watt and Eli Kirk Price and Laurence B. Levy, as administrator of the estate of E. L. Levy,

deceased, the bill of complaint be dismissed; the cost as to these three defendants to be paid by the complainant. (2) That the defendants Mathias Seddinger and Somers N. Smith are severally and jointly liable under the terms of the said bill, and that they be and are hereby ordered and decreed to pay to Howard E. Cornell, receiver of the Neafie & Levy Ship & Engine Building Company, Penn Works, Philadelphia, the sum of \$124,000, covering the depletion of the capital stock by the declaration of dividends by the Neafie & Levy Ship & Engine Building Company, Penn Works, Philadelphia, on or about the 25th day of November, 1901, the 2d day of April, 1902, and the 30th day of March, 1903, together with interest on \$28,000 from December 10, 1901; on \$48,000 from April 7, 1902; and on \$48,000 from April 6, 1903."

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

George Quintard Horwitz and William T. Wheeler, both of Philadelphia, for appellant. John G. Johnson and Maurice Bower Saul, both of Philadelphia, for appellees.

POTTER, J. This was a bill in equity filed by Howard E. Cornell, receiver of the Neafie & Levy Ship & Engine Building Company, Penn Works, Philadelphia, against Mathias Seddinger, John H. Watt, Eli Kirk Price, Somers N. Smith, and Laurence B. Levy, administrator of Edmund L. Levy, deceased. The purpose of the bill was to compel the defendants to repay to the company certain sums which it was alleged the defendants, as directors, had wrongfully declared as dividends, when as a matter of fact there were no profits to divide, and the so-called dividends were paid out of capital. During the proceedings, John H. Watt died, and his executors were substituted. Separate answers were filed on behalf of each of the defendants. Issues were joined, and, after hearing, the learned chancellor in the court below found the facts substantially as follows: The Neafie & Levy Ship & Engine Building Company, Penn Works, was incorporated under the Act of April 29, 1874, P. L. 73, on March 5, 1891, with an authorized capital of \$800,000, and carried on business in Philadelphia until December 9, 1904, when it was placed in the hands of receivers under proceedings in court of common pleas No. 5, of Philadelphia county. On January 1, 1901, Somers N. Smith, Mathias Seddinger, John H. Watt, Eli Kirk Price, and Edmund L. Levy were elected directors of the corporation, and they all continued in office until April, 1904. Levy died November 2, 1905, intestate, and Laurence B. Levy is administrator of his estate. Mathias Seddinger was elected president, and Somers N. Smith vice president from year to year from 1900 to 1904 inclusive. The former received a salary of \$10,000 per annum, and the latter,

who was also general manager, \$15,000 per annum. The dividends which are here in question were declared by the directors as follows: On November 25, 1901, one of $8\frac{1}{2}$ per cent., \$28,000. On April 2, 1902, one of 6 per cent., \$48,000. On March 30, 1903, one of 6 per cent., \$48,000. These dividends were in each case paid shortly after they were declared. During the period from 1900 to 1904, the company was engaged in building three torpedo boat destroyers, and a cruiser for the United States government, and the business was carried on at a loss. The original capital of \$800,000 was largely impaired, being depleted by a sum in excess of \$760,000, leaving only a nominal amount. The dividends above referred to were paid, not out of profits, but out of capital. In placing the responsibility for this action upon the directors, the trial judge distinguished between the directors Seddinger and Smith, who were executive officers of the company, and the other three directors, Price, Levy, and Watt, and held that the former were liable for the amount of the dividends improperly declared and paid, but the other three he relieved from responsibility, and directed that as to them the bill be dismissed. Whether or not he was correct in making this distinction is the important question raised by this appeal. Exceptions were filed by the plaintiff, which were overruled, and a final decree was entered, dismissing the bill as to Directors Price and Watt and the Levy estate. The plaintiff has appealed.

Eighty-five assignments of error have been filed, all of which except the first are to the dismissal of exceptions filed by plaintiff. These assignments are not in proper form, because neither the exceptions nor the orders of court dismissing them are set forth *totidem verbis*, as required by the rule. The first assignment of error, however, is to the final decree of the court below, dismissing the bill as to the three defendants Price, Watt, and Levy, and under this assignment all questions relating to the liability of these defendants may be considered.

A careful examination of the evidence shows that the learned chancellor was abundantly justified in the general conclusion which he reached, and stated as follows: "I find as matter of law that, at the time of the declaration of the several dividends exhibited by the proofs, there had been an impairment of the capital of the corporation, which impairment was increasing, in increasing volume from time to time as and when additional dividends were made, estimating the depletion as arising on or about the 25th of November, 1901, the 2d of April, 1902, and the 30th of March, 1903." These dates, it will be noticed, were those of the declaration of the dividends of which complaint is made.

[1] It may be regarded as settled law that directors of a corporation are trustees or

quasi trustees of the capital of the company, and liable as trustees for any breach of duty with respect to the application of it. The capital of a company may not lawfully be used for the payment of dividends. It was so used in the present case. At whose instance and direction was this done? Obviously by the board of directors. But, says the learned chancellor, three of the members of the board were not practical shipbuilders, or were not personally familiar with the processes of construction, and therefore they were excusable for accepting the reports at their face value, without further inquiry. We are not able to accept this theory as applicable to the facts of the present case. No special knowledge of the details of shipbuilding was required in order to determine whether or not a dividend might properly be declared. Certain reports of the treasurer were presented to the directors at the meeting of the board. These reports were made up by the treasurer partly from the books and partly from information from the executive officers as to the inventories of stock on hand, work in progress, etc. These items included very large amounts which were not available as assets in any proper sense of the word, as a basis for the declaration of dividends. For instance, it was shown that under the head of "Work in Progress" it was the custom to charge up all the money expended for the construction of certain vessels, without any regard to the price at which these vessels had been sold. On three torpedo boat destroyers, the company received under its contract less by more than \$180,000 than the vessels cost to build. Yet the total cost was carried upon the books as an available asset, under the head of "Work in Progress." Any inquiry into the make-up of this item would have disclosed its hollowness in so far as its fitness to be considered as a basis for dividends was concerned. The method of accounting was entirely wrong. Inflations of various kinds were in existence, of so glaring a nature that any fairly competent man, who paid any attention to the make-up of the items appearing upon the face of the reports, would have found that, instead of apparent profits, there was in reality an impairment of the capital.

[2] The defense of Directors Price, Watt, and Levy was that they relied upon the face of the reports of the treasurer, as showing profits, without making any inquiry as to the nature of the items reported as available assets. Directors can hardly be regarded as discharging their duty, and protecting the trust imposed upon them, when they accept a report which upon its face calls for explanation and analysis, and after a glance at it, to see that it purports to show profits, proceed without further investigation to declare dividends. Yet it is admitted that this is practically what was done. Nor was the

general condition of the company such as to blunt the senses of the directors to the need of scrutinizing the reports. The minutes show that, at the time these various dividends were declared, there was a shortage of working capital, and the directors were considering the necessity of borrowing money, both upon notes and by mortgaging the real estate.

[3] It is admitted that two of the directors had personal knowledge of the real condition of the company, and, after a careful examination of the evidence, we cannot avoid the conclusion that the other directors might, by the exercise of common prudence, have readily ascertained the worthless character of much that was carried upon the reports of the treasurer as assets. As well might a board include the expense account of a corporation as a basis for dividends, as that which was reckoned by this board as part of the assets of the company. As a matter of course, any such account must be deducted from the apparent profits before a basis for considering the declaration of a dividend can be reached. The failure of the directors to investigate the character of the items of the report led them to declare dividends when there was no surplus or profits to divide. This action was not merely an error of judgment, but was the result of lack of attention to the real condition of the company. Mere ignorance of facts which they could easily have ascertained cannot excuse them for the performance of illegal acts, in declaring dividends out of capital. It was the duty of the directors to inform themselves as to the actual condition of the company before declaring dividends. If they

had made full inquiry and reasonable examination, and had been misled by erroneous information on which they had the right to rely, that might have served as an excuse for distributing capital instead of profits. But nothing of the kind appears from the evidence.

The bill in this case was not filed to secure payment by the directors of the debts of the corporation, but its purpose was to compel the directors to replace funds of the company which they wrongfully paid out as dividends. It is suggested in the argument of counsel for appellee Price that the report of the receiver showed that the assets exceeded the liabilities when the company passed into the hands of the receiver. An inspection of this report shows, however, that in making it up the capital stock was not taken into consideration as a liability.

[4] The first assignment of error is sustained, and the decree of the court below is reversed, in so far as it directs the dismissal of the bill of complaint against John H. Watt and Eli Kirk Price and Laurence B. Levy, as administrator of the estate of E. L. Levy, deceased. It is adjudged that all the directors by their conduct rendered themselves jointly and severally liable under the terms of the bill, and the plaintiff is entitled to the same relief with respect to all of the defendants as was extended to him with respect to the defendants Seddinger and Smith. It is further ordered that the record be remitted to the court below, in order that a decree may be entered in accordance with this opinion.

FELL, C. J., dissents.

**O'MALLEY et al. v. MAYOR AND COUNCIL
OF CITY OF HOBOKEN et al.**

(Supreme Court of New Jersey. Jan. 7, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 237*)—CONTRACTS—ADVERTISEMENT FOR PROPOSALS.

Under the act of March 27, 1902 (P. L. p. 200), a contract for the removal of garbage cannot lawfully be awarded for a term of five years beginning December 15, 1911, when the advertisement called for proposals for a term beginning September 25, 1911.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 670; Dec. Dig. § 237.*]

2. MUNICIPAL CORPORATIONS (§ 237*)—CONTRACTS—ADVERTISEMENT FOR PROPOSALS.

Under the act of March 27, 1902 (P. L. p. 200), a contract cannot lawfully be awarded for the removal of garbage in accordance with specifications annexed thereto, when, in fact, the specifications so annexed were not in legal existence at the time the call for bids was advertised, and when the call was for bids "in accordance with specifications on file," and, in fact, none were on file.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 670; Dec. Dig. § 237.*]

Certiorari prosecuted by James O'Malley and others to review an award of a garbage contract by the Mayor and Council of the City of Hoboken and others. Resolution and contract set aside.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Leon Abbett, of Hoboken, for prosecutors. John J. Fallon, of Hoboken, for defendants.

TRENCHARD, J. This writ brings up for review the award of a garbage contract. The state of the case shows that in pursuance of a resolution of the city council of Hoboken passed August 23, 1911, the city clerk advertised for proposals to be submitted to city council September 27, 1911, for the removal of garbage, etc., "for the term of one year, three years and five years, beginning September 25, 1911, in accordance with specifications on file in the office of the city clerk." The resolution recites that it is "in pursuance of the provisions of an act of the Legislature approved March 27, 1902" (P. L. p. 200). On September 27, 1911, city council received several bids for the five-year term, among others that of the Hudson Contracting Company for \$52,980, and that of the Central Contracting Company for \$56,000. On November 29, 1911, city council by resolution rejected the bid of the Hudson Contracting Company and awarded the contract to the Central Contracting Company for five years upon their bid for \$56,000. The resolution recited that, after a hearing given to the Hudson Contracting Company, city council determined that it "was not to the best interests of the city to award the contract" to them "because of the slovenly and unsatisfactory manner in which they have per-

formed their work." On December 13, 1911, the resolution awarding the contract was vetoed by the mayor, and on the same day it was passed over his veto. On December 14, 1911, a contract was entered into between the city and the Central Contracting Company for the removal of garbage etc., "in accordance with the specifications hereto annexed, for the term of five years, beginning December 15th, 1911." The state of the case also discloses that at the time the call for bids was advertised no specifications were on file, and that the specifications annexed to the contract were not formulated and adopted by council until November 29, 1911. The prosecutors who challenge this proceeding are two taxpayers, besides the Hudson Contracting Company. We are of the opinion that the proceedings and contract are so irregular as to require us to set them aside.

Passing over the question of the propriety of the rejection of the bid of the Hudson Contracting Company under the rule laid down in *Faist v. Hoboken*, 72 N. J. Law, 361, 60 Atl. 1120, we find these difficulties:

[1] The contract awarded was for a term of five years beginning December 15, 1911, while the advertisement called for proposals for a term beginning September 25, 1911. Such a contract must be set aside. It is not necessary to hold, and we do not hold, that under P. L. 1902, p. 200, it was necessary in the call for proposals to designate the beginning of the term. What we do hold is that, such designation being made, the advertisement will not support an award of a contract for a different term.

[2] Moreover, the call was for bids "in accordance with specifications on file," when in fact none were on file, and the contract was awarded for the removal of garbage in accordance with specifications annexed thereto, when in fact the specifications so annexed were not in legal existence at the time the call for proposals was advertised. Such a contract cannot lawfully be awarded in such circumstances.

The resolution and contract under review will be set aside, with costs.

SINGER MFG. CO. et al. v. BOWNE et al.
(Court of Chancery of New Jersey. Jan. 2, 1913.)

DISCOVERY (§ 23*)—EVIDENTIAL LETTERS—ORDER TO PRODUCE.

Wherever letters or papers are evidential in a cause, and are in the possession of either party, and are clearly relevant, the court of equity has the inherent power to order the production of such papers for inspection by the other party.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 35; Dec. Dig. § 23.*]

Suit by the Singer Manufacturing Company and others against Roland C. Bowne and others. On application by complainants for

an order requiring defendants to produce letters for inspection. Granted.

Lindabury, Depue & Faulks, of Newark, for complainants. Frederick A. Rex, of Camden, for defendants.

LEWIS, V. C. The application in the above cause is for an order requiring the defendants to produce for the inspection of the complainants certain letters and papers. The claim of the complainants is that the letters and papers sought to be inspected are evidential in this cause. There is no dispute raised upon argument by the defendants as to the control of the letters and papers. It is admitted that they are in the custody and under the control of the defendants. They resist the application, however, of the complainants on the ground that it is not a request for evidence, but is made for the purpose of ascertaining the names of the defendants' witnesses and embarrassing the defendants in the preparation of their defense. At the hearing and upon their brief, the defendants urge that the rulings laid down in the case of *Dodd v. Public Service Corporation*, 29 N. J. Law J. 22, support their position. As contended by the complainants, the case in question does not seem relevant to our investigation. It is to be observed that the court in the *Dodd Case* does not attempt to deal with equitable jurisdiction in the matter of inspection of letters and papers. It disposes of an application questioning the propriety of the interrogatories in cases at law. While the general proposition as laid down by Mr. Justice Fort in the case is that "it is not the proper provision of an interrogatory to seek information as to the name or names of persons from whom evidence may be obtained, but interrogatories may only be asked when the answers thereto will make evidence for the party who asks them," yet the interrogatory sought to be stricken out under the application was held to be a proper one, and the defendant was required to answer it.

The question asked at the trial was the number of the car and the names, respectively, of the conductor and motorman in charge thereof at the time of the collision, and the court held in its decision that the admission of the company that the motorman and conductor were its employees, and that the car in collision was its car, is an acknowledgment of its ability to secure an answer to the question by one who has the requisite knowledge. The case is important, and suggestive in the present inquiry in showing the length to which a court of law will go under an application of this character, although the statutory authority is not very broad. Upon the argument in this matter in hand, the question as to the extent of the power of this court to direct inspection was raised. This question is well settled. There is an inherent

power in the court of equity wherever letters or papers are evidential in a cause, and are in the possession of either party to the proceedings to order an inspection. "The power to direct either party to give to the other an inspection and permission to take copies of any books or papers in his possession is inherent in a court of equity, and can be exercised in the absence of any statute conferring such right." *Lawless v. Fleming*, 56 N. J. Eq. 815, 40 Atl. 638. By further decisions of our courts it has been firmly established that, where letters or papers in the possession of either party are relevant to the matters in question in a suit in the court of equity, their inspection can be obtained upon petition of the opposing party. *Fuller v. Hollander & Co.*, 61 N. J. Eq. 651, 47 Atl. 646, 88 Am. St. Rep. 456; *Copper King v. Robert*, 76 N. J. Eq. 251, 253, 74 Atl. 292.

It was evident on this application that the letters and papers sought to be inspected were relevant to the matter in litigation. The argument at the hearing clearly disclosed this fact. Their production at this time it seemed manifest would tend toward a clarification of the matters in controversy, and were not demanded in the opinion of this court for the purpose of ascertaining the names of witnesses for the defense. That the case was ready for trial was indicated by argument upon both sides, and the preparation of the defense could not be hindered by the inspection sought.

The application for inspection should be granted, and an order is accordingly directed for the same.

HIGGINS v. UNITED STATES EXPRESS CO.

(Supreme Court of New Jersey. Dec. 23, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 105*)—CARRIAGE OF GOODS—LIABILITY FOR LOSS—MEASURE OF DAMAGES.

Where mill castings were deposited with an express company for delivery to a repair shop, and no specific instructions were given to the carrier as to the necessity for an expeditious transportation of the castings by the carrier to and from the shop, and the carrier was not informed that pending the return of the castings the mill would have to shut down, and the plaintiff's business cease, the damages recoverable for delay in transportation and return of the castings are governed by the rule laid down in *Hadley v. Baxendale*, 9 Ex. 341.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 451-458; Dec. Dig. § 105.*]

2. CARRIERS (§ 105*)—CARRIAGE OF GOODS—LIABILITY FOR DELAY.

For an inordinate and unnecessary delay in the carriage of goods, the consignor is entitled to recover the loss directly and proximately resulting from the delay.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 451-458; Dec. Dig. § 105.*]

3. CARRIERS (§ 106*)—CARRIAGE OF GOODS—LIABILITY FOR DELAY—QUESTION OF FACT.

Whether the delay was unreasonable is generally a question of fact.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 448-450; Dec. Dig. § 106.*]

(Additional Syllabus by Editorial Staff.)

4. CARRIERS (§§ 87, 91*)—CARRIAGE OF GOODS—LIABILITY FOR DELAY—"CONVERSION."

An unreasonable delay in the shipment of goods does not amount to a conversion, and the owner is bound to receive the goods when tendered at the proper place, however long the delay.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 328, 338-355; Dec. Dig. §§ 87, 91.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1562-1570; vol. 8, p. 7618.]

5. CARRIERS (§ 155*)—CARRIAGE OF GOODS—LIMITATION OF LIABILITY—VALIDITY.

Where the limitation of damages in a receipt for goods shipped was not in any manner called to the attention of the shipper, nor assented to by him, it is not binding on him.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 677, 679, 682-685, 691-696; Dec. Dig. § 155.*]

Certiorari to Court of Common Pleas, Hunterdon County.

Action by Jacob V. Higgins against the United States Express Company. Judgment for plaintiff, and defendant applies for certiorari. Reversed, with directions to modify judgment.

Argued November term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Elinor R. Gebhardt, of Clinton, and William O. Gebhardt, of Jersey City, for plaintiff. McDermott & Enright, of Jersey City, for defendant.

MINTURN, J. The suit was instituted before the small cause court in the county of Hunterdon to recover damages upon a contract entered into between the plaintiff and defendant for the shipment of certain mill castings from Flemington to the Bacas Water Motor Company in Newark, where they were to be repaired and returned to Flemington for use in the mill. The substantial facts are not in dispute.

At the time of the shipment on March 2, 1911, the castings were tied in a bag, and taken to the office of defendant company at Flemington, placed on the scales, and weighed by the agent in charge, who, having made the necessary inquiries as to the destination of the bag, made out a receipt. The defendant admitted the receipt of the goods, and the giving of the receipt to the plaintiff; also admitted a delay in the shipment whereby the castings were not delivered to the consignee until some time about the middle of May, and shortly thereafter were returned by defendant to the plaintiff at Flemington, and that the plaintiff then refused to accept them. The plaintiff in the interim attempted to trace the shipment but unsuccessfully, and

as a result was obliged to procure the necessary parts for his mill machinery. In this action he seeks to recover the cost of the new parts and incidentals, including time necessary to adjusting them in place, besides expenses incurred in tracing the shipment, and six days of time lost by the shutting down of the mill.

[1] The conspicuous facts in the case upon which liability must be predicated, if at all, are that no value was placed upon the goods at the time of shipment, and that the shipping receipt contains a limitation of \$50 as the extent of the defendant's liability in such case, and that the plaintiff at the time of shipment gave no notice to the defendant of the particular use to which the castings were put in the operation of the mill, and the consequent necessity for a speedy delivery of the same, in order to continue the operation of the mill. The briefs deal at length with the legal effect of the limitation of liability contained in the receipt, but our difficulty has been to ascertain, under the well-settled legal rules applicable to the plaintiff's status, how under the circumstances a recovery can be had for the loss of profits resulting from the closing down of the mill until the repairs were made.

Hadley v. Baxendale, 9 Ex. 341, supplies the rule applicable to this phase of the case, and there the now well-settled doctrine was enunciated that "no recovery can be had for loss of profits in contracts of sale, made or contemplated by the shipper, unless the facts and circumstances of such sale are communicated to the carrier upon shipment." The rule in its application is not limited to contracts of sale in contemplation by the shipper, but is applied to the varying phases of mercantile life, upon the theory that unless the carrier be made aware by the shipper, at the time of shipment, of the urgency, and the circumstances that require unusual dispatch or care in transportation, he cannot be presumed to know the facts, the existence and knowledge of which upon his part present the legal status upon which his liability for more than ordinary damages can be predicated.

In Wolcott Johnson v. Mount, 36 N. J. Law, 270, 13 Am. Rep. 438, Mr. Justice Depue, speaking for this court, applied this rule, and held, adopting the language of Hadley v. Baxendale, that the damage recoverable in such cases is "such as might arise naturally—i. e., according to the usual course of things—from the breach of the contract or such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable results of the breach of it."

In Hadley v. Baxendale the facts were not in the main unlike those in the case at bar. There the plaintiff, the owner of a flour mill, sent a broken iron shaft to the defend-

ants, who were common carriers, to be conveyed by them to certain millwrights. The defendant's clerk was told at the time of shipment that the mill was stopped, and that the shaft must be delivered immediately, and that a special order should be given to hasten its delivery. The delay in delivery by the carrier caused the closing of the mill for some days, and resulted in a loss of profits to the millowner. These profits were held not to be recoverable in the action for a breach of the contract, for the reason that the special circumstances of the case—i. e., that the millowner was depending upon the return of the shaft for the purpose of continuing operations at the mill—had not been communicated to the carrier at the time of shipment.

The case at bar presents no facts at all analogous in strength or force to those of the English case upon which it can be urged that the parties had in contemplation such an exigency resulting from delay in transportation as the shutting down of the plaintiff's mill. On the contrary, the case is entirely barren of the very element of notice which distinguishes the English case. Our court of Errors and Appeals has recently in *Pope v. Ferguson*, 83 Atl. 353, had this subject before it in a discussion of the ruling in *Hadley v. Baxendale*, upon the question of the effect of the sale of scrap iron to a vendee, who subsequently sold the entire output to a subcontractor; and in an opinion by the learned Chief Justice the test of liability for more than the ordinary decrease in value of the material was made to depend upon the fact of notice by the vendee. The cases, both English and American, are collected in a valuable footnote to *Horne v. Midland Ry. Co.*, in 5 E. R. O. 524, from a perusal of which it becomes manifest that this rule of notice has been uniformly adopted as the correct test of liability.

Another feature of this case, however, presents a different aspect. The castings in question were delivered to defendant for carriage on March 2, 1911, and were not delivered by it to the consignee until the middle of May, and some days thereafter were tendered to the plaintiff at Flemington, who refused to accept them. This unusual interval of time in transit presents the inquiry whether the delay thus occasioned was reasonable because the duty of the defendant was manifestly to deliver in a reasonable time. *Hale on Carriers*, 408. What is a reasonable time is dependent on the circumstances. *Coffin v. Railroad Co.*, 64 Barb. (N. Y.) 379; *Missouri Pac. Ry. v. Hall*, 66 Fed. 868, 14 C. C. A. 153.

[4] An unreasonable delay, however, conceding this to be such, does not amount to a conversion, and the owner therefore is bound to receive the goods when tendered at the proper place, however long the delay. *Scovill*

v. Griffith, 12 N. Y. 509; *Michigan Cent. Ry. Co. v. Burrows*, 33 Mich. 6; *Hutch. Carriers*, 328.

[2] The measure of damages therefore under such a status is not the value of the goods, since the bailor still retains his ownership, but the loss proximately caused by the delay. *Hale on Carriers*, 408; *Scovill v. Griffith*, 12 N. Y. 509; *Fox v. Railroad Co.*, 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702; *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644. We must assume that in rendering judgment the trial court was necessarily influenced by this circumstance, and found the delay under the circumstances to be inordinate and unnecessary, and that, by reason thereof, the repairs made by the plaintiff to his machinery became imperative, and were the direct and proximate consequence of the delay in shipment.

[5] We are unable from the testimony in this case to discover any evidence from which it may be reasonably inferred that the limitation of damage to the sum of \$50 contained in the receipt was in any manner brought to the attention of the plaintiff, at the time of shipment, and that he assented to it, and therefore under the well-settled rule applicable to such a situation the limitation cannot be said to be binding upon him. *Hayes v. Adams Exp. Co.*, 73 N. J. Law, 105, 62 Atl. 284; *Cohen v. U. S. Exp. Co.*, 81 N. J. Law, 355, 79 Atl. 1053.

The plaintiff therefore is entitled to recover his entire demand for the repairs to his machinery, amounting as we conceive to \$66, but, for the reasons stated, is not entitled to his claim for possible earnings and profits during the interval of the delay. The judgment below will therefore be reversed for the purpose of modification to the extent herein indicated.

STATE v. THOMAS.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

1. CRIMINAL LAW (§ 785*)—EVIDENCE—INSTRUCTIONS.

Where on a trial for rape the prosecutrix testified and detailed the occurrence and accused testified and denied it, an instruction that it was impossible to believe that the two told the truth, and that, if the story of one was true, the story of the other was false, and that if defendant told the truth he must be acquitted, while if prosecutrix was telling the truth accused must be convicted, was a proper argument and comment.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1774, 1776-1781, 1889-1894; Dec. Dig. § 785.*]

2. CRIMINAL LAW (§ 1172*)—WRIT OF ERROR—HARMLESS ERROR—INSTRUCTIONS.

Where the evidence showed that prosecutrix and accused had made statements conflicting with their testimony, an instruction that proof of such statements had been admitted to test their credibility was not prejudicial to ac-

cused on the theory that he had not made conflicting statements.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3163, 3169; Dec. Dig. § 1172.*]

8. CRIMINAL LAW (§ 1129*)—WRIT OF ERROR—ASSIGNMENT OF ERRORS—INSTRUCTIONS.

A general exception to the charge is unavailing to question the correctness of a part unless error has been assigned on such part.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.*]

4. CRIMINAL LAW (§ 561*)—REPUTATION OF ACCUSED—EFFECT.

Though good reputation of accused may not prevail against a belief that he committed the crime charged, the jury may consider the good reputation, which may be sufficient to raise a reasonable doubt and so lead to an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

5. WITNESSES (§ 37*)—GOOD REPUTATION—COMPETENCY OF WITNESSES.

A witness ignorant of the reputation of accused in the community in which he resides is not competent to testify to his good reputation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.*]

Error to Supreme Court.

Joseph Thome was convicted of crime. There was a judgment of the Supreme Court affirming the judgment of conviction, and he brings error. Affirmed.

The following is the per curiam opinion of the Supreme Court:

[1] "The writ of error in this case is directed to the conviction of the defendant on an indictment for rape. The complaining witness and the defendant each testified; the one detailing the occurrence and the other denying it. The judge, in his charge, after commenting upon this evidence, said: 'I think you will agree with me that it is impossible to believe that these two people are telling you the truth, therefore you have got to come to the conclusion that, if the story of the one person is true, the story of the other is false. Therefore, who is telling the truth? If the defendant is, you ought to acquit him, and then you have got to conclude that the girl is lying; and, if the girl is telling the truth, you have got to convict the defendant.' I think this was proper argument and comment on the part of the court. There can hardly be room for the jury to find the truth in neither version concerning forcible sexual intercourse between them.

[2] "The court charged: 'There has been, both on the part of the defense and the state, a question as to whether or not the girl and the defendant have told on other occasions the same story they have told you under oath, and the reason for bringing that out is to test their credibility.' It is said that this was injurious to the defendant because the defendant had not told on other occasions other stories. It is sufficient to remark that the record reveals such testimony.

[3] "The court charged with reference to the divergent stories that, if the jury believed that the girl or the defendant had gone upon the stand and testified untruthfully, the question is, Did they do that willfully or through mistake? If the former, it goes to shake their credibility; but, if through an honest mistake, it would not have that effect. If this is to be considered, it must be in virtue of the general exception taken to the charge. No error, however, has been assigned 'upon any portion of the charge' which would embrace or bring the above instruction under review. State v. MacQueen, 69 N. J. Law, 476, 55 Atl. 45.

[4] "The comment of the court upon the evidence as to the good reputation of the defendant was proper. Reputation could not prevail against a belief that the defendant committed the offense. The judge, however, told the jury that it was proper to consider this, and it might be sufficient to raise a reasonable doubt and so lead to an acquittal. There was no error in these instructions.

[5] "The witnesses called to testify to defendant's reputation appeared to be ignorant of it in the community where the defendant lived. Their testimony was properly excluded. "The judgment should be affirmed."

Sommer, Colby & Whiting, of Newark, for plaintiff in error. Wilbur A. Mott, Prosecutor of the Pleas, and Frederick R. Lehlbach, Asst. Prosecutor of the Pleas, both of Newark, for the State.

PER CURIAM. The judgment under review herein should be affirmed for the reasons expressed in the per curiam opinion in the court below.

POOLE v. SUPREME CIRCLE, BROTHERHOOD OF AMERICA, et al.

(Court of Chancery of New Jersey. March 18, 1912.)

1. EQUITY (§ 97*) — PARTIES — PERSONS LEGALLY REPRESENTED—DECREE—EFFECT.

A decree granting the relief prayed for in a bill by one suing for himself and all others of a class coming in and contributing to the expense of the suit beneficially affects all of the class, though none of them make themselves active parties complainant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 257; Dec. Dig. § 97.*]

2. INSURANCE (§ 719*)—FRATERNAL INSURANCE—RIGHT TO INCREASE RATES—TEMPORARY INJUNCTION.

The court in a suit by a member of a death benefit fund of an order for himself and all other members of the fund who shall come in to restrain the order from increasing the dues will on motion for a temporary injunction after the order has changed its bookkeeping scheme, based on the increased dues, grant relief by permitting the order to attempt the collection of the increased dues, and by providing that the members may pay the same, and that, if complainant finally succeeds, the class he represents will receive the benefit of the

excessive payments, or by permitting any member to pay merely the existing rates and in the event the increased dues are permitted, delinquents will be offered a reasonable opportunity to pay the additional amounts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.*]

Suit by Hamlet Poole against the Supreme Circle, Brotherhood of America, and others. Heard on motion for preliminary injunction. Granted.

Frank S. Katzenbach, Jr., of Trenton, for complainant. John F. Harned, of Camden, for defendants.

WALKER, V. C. The bill in this cause was filed by the complainant, a member of the death benefit fund of the supreme circle, for and on behalf of himself and all other members of the fund who should come in and contribute to the expense of the suit. When the complainant became a member of the order and of the fund, monthly dues of 50 cents from each member were required, which might be raised, under certain circumstances, to 60 cents. Several years later, and in December, 1909, the supreme body of the order changed the rates so that now the complainant's dues will be 90 cents per month, an increase of 80 per cent. over the rate required of him upon admission. The complainant claims that his relation to the order in respect to the death benefit fund is a contractual one, and that the proposed increase of dues is an attempt to impair that contract. The defendants insist that they have a right to make the change because of a reservation in the laws of the order existing at the time the complainant became a member, authorizing amendments to be made. They have filed an answer, and show that their bookkeeping scheme has, at great labor and considerable expense, been entirely changed, and that great inconvenience and loss will be entailed if they are to be enjoined in this suit from carrying out the changed law, which went into effect March 1, 1910.

[1] In my judgment the complainant is entitled to have the status preserved until the final hearing of this cause. There are several thousand members of the order in this state, and the complainant's suit, if successful, would beneficially affect them all, notwithstanding none of them might make themselves active parties complainant. This is my understanding of the effect of a class bill. Dan, Ch. Pl. & Pr. *191 et seq.

[2] Upon filing the bill an order was made restraining the defendants from collecting and enforcing the payment from the complainant of the increase of 40 cents in the monthly dues, and from expelling or striking from the roll of the death benefit fund the complainant, or any other member, for failure to pay the increased dues. In order not to overturn the elaborate new bookkeeping scheme of the defendants, the present order

will be modified pende lite so as to permit the defendants to send out bills and attempt the collection of the increased dues as they appear upon their books charged to the members. The members may pay the same, and such payment will be regarded as being made under protest, without any formal protest being entered, so that, if this suit shall be finally determined in favor of the complainant and the class he represents, the whole class will receive the benefit of the payments by having credited the overplus to future accruing dues. If, however, any member shall refuse to pay the bill for increased dues, he shall not be expelled or dropped from the roll, if he pays the amount for which he was heretofore obligated. In this event, if the suit shall be finally determined against the class, then the delinquents will be afforded a reasonable opportunity under the protection of the court to pay and satisfy the amounts which shall be ascertained to be in arrears and due from them. This will fully preserve the status until final disposition of the cause. Costs will abide the event of the suit.

STATE v. FENN.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

FALSE PRETENSES (§ 51*)—PROSECUTION—EVIDENCE.

In a prosecution for obtaining money upon the faith of a false written statement of financial conditions, evidence held sufficient to go to the jury.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 63; Dec. Dig. § 51.*]

Error to Supreme Court.

Joseph P. Fenn was convicted of crime, and he brought error to the Supreme Court, where the conviction was affirmed, and from that judgment he again brings error. Affirmed.

The per curiam opinion of the Supreme Court referred to in the judgment of the Court of Errors and Appeals is as follows:

"The defendant was indicted under the supplement of the Crimes Act of May 17, 1906, being chapter 266 of the laws of that year. The act provides that if any person shall obtain any money in whole or in part upon the faith of a statement of the financial condition or responsibility of such person so obtaining such money, and such statement shall be in writing and signed by the person obtaining such money, and the said statement shall be willfully false in any material particular, then such person signing such statement shall be deemed guilty of a misdemeanor. The trial of the indictment having resulted in the conviction of the defendant, the case was removed by writ of error to this court for review. The only assignment of error which is relied upon before us

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was the refusal of the trial court to direct a verdict for the defendant.

"The specific charge in the indictment was that the defendant unlawfully did obtain from the Union National Bank of Mt. Holly current lawful money of the value of \$685.65 upon the faith of a written statement signed by him showing that he and his partner were worth \$17,325 over and above all their debts and liabilities; that said statement was untrue; that the debts of the defendant were much greater than were represented; and that the statement was willfully false.

"We think it can be fairly inferred from the testimony of Tomlinson, the cashier of the bank, that the bank loaned the defendant and his partner \$685.65 upon the faith of the written signed statement furnished by them to the bank. It appeared from the proofs that they came to the bank and saw Mr. Tomlinson; that they disclosed to him that their purpose in coming was to borrow \$700; that Tomlinson asked what their means were; that they represented that they had about \$19,000 worth of property, and that their indebtedness was about \$1,775; that this statement of their liabilities and assets was set out in writing by the defendant and his partner, signed by them, and that, after this was done, was laid before the board of directors of the bank and the loan was thereupon made. It further appeared that the statement was untrue. Under this state of proofs, it was clearly a question for the jury whether or not the defendant was guilty as he stood charged. The refusal to direct a verdict in his favor was therefore proper.

"The judgment under review will be affirmed."

Argued June term, 1911, before GUMMERE, C. J., and PARKER and VOORHEES, JJ.

Davis & Davis, of Mt. Holly, for plaintiff in error. Samuel A. Atkinson, of Mt. Holly, Prosecutor of the Pleas, for the State.

PER CURIAM. The judgment under review should be affirmed for the reasons expressed in the per curiam opinion of the court below.

STATE v. MacRAE.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

1. CRIMINAL LAW (§ 1105*)—WRIT OF ERROR—RECORD.

Where a writ of error from a conviction does not certify that "the entire record of the proceedings had upon the trial" is sent up, as required by P. L. 1898, p. 915, § 136, providing for a determination upon the record below, the appellant is confined to a strict writ of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2887-2889; Dec. Dig. § 1105.*]

2. BIGAMY (§ 10*)—EVIDENCE — PREVIOUS MARRIAGE.

In a prosecution for bigamy, evidence on the part of the defendant as to illicit relations before marriage between himself and the woman last married, that the parties were intoxicated on the night before the marriage, as to certain conversations about the marriage had before and succeeding the marriage ceremony, that the family of the woman last married knew of his former marriage, and that, before the marriage, her father had tried to get money from him because of his relations with his daughter, in so far as excepted to, was properly excluded.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 34-53; Dec. Dig. § 10.*]

3. BIGAMY (§ 8*)—EVIDENCE—POSSESSION OF MARRIAGE CERTIFICATE.

In a prosecution for bigamy, evidence as to why the father of the woman last married kept the marriage certificate from his daughter, and why he had not delivered it to defendant, was inadmissible.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 41-49; Dec. Dig. § 8.*]

4. MARRIAGE (§ 45*)—EVIDENCE — MARRIAGE CERTIFICATE.

A marriage certificate is admissible in evidence without the production of the witnesses thereto, who are without the jurisdiction.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 73; Dec. Dig. § 45.*]

5. CRIMINAL LAW (§ 1043*) — APPEAL — GROUNDS OF APPEAL.

The Supreme Court is not bound to consider an objection upon any other ground than that brought to the attention of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

6. CRIMINAL LAW (§ 1120*)—APPEAL—EVIDENCE NOT INCLUDED IN RECORD—DOCUMENTS.

In a prosecution for bigamy, objection to the state's offer of the copy of divorce proceedings in another state as to the form thereof cannot be considered, where defendant on writ of error does not bring up such document.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.*]

Error to Supreme Court.

Gustavus Fulton MacRae was convicted of bigamy and he brings error. Affirmed.

The following is the per curiam opinion of the Supreme Court:

[1] "The defendant was found guilty of bigamy, and has, with his writ of error removing that judgment, essayed to obtain the benefit of the one hundred and thirty-sixth section of the Criminal Procedure Act of 1898 (P. L. 1898, p. 915), but the certificate fails to conform to the requirements of that act, by stating that 'the entire record of the proceedings had upon the trial' are sent up. State v. Webber, 77 N. J. Law, 580, 72 Atl. 74. The plaintiff in error must therefore be confined to his strict writ of error and the assignments founded upon exceptions taken at the trial. There is neither a general or a special exception to the charge.

"The allegations were that the defendant was the lawful husband of one Beers, formerly Baum, to whom he was married in Philadelphia in 1903, and while she was living, and being undivorced from her, married Rose Spiro, in the city of Newark, on November 23, 1908.

[2] "The defense on cross-examination of Rose Spiro sought to inject into the case questionable and illicit relations existing between witness and the defendant before the marriage. The defense also sought to show that the night before the marriage the parties were intoxicated, the conversations before and succeeding the marriage ceremony about the marriage, evidence to show that the Spiro family had knowledge of the former marriage, and that, some time before the marriage, the wife's father had tried to get money from the defendant because of the relations existing between his daughter and the defendant. We think the exclusion of such of this evidence as was the subject of exception was proper.

[3] "After the ceremony the marriage certificate had been mailed to Mr. Spiro's address, who had since that time retained it. Spiro was asked, on cross-examination, his object in keeping it from his daughter, and why he had not delivered it to this defendant. Its exclusive was proper.

[4, 5] "The former ceremonial marriage was proved by the wife, who gave evidence of what occurred, showing the performance of the ceremony by a minister, and then produced a certificate signed by two witnesses and the clergyman. The whereabouts of these witnesses were shown to be unknown, but that they were in New York at the time of signature. Objection to its admission was made because the subscribing witnesses were not produced. The witnesses being without the jurisdiction, need not be produced, and we are not bound to consider the objection upon any other ground than that brought to the attention of the trial court. The objection is without merit.

[6] "The state offered what purported to be an exemplified copy of divorce proceedings in Pennsylvania between Mary E. Baum and Joseph K. Baum, and the final decree in that case. Its admission was objected to as immaterial, that it was the testimony and libel only in the case, and that the certificate was not in proper form under the act of Congress.

"Whether these objections as to form were substantial cannot be determined, for the plaintiff in error, whose duty it was to bring to this court the document, has failed to do so, and consequently has not made it appear that there was error in its admission.

"The judgment is affirmed."

Argued November term, 1911, before GUMMERE, C. J., and SWAYZE and VOORHEES, JJ.

McDermitt & McDermitt and Frank H. Sommer, all of Newark, for plaintiff in error. Wilbur A. Mott, Prosecutor of the Pleas, and Andrew Van Blarcom, Assistant Prosecutor of the Pleas, both of Newark, for the State.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the per curiam opinion in the court below.

WILLIAM L. BLANCHARD CO. v. HILTON et al.

(Court of Errors and Appeals of New Jersey. Nov. 18, 1912.)

PARTNERSHIP (§ 139*)—RENTED PREMISES—REMODELING BUILDING—AUTHORITY OF PARTNERS.

Where a firm in possession of a business building under a lease intended to use it for the conduct of its business, and was engaged in remodeling the entrances for that purpose, one of the partners had authority to bind the firm by a contract with a contracting corporation employing it to do the work.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 206-211, 213; Dec. Dig. § 139.*]

Error to Supreme Court.

Action by the William L. Blanchard Company against Joseph Hilton and another, partners, trading as the Hilton Company. Judgment for plaintiff, and defendants bring error.

Affirmed on the per curiam opinion of the Supreme Court, which is as follows:

"The only question in this case is whether the contract sued on was outside of the scope of partnership agency. The plaintiff was a corporation engaged in business as a mason contractor. The defendants were engaged in the clothing business, and the evidence justifies a finding that they had just rented or taken over the upper premises on Broad street, Newark, formerly occupied and used in the same business by George Watson & Co., and that they were engaged in remodeling the entrances on both Market and Broad streets so as to make them more suitable to some purposes that they had in mind. The evidence further justifies the finding that Joseph Hilton, one of the partners, employed the plaintiff through Mr. Blanchard, then president, to do some repairs and alterations on these entrances; that the work was done; that a bill was presented and was not paid.

"The principal claim made by defendant at the trial was that there had been no direct employment, but that the alterations to the building had been done by contract with some one else, and that the Blanchard Company was a subcontractor of this other contractor. This presented a pure question of fact for the trial court which might have been found either way on the evidence, and the finding is not reviewable here. If as

the trial court evidently did find the employment was directly by the Messrs. Hilton through one of the partners, and if, as the court presumably found, they were in possession of this building and remodeling these entrances for the purposes of their business, it is quite obvious that the partnership agency extended to the ordering of such repairs as they were clearly connected with the prosecution of the business in which the defendants were engaged.

"The judgment under review will be affirmed."

John A. Bernhard, of Newark, for plaintiffs in error. Pelce & Hoover, of Newark, for defendant in error.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the per curiam opinion in the court below.

BOOTH & FLINN, Limited, v. MILLER.
(Supreme Court of Pennsylvania. July 2, 1912.)

1. STATUTES (§ 121*)—SUBJECTS AND TITLES—APPROPRIATIONS.

Act May 13, 1909 (P. L. 835), entitled "An act making an appropriation to Western Pennsylvania Hospital," does not, by a provision that the amount appropriated shall be a noninterest-bearing lien on the premises for the use of the commonwealth to be refunded if the hospital building shall be converted to private use, offend against Const. art. 3, § 3, relating to subjects and titles of acts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 127, 128, 132, 173, 174; Dec. Dig. § 121.*]

2. STATUTES (§ 107*)—SUBJECTS AND TITLES—SUFFICIENCY OF TITLE.

That a bill contains several provisions does not offend against Const. art. 3, § 3, if they are connected with and germane to the one general subject, or relate to and are a means of carrying out the one general provision.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

3. STATUTES (§ 109*)—SUBJECTS AND TITLES—SUFFICIENCY OF TITLE.

The title of a legislative act need not include all the distinct provisions of the act, nor serve as an index or digest of its contents; but it is sufficient if it fairly gives notice of the real subject of the act, so as reasonably to lead to an inquiry into what is contained in its body.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136-139, 196; Dec. Dig. § 109.*]

4. STATUTES (§ 82*)—LOCAL OR SPECIAL LAWS—LIENS.

Act May 13, 1909 (P. L. 835), making an appropriation to the Western Pennsylvania Hospital and directing that the amount appropriated shall be a noninterest-bearing lien for the use of the commonwealth, does not violate Const. art. 3, § 7, prohibiting the passage of any local or special law authorizing the creation, extension, or impairing of liens, since that section does not apply to liens in favor of the state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 91; Dec. Dig. § 82.*]

5. CONSTITUTIONAL LAW (§ 13*)—CONSTRUCTION OF CONSTITUTION—PROVISION AFFECTING THE COMMONWEALTH.

Since it is the general business of legislative power to establish laws for individuals, not for the sovereign, the intention of a Constitution, as well as of a legislative act, to transfer or affect rights of the commonwealth, must be plainly expressed or necessarily implied.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 10; Dec. Dig. § 13.*]

6. CONSTITUTIONAL LAW (§ 20*)—EXTRINSIC AIDS—LEGISLATIVE CONSTRUCTION.

In construing Const. art. 3, § 7, prohibiting local or special laws, creating, extending, or impairing liens, as being inapplicable to the right of the commonwealth to protect itself against the diversion of money appropriated to charitable purposes, the courts give great weight to the fact that the Legislature both before and after the adoption of the present Constitution passed numerous acts creating and enforcing liens in favor of the commonwealth.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 15; Dec. Dig. § 20.*]

7. STATUTES (§ 64*)—REQUISITES AND VALIDITY—EFFECT OF PARTIAL INVALIDITY.

A holding that the provision in Act May 13, 1909 (P. L. 835), reserving to the state a lien to secure the refund of the money thereby appropriated if the hospital building for the benefit of which the appropriation was made should be converted to private use is void, would make the whole act void and deprive the hospital of any right to any part of the appropriation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

8. STATUTES (§ 64*)—REQUISITES AND VALIDITY—EFFECT OF PARTIAL INVALIDITY.

If the unconstitutional part of a statute is independent of, and readily separable from, that which is constitutional, the constitutional part may be sustained; but if the part which is void is vital to the whole, or the other provisions are so dependent on it or so connected with it that it may be presumed that the Legislature would not have passed one without the other, the whole is void.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

9. STATES (§ 110*)—RIGHTS AND LIABILITIES—PRIORITIES OF CLAIMS.

A lien in favor of the state executed by Act May 13, 1909 (P. L. 835), appropriating money to the Western Pennsylvania Hospital, is prior to a mortgage subsequently executed by the hospital to secure an issue of bonds.

[Ed. Note.—For other cases, see States, Cent. Dig. § 108; Dec. Dig. § 110.*]

Appeal from Court of Common Pleas, Allegheny County.

Action of assumpsit by Booth & Flinn, Limited, against William F. Miller, to determine the marketability of bonds. From a judgment for plaintiff on case stated, defendant appeals. Reversed and rendered.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Richard H. Hawkins, of Pittsburgh, for appellant. H. K. Siebeneck and H. G. Wasson, both of Pittsburgh, for appellee.

MESTREZAT, J. This was an amicable action of assumpsit to recover the price of 86 bonds issued by the Western Pennsylv-

nia Hospital and secured by a mortgage on its property.

The hospital is a charitable corporation of this state created and existing under an act of the General Assembly approved March 18, 1848 (P. L. 218), and its supplements, and the decree of the court of common pleas No. 2 of Allegheny county entered in accordance with the provisions of the act of assembly approved May 1, 1907 (P. L. 140), which decree provides, *inter alia*, that the corporation "may hold and enjoy real, personal, and mixed estate of any kind whatsoever, and may sell, convey, lease and incumber the same for the use, objects and benefits of the said institution." On December 1, 1910, the hospital issued and delivered to the Commonwealth Trust Company, trustees, 300 bonds of the denomination of \$1,000 each, payable in three years thereafter, and as security for said bonds executed and delivered to the trustee a mortgage covering its real estate in the city of Pittsburgh. By an act of the General Assembly approved May 13, 1909 (P. L. 835), entitled "An act making an appropriation to the Western Pennsylvania Hospital," the state appropriated to the hospital, for the purpose of assisting in the completion of its new hospital plant upon its premises in Pittsburgh, the sum of \$100,000; the act, in its third section, providing, *inter alia*, "that the amount so appropriated as aforesaid, be and the same is hereby made a noninterest-bearing lien on the said premises for the use of the commonwealth of Pennsylvania." The act further provides that no part of the appropriation shall be available until the board of managers shall certify to the auditor general that, exclusive of state aid, the sum of \$325,000 has been expended on the building, nor until they shall file with the auditor general a written obligation agreeing that the sum appropriated shall be refunded to the state whenever the building shall be converted to private use, conducted for private gain, or be abandoned or sold or transferred to any person for any use other than that authorized by the certificate of incorporation. The certificate and obligation were filed in April, 1910. Prior to December 1, 1910, the hospital received from the state a portion of the appropriation, and prior to July 29, 1911, received the balance thereof, and expended the moneys so received for the purposes for which it was appropriated.

The plaintiff, being the owner of 86 of the said mortgage bonds of the hospital, agreed to sell them to the defendant at par and accrued interest, if the bonds were a first lien on the mortgage premises. The defendant refused to accept and pay for the bonds, and this action was brought to enforce payment. The defendant denies that the bonds are a first lien on the property of the hospital because of the alleged prior lien created in favor of the commonwealth by reason

of the provisions of the act of 1909, making the appropriation. The learned judge of the court below held that the part of the appropriation act creating the lien was unconstitutional, because (a) it offends against section 3, art. 3, of the Constitution, which provides that "no bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title," and (b) that it offends against section 7, art. 3, of the Constitution, which provides that "the General Assembly shall not pass any local or special law authorizing the creation, extension, or impairing of liens." The court thereupon entered judgment for the plaintiff, from which the defendant has taken this appeal.

[1] We do not agree with the learned court below that the act of May 13, 1909 (P. L. 835), offends article 3, section 3 or section 7 of the Constitution. The act cannot be successfully attacked because it contains more than one subject, or that the subject is not clearly expressed in the title. The subject of the act is the appropriation of a certain sum to a charitable institution. The act had in view a single purpose, and that was the appropriation of the money for the charity administered by the hospital. It is claimed, however, that the provisions for the security and the lien constitute additional subjects which invalidate the act; but we are not favorably impressed with this position. The only subject of the act is the appropriation made to the designated beneficiary; the security and lien were not separate and distinct subjects, but simply provisions to compel the hospital to apply the appropriation to the charitable purpose, and they are naturally and properly connected with the main subject. These provisions were not subjects upon which the assembly was legislating, but were intended to and are related to and a part of the one general subject, the appropriation, with which the Legislature was dealing in the act. If this be not true, it follows that the Legislature must pass three acts instead of one act in making the appropriation and in preventing it from being diverted to a different use. It would be required to pass an act donating the money, another act providing for the statement and the obligation, and another act providing for the lien.

[2] The purpose of the section in question was, as we have frequently said, to strike down omnibus bills which unite in the same law subjects entirely foreign to and not connected with each other, thereby giving no notice of the greater part of the contents of the bill and affording opportunity for fraud and deception. It is, however, no infringement of the section if there are several provisions in the bill, provided they are connected with and germane to the one general subject of the legislation. It is

sufficient if they relate to and are a means of carrying out the one general purpose of the act. As said by Sterrett, C. J., in *Kelley v. Mayberry Township*, 154 Pa. 440, 449, 28 Atl. 595, instead of containing more than one subject, the provisions are cognate; each, respectively, relating not to a separate and independent subject of legislation, but to branches of the same general subject.

[3] The title, like the act itself, we think is sufficient. It is not misleading, and gives notice of everything contained in the act. In making the appropriation there is no presumption that the state will not designate the purpose for which it is to be used and protect itself against the fund being diverted to other purposes. The right to do so is unquestioned, and the title disclosing the appropriation is sufficient notice to interested parties to put them upon inquiry which will result in a disclosure of the terms and conditions on which the appropriation was made. If therefore any person was interested in the bill, he was bound to know that germane to the subject expressed in the title was the purpose for which the appropriation was to be used as well as the protection against its misuse. We have repeatedly said that the title need not embody all the distinct provisions of the bill, nor serve as an index or digest of its contents, but that it is sufficient if the title fairly gives notice of the real subject of the bill, so as reasonably to lead to an inquiry into what is contained in the body of the bill. The title to the act of 1909 was therefore not required to embrace, in addition to the one general subject, an index to the several provisions for carrying out the purpose of the appropriation. It was sufficient to put legislators and other interested parties on notice which would have led to an inquiry into the contents of the bill. Nothing more is required.

[4] We are of the opinion that section 7 of article 3 of the Constitution, prohibiting the enactment of any local or special law authorizing the creation, extension, or impairing of liens, did not prevent the passage of the act of 1909, nor invalidate any of its provisions. Mr. Buckalew, an eminent lawyer, and a leading member of the constitutional convention, says, in his work on the Constitution, that "this clause can hardly apply to liens of the state."

[5] It is a maxim of the common law that the king is not bound by any statute, if he be not expressly named to be so bound. It is inferred, *prima facie*, that the law made by the crown, with the assent of the Lords and Commons, is made for subjects and not for the crown. Per Alderson, B., in *Attorney General v. Donaldson*, 10 M. & W. 117, 122. The same doctrine applies to the American states. In *Commonwealth v. Baldwin*, 1 Watts, 54, 26 Am. Dec. 33, Chief

Justice Gibson delivering the opinion said, *inter alia*: "In a monarchy the exception of the sovereign from the operation of statutes in which he is not named is founded in prerogative; and hence it is supposed that no such exemption can be claimed for a sovereign constituted of the people in their collective capacity. It is certain that so much of the prerogative as appertained to the king by virtue of his dignity is excluded by the nature of our government, which possesses none of the attributes of royalty; but so much of it as belonged to him in the capacity of *parens patriæ*, or universal trustee, enters as much into our political compact, as it does into the principles of the British constitution. * * * Without pretending to fix its limits in all cases, it may be safely asserted that this prerogative is a principle of our government and a part of the law of the land." Mr. Justice Lewis, speaking for the court in *Jones v. Tatham*, 20 Pa. 398, 411, said: "Words of a statute applying to private rights do not affect those of the state. * * * The general business of the legislative power is to establish laws for individuals, not for the sovereign; and, when the rights of the commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily implied." Mr. Justice Strong delivering the opinion in *Dollar Savings Bank v. United States*, 19 Wall. (86 U. S.) 227, 22 L. Ed. 80, after saying that the king was not bound by any act of Parliament unless he be named therein by special and particular words, continued: "The rule thus settled respecting the British crown is equally applicable to this government, and it has been applied frequently in the different states and practically in the federal courts. * * * The reason of the rule which denies to others the use of any other than the statutory remedy is wanting, therefore, in applicability to the government, and the rule itself must not be extended beyond its reason."

The established rules of construction applicable to statutes apply also in the construction of a Constitution. *Nicholson v. Thompson*, 5 Rob. (La.) 367; *People v. May*, 3 Mich. 598; *People v. Potter*, 47 N. Y. 375. There is nothing in section 7 of article 3 that shows that the framers of the Constitution intended that this section should apply to legislation making appropriations by the state in separate acts for charitable or educational purposes, as required by section 15 of the same article, and therefore it falls within the general rule announced in the above cases that such legislation is exempt from the constitutional prohibition against local or special legislation.

[6] It has been the uniform practice of the General Assembly to enact legislation authorizing the commonwealth by such methods to enforce its claims, to collect its debts.

and create and enforce liens. It is true that most of these acts are general, but nevertheless they show that in such legislation the commonwealth does not stand on the same footing as a private suitor, but may protect itself as it deems best when dealing with its debtor, or may impose terms when it devotes its funds to charitable or educational purposes. In the light of such legislation and the uniform practice of enacting similar legislation on such subjects before and since the adoption of the present Constitution, we cannot conclude that the constitutional provision was intended to apply to the state in making appropriations of this character. During the very session at which the act under consideration was passed, the Legislature in several acts making appropriations to charitable and educational institutions adhered to the same practice, and inserted provisions stipulating the use to which the money was to be applied and reserving a noninterest-bearing lien on the property of the institution. Mr. Justice Agnew, in *Cronise v. Cronise*, 54 Pa. 255, 261, speaking of the mooted power of the Legislature to grant divorces under the Constitution of 1790, said: "The Constitution of 1790 was framed in view of this practice. The continued exercise of the power after the adoption of the Constitution of 1790 cannot be accounted for, except on the ground that all men, learned and unlearned, believed it to be a legitimate exercise of the legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it. Commons error facit jus would be sufficient to support it, but it stands upon the higher ground of contemporaneous and continued construction by the people of their own instrument." While we are not bound by the legislative interpretation of the Constitution, yet it is entitled to weight, and strengthens our conviction that the framers of the Constitution did not intend by section 7 of article 3 to deprive the commonwealth of its right to protect itself against the diversion of moneys appropriated to charitable purposes.

The state, when acting in its sovereign capacity, occupies a position entirely different and superior to that of the citizen. It cannot be sued without its consent. The statute of limitations, without it is expressly so declared, cannot be invoked to defeat its claim as a creditor. It takes precedence over other creditors. It may forego its rights as a sovereign power and place itself on the same footing as one of its citizens, but unless the statutory language affecting the subject so declares it will not be presumed. The state cannot be deprived of its rights as a sovereign by inference; it must be done by appropriate constitutional or legislative action.

McLeod v. Central Normal School Association, 152 Pa. 575, 583, 25 Atl. 1109, 1112,

decided since the adoption of the present Constitution, recognizes the validity of such legislation. There the General Assembly appropriated money and specified the particular educational purpose to which it was to be applied with a proviso for a lien similar to that in the act under consideration. While the constitutionality of the act in that case was not attacked, the court approved the provision imposing the lien and recognized its validity. Mr. Justice Clark, delivering the opinion, after saying that the act established the relation of debtor and creditor, proceeds: "The object and aim of all the legislation since 1857 has been to give the state standing as a creditor against them (Normal Schools) in order that, in the event of any such attempted diversion, the state might lay its hand upon the property for its own indemnification." The same purpose is manifest in the act under consideration. It appropriates the money for the specific charitable use and establishes the relation of debtor and creditor between the hospital and the state so that the purpose of the appropriation may be made effective and the fund cannot be diverted to any other purpose. It was not an absolute and unconditional gift, but one conditioned that the hospital should continue to use the money for the designated purpose or it should be repaid to the state. The hospital takes the appropriation cum onere, and, when it fails to use the fund for the purpose, it, as a debtor, must repay the money to the creditor.

[7] If, however, the contention of the appellee be correct that the provision for a lien on the premises of the hospital is unconstitutional and void, we see no escape from the conclusion that the whole act must fall and that the hospital has no right to any part of the appropriation. The first section of the act makes the appropriation, the second section prevents the payment of any part of the fund until the managers of the hospital have certified that exclusive of state aid \$325,000 have been expended on the building, and section 3 provides that no part of the appropriation shall be available until the managers give an obligation to the state that the building shall not be abandoned or converted to a private use, and providing that the appropriation shall be a noninterest-bearing lien on the premises. These are dependent provisions, and are in no sense separate and independent of each other. It cannot be doubted that the Legislature would not have made the appropriation had it not been for the protection against the diversion of the fund to other than charitable purposes. The object of the legislation as disclosed by its terms was to appropriate the fund, not to private uses or purposes, but to the charity represented by the hospital. This manifestly appears from the condition that the appropriation shall not be available until the sum of \$325,000

had been expended on the building, and the provision in the act against the diversion of the fund to any other purpose than that authorized by the hospital's charter. The "compensation for or the inducement to" make the appropriation was the provision that it should be applied to no other purpose than the charity represented by the hospital which was secured by the obligation and the lien. The several provisions, including the one creating the lien, are therefore dependent and connected, and show that the Legislature intended them to be read together as a whole, and that, if the provisions protecting the fund against diversion could not be carried into effect, the hospital should not have the appropriation.

[8] If therefore the provision for the lien falls, the appropriation falls. This is the settled rule of statutory interpretation applicable in such cases. 1 Lewis' Sutherland on Stat. Const. § 296. In *Rothermel v. Meyerle*, 136 Pa. 250, 285, 20 Atl. 583, 587 (9 L. R. A. 386), Mr. Justice Clark, speaking for the court, says: "If the part (of the statute) which is unconstitutional in its operation is independent of, and readily separable from, that which is constitutional, so that the latter may stand by itself, as the reasonable and proper expression of the legislative will, it may be sustained as such; but, if the part which is void is vital to the whole, or the other provisions are so dependent upon it, and so connected with it, that it may be presumed the Legislature would not have passed one without the other, the whole statute is void." Chief Justice Shaw, delivering the opinion in *Warren v. Mayor of Charlestown*, 2 Gray (68 Mass.) 84, 99, says: "If they (the parts of the act) are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are constitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." This is quoted and approved by Chief Justice Fuller delivering the opinion of the Supreme Court of the United States in *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 635, 15 Sup. Ct. 912, 39 L. Ed. 1108. Marshall, J., delivering the opinion in *Gilbert Arnold Land Company v. Superior*, 91 Wis. 353, 357, 64 N. W. 999, 1000, says: "If the void part of the act is the compensation for or the inducement to the valid portion, so that, looking at the whole act, it is reasonably clear that the legislative body would not have enacted the valid portion alone, then the whole act will be held inoperative and void."

[9] It follows that article 3, § 7, has no application to the act of 1909, and that

therefore the provision in the act creating a lien for the money appropriated is a valid exercise of the legislative power, and the lien thus created is effective. This lien is prior to the mortgage given to secure the bonds which are the subject of this litigation, and therefore, in accordance with the stipulation of the parties, the court below should have entered judgment for the defendant.

The judgment of the court below is reversed, and judgment is now entered for the defendant.

COMMONWEALTH v. UNION TRUST CO. OF PITTSBURGH.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. TAXATION (§ 371½*)—ASSESSMENT—TRUST COMPANIES.

The report required by Act June 13, 1907 (P. L. 640), to be filed by a trust company is intended to furnish the basis for fixing the taxable value of the shares of stock, but is not conclusive on the auditor general; and if he is not satisfied with its correctness he should inquire further and make settlement of the actual value of the stock as shown by the facts.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 619; Dec. Dig. § 371½.*]

2. TAXATION (§ 317*)—ASSESSMENT—DUTIES OF AUDITOR GENERAL.

Act Feb. 11, 1895 (P. L. 4), transferring supervisory duties in matters relating to banking institutions from the auditor general to the commissioner of banking, does not change the duties of the auditor general in matters of taxation, but in such matters he exercises his own functions without reference to the acts of the commissioner of banking relating to the supervision and regulation of banking institutions, and is not bound by the rules and regulations of the banking department.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 525, 526; Dec. Dig. § 317.*]

3. TAXATION (§ 371½*)—ASSESSMENT—TRUST COMPANIES.

Where the return of a trust company, on settlement of an account for taxes, appraises the value of its shares of capital stock at \$20,097,466.50, but the return shows that the company appraised securities representing undivided profits at their cost, while their reported value in the tax year was greatly in excess of the cost, and the company recognized the difference as a reserve account, the auditor general may fix the higher value upon such securities as a basis for ascertaining the actual value of the shares for taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 619; Dec. Dig. § 371½.*]

Appeal from Court of Common Pleas, Dauphin County.

Proceedings by the Commonwealth against the Union Trust Company of Pittsburgh. Appeal from settlement of account by the Auditor General and State Treasurer for taxation of the capital stock of defendant. From a judgment for defendant on case stated, plaintiff appeals. Reversed and remitted, with directions.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Wm. M. Hargest, Asst. Deputy Atty. Gen., and John C. Bell, Atty. Gen., for appellant. Samuel McClay and Reed, Smith, Shaw & Beal, all of Pittsburgh, for appellee.

ELKIN, J. The question involved in this case relates to the taxation of the shares of stock of a trust company under the act of June 13, 1907 (P. L. 640). This act was intended to put trust companies upon practically the same basis as banking institutions for the purpose of taxation. Bank stocks are taxed under the act of July 15, 1897 (P. L. 292), and the method of ascertaining and fixing the value of shares by this act was adopted by the Legislature in the act of 1907, as applied to title insurance and trust companies. The act of 1907 provides that "the value of each share of stock to be ascertained and fixed by adding together so much of the capital stock paid in, the surplus, and undivided profits as is not invested in the shares of stock of corporations liable to pay to the commonwealth a capital stock tax or tax on shares, and dividing this amount by the number of shares of such title insurance or trust company, and pay said tax into the state treasury, on or before the first day of March in each year, the shares, and so much of the capital stock, surplus, profits and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this commonwealth." In the present case the appellee company filed its report in the office of the auditor general in February, 1909, appraising the value of its shares at \$20,097,466.50, and elected to pay and did pay to the state treasurer five mills on the value of the shares so appraised by its own officers prior to March 1, 1909. By so doing appellee was entitled to a deduction for so much of its capital, surplus, and profits as was invested in shares of stock of other corporations liable to pay a capital stock tax or tax on shares, and to claim an exemption from all other taxation upon its capital stock, surplus, profits, and deposits not invested in real estate. The Legislature evidently intended to tax shares of stock in banks and trust companies for state purposes, and to set at rest the somewhat mooted question whether the deposits of such institutions invested in personal securities should be subject to local taxation like moneys at interest in the hands of individuals. Banks and trust companies, under the acts of 1897 and 1907, by paying a state tax upon the value of their shares to be ascertained as provided in these acts, are relieved from local taxation; and this fact must be given due consideration in determining what the Legislature intended by providing that the value of each share shall be fixed by adding together

the amount of capital stock paid in, the surplus, and undivided profits, and dividing this amount by the number of shares.

[1] The contention of the commonwealth is that the capital paid in, the surplus, and undivided profits represent all the property and assets of the trust company over and above its liabilities, and that it is the duty of the auditor general to ascertain and fix this value for the purpose of determining the taxable value of the shares. On the other hand, it is argued with great force by the learned counsel for appellee that the power of the auditor general is limited by the act of 1907 to the exercise of his right to ascertain the correctness of the report submitted by the company, showing capital paid in, surplus, and undivided profits, and, if found to be correct, add them and divide the total by the number of shares outstanding. This theory would make the auditor general a ministerial officer with practically no power in the settlement of taxes against trust companies, except to see that the addition and division of their officers were correct. This is clearly an erroneous view of the powers and duties of taxing officers. The report which the act requires a trust company to make is intended to furnish a basis upon which the auditor general shall fix the taxable value of the shares, but it is not conclusively binding upon him. He may or may not be satisfied with its correctness, and if he is not it is his duty to make further inquiry. In the present case the auditor general was not satisfied with the appraised value of the shares submitted by the officers of the company, and from data contained in the report filed he proceeded to settle an account by increasing the total value of all the shares to \$22,151,415.50. That he had the power to increase the value of the shares, if the facts warranted it, there can be no doubt. To hold otherwise would mean that the corporation subject to the tax is vested with the power to appraise the value of shares, and that the taxing officer had no duty to perform, except to solve a very simple problem in arithmetic. Nothing of this kind was intended by the act of 1907, and no reasonable interpretation of its language warrants such conclusion. The power to ascertain and fix the taxable value of shares is vested in the auditor general, but it must be exercised in the manner prescribed by law. He cannot act arbitrarily without regard to the facts, or without sufficient data upon which to base his conclusions. He must also follow the statutory method in determining the taxable value of the shares. This means, in the present case, that the actual value of each share must be determined upon the basis of the capital paid in, surplus, and undivided profits; but it does not mean that the auditor general must accept the book value, or any other value, reported by the officers of the company, as

final and conclusive in determining the taxable value of the shares. Ordinarily it may be assumed that the value of the shares reported by the company would be a fair approximation of their actual value, and, no doubt, in most instances would be satisfactory to the auditor general; but if he has reason to believe that the value of the capital paid in, surplus, and undivided profits is greater than the amount reported, it is his duty to inquire and make settlement upon the basis of the actual value as shown by the facts.

[2] It is argued for appellee that the power to direct what shall constitute surplus and undivided profits is exclusively vested in the commissioner of banking by the act of 1895, and that the auditor general is bound in this respect by the rules and regulations of the banking department. We cannot accept this view of the law. It is true that prior to the creation of the banking department the auditor general exercised certain supervision in matters pertaining to banking institutions, and that all of these duties, except those relating to taxation, were transferred to the commissioner of banking by the act of 1895. The power of taxation was reserved to the auditor general when the other powers and duties formerly imposed upon this officer were vested in the commissioner of banking. The act of February 11, 1895 (P. L. 4), in no way interfered with the power of taxation to be exercised by the auditor general, who, in the performance of his duties in this respect, exercises his own functions without reference to what the commissioner of banking may do in matters pertaining to the supervision and regulation of the business of banking institutions. In the exercise of his powers the auditor general is not bound by the rules and regulations of the banking department. The provision in the act of 1895 relating to visitatorial power has no reference to taxation, which in express terms was reserved to the auditor general when other powers were transferred.

[3] This brings us to the consideration of the only question in the case about which there can be any doubt, and that is: How shall the auditor general determine what is the actual value of the capital paid in, the surplus, and the undivided profits? If each of these elements of value was represented by cash on hand, the question would be of easy solution, but in the conduct of a banking business this rarely, if ever, happens; or if the funds were invested in securities worth their face value no difficulty would arise. But where, as in the present case, good securities were purchased for much less than their face value for investment account, and carried as such, a different question is presented. The act of 1907 is a revenue statute, and in the interpretation of its provisions this thought should be kept in mind.

Technical or etymological definitions of words are of little, if any, help in determining what the legislative language means in a revenue statute; and for this reason the cases cited by appellee on the question of what constitutes undivided profits are not convincing authorities under the facts of the present case. Some one must ascertain and fix the value of capital paid in, surplus, and undivided profits in order to determine the value of the shares; otherwise there would be no basis for taxation. The report required to be filed by a trust company under the act of 1907 is the first step taken, but it is only a means to an end; the end being to ascertain the actual value of the shares by the auditor general, whose duty as an accounting officer requires him to make the settlement and collect the tax. He is not required to accept the value placed upon the securities carried as undivided profits by officers of the trust company, and may fix such value upon these securities or investments as the facts warrant. This is what was done in the present case by the auditor general, and we think the facts were sufficient to sustain the valuation. The report shows that the appellee company considered the securities worth what the auditor general found their value to be; and it looks like a mere quibble in the administration of tax laws to say that securities representing undivided profits should be taxed at \$2,000,000 less than their reported value in the tax year, because the trust company had made a good bargain in purchasing them for less than their face value. That the appellee considered the securities representing undivided profits worth their appraised value is shown by what was done by carrying on the books as a reserve account the difference between cost and actual value, which valuation the auditor general adopted. Nothing said in *Commonwealth v. Mortgage Trust Co.*, 227 Pa. 163, 76 Atl. 5, was intended to announce any different rule for the valuation of shares in companies of the kind involved in the case at bar.

Judgment reversed and record remitted, with directions to enter judgment upon the valuation of the shares as fixed by the auditor general.

WHITE v. PROVIDENT LIFE & TRUST CO.
(Supreme Court of Pennsylvania. Oct. 14, 1912.)

INSURANCE (§ 59*)—MUTUAL INSURANCE COMPANY—DIVISION OF PROFITS.

Where a life insurance company charter provides that the net profits shall be divided pro rata among the policy holders, as the directors may determine, and it has accumulated a large surplus, the directors are bound to ascertain and pay over their equitable proportion of the surplus.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 47, 77; Dec. Dig. § 59.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by J. Brinton White against the Provident Life & Trust Company. From a decree dismissing the bill, plaintiff appeals. Reversed.

The bill averred that the plaintiff had taken out two policies of life insurance in the defendant company, one for \$10,000 on November 28, 1871, and the other for \$5,000 on January 18, 1889. The first ran for 38 years and matured on November 28, 1909. The second ran for 20 years and matured on January 18, 1909. The plaintiff set up that the defendant was required, under its charter, to divide equitably and ratably all the net profits derived from its life insurance business among the holders of the policy; that at maturity of his policy the defendant had about \$8,000,000 of surplus, of which plaintiff's proportionate share would be on the two policies about \$2,250, but that defendant had offered him less than \$640. The defendant filed an answer in which it denied that the plaintiff was entitled to any other share or part than that offered to him. The court dismissed the bill. The plaintiff made, *inter alia*, the following requests for findings of fact: "(4) The company never attempted at the time of the expiration of the plaintiff's policies to ascertain, determine, and report the net profits which had been derived from the business of life insurance during the currency of his policies, nor did it equitably or ratably divide the same, or attempt to make any division thereof. It is claimed that he was only entitled to receive such amount as it saw fit to pay over to him as profits, without any such ascertainment, determination, or reports." Answer: "Declined." "(13) The so-called 'surplus or contingency reserve' was an amount of profits at the time the two policies in controversy matured." Answer: "Declined."

Plaintiff presented the following requests for conclusions of law: "(1) As no account was ever rendered to the plaintiff by the defendant corporation of the amount of net profits realized at the time of the maturity of the policies, it is the duty of the company to render such an account, and an account thereof is decreed." Answer: "Declined." "(2) It was the duty of the company at the time of maturity of the policies in question to ascertain and determine the amount of net profits of the corporation at that time and to pay over to the plaintiff an equitable and ratable portion thereof." Answer: "Declined." "(4) The corporation had no right, by resolution, arbitrarily to determine, years before the maturity of the policies, that the plaintiff should receive a certain fixed percentage when the same matured, and should receive nothing further from the company outside of the amount of his policy." Answer: "Declined." "(5) The corporation defendant had no right to deduct from its prof-

its earned at the time of maturity of the policies in question any sum to cover a future increase of death rate or a future depreciation of value of the securities." Answer: "Declined." "(9) The plaintiff is entitled to a decree ordering the corporation to account to him for the net profits derived from its business of life insurance up to the time of the maturity of his policies, and to pay over to him his equitable and ratable proportion thereof." Answer: "Declined."

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

John G. Johnson and William White, Jr., both of Philadelphia, for appellant. H. Gordon McCouch, of Dickson, and Beltier & McCouch, Charles E. Morgan, and Joseph B. Townsend, Jr., all of Philadelphia, for appellee.

POTTER, J. The plaintiff is a policy holder in the defendant company. He carried to maturity two endowment policies, one for \$10,000 taken out November 28, 1871, which ran for 38 years, and became payable November 28, 1909. The other policy was for \$5,000, taken out January 18, 1889, ran for 20 years, and became payable January 18, 1909.

As appears from its charter, the defendant company is authorized to carry on not only the business of life insurance, but also that of a trust company, and to receive deposits of money and other property and to act as trustee, guardian, executor, administrator, etc. But the charter contemplates that its life insurance business shall be conducted separate and apart from its other business, and upon a purely mutual basis. The stockholders of the company as such are to derive no profit from the insurance business. The act of February 18, 1869 (P. L. 194), which is a supplement to the act of incorporation, provides: "That all the net profits to be derived from the business of life insurance, after deducting the expenses of the company, shall be divided pro rata among the holders of the policies of such life insurance, equitably and ratably, as the directors of said company shall and may, from time to time, ascertain, determine, and report the same for division." The term "net profits," as applied to the business of life insurance, is not strictly accurate, but its use by the framers of the law was evidently meant to apply to such funds as might arise from the receipts of the company in excess of the cost of doing business, and of the maintenance of a reserve fund, which will provide for the payment of claims on account of deaths, or the maturing of the policies. The surplus is a fund entirely apart from the reserve. The solvency of the company depends upon maintaining the integrity of the reserve fund, but the surplus may be distributed without in any way affecting the ability of the company to meet its obligations upon its policies

as they mature. When, therefore, the law requires all the net profits to be divided pro rata among the policy holders, it obviously refers to items of surplus. These items arise from savings upon the assumed rate of mortality, from the excess of interest received over the assumed rate, from the loading for expenses, and the gains from lapsed and surrendered policies. All such items, we understand, go to make up the surplus or the so-called net profits of the business, and it is from this source that all so-called dividends and returns to the policy holders, in excess of the face of the policy, are made.

In the present case it appears that, upon the date of the maturity of the plaintiff's policies, the defendant company had, in addition to its lawful reserve, a surplus fund of nearly \$8,000,000. The plaintiff claims that under the law it became the duty of the directors to ascertain and report the pro rata share of this surplus, which was due to him under his policies, under an equitable and ratable division of the surplus. He alleges that the directors refused to give him a statement of his proportionate share of the surplus, or to pay him his pro rata share, and he therefore filed this bill for an accounting. The answer filed on behalf of the company admitted that the appellant was the holder of the policies maturing as alleged in the bill; that under its charter the company was required to divide among the policy holders the profits from insurance as set out in the bill; and that its surplus was about \$8,000,000. But that appellant was entitled to anything more than had been offered and paid to him without prejudice was denied. It was further asserted that the action of the directors in dividing, or in refusing to divide, the surplus was not subject to review or modification by the court. Upon issue joined, the case was heard in the court below, and it was held that the appellant was not entitled to the relief for which he prayed, and that the bill should be dismissed. No opinion was filed. Exceptions filed by the plaintiff to the findings of the trial judge were overruled, and a decree was entered dismissing the bill. Plaintiff has appealed, and assigns for error the overruling of various exceptions filed in his behalf, and the entry of the final decree.

The law clearly directs that the net profits are to be divided among the policy holders, equitably and ratably, and it clearly contemplates that the directors shall from time to time ascertain, determine, and report what such an equitable division should be. It appears from the testimony of the president of the company, Mr. Wing, that, when appellant's policies matured in 1909, no attempt was made to ascertain in any accurate way the amount of net profits then subject to equitable division, or to fix the amount of his proportionate share thereof. All that was done with respect to the matter was un-

der the terms of a general resolution passed by the board early in the year, declaring a dividend of one-tenth of 1 per cent. on the face of maturing endowment policies, for each full year from the date of the policy to its maturity. Similar action was taken each year from 1906. Mr. Wing testified that at the close of the year 1908 the reserve held by the company, computed by the standards of the insurance department of Pennsylvania, being the sum necessary to reinsure all risks, was \$57,000,312. In addition, the company had a surplus or contingent reserve of \$7,831,007.86. He further testified that there was no disposition to dispute the fact that this so-called surplus or contingent reserve belongs to the policy holders, when the directors can determine in what proportion it shall be divided. The witness stated that the percentage allotted to endowment policies, one-tenth of 1 per cent. a year, upon the face of the policy, had remained the same since 1906. It was, he said, an effort on the part of the company to recognize that there was something due to a man withdrawing in that way. On cross-examination Mr. Wing said that the dividend of one-tenth of 1 per cent. for each year of the life of the maturing policies was an arbitrary figure fixed without any special calculation. The resolution of the board of directors was made in such a way that the longer the policy had run the more the policy holder got. On re-examination the witness said that if the company had reinsured its risks the surplus fund of \$7,831,007.86 would not have gone to the stockholders of the defendant company, but he said that he had never taken up the subject of its division. Appellant contends that the amount which the directors thus arbitrarily allotted to him was not based upon any reasonable calculation as to the amount of his share in the net profits, and did not therefore constitute such an equitable and ratable division of the profits as is contemplated by the terms of the charter of the defendant company.

[1] In the face of the clear mandate of the law requiring all the net profits to be divided pro rata among the policy holders, we are unable to see how the directors can justify their failure to ascertain and adopt a method which would, with at least approximate accuracy, distribute the profits equitably and ratably as required by the act of assembly. While much must be left to the discretion and judgment of the directors in such matters, yet it is a discretion which must be legally exercised. In *Grange v. Insurance Co.*, 235 Pa. 320, 330, 84 Atl. 392, 395, we said: "We have no hesitation in saying that, whenever a proper case is made out, a policy holder is entitled to an account, and is not to be dismissed with the statement that he is bound by the action of the trustees of the company." In that case the policy provided that the accumulated surplus should

be "apportioned equitably" among the policies completing the designated period of payment of premiums. The directors of the company, under guidance of calculations made by the actuary, made an apportionment which was claimed by the company to be equitable, and it was held that the plaintiff had failed to show that it was not so. But in the case at bar there is no evidence to show that the directors attempted to make an "equitable and ratable" division of all the net profits. The amount allotted to maturing endowment policies was admittedly an arbitrary figure, based on no calculations by an actuary or by themselves. It is admitted that appellant is entitled to receive an "equitable and ratable" proportion of the net profits. But there has been no attempt to ascertain what that proportion is. The company offers him in lieu thereof a sum arbitrarily fixed without calculation or accurate consideration of its effect upon the net profits in connection with the claims of other policy holders. It would seem that appellant is entitled to have the amount due him accurately ascertained, even at the risk of causing additional trouble in procuring the necessary calculations, and in making the payments required. The appellant, being the holder of matured policies, is, in so far as those policies are concerned, severing his connection with the company. Unless he now secures his just and proper share of the profits, he can never get them. Whatever the fund in question may be called, whether surplus or contingent reserve, its office must be the ultimate protection of the policy holders. However much of it may be retained during the running of a policy, at its maturity the policy holder is entitled to his pro rata share of the fund which has been retained for his benefit. Unless he does thus participate in it, the retaining of the surplus is not only a vain thing, in so far as he is concerned, but it is a detriment in that his so-called annual dividends have been reduced in order to build up a surplus in which he does not share.

Counsel for appellee cite in their argument the case of Provident Life & Trust Co. v. Durham, 212 Pa. 68, 61 Atl. 636, to sustain their contention that the "surplus and contingency fund" belongs to the company and not to the policy holders. The distinction is not important here, for appellant does not claim to be the owner of any particular part of the surplus fund, but he contends that the directors are bound to ascertain the amount, if any, of his interest in the "net profits," and to award to him such dividend as he is entitled to. It will be remembered that the president of the company, in his evidence, disclaimed any disposition to dispute the fact that this so-called surplus belongs to the policy holders, when the directors can determine the proportion in which it shall be divided. The decision in the case cited

involved nothing but the question of the right of the state to tax the company's reserve as a fund held in trust for the policy holders. It was held that, in so far as the right of taxation was concerned, the title to the insurance assets was vested in the company in its own right. The principle there announced has no bearing upon the question now under consideration. Three other decisions are cited in support of the decree of the court below: Greeff v. Assurance Society, 160 N. Y. 19, 54 N. E. 712, 48 L. R. A. 288, 73 Am. St. Rep. 659, Equitable Life Assurance Society v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682, and Mutual Life Ins. Co. v. Trust Co., 100 Pa. 172. The first of these (Greeff v. Assurance Society) was a suit at law brought against the Equitable Life Assurance Society subsequent to the adoption of the New York act requiring actions against insurance companies in which accountings are demanded, to be instituted only by leave and in the name of the Attorney General. The court held that under the New York statute the plaintiff was not entitled to an accounting. No such barrier as the New York statute presents to the claim of the plaintiff, in that case, is to be found in this state. In the case of Equitable Life Assurance Society v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682, the holder of the policy was entitled to participate in the distribution of the surplus "according to such principles and methods as may from time to time be adopted by this society for such distribution, which principles and methods are hereby ratified and accepted by and for any person who shall have or claim any interest under this contract." Mr. Chief Justice Peckham held that the terms of the contract prevented the policy holders from claiming the right to an accounting, or to compel the distribution of the surplus fund in any other manner than that provided for in the contract.

The case now before us is clearly distinguishable in that the policy contains no such provision as that upon which the decision in the Brown Case turned. And further in the fact that in the present case the directors of the company awarded merely an arbitrary percentage determined without accurate calculation. The decision in Mutual Insurance Co. v. Trust Co., 100 Pa. 172, has no bearing upon the question here involved. It was there held that the law would not apply an undivided surplus, out of which the insured might be entitled to have a dividend declared and paid to him, to the payment of a premium falling due in advance of the declaration of such a dividend by the board of directors. The right of a policy holder by proceeding in equity to compel the distribution of net profits, and the allotment to him of his pro rata share thereof, was neither raised nor considered in that case. A sound illustration of the principle of law here in-

involved is found in *Pierce v. Assurance Society*, 145 Mass. 56, 58, 12 N. E. 858, 861 (1 Am. St. Rep. 433), where it was held that the holder of a maturing tontine policy was entitled to an accounting to determine what share of the reserve and profits was equitably apportionable to him. Devens, J., said: "It is the contention of the defendant that the plaintiff is bound by the apportionment made by its officers in the discharge of their duties, unless it shall be shown at least that they did not act in the exercise of an honest discretion and in good faith. We find no words in the policy indicating that the decision of the defendant is to be conclusive, and the words by which the defendant agrees 'equitably' to apportion to the plaintiff's policy its share of the profits bind the defendant to make the apportionment, and imply that, in any proper proceeding, it may be inquired whether it has fulfilled this part of its contract." It will be borne in mind that in the case at bar an equitable division of the net profits is required by the law of the incorporation of the defendant company.

In *Uhlman v. Insurance Co.*, 109 N. Y. 421, 432, 17 N. E. 363, 366 (4 Am. St. Rep. 482), which was a suit for an accounting under a tontine policy, Mr. Justice Peckham said: "We do not, however, accede to the claim of the defendant herein to its full extent, * * * which is that the apportionment, as made by the defendant, is absolutely, and at all events, conclusive upon the policy holders. We hold that, under the terms of this policy, the apportionment was to be equitably made, and, in the first instance, by the defendant's officers or agents. But, inasmuch as the agreement is that the apportionment shall be an equitable one, the question of what is an equitable one, all the facts and circumstances being known, may be one over which the courts have supervision. Prima facie the apportionment, as made by the defendant, should be regarded as a compliance with the terms of the policy, or, in other words, should be regarded as an equitable apportionment. * * * The plaintiff, and all others similarly situated, have the right, upon proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous principles, to have a trial and make proof of such allegations, and, if proved, the court will declare the proper principles upon which the apportionment is to be made, so as to become an equitable apportionment."

Counsel for appellee suggest that a mathematical method of computing the equitable and ratable division of net profits among policies, as they mature, would be impracticable. Why this should be so is not apparent. A mutual insurance company is essentially a great savings institution, and its methods of accounting might follow those of

other savings institutions in keeping an account with each policy holder, so that a statement of the condition of the policy might be furnished when required. Or the policies might be grouped into classes of those issued in the same form, and accounts kept with the classes. This is a matter for accountants to determine. Surely the business of insurance is not one which is beyond the methods of accuracy in the keeping of its accounts with its policy holders, or in the determination of their fair share of the savings of the business. We are of opinion that the plaintiff is entitled to a decree requiring the defendant corporation to state an account showing the net profits it held, derived from its business of life insurance at the time of the maturity of his policies, and to ascertain the amount of and pay over to him his equitable and ratable proportion thereof.

Without disposing in detail of all the assignments of error, it is sufficient to say that the fifth, sixth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, eighteenth, twenty-fourth, and twenty-fifth assignments, which substantially cover the case, are sustained.

The decree of the court below is reversed, and the bill is reinstated. It is further ordered that the record be remitted to the court below for further proceedings in accordance with this opinion.

IN RE MERCERSBURG INDEPENDENT SCHOOL DIST.

Appeal of SMITH et al.

(Supreme Court of Pennsylvania. July 2, 1912.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 27*)—PETITION FOR CREATION OF DISTRICT—WITHDRAWAL OF NAMES.

One who has signed a petition for the formation of an independent school district may withdraw his name as of right before jurisdiction has attached, and, before officers or boards, jurisdiction cannot be said to attach until formal action has been taken on the petition.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 65, 66; Dec. Dig. § 27.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 27*)—PETITION FOR CREATION OF DISTRICT—WITHDRAWAL OF NAMES.

A petitioner for an independent school district is not entitled as of right to withdraw his name after jurisdiction has attached, and in such cases cannot withdraw without leave of court.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 65, 66; Dec. Dig. § 27.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 27*)—PETITION FOR CREATION OF DISTRICT—WITHDRAWAL OF NAMES.

A petitioner for an independent school district induced to sign by misrepresentations may withdraw his name even after jurisdiction has attached, but only with leave of the court or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

other body or tribunal having jurisdiction of the proceeding.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 65, 66; Dec. Dig. § 27.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 27*)—PETITION FOR CREATION OF DISTRICT—WITHDRAWAL OF NAMES.

Where jurisdiction has attached under a petition for an independent school district, the fact that several petitioners desire to withdraw should be considered by the court, and, if a sufficient number desire to withdraw, the court will not only be warranted in dismissing the petition, but in many instances should do so, since the power of the court should not be asserted against the real wishes of signers whose names are necessary to give jurisdiction.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 65, 66; Dec. Dig. § 27.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 27*)—INDEPENDENT SCHOOL DISTRICT—PETITION FOR CREATION.

Where under School Act May 18, 1911 (P. L. 309), an independent school district was to go out of existence on the first Monday of July, 1911, the presentation on June 20, 1911, of a petition to create a new independent district out of the same territory embraced in the old district was premature.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 65, 66; Dec. Dig. § 27.*]

Appeal from Court of Common Pleas, Franklin County.

Petition for the creation of the Independent School District of Mercersburg. From an order creating the district, William H. Smith and another appeal. Reversed.

From the record it appeared that the petition was presented on June 20, 1911, and prayed for the formation of an independent school district composed of the borough of Mercersburg, part of Montgomery township, and part of the township of Peters. It appeared that this territory had for many years existed as an independent school district. At the hearing 15 signers of the petition applied to withdraw their names on the ground that they had signed the petition under a misapprehension, and that as they now understood the matter it would not be to the interests of Montgomery township to have such a district created. The court refused the application, and made an order creating the independent school district which the petition called for.

Argued before MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

J. R. Ruthrauff and W. O. Nicklas, both of Chambersburg, for appellants. Sharpe & Elder, of Chambersburg, for appellee.

ELKIN, J. The right of the 15 original signers of the petition to withdraw is one of the questions raised by this appeal. As a general rule, parties who institute a proceeding have the right to discontinue it, subject, of course, to the order of court as to costs and proper charges. If all the original sign-

ers had joined in a petition asking to withdraw their names, or to discontinue the proceeding, before the hearing, or prior to the taking of testimony, and before the questions involved were considered or determined, the right to do so could not be seriously questioned. Parties are not bound to pursue an action, or to press litigation, if, upon reflection, they conclude it is unwise to proceed further. If, therefore, in the present case, all the signers had asked leave to withdraw their names and discontinue the proceeding, it would have been the duty of the court to respect their wishes by dismissing the petition, subject to costs and proper charges. But all of the petitioners did not ask leave to withdraw, and this makes the situation somewhat different. Under the practice recognized by this court and by lower courts, the right of a petitioner, or of several, to withdraw, while others desire to press the controversy, depends largely upon the nature of the proceeding and the facts of the case. After a careful examination of all our Pennsylvania cases, above and below, the following general rules may be regarded as well established:

[1] 1. One who has signed a petition calling for the action of a judicial, legislative, or executive office or body may withdraw his name as of right before the jurisdiction of that tribunal, body, or officer has attached. In legislative and municipal bodies, and before officers or boards, whose duty involves the power to decide, and to exercise judgment or discretion, jurisdiction cannot be said to attach until formal action has been taken on the subject-matter of the petition.

[2] 2. A petitioner does not have the right per se to withdraw his name after jurisdiction has attached, and in such cases never has the right to withdraw without leave of court.

[3] 3. If a petitioner has been induced to sign by misrepresentations, he may withdraw his name even after jurisdiction has attached; but this must be done with leave of court, or other body or tribunal having jurisdiction of the proceeding.

[4] 4. In those cases, in which jurisdiction has attached, the fact that several petitioners desire to withdraw their names should be taken into consideration by the court; and, if a sufficient number desire to withdraw, the court would not only be warranted in dismissing the petition, but in many instances should do so, on the ground that under such circumstances the power of the court should not be asserted against the real wishes of signers whose names are necessary to give jurisdiction when they in good faith desire to withdraw from the proceeding. In other words, there should be no hard and fast rule making it impossible for petitioners to withdraw from a proceeding or to discontinue a case, because jurisdiction in the first instance had attached. Quakertown

Borough, 3 Grant, Cas. 203, Flemington Borough Incorporation, 168 Pa. 628, 32 Atl. 86, and Old Forge Borough, 12 Pa. Super. Ct. 359, are relied on to sustain the contention that there can be no recantation under any circumstances after jurisdiction attaches. This states the rule of these cases too broadly. The effect of these decisions was to hold that, after jurisdiction had attached, petitioners could not by any act of theirs oust that jurisdiction; but this is a very different thing from saying they might not be permitted to withdraw if on application to the court they were given leave to withdraw. Certainly, it was not intended to say that petitioners under no circumstances, even with leave of court, could withdraw. Such a rule would not only be a harsh one, but it would not be in keeping with the spirit and purpose of our system of jurisprudence. In such cases much must be left to the sound discretion of the court. The jurisdiction of a court in a sense attaches as soon as the petition is filed, or presented; but, prior to a hearing, and before anything has been done involving the rights of the parties, reasonable discretion should be exercised in favor of petitioners who in good faith and for proper reasons desire to withdraw. In the present case the 15 signers who asked to withdraw averred that they were influenced to sign under a misapprehension of the facts, and that, if they had been properly informed as to the facts, they would not have signed the petition. The request to withdraw was made at the first opportunity afforded to make such an application and before any action had been taken by the court or the parties in interest. The good faith of these petitioners does not seem to be questioned, and, as we view it, they were entitled to a hearing upon the merits of their application. The mere fact that the jurisdiction of the court had technically attached is not in itself sufficient to deprive them of the right to withdraw, if, under the facts, they were warranted in withdrawing from the proceeding. They could not withdraw without leave of court, but it was the duty of the court to inquire into the facts for the purpose of ascertaining whether the reasons were sufficient to warrant their withdrawal, and whether they were acting in good faith. This was not done, and, if the case depended upon the right of these petitioners to withdraw, we would send it back for the purpose of giving the petitioners an opportunity of showing the facts relied on for asking leave to withdraw. But the case does not depend upon this question, and it will not be necessary to give it further consideration.

[5] The petition asking that a new independent district be created was presented June 20, 1911, before the old district by the terms of the act was abolished. It is contended that this was premature because a new district could not be created out of the very same territory embraced in the old dis-

trict while that district was still in existence. We think this position is well taken. Section 108 of the School Code (Act of May 18, 1911, P. L. 310) provides that all existing independent districts shall be abolished from and after the beginning of the school year fixed by the act. In districts of the class to which the one in question belongs, the school year begins on the first Monday of July, and the old district was not abolished until that time. Section 101 provides that each city, incorporated town, borough, or township, now existing, or hereafter created, shall constitute a separate school district. Independent districts are not included in the enumeration, and it is too plain for argument that the intention of the Legislature was to abolish existing independent districts at the time mentioned in the act. The act so declares in express words, and, the Legislature having the power to deal with the subject, courts are bound by the statutory requirements. While independent districts were abolished, the welfare of pupils residing in the attached parts of former districts was provided for, by giving such pupils the right to attend schools located in the old independent districts by requiring the cost of tuition, books, and supplies to be paid by the district in which the pupils reside. So that, under the new law, pupils residing in the territory comprising the old independent district have the right to attend the schools located in that district after it is abolished, subject to a proper charge for tuition, books, and supplies, to be paid by the proper district. This was evidently intended to provide for the convenience, comfort, and welfare of pupils thus located after the breaking up of old independent districts under the provisions of the act. It is true section 117 makes provision for establishing new independent districts, but certainly it was not the intention of the Legislature to provide for the creation of new districts before the old districts were abolished. The plain purpose of the act was to make school districts coterminous with established municipal divisions such as cities, incorporated towns, boroughs, and townships. It was not contemplated that every old independent district should be of right created into a new district under the act. It would have been a vain thing to abolish all the old districts, simply to have a new district re-established as soon as the old district passed out of existence. We do not mean to say that new independent districts should not be created; but, since it is evident the Legislature intended to abolish old independent districts, and did so, the burden is certainly upon those who undertake to have a new district created out of the old to show the necessity for re-establishing the very district which the Legislature abolished. Section 117 contemplates that there are instances in which independent districts should be created and the necessary procedure is

therein provided. The primary purpose of this section is to authorize in proper cases the creation of new independent districts, rather than the re-establishing of old districts. Nothing is said about re-establishing old districts except in the proviso in which it is said "that in case any such independent district so created shall include the territory of any former independent school district abolished by this act having any indebtedness, such indebtedness shall be assumed and paid by such newly created independent school district." The words "in case any such independent district so created shall include the territory of any former independent school district abolished" have a plain implication that the primary purpose of this section was to provide for the creation of new districts, which, of course, might include old districts; but the rights of the old district are to be regarded as incidental to the creation of the new district. We are not convinced that the phrase "after the approval of this act" was intended to authorize immediately thereafter the creation of a new district out of the territory comprised in an old district before the old district was abolished. An entirely new district might have been so created, but certainly it could not have been intended to apply to a district then in existence. For these reasons we think the proceeding was prematurely instituted and cannot be sustained.

Decree reversed, at the cost of appellees.

BOHLEN et al v. BLACK et al.
(Supreme Court of Pennsylvania. Oct. 14, 1912.)

1. SPECIFIC PERFORMANCE (§ 131*)—DECREE—PAYMENT OF MONEY.

Where a decree of specific performance shows on its face that it enforces the contract, which gave the vendors a right of reconveyance within a fixed period, on specific terms, and contained stipulations, for the nonobservance of which the law would afford no adequate measure of compensation, the decree was not objectionable as calling solely for the payment of money.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 426-435; Dec. Dig. § 131.*]

2. VENDOR AND PURCHASER (§ 180*)—CONTRACT OF SALE—PERFORMANCE—BOND—MORTGAGE—TENDER.

Where a land contract provided that the vendee should give a purchase-money mortgage, and he subsequently tendered bond and mortgage, which were refused, he could not thereafter successfully claim that he was only required to execute the mortgage, and not the bond.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 366; Dec. Dig. § 180.*]

3. SPECIFIC PERFORMANCE (§ 101*)—DEED IN ESCROW.

Where vendor's failure to place a deed in escrow, as required by the contract, did not affect the vendee's right, and was not asserted as ground for forfeiture, nor referred to in the answer, in a suit for specific performance,

and the vendee had tendered to the vendors a deed for execution, and a bond and a mortgage which he claimed complied with the contract, the vendor's failure to place the deed in escrow was waived.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 290, 295, 311-317; Dec. Dig. § 101.*]

4. SPECIFIC PERFORMANCE (§ 105*)—DEFENSES—LACHES.

Where a vendee was placed in possession of land, he could not object to a decree of specific performance because it was not entered until five years after the date of the contract, there being no single circumstance shown whereby the vendors' laches made it more inequitable or onerous for him to perform the contract than it would have been if the proceedings had been instituted with due diligence.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. § 105.*]

Appeal from Court of Common Pleas, Philadelphia County.

Suit for specific performance by Francis H. Bohlen and another against Frederick Black and others and James D. Black, as executor of Mary K. Black, deceased. Judgment for complainants, and defendant Frederick Black appeals. Affirmed.

The material provisions of the contract in suit were as follows, the land in question having been purchased by the vendors in the contract at a master's sale following proceedings in partition, though they had not yet received their deed:

"(1) The parties of the first part agree to sell and the party of the fourth part agrees to purchase for the sum of ten thousand dollars when title is obtained from the master in the partition proceedings, two certain tracts of land known as tracts Nos. 1 and 2 on the plan of said partition proceedings now pending in Delaware county containing some 44 acres by survey (but 35 acres available land) saving and excepting therefrom the strip of land lying to the north and west of the southern line of the right of way granted to the South Western Street Passenger Railway Company together with the right of way over a strip of land 100 feet wide extending from a point near the ferry wharf to and across the Back Channel upon which the South Western Street Passenger Railway Company's track is located, for the price of ten thousand dollars upon the following terms and conditions, viz.:

"(2) The partition proceedings are to be immediately settled, and the party of the fourth part to be released from his bids, except for liability for the deposit money, if not paid in, and he to release all right, title and interest in the fund as heir of Miss E. N. Black.

"(3) The party of the fourth part to give a purchase-money mortgage in the said sum of ten thousand dollars, payable twenty years after the date thereof with interest at the rate of four per cent. per annum and at the expiration of five years from the date

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereof, to make yearly payments of five hundred dollars on account of the principal of the said mortgage.

"(4) The party of the fourth part agrees to improve the property by buildings and other permanent betterments, to the value of not less than three thousand dollars, nor more than five thousand dollars. And he further agrees to submit the estimate for such improvements to the parties of the first part, and after the completion of such work to submit bills and receipts as vouchers therefor.

"(5) And it is further understood and agreed that the deed to said party of the fourth part shall be delivered in escrow to John Rodgers, not to be delivered to said party of the fourth part, until the said sum of three thousand dollars shall have been expended as aforesaid, or until the security for the expenditure of the said sum of three thousand dollars within one year from the date of obtaining title from the master by the said Bohlen and Black shall have been given by said party of the fourth part, satisfactory to the said parties of the first part. And if said improvements shall not have been completed, or said security entered within one year from the date upon which said parties of the first part shall have obtained title from the master then this contract shall be void and of no effect, and the said deed in escrow shall be redelivered to said parties of the first part.

"(6) The said deed shall contain a clause of defeasance whereby at any time within twenty years from the date of the said deed, upon one month's notice in writing, and upon the payment of the sum of twelve thousand dollars, together with all sums which may have been expended upon betterments and improvements, authorized and vouched for as above provided, and together with such further sum as will compensate the said party of the fourth part for the way-going crops and emblements, if the notice be so short as to prevent the crops from being harvested by him—less the amount still due and payable upon the said mortgage—and any other indebtedness by the party of the fourth part to the parties of the first, second and third parts or any of them—the title shall immediately revert to and revest in the said parties of the first part, and the party of the fourth part shall execute a deed of reconveyance therefor.

"(7) The said mortgage shall include in addition to the usual covenants for the payment of interest, and the yearly payment for the sum of five hundred dollars on account of the principal as above, and for the production of tax receipts and the maintenance of fire insurance to a satisfactory amount, to the parties of the first part—a covenant for the proper upkeep of the river banks, upon the land conveyed—and a failure to place and keep said banks in good order, upon notice given in writing to said party of

the fourth part, shall be a breach of said covenant for the repair of said banks, and shall render the principal of said mortgage immediately due and payable."

The vendors obtained a title to the property under the partition on January 7, 1905. In the meantime Frederick Black had taken possession and continued therein. During his possession he made improvements stated to be of the value of \$8,500. In 1907 plaintiffs submitted to defendant a form of deed, bond, and mortgage. These were objected to by defendant, and he, in turn, in 1908 submitted to plaintiffs a form of deed, bond, and mortgage, which were refused by plaintiffs. On June 18, 1910, another form of deed, bond, and mortgage were submitted to defendant, and upon the refusal of them the bill was filed.

Ralston, J., entered the following decree in the court of common pleas:

"And now, to wit, July 14, A. D. 1911, the above case having come on for a hearing before me, upon bill, answers, and proof, and upon consideration of the same, it is hereby ordered, adjudged, and decreed:

"(1) That defendant Frederick Black execute and acknowledge a deed, in the form hereto annexed, made a part of this decree, and marked 'Exhibit A,' when the same is duly executed and acknowledged by plaintiffs Francis H. Bohlen and Charles N. Black, and by Margaret W. Bohlen, wife of plaintiff Francis H. Bohlen, and is tendered by plaintiffs to defendant Frederick Black.

"(2) That defendant Frederick Black execute a bond and execute and acknowledge a mortgage in the forms hereto annexed, made a part of this decree, and marked, respectively, 'Exhibits B' and 'C,' and then deliver said bond and mortgage to plaintiffs Francis H. Bohlen and Charles N. Black, said delivery to be made when and at the time a deed is tendered in the form in this decree provided by plaintiffs to defendant Frederick Black.

"(3) That defendant Frederick Black pay plaintiffs the sum of one thousand dollars (\$1,000), which payment shall cover and represent the two installments of principal which fell due on January 7, 1910, and 1911, respectively, as provided in the above bond and mortgage, and which payment shall be made by defendant Frederick Black to plaintiffs when and at the time a deed is tendered by plaintiffs, as in this decree provided.

"(4) That defendant Frederick Black pay plaintiffs interest at the rate of four (4) per centum per annum on the sum of ten thousand dollars (\$10,000) from January 7, 1905, to the date of the delivery by him to plaintiffs of a bond and mortgage, properly executed and acknowledged, as in this decree provided, said payment to be made when and at the time plaintiffs tender a deed to defendant Frederick Black in the form provided for in this decree, said payment to cover and represent the interest due on said

bond and mortgage from January 7, 1905, to the date of said delivery.

"(5) That plaintiffs Francis H. Bohlen and Charles N. Black shall not be obligated to deliver a deed at the time tender is made by them, as in this decree provided, or at any time thereafter, unless and until defendant Frederick Black executes and acknowledges said deed, tenders and delivers said bond and mortgage properly executed and acknowledged, and pays plaintiffs the sums herein provided for.

"(6) That defendant Frederick Black pay the costs of this proceeding."

Argued before FELL, C. J., and MESTREZAT, ELKIN, STEWART, and MOSCHZISKEB, JJ..

V. Gilpin Robinson, John G. Kaufman, and A. E. Peterson, all of Philadelphia, for appellant. Owen J. Roberts, of Philadelphia, for appellees.

STEWART, J. This appeal is from a decree enforcing specific performance by a vendee of a written contract entered into for the sale and purchase of real estate. The integrity of the contract was not impeached. That it was entered into with a full understanding of its terms, in the exercise of entire good faith on part of both contracting parties, that it is fair and conscionable in all its provisions, and that nothing has since occurred in change of values to render its enforcement oppressive upon either, and that the vendee has been in possession of the premises ever since the contract was entered into, are admitted facts. Why, then, should specific performance not have been decreed? If we confine ourselves to the reasons urged in the argument submitted on behalf of appellant, it is only because we find it utterly impracticable, as counsel themselves must have done, to discuss seriatim the 26 assignments of error with which we are confronted. The argument submitted so reduces these that the case is brought within very narrow limits, and these we shall observe.

[1] First, it is objected that the case is not one calling for specific relief, inasmuch as the decree is solely for the payment of money which could as readily be recovered in an action at law; second, the complainants by reason of laches have forfeited whatever right they had to equitable relief, and that it is now impossible to carry out the contract as a whole; third, that the bill and proofs do not show that the vendors were during this interval ready and willing to carry out their part of the contract; and, finally, that the decree is inequitable in its requirements and departs from the terms and conditions of the contract.

None of the objections call for extended discussion. With respect to the first it is sufficient to say that it involves a misstatement of facts. As the decree shows upon its

face the relief obtained is not confined, as was the case in Kauffman's Appeal, 55 Pa. 383, the authority relied upon, to the payment of money. It enforces a contract which gives to the vendors a right of reconveyance within a fixed period, upon certain terms, and contains other stipulations which appear in the recital hereinafter given, for nonobservance of any of which the law could afford no adequate measure of compensation. While the contract is plain and unambiguous in its terms, yet because of exceptional provisions including that we have specifically referred to, and others which equally distinguish it from the ordinary contract of sale of real estate, it is one which, except as specifically enforced in equity, leaves the disappointed party without adequate relief.

[2] The second objection is equally lacking in merit. Before making the contract, the vendors had purchased the land at a master's sale following proceedings in partition, but had not as yet received their deed. By the contract the parties of the first part, here the appellees, agreed to sell and the party of the other part to purchase the land for the sum of \$10,000, "when title is obtained from the master in the partition proceedings," upon the following terms: (1) The purchasing party to give a purchase-money mortgage in the said sum of \$10,000, payable 20 years after the date thereof, with interest at the rate of 4 per cent. per annum, and at the expiration of five years from the date thereof to make yearly payments of \$500 on account of the principal of said mortgage; (2) the purchasing party to improve the property by building and other permanent betterments to the value of not less than \$3,000 nor more than \$5,000, and agreeing to submit the estimate of such improvements to the vendors, and upon completion to submit bills and receipts and vouchers therefor; (3) the deed to be delivered in escrow, not to be delivered to the vendee until the sum of \$3,000 shall have been expended in improvements, or until security shall have been given for the completion of the improvements within a year from the time title from the master shall have been obtained; (4) the deed to contain a clause of defeasance whereby at any time within 20 years from the date of the deed upon a month's notice in writing and upon payment of \$12,000, together with all sums which may have been expended upon improvements authorized and vouched for as provided, and such further sum as will compensate for way-going crops, less the amount due and payable on the mortgage, and any other indebtedness by vendee to vendors, the title to revert to the vendors, the vendees to execute a deed of reconveyance therefor. A number of other provisions and stipulations were contained, which are unimportant in this connection and need not here be repeated. Title was obtained from the master Jan-

uary 7, 1905. Meanwhile appellant had entered into possession, and that he has so continued is a fact found by the court. The vendors did not, upon obtaining title from the master, place in escrow a deed to the vendee as provided in their contract, but suffered matters to remain as they were with the vendee in possession until 1907, when they tendered to the vendee a conveyance and demanded compliance by the latter with the terms of the contract. Meanwhile the vendee had made large expenditures in permanent improvements, amounting, as he alleges, to \$8,500. He declined the deed tendered, not in disaffirmance of the contract, not because of any failure on the part of the vendors to keep and observe their covenants, but because the deed and mortgage accompanying which he was asked to execute did not correctly follow the terms of the contract. In 1908 the appellant, demanding a conveyance, submitted to the vendors a bond and mortgage which he asserted were in full compliance on their part of the contract. These securities the vendors in turn rejected for like reason. In 1910 vendors submitted still another deed with bond and mortgage to be executed by the complainant, which offer was also rejected by the appellant. The present bill for specific performance followed in 1910. The following conclusions are very clearly deducible:

[3] (1) The failure on part of appellees to place a deed in escrow was not in prejudice of the vendee's rights. It affected him in no way whatever, was not complained against at the trial, was never asserted as ground of forfeiture, and is not even referred to in the answer to the bill. More than this, when the appellant in 1908 submitted a form of deed to appellees which he was willing to accept and a bond and mortgage which he was willing to execute in compliance with the terms of the contract as he alleged, he not only recognized the continuance of the contract, but waived the failure upon which he now relies.

[4] (2) There is nothing in the history of the transaction which shows any purpose or desire in the parties on either side to abandon or rescind the contract. Whatever the delay, it was occasioned by a disagreement as to the conditions imposed on each, for which no warrant can be found in the contract itself.

(3) The appellant is and has been in the enjoyment and possession of everything he contracted for, and has paid nothing. He has expended in permanent improvements an amount in excess of the sum required by the contract, but has submitted no receipts or vouchers for such expenditures, nor does it appear that the improvements made were authorized or approved by the vendors. Not a single circumstance has occurred to make it more inequitable or onerous upon the ap-

pellant to enforce the contract now than would have been the case had the vendors proceeded with the utmost diligence to enforce it; nor has anything occurred to interfere with its enforcement even at this time in every substantial requirement. That this exhibits a case entitling the vendors to a decree of specific performance is too obvious to call for discussion, and the principles governing are too familiar to call for any citation of authorities.

Nothing remains to consider but the terms of the decree. A careful examination shows that it enforces the contract in entire accordance with its terms, except where lapse of time has made exact compliance impossible with respect to matters of no substantial significance, and in regard to which the equities of the parties can readily be adjusted. The deed which the complainant is required to accept is a sufficient conveyance under the terms of the contract. It recites that it is to take effect as of January 7, 1905, in execution of a contract entered into January 21, 1904, the terms of which are all therein recited, as well the stipulation for defeasance at the option of the vendors within the period fixed, and the terms to be observed in connection therewith. The bond and mortgage which complainant is required to execute and deliver alike relate back to the same period, and make specific reference to the decree of the court requiring them. Together, deed, bond, and mortgage are in exact conformity to the terms of the contract, even to the date of their taking effect. Every right of complainant under the contract is fully and amply reserved and protected. His right upon reconveyance to compensation for betterments and improvements he has made is expressly reserved in the very terms of the contract. The objection that he is required to execute a bond when the contract calls simply for a mortgage to secure the payment of the purchase money could have been urged with great force, had not the complainant shown this to be his own understanding of the requirements of the contract by tendering to the appellees bond and mortgage as a fulfillment on his part. We see no merit in any of the contentions made by the appellant.

The assignments of error are overruled, and the decree is affirmed.

MANSELL v. LEWISTON, A. & W. ST. RY.
(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. STREET RAILROADS (§ 86*) — OPERATION—
DEFECTS—PILING SNOW OUTSIDE TRACK.

Where a street railway required by its charter to so maintain its railroad that the part of the highway occupied thereby should be safe for travelers in clearing snow from its road bed, piled it up six or seven inches high and sloping to the track in the traveled part of

the highway, such trench, if sufficient to overturn a cab driven with due care, constituted a defect.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 160, 173, 183-185, 187; Dec. Dig. § 86.*]

2. STREET RAILROADS (§ 114*)—ACTION FOR INJURIES—RES IPSA LOQUITUR.

That a cab overturned in the traveled part of a street by contact with the rail of a street car track on both sides of which snow was piled was strong evidence that the street was unsafe and inconvenient for travelers.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

3. STREET RAILROADS (§ 114*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

Evidence in an action for personal injuries resulting from the overturning of a cab by contact with the rail of a street railroad held to sustain a finding that plaintiff was in the exercise of due care.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

On Motion from Supreme Judicial Court, Kennebec County, at Law.

Action by George M. Mansell against the Lewiston, Augusta & Waterville Street Railway. Judgment for plaintiff, and defendant moves to set aside the verdict. Motion overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

B. F. Maher, of Augusta, for plaintiff. Heath & Andrews, of Augusta, for defendant.

PER CURIAM. This case comes up on motion. It is an action for damages for personal injuries received by the plaintiff by the overturning of his cab, which came in contact with a rail of the defendant's road at the Western avenue junction in the city of Augusta. No question is raised as to the amount of the verdict. The accident occurred in the traveled part of the way.

[1] Upon the evidence the jury would be authorized to find that at the point of accident the defendant in clearing the snow from its roadbed had left a depression or trench occupied by the track which made a diagonal slope to the rails from the level of the snow in the road eight inches in length and six or seven inches in depth; that is, it formed a triangle with a hypotenuse of eight inches and a perpendicular of six or seven inches.

It was the duty of the defendant, by its charter, to so construct and maintain its railroad that so much of the highway as might be occupied thereby should be safe and convenient for travelers—the same duty imposed upon towns with respect to maintaining the highways and keeping them in repair.

The first question, therefore, is: Was the condition complained of a defect? This was a fact for the consideration of the jury.

Unless their verdict was clearly wrong, it cannot be disturbed.

[2] We are unable to avoid the conclusion that this trench or channel cut through the snow in the traveled part of the highway sufficient to cause the overturn of a cab, or other vehicle upon runners, whatever its depth and shape, could be regarded as other than a defect, provided the vehicle was being driven with due care. It is a case in which the accident itself speaks. The fact that the cab overturned in the traveled part of the street is very strong evidence that such street was unsafe and inconvenient for travelers. Upon this element of the case the verdict cannot be set aside.

[3] It accordingly remains to be seen if the plaintiff was in the exercise of due care. The jury was clearly warranted in finding for the plaintiff upon this issue. In fact, there is no evidence that contravenes this conclusion, nor does the defendant raise the question in its brief. It is true the plaintiff had frequently been past the locus, but upon the day of the accident quite an amount of snow had fallen which obscured the real condition, and, in addition to this, the plaintiff was obliged to turn from the most traveled part of the way to avoid collision with an approaching coal team.

Motion overruled.

STATE v. STURGIS et al.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. BREACH OF THE PEACE (§ 22*)—BOND—VOLUNTARY ENGAGEMENT—VALIDITY.

A voluntary engagement entered into on the part of a citizen with the state to keep the peace and be of good behavior, and especially not to violate a particular law, does not create an enforceable contract.

[Ed. Note.—For other cases, see Breach of the Peace, Cent. Dig. § 14; Dec. Dig. § 22.*]

2. CRIMINAL LAW (§ 995*)—REQUISITES OF SENTENCE—CERTAINTY—ALTERNATIVE SENTENCE.

A sentence in a criminal case must be definite and certain, and not dependent on any contingency or condition, and, in the absence of statute, a sentence in the alternative is bad for uncertainty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2521, 2523-2526, 2528½, 2536-2543; Dec. Dig. § 995.*]

3. JUDGMENT (§ 228*)—FORM AND REQUISITES—ALTERNATIVE OR CONDITIONAL JUDGMENT.

Alternative or conditional judgments at law are void in civil, as well as in criminal, cases.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 407; Dec. Dig. § 228.*]

4. CRIMINAL LAW (§ 991*)—SENTENCE—ALTERNATIVE SENTENCE—STATUTES.

Rev. St. c. 136, § 5, which provides that, when a convict is sentenced to jail, the court may, in addition, sentence him to the other punishment provided by law for the same offense, with the condition that if he cannot be received at the jail to which sentenced, or if at

any time before the expiration of the sentence he becomes incorrigible or unsafe, the inspector of jails may order that he suffer such alternative sentence, is special and limited in its operation, its very enactment emphasizing the fact that alternative sentences without statutory authority are void, and hence does not authorize alternative sentences generally.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1483, 2518, 2525, 2528; Dec. Dig. § 991.*]

5. CRIMINAL LAW (§ 982*)—SENTENCE—SUSPENSION.

After judgment in a criminal case is rendered and sentence has been imposed, the court cannot relieve the convict from its execution, or indefinitely postpone execution, or commute the punishment, or exempt the prisoner from it in whole or in part or do anything which would in effect cancel the sentence, as distinguished from the suspension of the imposition of sentence, the correction of sentence or suspension pending appeal, since that would, in effect, be the exercise of the power of pardon exclusively vested in the Governor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

6. CRIMINAL LAW (§ 1001*)—SENTENCE—SUSPENSION PENDING REVIEW.

The court may temporarily suspend the execution of its sentence pending review, and also in cases where cumulative sentences are imposed, and perhaps in some cases on extreme necessity or emergency.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2554-2559; Dec. Dig. § 1001.*]

7. CRIMINAL LAW (§ 991*)—SENTENCE—UNCERTAINTY.

Rev. St. c. 22, § 2, as amended by Laws 1909, c. 231, makes the maintaining a liquor nuisance subject to a fine not exceeding \$1,000, and imprisonment in jail not less than 30 days or more than one year, and, in default of payment, additional imprisonment of 30 days. Rev. St. c. 136, § 1, provides that where the statute provides for imprisonment and fine, or imprisonment or fine, or by fine with additional imprisonment, the sentence may be either or both, and section 9 empowers the court to require any person convicted of an offense not punishable by imprisonment in the state prison to recognize with sureties to keep the peace and be of good behavior for not to exceed two years, or stand committed. Defendant was sentenced to a fine of \$1,000, and to imprisonment for six months, and, in default of payment of the fine, 30 days additional in jail, the imprisonment part of the sentence to be canceled on payment of the fine, if he should recognize with sureties in \$1,500 to keep peace and be of good behavior, and especially to violate no provision of the liquor laws during two years. *Held*, that whether the provision for canceling the imprisonment part of the penalty by payment of the fine was a further sentence, to be accepted or rejected at the option of defendant, or as a condition stipulated by the court, the performance of which by defendant, at his option, should relieve him from the imprisonment part of the sentence, it was unauthorized and void because of the alternative, and hence that defendant's recognizance was not enforceable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1483, 2518, 2525, 2528; Dec. Dig. § 991.*]

Agreed Statement from Superior Court, Kennebec County.

Scire facias by the state against Charles E. Sturgis and the sureties on his peace

recognizance. Case reported to the law court on an agreed statement. Judgment for defendants.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Joseph Williamson, Co. Atty., of Augusta, for the State. George W. Heselton, of Gardiner, for defendants.

KING, J. This case is reported to the law court on an agreed statement.

At the January term, 1910, of the superior court for Kennebec county, Me., the defendant Charles E. Sturgis entered a plea of nolo contendere to an indictment pending against him for maintaining a liquor nuisance, and the following sentence was imposed upon him by the court:

"Sentence: Fine \$1,000, and, in addition, imprisonment at hard labor in jail for the term of six months, and, in default of payment of fine, thirty days additional in jail, the imprisonment part of the penalty to be canceled on payment of the fine, if respondent shall recognize with sufficient sureties in the sum of \$1,500 to keep the peace and be of good behavior, and especially to violate no provisions of law for the prevention of the traffic in intoxicating liquors for the term of two years."

The fine was paid and the peace recognizance given. Thereafter, at the September term, 1911, of said court, Sturgis entered a plea of nolo contendere to a search and seizure process issued against him for a violation of a provision of law for the prevention of the traffic in intoxicating liquors, and was sentenced thereunder to pay a fine and costs, which he paid. Thereupon, at said September term, 1911, of said court, and after the conviction and sentence of said Sturgis in said search and seizure proceedings, he and his sureties in said peace recognizance were defaulted, and this action of scire facias is brought to recover \$1,500 as the penalty of the recognizance.

[1] It must be conceded that a voluntary engagement entered into on the part of a citizen with the state to keep the peace and be of good behavior, and especially not to violate a particular law, would not create an enforceable contract. Therefore the real question presented in this case is whether the recognizance was given in compliance with a lawful requirement therefor.

The statutory penalty for maintaining a liquor nuisance is as follows: "Whoever keeps or maintains such nuisance, shall be fined not less than one hundred dollars and not exceeding one thousand dollars, and imprisonment in jail not less than thirty days and not more than one year, and in default of payment of said fine an additional imprisonment of thirty days in jail." Section

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

2, c. 22, Revised Statutes, as amended by chapter 231, Laws 1909.

It is also provided by section 1, c. 136, R. S., that where the statute provides for punishment "by imprisonment and fine, or by imprisonment or fine, or by fine and in addition thereto imprisonment," the sentence may be "to either or both." And section 9, c. 136, reads as follows: "In addition to the punishment prescribed by law, the court may require any person convicted of an offense not punishable by imprisonment in the state prison, to recognize to the state, with sufficient sureties, in a reasonable sum, to keep the peace and be of good behavior for a term not exceeding two years, and to stand committed until he so recognizes."

Under these provisions of statute, the court could have sentenced Sturgis for maintaining a liquor nuisance to a fine of not less than \$100 nor more than \$1,000, or to imprisonment in jail for not less than 30 days nor more than a year, or to both fine and imprisonment. And, assuming that the provision of section 9, c. 136, applies to this statutory offense, the court could have required, in addition to the punishment imposed, as prescribed by law, that Sturgis should recognize to keep the peace and be of good behavior for a term not exceeding two years, and to stand committed until he so recognized.

Before passing to the consideration of the construction of the sentence pronounced in this case, it may be well to note some principles applicable to judgments and sentences in criminal cases.

[2] It is fundamental law that the sentence in a criminal case should be definite and certain, and not dependent on any contingency or condition. Bishop, *Crim. Proced.* § 1309; 19 *Ency. Plead. & Prac.* p. 476, and cases cited; 12 *Cyc.* p. 779, and cases cited. Accordingly, where no statute is found to authorize it, a sentence in the alternative is bad for uncertainty. In *Brownbridge v. People*, 38 Mich. 753, the court, referring to Mr. Bishop, said: "He says that, where there are no statutory provisions for sentences in the alternative, 'the judgment should be direct and unconditional and distinctly limited in its terms,' and the authorities he cites and many others fully sustain him."

[3, 4] In *State v. Hatley*, 110 N. C. 522, 14 S. E. 751, the court said: "It is earnestly insisted by counsel for the defendants that the judgment is an alternative judgment, and as such is void. Is it an alternative judgment? If so, the authorities are abundant to settle the question of its invalidity"—citing *Strickland v. Cox*, 102 N. C. 411, 9 S. E. 414, where it is said: "Alternative or conditional judgments at law are void in civil as well as in criminal cases. *State v. Bennett*, 20 N. C. 170; *State v. Perkins*, 82 N. C. 682." In *Miller v. City of Camden*, 63

N. J. Law, 501, 504, 43 Atl. 1069, 1070, the court said: "The sentence complained of is further objectionable from a legal standpoint by reason of its alternative character. It leaves it to the prosecutor (the convict) either to pay a fine or submit to a term of imprisonment as he may select." And in *Rx parte Martini*, 23 Fla. 343, 345, 2 South. 689, 690, it was said: "If the sentence is to be considered as inflicting in the alternative a fine of \$100, or the performance of 60 days' work on the public streets as the punishment adjudged for the offense, not only is the latter part of it wholly unauthorized as a punishment by the ordinance denouncing the offense, but the sentence is void for uncertainty. If it be left by the court to either the prisoner, or the ministerial officer of the court having him in charge, or to any one else, to say whether the prisoner shall pay a fine or do something else, then the court has not fixed the sentence, and we have no certain sentence of the court; and whichever of the two things may be done is not done by virtue of any decision of the court as to which shall be done." We find no authorities to the effect that an alternative sentence is valid, except where it is authorized by statute. There is no statutory provision in this state for alternative sentences except that contained in section 5, c. 136, R. S., which is that, when a convict is sentenced to either of the work jails, "the court or magistrate may in addition sentence him to the other punishment provided by law for the same offense, with the condition that if such convict cannot be received at the work jail to which he is sentenced, or if at any time before the expiration of said sentence, in the judgment of the inspectors of jails, he becomes incorrigible, or unsafe, they may order that he suffer such alternative sentence or punishment." That provision is special and limited; and its very enactment emphasizes the fact that alternative sentences without statutory authority therefor are unlawful.

[5] Again, it is a well-recognized principle that, after a sentence has been imposed, the court has no authority to relieve the convict from its execution. The authorities draw a clear distinction between the suspension of the imposition of a sentence and the indefinite suspension or remission of its enforcement. There is a conflict of authority as to the power of the court after a conviction to indefinitely postpone the imposition of the punishment therefor prescribed by law, but, however the courts may differ as to such power, it is well established that the court cannot, after the judgment in a criminal case is rendered and the sentence pronounced, indefinitely postpone the execution of that sentence, or commute the punishment, and release the prisoner therefrom in whole or in part. Of course, it is not to be understood that the court has not the power to

temporarily postpone the execution of its sentence pending an appeal and other proceedings to obtain a new trial or review of the judgment, and in cases where cumulative sentences are imposed, and perhaps in some cases of great necessity and emergency. And the power of the court to correct errors in its judgment, and to change its sentence during the term at which it is imposed and before its execution has begun, is another and different matter. The act which the authorities hold that the court has not the power to do is not the act which stays the execution of its sentence in order that the convict may exercise his legal rights to obtain a reversal or modification of the judgment against him, and not the act done to correct its sentence so that it shall be in accord with its final and lawful judgment, but the act done for the purpose of exonerating the convict, in whole or in part, from the final and lawful judgment and sentence of the law which has been imposed upon him. That is the power to pardon, to commute penalties, to relieve from the sentences of the law imposed as punishments for offenses against the state, which power has not been given to the courts, but confided exclusively to the Governor of the state, with the advice and consent of the council. Const. Me. art. 5, part 1st, § 11.

It may be unnecessary to cite authorities in support of this principle, that, after sentence has been pronounced in a criminal case, the court cannot as a matter of leniency to the convict do that which would in effect cancel the sentence, and relieve or pardon the offender in whole or in part.

In a recent case—*Tuttle v. Lang*, 100 Me. 123, 60 Atl. 892—the defendant was sentenced to fine, costs, and imprisonment, but with the proviso that no mittimus in execution of the sentence should issue until the petitioner should again be guilty of selling intoxicating liquors. Nearly two years afterward a mittimus was issued under that sentence, and he was committed thereon. The court said: "If after conviction and sentence any court, whether of general or limited jurisdiction, permits the convict to go at large without day, it can never thereafter issue a mittimus for his commitment. In such case, having completed its judicial functions, it has voluntarily surrendered all further control over the case and person"—citing *Ex parte Gordon*, 1 Black, 503, 17 L. Ed. 134; *In re Webb*, 89 Wis. 354, 62 N. W. 177, 27 L. R. A. 356, 46 Am. St. Rep. 846; *People v. Brown*, 54 Mich. 15, 19 N. W. 571; *State v. Voss*, 80 Iowa, 467, 45 N. W. 898, 8 L. R. A. 767; *People v. Barrett*, 202 Ill. 287, 67 N. E. 23, 63 L. R. A. 82, 95 Am. St. Rep. 230. While the precise question decided in *Tuttle v. Lang* was that a convict who had been sentenced, and then permitted to go without day, could not be subsequently committed under the original sentence, yet that decision

is necessarily grounded in the fundamental principle that after a sentence is imposed the court has no power to indefinitely suspend its execution.

[6] It has already been suggested that the court may temporarily suspend the execution of its sentence to enable the defendant to prosecute authorized proceedings to reverse or modify the judgment against him, also in cases where cumulative sentences are imposed, and probably in some cases of extreme necessity therefor. And it will be found, we think, that most of the cases occasionally cited in support of the proposition that the court has power to suspend the execution of its imposed sentence are clearly within some of these classes of permissible temporary suspensions. We shall not attempt here to review those cases. Many of them were cited in behalf of the state in the quite recent case (*Ex parte Clendenning*, 22 Okl. 108, 97 Pac. 650, 19 L. R. A. [N. S.] 1041, 132 Am. St. Rep. 628), and the court there exhaustively reviewed and analyzed them, finding that none of them (except *Sylvester v. State*, 65 N. H. 186, 20 Atl. 954) is to be regarded as an authority in point that the court has power to indefinitely postpone the execution of its imposed sentence. And we do not think that *Sylvester v. State*, supra, holds that such a stay of execution of sentence is lawful. The *Clendenning* Case is on all fours with that of *Tuttle v. Lang*, and the decision was the same. Referring to the authorities, the court there said: "Every case wherein the question is squarely presented and passed upon, and the courts have given it the care and attention its importance deserves, holds, practically without dissent, that in passing sentence on a person convicted of an offense the court has no power to provide that the imprisonment of the defendant shall begin at some future, indefinite time, depending on the happening of a contingency."

The case of *Re Webb*, 89 Wis. 354, 62 N. W. 177, 27 L. R. A. 356, 46 Am. St. Rep. 846, was one where the petitioner was convicted of the crime of adultery, and was sentenced to pay a fine of \$200, and to be committed to the common jail for six months. He paid the costs, and the court directed "that the sentence of imprisonment be suspended until the further order of court." After the expiration of that term, and after six months had expired, he was ordered to comply with the sentence, and the court, in holding that the judgment of the court committing him was void, said: "While it may be said that the defendant is in no position to complain or take advantage of the clemency of the court, the question at issue is one of power, involving serious considerations of public policy respecting the administration of criminal justice. After the defendant had been convicted, and the sentence of the law in legal and proper form had been pronounced

against him, it is difficult to understand upon what principle the court could further interfere in the premises. The right of the court for cause within the exercise of a reasonable discretion to postpone sentence or suspend sentence, as it is said, seems to be clear; but we think, both upon principle and authority, its right to suspend the execution of the sentence after it has been pronounced cannot be sustained, except as incident to a review of the case upon a writ of error, or upon other well-established legal grounds."

In *Re Strickler*, 51 Kan. 700, 33 Pac. 620, the defendant was sentenced to imprisonment, and it was "further ordered by the court that the operation of this sentence shall be suspended during such time as the defendant shall keep the peace with all mankind, and desist from all unnecessary use of intoxicating liquor, and refrain from becoming intoxicated." The court held the stay of the execution of the sentence "wholly unauthorized by law." See, also, *Re Bloom*, 53 Mich. 597, 19 N. W. 200; *Re Markuson*, 5 N. D. 180, 64 N. W. 939; *Tanner v. Wiggins* (1907) 54 Fla. 203, 45 South. 459, 14 Ann. Cas. 718. In the last case cited the defendant was sentenced to imprisonment for 12 months, with the following stipulation: "It is further ordered that on payment of \$50 and costs the above sentence will be suspended during such time as defendant abstains from selling, by himself or others, any spirituous, vinous, or malt liquors, or from staying or being where any such liquors are sold, or from maintaining, keeping or being interested in any place of business or institution where any of such liquors are sold or kept." The court held the attempted suspension of the execution of the sentence to be a nullity. The citation of authorities need not be multiplied, for they are in substantial harmony in holding that, where the court has pronounced the sentence of the law against one convicted of a criminal offense, it then has no power (unless so authorized by statute) to make any order, the effect of which would be to indefinitely suspend the execution of that sentence, or to nullify it upon the happening of a contingency, or upon the performance of some condition by the defendant at his option, and that any such order is void and any bond or recognizance given in pursuance of such order is also void.

[7] It may not be entirely clear as to what should be the construction of the sentence, under consideration in the case at bar.

The language used, "Sentence: Fine \$1,000, and, in addition, imprisonment at hard labor in jail for the term of six months, and, in default of payment of fine, thirty days additional in jail," must, we think, be construed as an actual imposition of a sentence authorized by statute for the offense of which the defendant stood convicted. If the additional words, "the imprisonment part of the penalty to be canceled on payment of

the fine, if respondent shall recognize," etc., are to be construed as imposing a further sentence to be accepted or rejected at the option of the defendant in lieu of the imprisonment part of the original sentence, then we are constrained to hold that the sentence was unauthorized and void because in the alternative, and therefore not definite and certain as required by law. If on the other hand, those additional words are to be construed (and this seems to us to be the meaning intended) as a condition stipulated by the court, the performance of which by the defendant, at his option, should relieve him from the imprisonment part of the sentence imposed upon him, then it must be held that the court had no power to so stipulate, and accordingly that the recognizance given in carrying out that stipulation was void.

It follows, therefore, as the opinion of the court, that the recognizance to enforce which this action is brought was not given in compliance with a lawful requirement therefor, and for that reason is not enforceable.

Judgment for the defendants.

TRAINER v. MARINE NAT. BANK.

(Supreme Judicial Court of Maine. Dec. 20, 1912.)

1. BANKS AND BANKING (§ 154*)—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action to recover a deposit, where the bank claimed with the depositor's authority to have purchased a bond out of the proceeds of such deposit, evidence held to support a finding that the purchase had not been authorized by the depositor.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 502-512, 514-533; Dec. Dig. § 154.*]

2. BANKS AND BANKING (§ 154*)—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action to recover the excess charged against plaintiff's deposit of interest on a loan made by the bank, evidence held insufficient to support a finding for the depositor on the theory that the notes had been altered after execution by increasing the interest rate.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 502-512, 514-533; Dec. Dig. § 154.*]

3. BANKS AND BANKING (§ 154*)—ACTIONS—EVIDENCE.

In an action to recover a deposit where it was claimed that part of the deposit had, with the depositor's authority, been expended in purchasing a bond for him, evidence that the property upon which the bond was secured could, after the insolvency of the company, have been sold for more than enough to pay the bond issue was inadmissible; the authority of the bank being the question in issue.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 502-512, 514-533; Dec. Dig. § 154.*]

Motion and Exceptions from Supreme Judicial Court, Sagadahoc County, at Law.

Assumpsit by John Trainer against the Marine National Bank. There was a verdict for plaintiff, and defendant moves for a

new trial and brings exceptions. Exceptions overruled, and motion sustained unless plaintiff files remittitur.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, KING, and HALEY, JJ.

George W. Heselton, of Gardiner, for plaintiff. Arthur J. Dunton, of Bath, for defendant.

KING, J. This is an action of assumpsit to recover three different items.

First, \$500 which the plaintiff claimed to be due him as a balance of a call deposit which he made with the bank December 1, 1905; second, \$111.55 as an overcharge of interest on two notes discounted for him by the bank; and, third, \$295.83 as interest on the alleged call deposit.

Under the ruling of the presiding justice, acquiesced in by the plaintiff, the third item was abandoned; and the second item was, by agreement of the plaintiff, reduced to \$101.25. The verdict was for \$601.25, showing that the jury found the plaintiff entitled to recover the first item of \$500, and the second item, as corrected, of \$101.25. The case is before the law court on the defendant's motion for a new trial, and also on its exceptions as to the admission and exclusion of testimony.

The Motion.

1. The \$500 item. The plaintiff, a sea captain, was a customer of the defendant bank from some time prior to December, 1905, until the bank went into liquidation in 1910 or thereabouts. During the period covered by the transactions in question Horatio A. Duncan was president of the bank, and his son, Silas H. Duncan, was its cashier. December 1, 1905, the plaintiff deposited in the bank \$5,843.75. After charging against that deposit an overdraft of \$362.97 and the balance due on two notes of the plaintiff, his balance was \$4,350.86.

The plaintiff claimed that immediately after that deposit was made the cashier of the bank proposed to him that if he could allow \$3,000 of his deposit to remain in the bank for some material time it would pay him 5 per cent. interest thereon, the same rate it was then paying for borrowed money, and that he assented to that proposition, but on condition, however, that his money should be subject to call. This alleged arrangement was the basis of the third item in the plaintiff's writ, which, however, was abandoned. On the part of the bank it was claimed that no such arrangement was made, and the evidence introduced relating to it, on the one side and on the other, became of little consequence after the third item was abandoned.

On December 8, 1905, three days after the deposit was made, an item of \$2,500 was charged against the plaintiff's account, and it appears to have been represented by a "debit" slip containing the words "note pur-

chased." It was claimed in behalf of the bank that this sum was applied, on authority of the plaintiff, to the purchase of the joint and several note for that amount of Silas H. Duncan, Horatio A. Duncan, and John S. Hyde, bearing 5 per cent. interest; that this note was kept in the bank with other papers of the plaintiff; and that the interest accruing thereon from time to time was credited to his account, and that finally the note was paid and the amount credited to him. The plaintiff, on the other hand, denied that he had any knowledge that such a transaction had occurred until after the bank went into liquidation, when he saw for the first time his canceled checks and debit slips, which up to that time had been in the possession of the bank. The validity of this \$2,500 note transaction was not directly involved in the issues submitted to the jury, and was material only so far as it shed any light upon those issues.

[1] We come now to the first matter in issue—the \$500 item. On January 31, 1906, the plaintiff's account was charged with an item of \$500. The bank claimed the charge was made by authority of a counter check for that amount dated December 18, 1905, payable to cash, and signed "John Trainer by S. H. D. authorized." This check was made out and signed by the cashier, Silas H. Duncan, and the bank claimed that it was given for the purchase of a \$500 bond of the Monson Consolidated Slate Company, which bond was then the property of the cashier. The bond was kept in the bank, and it claimed to have credited to the plaintiff's account such of the maturing coupons thereon as were paid. The slate company is in the hands of a receiver, and it was not claimed that the bond was of full value, at least at the time of trial. The First National Bank of Bath became the liquidating agent of the defendant bank, and Mr. Low, vice president of the First, testified that in searching, at the request of Horatio A. Duncan, for passbooks, canceled checks, and other papers and vouchers relating to the plaintiff's account in the Marine Bank, among the books and papers turned over to the First by the Marine Bank, he found a tin box containing a passbook in which were some canceled checks and other vouchers relating to the plaintiff's account, and that the \$500 bond was with the other papers, and that he passed the bond to the plaintiff who, after inquiring of him what it was and how it came there, passed it back to him.

The question of fact presented to the jury concerning the \$500 item was whether the plaintiff authorized the appropriation of \$500 of his deposit to the purchase of the bond, and the burden was on the defendant to prove that fact.

Silas H. Duncan now resides in Seattle, Wash., and he was not present at the trial, but a statement of what the plaintiff admitted he would testify to if present was

read to the jury, in which it was stated that he would testify, if present, that he called the plaintiff's attention to the \$2,500 note and the \$500 bond, and suggested to him that they would prove a good investment, yielding a good rate of interest, and that the plaintiff agreed to buy both the note and bond and authorized him to charge his account with the amount necessary for the purpose, which he did, and that after the transaction the matter was talked over between them, and that the plaintiff saw and handled the note and bond. In rebuttal the plaintiff called several witnesses who gave testimony tending to impeach the credibility of Silas H. Duncan.

The plaintiff testified that he did not authorize Silas H. Duncan to sign his name to the \$500 check; that he did not purchase the bond or give any one authority to purchase it for him; and that he never saw the bond or heard it spoken of until Mr. Low of the First National passed it to him in that bank with some of his canceled checks and other memoranda relating to his account as kept by the Marine Bank.

The defendant urged in support of its contention the circumstances that on March 13, 1906, the plaintiff's account was overdrawn \$902.11 according to the books of the bank, and that, at the request of the cashier, he gave his note for \$1,500, the proceeds of which were placed to his credit; that in December following his account was again much overdrawn, and he gave another note for \$1,500 the proceeds of which were credited to his account. And the bank contended that the plaintiff used the \$2,500 note and the bond as collateral security for the \$1,500 notes.

On the other hand, the plaintiff contended that he then told the cashier that he did not understand how his account could be overdrawn, or why he should be asked to give a note to the bank when the bank was indebted to him, and that the cashier told him it would be inconvenient for the bank at that time to call in the \$3,000 of the plaintiff's deposit which the bank had used, and that it could make no financial difference to him if he gave the note, as the bank would allow him the same rate of interest on his call deposit as he would pay on the note, and that he gave the \$1,500 notes relying upon that explanation, and because he then had implicit confidence in the cashier. He admitted that he signed his name on the back of the \$2,500 Hyde note, claiming that he did so at the time he gave the first \$1,500 note, and saying that the cashier called him back into the bank to do that, but he denied that he then knew that he had any ownership or interest in that \$2,500 note, and supposed he was asked to indorse it to assist the bank so it would not be obliged to call in his call deposit as the cashier had explained to him.

Much evidence was introduced on the one side and on the other bearing upon this is-

sue, but it is impracticable to attempt here any extended reference or detailed analysis of it. The direct evidence was conflicting, and there were other facts and circumstances shown which the parties claimed tended to support their respective contentions. The issue was clearly presented to the jury by the presiding justice in these words: "Did he authorize the appropriation of that money which the bank owed him to be expended for this \$500 Monson bond? If he did authorize the bank or its officials to appropriate his money to the purchase of that bond, why then that is the end of his case, as far as the bond is concerned. On the other hand, if he did not authorize the appropriation of his money to the purchase of that bond, then this bank is responsible for it and is responsible for it to-day, because there is no claim that that amount of money was appropriated upon the plaintiff's order except for the purchase of this Monson bond, and that is the issue. That is purely a question of fact for you to determine upon all the evidence in this case."

The jury found that issue of fact in the plaintiff's favor, and we are not persuaded by a study and consideration of all the evidence that their finding on that issue ought to be set aside as manifestly wrong. They saw the witnesses as they testified, and had a better opportunity to judge of their credibility than this court now has.

[2] 2. The item of \$101.25.

August 31, 1907, the plaintiff, who was then engaged in building a vessel, borrowed of the defendant bank \$2,200 and gave his note on two months therefor. His account was credited on that day with the proceeds of the note discounted at 6 per cent. But it appears that on September 3, 1907, his account was charged with \$3.70, it being the difference between the proceeds of the \$2,200 note discounted at 7 per cent. instead of 6 per cent. When that note matured October 31, 1907, a new note for \$2,200 was given on four months on which appears written, "With int. after at 7%." November 13, 1907, the plaintiff borrowed of the bank \$1,300 more and gave his note for that amount on four months, on which appears written, "With int. after at 7%." On the same day, November 13, 1907, a mortgage of certain vessel property was given by the plaintiff to the bank to secure the two notes, that of October 31st for \$2,200, and that of November 13th for \$1,300. This mortgage was written by George H. Clark, an insurance agent, now deceased. After the description of the notes in the mortgage there is written, "Both notes 'with interest after at 7%.'" On November 14, 1907, the plaintiff's account in the bank was credited with \$1,218.34, which appears to be the amount of the \$1,300 note, less the discount on both notes at 7 per cent. for four months, the time on which each was written. On the back of each note there

appears indorsed at regular intervals of four months, down to 1910, payments of interest at 7 per cent., and, so far as we have been able to determine, corresponding charges of interest were made against the plaintiff's account in the bank.

The plaintiff claimed that he should have been charged with only 6 per cent. interest on this loan of \$3,500, and the item of \$101.25 is the difference between the charges made against his account for interest on these notes and what it would have been at 6 per cent.

It was the plaintiff's contention that these notes were altered after he signed them, and manifestly the jury so found. We do not think that finding is reasonably justified by the evidence.

The plaintiff's testimony relating to this matter was not positive and certain. He could only testify that he did not remember that anything was said about 7 per cent. interest when the notes were made, and that he did not believe that the words relating to the interest were written on the notes when he signed them, and on cross-examination, being questioned with reference to the notes being changed after he signed them by adding the clause "With int. after at 7%," he testified: "Q. Would you swear positively that that was not on there at the time you signed it? A. I would not. I don't believe it was. Q. But you wouldn't swear positively that it wasn't? A. I wouldn't want to, no."

The evidence justifies the conclusion, we think, that in the summer of 1907 the plaintiff required a loan of \$3,500 and arranged for the same with the defendant bank; that the loan was to be secured by a mortgage of certain vessel property, but the execution of the mortgage was necessarily delayed on account of the registration of some of the vessels; that the \$2,200 note, dated August 31, 1907, on two months, was taken temporarily until the mortgage security could be given, which was done later, on November 13, 1907, when the \$1,300 note was given for the balance of the loan, and a new \$2,200 note was given bearing date October 31, 1907, the date of the maturity of the first note for that amount. Horatio A. Duncan, the president of the defendant bank, at the time of the transaction testified that the rate of interest on the loan at 7 per cent. was agreed upon when the first note of \$2,200 on two months was taken, but that by an error of the bank officials only 6 per cent. discount was charged on the books in the first instance, which error, however, was corrected three days after, on September 3, 1907, and the difference charged to the plaintiff's account; that the notes in question were filled out by him on printed blank notes; and that the clauses "With int. after at 7%" were written by him in both notes before they were signed, and that

no change had been made in the notes since they were signed. He further testified that the mortgage was written by Mr. Clark, with whose handwriting he was familiar, and that the clause in the mortgage relating to the interest on the notes is in Mr. Clark's handwriting and was in the mortgage when it was first delivered to the bank. But the plaintiff contended that an inspection of the notes and mortgage disclosed some evidence in support of his contention that the interest clauses in question were not written into the notes and mortgage at the same time the rest of the notes and mortgage was written. And the defendant called one witness who gave it as his opinion, from an inspection of the notes and mortgage, that the clauses in question were written into the notes after they were signed. The jury had the original notes and mortgage for their inspection, and we have examined them with care. While it is possible, perhaps, to discern from an inspection of the mortgage a slight difference between the quantity or shade of the ink in the writing of the clause relating to the interest and the other writing, yet that difference, if any, is extremely slight, and all the writing, we think, was manifestly done by the same person. And from an inspection of the notes we fail to discern anything that sufficiently indicates that the words relating to the interest were written after the notes were signed. Further the improbability that these notes were altered by the bank officials after they were signed is an important consideration. It is quite impossible to believe that an intelligent person would wrongfully alter a note after it was signed, thereby committing forgery under the statute, for no other motive than that a bank should get the benefit of an increase of 1 per cent. in the rate of interest on a comparatively small loan for a short time.

After a careful and painstaking examination of all the evidence relating to this issue, especially the fact that the plaintiff himself was unwilling to state positively that the interest clauses were not in the notes when he signed them, the positive testimony of the president of the bank who wrote the notes that he wrote the interest clauses into them before they were signed, the absence of any substantial evidence from an inspection of the notes that they have been altered since they were signed, and the improbability that any intelligent person would make such an alteration on a note after it had been signed by the maker, we are constrained to the opinion that the jury's finding on this issue was against the weight of the evidence.

It may be that the other issue relating to the item of \$500 so engrossed the consideration of the jury that they failed to give discriminating consideration to the evidence bearing on this issue. But whatever may

have been the cause for it, the court is of the opinion that the finding of the jury on this issue was unmistakably wrong, and that it ought to be set aside.

The Exceptions.

[3] In the reply to the plaintiff's brief the defendant's learned counsel says: "As to the exceptions, we will say that the only one of the exceptions to which any attention was devoted in our brief was the exception to the exclusion of the testimony of George W. Johnson. This is the one to which the plaintiff does not seem to refer in his brief but is the one on which we rely."

George W. Johnson, treasurer of the Monson Consolidated Slate Company from 1896 until it went into a receiver's hands in 1910, as a witness for the defendant, testified that the bond issue, of which the \$500 bond in question was a part, was \$50,000, of which \$20,000 were issued, and that the bonds were secured by a mortgage of property which he said "cost about \$200,000 at that time." He was then asked this question, "Could it have been sold for enough, in your opinion, even at forced sale, to have paid the bonds in full?" and his answer was excluded, to which ruling the defendant excepted.

We think the ruling was right. The fact sought to be elicited by the question was immaterial. The issue was whether or not the plaintiff purchased the \$500 bond of Silas H. Duncan and authorized the appropriation of \$500 of his deposit in the defendant bank for that purpose. The opinion of the treasurer of the slate company as to what the property securing the bonds would sell for at a forced sale could not be material to that issue. As bearing upon the probability that the plaintiff did or did not purchase the bond, his knowledge of the value of the bond at the time of the alleged purchase, or facts relating thereto then brought to his attention, might have been competent. But there was no such evidence offered. The court, however, did allow witnesses to be inquired of relative to the market value of the bonds. This was as far, we think, as the court was permitted to go in admitting testimony in relation to the value of the bonds.

It is therefore the opinion of the court that there was no reversible error in the ruling complained of.

We do not understand that the other exceptions are urged, but we have considered them and do not find the rulings complained of exceptionable.

In accordance with the foregoing opinion of the court, the entry in this case must be:

Exceptions overruled. Motion sustained unless plaintiff files remittitur for all of the verdict over \$500 within 30 days after the rescript is filed.

LITTLEFIELD v. NEWPORT WATER CO.
(Supreme Judicial Court of Maine. Dec. 23, 1912.)

WATERS AND WATER COURSES (§ 209*)—WATER SUPPLY—INJURIES INCIDENT TO SUPPLY AND USE—LEAKAGE—EVIDENCE.

Evidence held not to warrant a finding that water entering plaintiff's cellar came from water pipes of a water company, relieving it from liability therefor.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 302; Dec. Dig. § 209.*]

On Motion from Supreme Judicial Court, Penobscot County, at Law.

Action by Ulysses S. Littlefield against the Newport Water Company. There was a verdict for plaintiff, and defendant moved for a new trial. Sustained.

Argued before SAVAGE, KING, BIRD, HALEY, and HANSON, JJ.

F. W. Halliday, of Newport, for plaintiff.
W. H. Mitchell, of Newport, and John E. Nelson, of Waterville, for defendant.

SAVAGE, J. Case for negligence. The plaintiff obtained a verdict, and the case comes here on the defendant's motion for a new trial. In September, 1907, the Newport Water Company laid a two-inch water main up Park avenue in Newport to a point in front of the plaintiff's house. The main was in the southerly side of the street. The house was on the northerly side of the street and 50 feet from the main. The main was about eight inches lower than the bottom of plaintiff's cellar. At this point in front of the plaintiff's house, the pipe was reduced to a one-inch pipe by a reducing nipple a few inches long, a shut-off was put in, and a perpendicular one-inch pipe with elbow was connected by a nipple to the shut-off and came to the surface of the ground. Then it was extended on the surface to a trotting park as a service pipe. At about the same time a service pipe was laid from the main across the street and into the plaintiff's cellar. It started within a few inches of the shut-off just referred to. This service pipe also had a shut-off on the plaintiff's premises from 20 to 25 feet from the house. It is undisputed that the ground sloped away from the plaintiff's house to the north and the west; it is disputed whether it sloped to or from the house on the east; it is undisputed that on the south or road side of the house the ground sloped slightly from the traveled part of the road to the house from 2 to 4 inches in 50 feet.

The plaintiff complains that each winter since the pipes were laid large quantities of water have either flowed or percolated into his cellar, doing him much damage. He alleges that the water came from a break in the defendant's pipe in the ground at or near the connection between the two-inch

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

main and the trotting park service pipe. The negligence alleged and relied upon in argument is that the defendant laid the trotting park horizontal service pipe so closely to the surface of the ground at the point where it was connected with the perpendicular pipe that the heaving of the frozen ground in winter wrenched the pipe in the ground from its connection with the main, thus allowing the water to escape from the main. Counsel in his brief states the claim in these words: "As soon as the frost came the pipe above the ground was raised, and, acting on the connection under the ground, pulled it away from the main, causing a leak." It is not claimed that water froze in the pipe and thus cracked it.

In February, 1911, the fourth winter, the pipe at this point was uncovered, and it was found to be broken or cracked. The parties agree substantially as to where the break or crack was. They disagree as to size of the pipe in which it was, and as to the size of the leak. But these latter questions are of no importance at present. The leak was between the main pipe and the trotting park service pipe shut-off. And as it is not disputed that the water had been shut off from that service pipe, and that there was no water in it that could freeze, the allegation in the writ that the perpendicular pipe had been left uncased and unprotected from the frost is of no consequence. The trouble was not in the perpendicular pipe. A few days previous to the discovery of the leak already referred to, the plaintiff uncovered a portion of his own service pipe on his own ground, and at the point where the shut-off was connected he found, he says, slush and water in large quantities. It is testified to for the defendant, and not denied by the plaintiff, that this service pipe also was cracked at that point.

The plaintiff contends that all the water which came into his cellar came from the break in the defendant's pipe in the street, and that at times it came in such quantities as to stand from one to three feet in depth. The defendant concedes that water has flowed into the plaintiff's cellar at times from some source, and that, when the cellar drain has been clogged, it has stood there to the depth of a foot and a half, but it denies that any part of the water has come from its pipe in the street. It contends, on the contrary, that it has come partly from surface water flowing from the street and ground in front of the house down to the house, and emptying into the cellar through holes in the walls, but chiefly from springs or moisture in the ground at that place. It suggests, indeed, that as there were two cracked pipes, one in the street 50 feet away and one in the plaintiff's ground 20 or 25 feet away, there is no ground for saying that the water came from the street pipe rather than the other, if it came from either, and that the

presumption would be that the water came from the nearer one. The nearer one is not complained of in the writ.

With the plaintiff's testimony to guide us, it is clear that the same cause has been operative during the entire period from the first trouble in January, 1908, until the leak was discovered and repaired in February, 1911. The only difference has been in degree. This presents a rather remarkable, if not incredible, situation. It is that the water was burrowing or percolating from the pipe to the cellar for three years, and yet no sign of it appeared on the surface of the earth. It is argued that it followed the service pipe under the ground. But the evidence tends to refute that. The plumber who repaired the break in the service pipe testified positively that no water was coming in the ditch from the street, and the plaintiff does not say that there was any. Although the plaintiff says that he spent many days, for which he now seeks to recover compensation, in seeking the leak, he seems to have found on the top of the ground no evidence of any. And no softening of the ground, even, was ever noticed anywhere until about the time the street pipe was uncovered in 1911. Then the ground was found to be soft in the vicinity of that leak. It is true that the plaintiff testifies that in the winter of 1909 "it broke out; it filled the street; it flowed there for months; two feet of ice all over the street." But it would seem that the plaintiff must be in error about this, for in 1911, when the water was coming into his cellar, he renewed his search. Instead of digging up the pipe in the street, where he says it broke out so seriously in 1909, he began his search at the shut-off on his own service pipe. It would seem quite clear that at that time he had forgotten the alleged surface indications of 1909, if such ever existed.

Upon the plaintiff's theory that the break existed as far back as January, 1908, another singular feature appears. The water flow into the cellar, as the plaintiff testifies, has been intermittent for the most part. The principal trouble has been in the winter. In fact, the plaintiff in his testimony omits all reference to summer conditions. Doubtless the freezing of the cellar drain made conditions worse in the winter than they otherwise would have been. But it has been in the winter that the large quantities of water have come in, as he says. In one instance, as the plaintiff claims, the cellar filled two feet in less than 24 hours. If, as is argued, water from the break in the street pipe followed the plaintiff's service pipe ditch, or if it percolated through the soil to the cellar, we can think of no reason, and none has been suggested to us, why the flow should not be practically constant the year round. The pressure on the water in the pipes naturally would be about the same, summer

and winter. This intermittent condition would be more likely to exist in case of water coming from a springy, wet soil, which is naturally affected by drouths, and as well by the ordinary summer heat and dryness in this climate.

We mention these points as illustrative of some of the difficulties in the plaintiff's case upon his own testimony. But we go further. The testimony is overwhelming that the soil in the vicinity of the plaintiff's cellar is wet and springy; that water from the soil flows into the cellar; that both before the defendant's pipe was laid in the street, and since it was repaired, the same conditions that the plaintiff complains of have existed in the cellar, though to a lesser degree than he states them.

Upon the evidence, the only conclusion upon which the jury could base a verdict for the plaintiff is that water had been for three years, but intermittently, percolating through the soil 50 feet from the pipe to the cellar, and that without showing anywhere on the surface. We do not think the evidence warranted such a conclusion. The verdict is manifestly wrong and must be set aside.

Motion sustained.

CONTI v. AMERICAN EXPRESS CO.

(Supreme Judicial Court of Maine. Dec. 26, 1912.)

1. CARRIERS (§ 185*)—INJURIES TO GOODS IN TRANSIT—LIABILITY—PRESUMPTIONS.

To bring a case within the rule that, in an action against the terminal carrier for injuries to goods in transit, the presumption arises that the goods, shipped in good condition, continued in that condition until they reached the terminal carrier, so that the burden was on it to show that the injury occurred before the goods came into its possession, it must be shown that the terminal carrier was the last of a line of successive carriers carrying the goods continuously in pursuance of a through bill of lading or contract of shipment, and that they were received by the initial carrier in good condition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-850; Dec. Dig. § 185.*]

2. CARRIERS (§ 185*)—INJURIES TO GOODS IN TRANSIT—LIABILITY—PRESUMPTIONS.

Where the baggage of a passenger had not arrived when she sailed from a foreign port to New York, and the steamship agent agreed to forward it later as personal baggage, but the contract under which the steamship company carried the baggage was not shown, and it appeared that the passenger directed the steamship agent in New York to send the baggage to her to her destination, there was no presumption that an express company carrying the baggage from New York to the passenger's destination injured the baggage, and it was not liable for injury thereto, in the absence of proof of its negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-850; Dec. Dig. § 185.*]

Report from Supreme Judicial Court, Washington County, at Law.

Action by Ada Conti against the American Express Company. Cause reported to Supreme Judicial Court. Judgment for defendant.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Leo D. Lamond, of Eastport, and R. J. McGarrigle, of Calais, for plaintiff. C. B. & E. C. Donworth, of Machias, for defendant.

KING, J. This case comes up on report. It is an action to recover damages for injuries to seven trunks, one sewing machine, and a quantity of music in one of said trunks carried by the defendant, as a common carrier, from New York to Eastport, Me.

It appears from the report that the plaintiff visited Italy in 1910. She returned to the United States in November of that year by the Hamburg-American Line from Genoa to New York. She intended to take the trunks and sewing machine along with her as personal baggage, and says that the sewing machine was properly crated, and that the trunks were in sound condition, and securely locked and tied with ropes. It appears inferentially that this baggage may have been sent by rail to the steamship company at Genoa. It had not arrived there, however, when the plaintiff sailed, and the steamer agent was to forward it later. About three weeks after she arrived in Eastport, the trunks and sewing machine were delivered to her by the defendant, she paying the charges thereon, and she claims that they were then in a damaged condition. No bill of lading or shipping receipt from the defendant company is shown, and no evidence was offered to show who delivered the property to the defendant company in New York, or what its condition was when the defendant received it.

The plaintiff says she heard nothing about the baggage after she left Genoa until she received it in Eastport. But, when asked on cross-examination if she left any directions with the steamship agent in New York as to what should be done with her baggage when it arrived there, she said: "Yes; I told him to send it to me." It is therefore reasonable to infer that the steamship company, in compliance with the plaintiff's request, delivered the baggage to the American Express Company in New York to carry to Eastport.

[1] The plaintiff contends that, having shown that the property was in a damaged condition when the defendant delivered it to her, the burden was thereby imposed on it to exonerate itself by showing that the property was not injured while in its possession. She evidently relies upon the well-established rule that in an action against the last of a series of carriers to recover for injuries to goods in transit, when the goods were ship-

ped in good order, the presumption arises that they continue in that condition until they reach the hands of the delivering carrier, and the burden is on it to show that the injury occurred before the goods came into its possession. *Colbath v. B. & A. R. Co.*, 105 Me. 379, 74 Atl. 918, 134 Am. St. Rep. 569, and cases cited. To bring this case within the application of that rule, it must be shown that the defendant company was the last of a line of successive carriers carrying the goods continuously in pursuance of a through bill of lading or contract of shipment, and that they were received by the initial carrier in good condition.

[2] It sufficiently appears that the goods in question were transported by some means of conveyance from some other place in Italy to Genoa, for the plaintiff testified that they had not "arrived" at Genoa when she sailed, and she was asked if there were not washouts on some of the Italian roads on the day she sailed which delayed the goods, and she replied, "I supposed it did." There is no other evidence relating to this initial carriage of the goods, and, in the absence of any information as to the terms of the contract therefor, it seems just and reasonable to infer, under the circumstances, that this first carriage of the goods was not a part of a through shipment of them from their starting point in Italy to Eastport, Me., but only an independent transportation of them to Genoa, thence to accompany the plaintiff as "personal baggage" on her passage from Genoa to New York by the Hamburg-American Line.

If the carriage of the goods before they arrived in Genoa was not in pursuance of a contract for a through shipment of them to Eastport, and we think it was not, then there is no evidence, or presumption that can be legitimately applied, that the goods were in good condition when received by the Hamburg-American Line.

Further, there is no evidence that, when the goods were later taken to New York by the steamship company, they were carried in pursuance of a through shipment from Genoa to Eastport. No bill of lading or contract for shipment by the Hamburg-American Line is shown. And it is not shown that the plaintiff herself had a through ticket to Eastport. In the absence of any contract for through transportation to Eastport, the inference would seem to be that the goods were merely taken by the steamship company from Genoa to New York as the plaintiff's delayed baggage, and that the steamship company's only duty as a common carrier, with respect to the goods, was to land them safely in New York, where the plaintiff was to take charge of them. And this inference is made quite indisputable by the plaintiff's testimony that she left directions with the steamship agent in New York to send the goods to her when they arrived.

It is therefore the opinion of the court that the evidence in this case does not show that the American Express Company was the last of successive carriers of the goods in pursuance of any continuous carrying of them under a through bill of lading from Italy to Eastport, but, on the other hand, that the defendant received the goods in New York as a new shipment, independent of, and without connection with, any previous carrying of them. The plaintiff alleges in her declaration that she delivered the goods at New York to the defendant as a common carrier, to be carried to Eastport. That allegation is sustained by her evidence, for the goods were delivered to the defendant in New York by the plaintiff through her representative, the agent of the steamship company, acting under her directions to send the goods to her.

This suit is based on the negligence of the defendant. The burden is on the plaintiff to prove it. It is not enough for her to show that the goods were in a damaged condition when the defendant delivered them to her. She must show that they were injured while in the defendant's possession by its negligence. If she had shown that they were uninjured when the defendant received them, that would have imposed upon it the burden of exonerating itself. But she offered no evidence on that point. The mere fact that the goods were in a damaged condition when the defendant delivered them to the plaintiff is not, in the opinion of the court, sufficient evidence to sustain the burden of proof that the goods were injured by the defendant's negligence, because there is no evidence, or presumption applicable in this case, that the goods were uninjured when received by the defendant.

Judgment for defendant.

JUMPER v. MOORE et al.

(Supreme Judicial Court of Maine. Dec. 28, 1912.)

1. EXEMPTIONS (§ 48*) — CIVIL ACTIONS— POOR DEBTOR—EXEMPT CLAIM.

In view of Rev. St. c. 83, § 55, subd. 6, as amended by Laws 1909, c. 256, and further amended by Laws 1911, c. 175, providing that \$10 of the debtor's wages earned within the month preceding the service of process "shall be exempt in all cases," a claim for \$8 due the debtor for his personal labor earned within one month before the date of his disclosure was "exempted by statute from attachment" within Rev. St. c. 114, § 28, under which a debtor is not required to assign claims thus exempted.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 64-72; Dec. Dig. § 48.*]

2. STATUTES (§ 142*)—CONSTRUCTION—AMEND- ED BY IMPLICATION.

Where a new statute covers the same subject-matter as an existing statute and the two are plainly repugnant, the old statute is regarded as amended by the new so as to become conformable thereto.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 210; Dec. Dig. § 142.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Report from Supreme Judicial Court, Cumberland County, at Law.

Petition for a writ of certiorari by John S. Jumper against Frank I. Moore and others to quash a record of a disclosure commissioner. On report on petition, answer, and agreed statement of facts. Writ denied.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

D. A. Meaher, of Portland, for petitioner. Frank I. Moore, of Portland, for defendants.

KING, J. This is a petition for a writ of certiorari to quash a record of a disclosure commissioner relating to the disclosure and discharge of a poor debtor under the provisions of chapter 114 of the Revised Statutes. The case is reported to the law court upon the petition, answer, and an agreed statement of facts.

[1] The question presented is whether under the provisions of section 28, c. 114, R. S., a poor debtor should have been required to assign to his judgment creditor, whose original debt was for necessities, a claim for \$8, which was the only sum due him as wages for his personal labor earned within one month next preceding the date of his disclosure.

The section of the statute referred to, so far as material, reads as follows:

"When from such disclosure it appears that the debtor possessed, or has under his control, any bank bills, notes, accounts, bonds or other contracts or property, not exempted by statute from attachment, which cannot be come at to be attached, and the petitioner and debtor cannot agree to apply the same towards the debt the magistrate hearing the disclosure shall appraise and set off enough of such property to satisfy the debt, costs and charges; and the petitioner or his attorney, if present, may select the property to be appraised. If the petitioner accepts it, it may be assigned and delivered to him by the debtor, and applied towards the satisfaction of his demand. Except where the original debt was for necessities, the debtor shall not be required to assign any sums due him as wages for his personal labor earned within one month next preceding the date of the disclosure and not exceeding twenty dollars."

It is contended that the debtor should not have been required to assign said claim, because it was exempt from attachment under the statutes of this state in force in 1912 when the judgment was obtained and the disclosure made. And the statute quoted applies only to such bank bills, notes, account, etc., as are "not exempted by statute from attachment." Was the \$8 in question "exempted by statute from attachment," within the meaning of the statute quoted? We think it was.

Subdivision 6, § 55, c. 88, R. S., as amend-

ed by chapter 256 of the Laws of 1909, and as further amended by chapter 175 of the Laws of 1911, provides that no person shall be adjudged a trustee, under trustee process, "by reason of any amount due from him to the principal defendant as wages for his personal labor, or that of his wife or minor children, for a time not exceeding one month next preceding the service of the process, and not exceeding twenty dollars of the amount due to him as wages for his personal labor; and ten dollars shall be exempt in all cases."

By these legislative acts of 1909 and 1911 it was expressly provided that in "all cases" \$10 of the wages for the personal labor of a debtor should be exempt from attachment under the trustee process. That we think is in effect a general exemption from attachment of that much of a debtor's wages, since the trustee process is the only appropriate proceeding under our statutes for the attachment of such a property right.

But it is suggested in behalf of the creditor that if the legislation amending the statute relating to the trustee process, so that in all cases at least \$10 of the debtor's wages is exempt therefrom, is to be regarded as an exemption from attachment of that much of his wages within the meaning of section 28, c. 114, nevertheless, the provision of section 28 requiring an assignment, not having been expressly repealed, was still in force, and the debtor should have been required under that provision to make the assignment of the \$8; the original debt being one for necessities.

[2] It is, however, a well-recognized principle that where a new legislative act covers the same subject-matter as an existing statute, and the two are so plainly repugnant and inconsistent that they cannot stand together, the old statute is to be regarded as amended by the new so as to become conformable thereto.

In *Starbird v. Brown*, 84 Me. 238, 240, 24 Atl. 824, the court said: "The test is whether a subsequent legislative act is so directly and positively repugnant to the former act that the two cannot consistently stand together. Is the repugnancy so great that the legislative intent to amend or repeal is evident? Can the new law and the old be each efficacious in its own sphere?"

Let us apply this test to the case at bar. It is reasonably certain that the intention of the Legislature, when it amended the trustee process as above noted, was to make \$10 of a debtor's wages secure and available to him for the immediate succor of himself and family.

While the new legislative acts expressly amended the statute relating to the trustee process, still it cannot be reasonably contended that it was not the legislative purpose to make at least \$10 of a debtor's wages in all cases exempt from any attachment.

The new provision cannot work in harmony with the old law, for the operation of the old would completely destroy the efficacy of the new. If a poor debtor is to be required in certain cases to assign all the wages due him, then certainly he would not have \$10 exempt for his benefit in all cases as the Legislature manifestly intended.

It is therefore the opinion of the court that the decision of the disclosure commissioner in this case, not to require the debtor to assign the \$8 to his creditors, was correct.

Writ denied.

Petition dismissed, with costs.

HILL v. LIBBEY et al.

(Supreme Judicial Court of Maine. Dec. 26, 1912.)

1. MASTER AND SERVANT (§ 153*)—OBLIGATION OF MASTER—DUTY TO INSTRUCT AND WARN SERVANT.

An employer who directs his employé to perform a dangerous service requiring skill and caution to avoid the danger, knowing that the employé is inexperienced and ignorant of the dangers, must inform him of the dangers and instruct him as to how to do the work with reasonable care to avoid the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

2. MASTER AND SERVANT (§ 153*)—INJURY TO SERVANT—FAILURE TO WARN—NEGLIGENCE.

Where an employé engaged in dynamiting was injured by the explosion of a fuse cap used, and he testified that he knew that dynamite was dangerous but that he did not know of the danger of the fuse cap exploding when sought to be placed in proper position, he did not appreciate the risk and it was the duty of the employer, knowing of the employé's ignorance, to instruct and warn him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

3. MASTER AND SERVANT (§ 234*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The care required of an employé depends on his knowledge, actual or constructive, of the risks of the work assigned him, and, where he does not know of a danger, he is not chargeable with negligence for failing to avoid it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686, 706-709; Dec. Dig. § 234.*]

4. MASTER AND SERVANT (§ 281*)—INJURY TO SERVANT — NEGLIGENCE — QUESTION FOR JURY.

Where an employé, injured by the explosion of a fuse cap while being placed in position for blasting, did not know whether the cap was defective because the employer had failed to instruct him, and he testified that the cap had been wet and rendered more liable to explode, but he did not know that fact at the time nor the significance of the appearance of the cap, a finding that he was not guilty of negligence in using the cap was justified, since he could rely on the performance by the employer of the duty of using reasonable care in furnishing caps safe for use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.*]

5. MASTER AND SERVANT (§ 158*)—INJURY TO SERVANT — NEGLIGENCE — QUESTION FOR JURY.

Where an employer failed to instruct and warn an employé of the dangers and hazards in the use of fuse caps for blasting, and an explosion of a fuse cap occurred because of such failure without any negligence on the part of the employé, the fact that the jury could not determine precisely where in the cylinder of the cap the friction occurred that caused the explosion was immaterial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 304; Dec. Dig. § 158.*]

6. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where, in consequence of an explosion of a fuse cap used for blasting, an employé lost his thumb and forefinger of his right hand and pieces of the cap were blown into his face and chest, causing an infection in the nature of blood poisoning, on account of which he suffered much pain and was sick for several months, a verdict for \$1,494 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 178, 372-385, 396; Dec. Dig. § 132.*]

7. NEW TRIAL (§ 69*)—GROUNDS—PERJURY—TESTIMONY.

Where a party commits willful perjury, or knowingly makes use of false testimony and thereby obtains a verdict, the court in its discretion may set it aside, but it should not set aside a verdict merely because it is shown that false testimony was given at the trial or that the party obtaining the verdict testified untruly, but it must be shown that the successful party willfully gave false testimony or willfully made use of false evidence to obtain the verdict, and the court must be reasonably satisfied that the verdict was thereby obtained.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 141; Dec. Dig. § 69.*]

8. NEW TRIAL (§ 69*)—GROUNDS—PERJURY—TESTIMONY.

Where the successful party contradicting the stenographer's report of former testimony might have believed what he testified to, though he was mistaken, and it was reasonably probable that the jury was not materially influenced as to their verdict by his false testimony, a new trial should not be granted on the ground that he willfully committed perjury and thereby obtained the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 141; Dec. Dig. § 69.*]

On Motion from Supreme Judicial Court, Androscoggin County, at Law.

Action by E. J. Hill against W. S. Libbey and another. There was a verdict for plaintiff, and the cause was heard on a general motion for new trial and on a special motion. Motions overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, KING, and HALEY, JJ.

McGillicuddy & Morey, of Lewiston, for plaintiff. Joseph M. Trott, of Bath, and Newell & Skelton, of Lewiston, for defendants.

KING, J. Action for personal injuries occasioned to the plaintiff while in the employ of the defendants. Verdict for \$1,494. The case comes before this court on defendants' motions for a new trial.

General Motion.

The plaintiff had been in the employ of the defendants for some years as an overseer in their woolen mill. The mill being shut down for a time, at the defendants' request the plaintiff took charge of a small crew of their laborers in the work of grading an electric railroad which they were constructing from Lewiston to Portland. To facilitate the work it became necessary from time to time to have some blasting done, and a short time after the plaintiff began work the defendants' superintendent of construction asked him if he knew anything about using dynamite, to which he replied that he did not, and Mr. Clark, a man experienced in that work, was put in charge of the blasting that was done at that time. It appears that there are two methods, or two kinds of caps, used in exploding sticks of dynamite. One is the electric fuse cap which is exploded by heat from a battery, and the other the cotton fuse cap which is exploded by fire through the fuse. The latter cap is about an inch long and of small diameter, a little larger than a lead pencil. The explosive substance is at the bottom or closed end of the cap, being congealed there or dried in. The fuse is connected with the cap by carefully inserting its end without twisting it as far into the cylinder of the cap as prudent and not strike the explosive substance, and then the top of the cap is crimped upon the fuse so that it may not move when the cap is pushed into the soft stick of dynamite. If the end of the fuse should be pushed against the charge in the cap, the slight friction thereby caused would be apt to explode the cap. It is important, also, that there should be no dirt or grit in the cylinder of the cap or on the end of the fuse. The plaintiff saw Mr. Clark use the cotton fuse caps in his work of blasting, but he was not instructed by Clark or by any one else as to the risks of exploding a cap by inserting a fuse into it, or as to the care to be exercised in doing it to avoid those risks. Subsequently the plaintiff did some blasting with dynamite using the battery caps which are less dangerous. He did, however, on one occasion at least before the accident in question, use some of the cotton fuse caps. As to the number of cotton fuse caps he had previously used, the evidence is not definite. He admitted that at a previous trial he answered that he might possibly have used 100, saying, however, in explanation of his last testimony and of that answer, "I couldn't tell you the exact number. I have thought that over since the last trial, and I don't see where it could have been over 13 or 14."

On the 29th or 30th of September, 1910, about five months after the plaintiff began work on the railroad, the superintendent directed him to do some blasting with dynamite to facilitate the work. He told the

superintendent that he had no caps, and the latter directed him to send to the "shanty," and if there were none there to send to the other crews for some, saying, "I believe Kendall has got some." There were no caps at the shanty, and the plaintiff sent Tim Mulrooney to Kendall's crew for some, and he brought back a small tin box about two inches square containing "probably 20" caps. This box with the caps in it Mulrooney obtained at Kendall's crew, "at the root of a pine tree," with a piece of pasteboard for a cover laid in the box and leaves put on top of that. As the plaintiff held one of these caps in his right hand and with the other hand was inserting the end of the cotton fuse into the cylinder of the cap, and when, according to his testimony, "the fuse had entered the cap but a short distance," the cap exploded, blowing off the thumb and forefinger of his right hand, and injuring him otherwise to some extent.

The negligence on the part of the defendants on which the plaintiff relies is: (1) Failure to instruct him as to the dangers, risks, and hazards incident to the work of blasting with dynamite, and especially in inserting a fuse into a small cap loaded with an explosive charge; (2) furnishing him with an explosive cap that was defective and dangerous on account of having been exposed to water and moisture, the dangerous condition of which he did not know and was unable to determine because of his lack of knowledge of explosive caps and his want of experience in their use; and (3) failure to inform him of the special dangers and risks in using a cap that had become defective from water and moisture, and how such defective condition could be detected.

[1] When an employer directs his employé to perform a dangerous service which requires skill and caution to avoid the risks and hazards incident to its performance, knowing that the employé is inexperienced in such service and ignorant of its dangers, it is the duty of the employer to give him adequate information as to the dangers he is likely to meet in performing the service, and suitable instructions and warnings as to the manner and method of doing it, so that he may be able by the exercise of reasonable care on his part to avoid the danger. This rule is too well established in judicial precedent to need the citation of authorities. The duty imposed upon an employer who makes use of agencies and appliances that are especially dangerous was stated by this court in *Welch v. Bath Iron Works*, 98 Me. 361, 369, 57 Atl. 88, 91, in these words: "And an additional duty, one that is to be particularly considered here, is imposed upon an employer who finds it necessary to adopt the use of particularly hazardous agencies and appliances, of giving full information to his servant, who does not already have that information, of the particular dangers arise-

ing from the use of such extraordinarily hazardous agencies, and sufficient instructions to enable him to intelligently determine whether or not he will accept the dangerous employment, and, if he does, that he may know how to avoid them by the exercise of due care upon his part." Numerous cases in this and other jurisdictions are there cited wherein that principle has been stated and applied.

[2] The defendants do not contend against this rule, but claim that at the time of the accident to the plaintiff he was not inexperienced in the use of these cotton fuse caps, in exploding sticks of dynamite, and was not then ignorant of the risks and dangers incident to their use, and therefore that they then owed him no duty to instruct and warn him as to those risks and dangers. But that was a question of fact in the case for the jury, and they have decided it in the plaintiff's favor, and, although it appears to this court that that question was a close one on the evidence, yet we think it cannot be said with reasonable certainty that there was not sufficient evidence to justify the jury in so deciding. It clearly appears that there were actual risks and hazards incident to the work of inserting the fuse in the loaded cap. As already noted, if the end of the fuse should be pushed against the explosive substance in the bottom of the cap, or if there should be any grit in the cylinder of the cap, or on the fuse, or if the fuse should be twisted while being put in, then an explosion of the cap would be apt to result. These were not obvious but latent risks and dangers. A person who had not learned from instruction or experience how slight the friction is that may explode the cap would not appreciate the caution and delicate touch necessary to be used in inserting the fuse in the cap to avoid the risk of an explosion. True the plaintiff admitted that he knew dynamite to be a dangerous agency, but it was the cap and not the dynamite that exploded in this case. Did he know and appreciate the imminent risk—the risk near at hand—that the cap might be easily exploded by a slight friction in inserting the fuse? He was asked on cross-examination, "You knew if you scratched whatever compound there was in the barrel of that cap or the bottom of it it would go off, didn't you? A. No, I didn't." Therein, we think, was the risk which he did not understand and appreciate, and as to which it was the defendants' duty to instruct and warn him.

And we do not think the fact that the plaintiff had used several of these caps before the accident shows that he had thereby acquired sufficient knowledge of the risks and dangers incident to their use. He was not instructed by any one as to these risks in using the cap, and the fact that he did use some of them without causing an explo-

sion does not prove that he had thereby learned of these particular risks that must be guarded against. That no explosion occurred from his previous use of the caps was the result of good fortune rather than the result of the exercise of that care and caution in their use which an appreciative knowledge of the imminent risks and dangers likely to be met with in using them would incite.

[3] The defendants also claim that the plaintiff was not exercising reasonable care on his part and therefore was not entitled to recover. But this, too, was a question for the jury which they decided in the plaintiff's favor, and rightly so, we think, for the care required of him depended upon his knowledge, actual or constructive, of the risks and dangers to be met with in the performance of the duty assigned him. If he did not know that the cap was apt to explode if the end of the fuse came in contact with the compound in the cap, or because of particles of dirt or grit on the fuse, then he should not have been held chargeable with negligence because he did not avoid those dangers.

[4] It is urged, further, by the defendants that if the plaintiff's theory of the cause of the explosion advanced at the trial was correct—that is, that the cap was defective and exploded on that account when the fuse had been inserted in it but a short distance—then they should not have been held liable. In support of this claim they contend that they had no knowledge of such a defective condition of the cap, and that the plaintiff was negligent in using a defective cap. The plaintiff did claim at the trial that the cap had been wet and thereby rendered more liable to explode. But he did not know that at the time of the explosion. He did say that he remembered that the inside of the cap looked green or blackish, but he did not know what that signified. He had a right to assume that the cap the defendants directed him to send for was suitable for use. It was their duty to use reasonable care to furnish him caps safe for use. The jury may have found that they failed in that duty. Moreover the plaintiff claims that he was unable to determine whether the cap was defective or not because the defendants had failed to properly instruct him. We think, therefore, that the jury was justified in not finding that the plaintiff was negligent in using the cap even if they accepted his theory that it was defective.

[5] It is also true that the plaintiff testified at the trial that the fuse had entered the cap but a short distance when the cap exploded; that he thought there was no dirt on the fuse; and that he did not think he twisted it as he put it in. He was cross-examined, however, in reference to his testimony given at a former trial, the substance of which appears to have

been that he was not then sure as to how far he had inserted the fuse into the cap before the explosion, or that there was not grit on the fuse, or that he might not have twisted it. Evidently he could not be accurate as to those details. But the cap exploded, and there can be no doubt that the explosion was caused by friction as he inserted the fuse. That friction may have resulted from the contact of a particle of grit on the fuse and the side of the cylinder of the cap when the fuse had been inserted but a short distance as he thought, or it may have resulted, as the learned counsel for the defendants states in his brief, when "the gritty end of the fuse scratched and ignited the explosive in the bottom of the cap as the fuse was twisted." The jury may not have been able to determine precisely where in the cylinder of the cap the friction occurred that caused the explosion. But that was not an essential to a justification of their finding in the plaintiff's favor. They evidently did find that the defendants failed to discharge the duty imposed upon them when they assigned the plaintiff to the work of using the fuse caps, to instruct and warn him as to the dangers and hazards incident to the use of them, and that the explosion occurred because of their failure to discharge that duty, and without any negligence on the plaintiff's part. It is the opinion of the court that that finding is not unmistakably wrong in view of all the facts and circumstances disclosed in the case.

[8] The jury awarded the plaintiff \$1,494. As the result of the explosion he lost his thumb and forefinger of his right hand, and pieces of the cap were blown into his face and chest causing an infection, somewhat in the nature of blood poisoning, on account of which he suffered much pain and was considerably sick and disordered for a period of several months. In the opinion of the court the damages assessed were not excessive.

Special Motion.

[7, 8] The defendants also filed a special motion for a new trial on the ground that the plaintiff testified falsely.

During the trial the defendants introduced, against objection, a copy of a letter claimed to have been written by the plaintiff to Tim Mulrooney, after the accident and before the trial, inquiring if the caps he got at the root of the pine tree were not tipped over into the dirt, or in some other way exposed to the dirt, and which letter, taken as a whole, the defendants contended indicated dishonesty on the plaintiff's part in procuring testimony. Ashley S. Ferguson, called for the defendants, testified that Mulrooney gave to him the original letter from the plaintiff, and that his (witness') wife made the copy of it which was put in evidence, and that the copy was compared with the original and was an exact copy of it, and that he re-

turned the original letter to Mulrooney. He stated on cross-examination that he did not testify at the former trial that he first made a copy of the letter himself and that his wife made the copy introduced in evidence from his copy, and that he destroyed his copy.

Just before the testimony was closed the plaintiff was recalled and testified as to Ferguson's former testimony concerning the copy of the letter as follows: "He said it was a copy that he had made from the original letter. Later he stated it was a copy his wife made, and then to fix it up he says that he copied the letter and his wife copied it from the one he had. Q. What did he say he did with his copy? A. Tore it up."

The stenographer's official report of Ferguson's testimony at the former trial, made a part of the report in this case by consent, shows that he testified the same at both trials.

If a party to an action, being himself a witness, commits willful perjury or makes use of false testimony which he knows to be false, and thereby obtains a verdict in his favor, the court in its discretion might, and perhaps it should, set aside the verdict so obtained.

But the court should not set aside a verdict and vacate its judgment because it is subsequently shown that false testimony was given at the trial, or even that the party in whose favor the verdict was given testified falsely. Something more than that must appear. It must be shown that the winning party willfully gave false testimony or willfully made use of false evidence to obtain the verdict, and the court must be reasonably satisfied that the verdict was thereby obtained.

We think the defendants have not shown that this case is within the application of that rule. The plaintiff's version of Ferguson's former testimony does differ somewhat from the stenographer's report of it, and no doubt the official report should be accepted. But the court ought not to find, we think, that the plaintiff thereby committed willful perjury. He may have believed what he testified to although it appears that he was mistaken. Nor does it seem reasonably probable to us that the jury could have been materially influenced as to their verdict by the plaintiff's false statement of Ferguson's former testimony. The controversy was as to whether the copy of the letter put in evidence was made from the original letter or from a copy of it. Ferguson testified that it was made from the original, and the plaintiff stated, incorrectly it appears, that Ferguson had previously testified that it was made from a copy of the original. We do not think it can be reasonably inferred that the plaintiff's verdict was obtained because he testified incorrectly in that particular.

It is accordingly the opinion of the court

that the special motion for a new trial must be overruled.

Motions overruled.

McGRAY v. WOODBURY.

(Supreme Judicial Court of Maine. Dec. 27, 1912.)

1. FRAUDULENT CONVEYANCES (§ 47*)—SALES OF MERCHANDISE IN BULK—STATUTORY PROVISIONS.

Where a contract for the sale of merchandise in bulk was modified by mutual consent because the parties understood that they must comply with Pub. Laws 1905, c. 114, regulating the sale of merchandise in bulk, and they undertook to comply with the law, but creditors attached the merchandise within five days from the date the parties undertook to comply with the law, there could be no sale.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 34; Dec. Dig. § 47.*]

2. CONSTITUTIONAL LAW (§ 87*) — FRAUDULENT CONVEYANCES (§ 8*)—RIGHT TO CONTROL PROPERTY—SALES IN BULK.

Pub. Laws 1905, c. 114, providing that a sale of merchandise in bulk shall be void against creditors unless the seller and buyer make an inventory and unless the purchaser obtains a list of creditors, who are notified of the sale, is not invalid as depriving persons of their privileges and liberty to control their property guaranteed by Const. art. 1, § 6.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 156-171; Dec. Dig. § 87.* *Fraudulent Conveyances*, Cent. Dig. § 5; Dec. Dig. § 8.*]

Exceptions from Supreme Judicial Court, Waldo County, at Law.

Action by Robert A. McGray against Orrin B. Woodbury. There was an order of nonsuit, and plaintiff brings exceptions. Overruled.

Argued before WHITEHOUSE, C. J., and SPEAR, CORNISH, BIRD, and HANSON, JJ.

Arthur Ritchie, of Belfast, for plaintiff. Dunton & Morse, of Belfast, for defendant.

HANSON, J. This is an action of assumpsit for goods sold and delivered, and comes to this court on plaintiff's exceptions to the ruling of the presiding justice ordering a nonsuit.

[1] The plaintiff was a grocer in East Knox, and occupied a store belonging to the defendant under a lease for five years. The lease was still in force. The defendant held a mortgage on the goods in the store for \$200. There was a second mortgage for \$50. The stock inventoried \$775.79, plaintiff's debts amounted to \$1,161.81, and he had no other property. In January, 1912, the plaintiff entered into an agreement with Walter Woodbury, a brother of the defendant, to sell to said Woodbury the stock of goods at cost, and a bonus of \$60. The plaintiff delivered the key to the store and the unexpired lease to the defendant. An account of stock was taken, and, the amount being lar-

ger than the buyer anticipated, he expressed doubt as to his ability to pay. Thereupon the defendant offered to take "the stock off his hands." The plaintiff claimed that this offer was accepted and agreed to by him. The defendant says the offer was not accepted. Walter Woodbury went to Belfast the same day, and the next morning the plaintiff and defendant rode to Belfast together. On the way they met Walter Woodbury returning. There was a conference in which the defendant asked his brother "if he had made up his mind about the goods," and he testifies: "I told him I had made up my mind to turn them over to him. He said he would take them off my hands, and Mr. McGray said he was perfectly willing." The plaintiff and his witness are not in agreement as to this; the plaintiff claiming a sale to defendant at the store the day before.

On reaching Belfast, the plaintiff and defendant ascertained for the first time that it was necessary to notify the creditors of the plaintiff, as provided in chapter 114 of the Public Laws of 1905. Advice of counsel was had and proper steps taken to make a valid sale. A list of creditors was then and there made and sworn to by the plaintiff and furnished to the defendant, and there was full understanding and agreement between the parties as to their further duty, one to the other. The largest creditor of the plaintiff was represented at the meeting in Belfast. In reference to this branch of the case the plaintiff was asked: "Q. Was it understood, when that (the list of creditors) was made, that Mr. Woodbury would notify or send the list and notices to the creditors? A. That was the way I understood it. Q. You understood that he was not to pay for the goods until that had been done according to the statute, didn't you? A. Why, yes; yes. Q. He refused to pay anything that morning? A. Yes."

Whatever occurred at the meeting on the way to Belfast, or the day before at the store, was modified by mutual consent on reaching Belfast; both parties seeing the necessity of beginning over, and proceeding according to law. They undertook to comply with the law, but creditors, exercising their rights, attached the goods *within five days* from the date of the meeting at Belfast.

Under such circumstances there could be no sale to the defendant. That the plaintiff so concluded appears from his testimony. He says that, after the meeting at Belfast, and on leaving the office of Dunton & Morse, the defendant advised him "to go into bankruptcy," and that on his return to East Knox "he demanded the return of the lease and the key of the store from the defendant."

[2] The plaintiff urges that chapter 114 of the Public Laws of 1905, which requires full information to be given to creditors, together with notice of such sale, is unconstitutional, "in that it deprives persons of their rights,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

privileges, and liberty to control their property," and thus violates section 6 of article 1 of the Constitution of Maine. We are of the opinion that the objection stated is insufficient to justify the conclusion that the act is unconstitutional.

In *J. P. Squire Co. v. Tellier*, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322, in which a similar statute was under consideration, the court say: "That the purpose of the Legislature evidently was to provide creditors protection against a class of sales which are frequently fraudulent and which leave creditors with no means of collecting that which they ought to receive. The statute deals only with sales in bulk of a part, or the whole of a stock of merchandise, which are not made in the ordinary course of trade, and in the regular and usual prosecution of the sellers' business. It does not interfere with the transaction of ordinary business, but relates to unusual and extraordinary transfers. In substance, it declares that a sale of this kind shall not be made without first giving creditors an opportunity to collect their debts so far as the property to be sold might enable them to collect, or subsequently make satisfactory provision for the payment of these debts. * * * That this is within a class of legislation for which there is constitutional authority is too plain for question. * * * The statute requires of the vendor nothing that cannot be done with reasonable effort. If he is unable or unwilling to pay his debts, it puts a substantial obstacle in his way when he wants to dispose of his stock of merchandise in bulk and receive payment for himself. But, under such circumstances, the property in most cases ought not to be sold in bulk without first giving creditors an opportunity to consider what ought to be done with it." *Lemieux v. Young*, 211 U. S. 489, 29 Sup. Ct. 174, 53 L. Ed. 295.

The nonsuit was properly ordered, and the entry will be:

Exceptions overruled.

HOLMES v. ADAMS.

(Supreme Judicial Court of Maine. Dec. 27, 1912.)

1. BASTARDS (§ 102*)—INHERITANCE—"AS IF BORN IN LAWFUL WEDLOCK."

The clause "the same as if born in lawful wedlock" used in Comp. Laws Nev. 1900, § 3046, providing that an illegitimate child shall be the heir of its mother, does not allow him or his issue to inherit from her lineal or collateral kindred, since such statutes are strictly construed.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 254, 255; Dec. Dig. § 102.*]

2. DESCENT AND DISTRIBUTION (§ 6*)—STATUTES.

The statutes in force at the time of one's death govern the disposition of his estate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 28-32; Dec. Dig. § 6.*]

3. DESCENT AND DISTRIBUTION (§ 5*)—PERSONAL PROPERTY—DOMICILE.

The disposition of the personal property of an intestate, wherever situated, is governed by the law of his domicile.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 19-22; Dec. Dig. § 5.*]

4. BASTARDS (§ 1*)—LAW OF DOMICILE.

As a general rule legitimacy is to be ascertained by the law of the domicile.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 1-3; Dec. Dig. § 1.*]

5. DESCENT AND DISTRIBUTION (§ 71*)—COURTS—JURISDICTION.

Since all distributive shares must be determined in the probate court before they become payable to the distributee, one claiming a share of the personal property of one dying domiciled in Nevada has no remedy in this state until he has obtained a decree in his favor in the probate court in that state.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 229-236; Dec. Dig. § 71.*]

Report from Supreme Judicial Court, Waldo County, at Law.

Action by Eben A. Holmes against Harriet A. Adams. On report on agreed statement of facts. Nonsuit.

Argued before WHITEHOUSE, C. J., and SPEAR, CORNISH, BIRD, HALEY, and HANSON, JJ.

Arthur Ritchie, of Belfast, for plaintiff.
Dunton & Morse, of Belfast, for defendant.

HANSON, J. This is an action for money had and received, and comes to this court on the following agreed statement of facts:

Alonzo Patterson, brother of the defendant, Harriet A. Adams, was a resident of the state of Nevada and died in that state previous to May 20, 1907, leaving no widow or issue. His estate was duly administered in the state of Nevada, and the defendant, Harriet A. Adams, on May 20, 1907, received from the administrator of said estate the sum of \$1,310.04 as her proportion of said estate, being one-half of said estate, and her brother Frank M. Patterson received the other half of said estate as his share. The plaintiff in this action received no part of said estate.

The following is a correct copy of so much of the Compiled Laws of the state of Nevada as relates to heirship of illegitimate children or their offspring, compiled in 1900.

"Illegitimate Child.

"3046 (Sec. 290). Every illegitimate child shall be considered as an heir of the person who shall acknowledge himself to be the father of such child by signing in writing a declaration to that effect in the presence of one credible witness who shall sign the declaration also as a witness, and shall in all cases be considered as heir of the mother, and shall inherit in whole or in part, as the case may be, in the same manner as if born in lawful wedlock. The issue of all

marriages deemed null in law or dissolved by divorce shall be legitimate."

The plaintiff is the son of one Aurelius Holmes, deceased, and claims that said Aurelius Holmes was the illegitimate child of Rhoda A. Patterson, mother of said Alonzo Patterson, deceased.

If, under this statement of facts, the plaintiff can maintain this action upon proof of the relationship claimed by him, the action is to stand for trial, otherwise a nonsuit to be entered.

The writ and pleadings are made a part of the case.

It is contended by the counsel for the plaintiff that this action may be maintained because:

(1) The words "in the same manner as if born in lawful wedlock" appearing in the statute of Nevada, supra, should have the same force and effect as the act of 1887, c. 14, Public Laws of Maine, which includes in express terms lineal and collateral kindred.

(2) Because chapter 14 of the act of 1887 is almost identical with the statute of Nevada, and he has a remedy in this state notwithstanding the decree of the judge of probate in Nevada ordering distribution of the personal estate involved in this case.

The defendant contests each position taken by the plaintiff.

Chapter 14 of the Public Laws of Maine for the year 1887 reads as follows:

"An illegitimate child born after March 24, in the year of our Lord 1864, is the heir of his parents who intermarry. And any such child born at any time is the heir of his mother. And provided, the father of an illegitimate child adopts him or her into his family, or in writing acknowledges before some justice of the peace or notary public, that he is the father, such child is also the heir of his or her father. And in either of the foregoing cases, such child and its issue shall inherit from its parents respectively, and from their lineal and collateral kindred and these from such child and its issue the same as if legitimate."

[1] Whatever rights the plaintiff has are derived from legislative enactment. At common law his father was incapable of inheriting. Statutes similar to the statute of Nevada, presented in the agreed statement, have been passed upon in many states, and it has been invariably held that a statute allowing an illegitimate child to inherit from his mother does not allow him to inherit from her lineal or collateral kindred. 5 Cyc. 640, 641; Messer v. Jones, 88 Me. 349, 34 Atl. 177; Pratt v. Atwood, 108 Mass. 40; Moore v. Moore, 35 Vt. 98; Bacon v. McBride, 32 Vt. 585; Stevenson's Heirs v. Sullivant, 5 Wheat. 207, 5 L. Ed. 70. In the same authorities, the rule requiring strict construction of statutes is emphasized. Applying the rule to the statute of Nevada, it is clear that the words "the same as if born in lawful wedlock" do not in this case enlarge the

rights of the plaintiff to include inheritance from lineal or collateral kindred. Pratt v. Atwood, supra. Prior to the act of 1887, c. 14, supra, the laws of Maine were practically the same as the present statute of Nevada, and illegitimate children could not inherit from lineal or collateral kindred. That act was passed for the express purpose of removing such disability. Messer v. Jones, 88 Me. 349, 34 Atl. 177; Lawton v. Lane, 92 Me. 170, 42 Atl. 352.

[2] But the plaintiff cannot invoke the aid of the present statute of Maine to control or in any manner influence the distribution of personal estate of an intestate whose domicile was in the state of Nevada. By the weight of authority, as all rights of inheritance become vested at the death of the person from whom they are derived, the statutes in force at the time of his death govern the disposition of the estate. Hughes v. Decker, 38 Me. 153; Messer v. Jones, supra; 14 Cyc. 20, and cases cited.

[3, 4] The succession to and disposition and distribution of personal property wherever situated is governed by the law of the domicile of the owner or intestate at the time of his death, without regard to the location of the property or the place of the death. 14 Cyc. 21, and cases cited; Ross v. Ross, 129 Mass. 245, 37 Am. Rep. 321. And, too, as a general rule, legitimacy is to be ascertained by the law of the domicile. Ross v. Ross, supra.

Counsel for the plaintiff cites Ross v. Ross, supra, as favoring the doctrine that, "where an illegitimate child has been legitimated, such legitimacy follows the child wherever it may go, and entitles it to all the rights flowing from such status," but that case expressly holds that:

"It is a general principle that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile, and that this status and capacity are to be recognized and upheld in every other state, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired; his personal property is indeed to be distributed according to the law of his domicile at the time of his death, and his real estate descends according to the law of the place in which it is situated; but in either case it is according to those provisions of that law which regulate the succession or the inheritance of persons having such a status."

That case is therefore in harmony with the line of decisions hereinbefore cited in support of the contention of the defendant that the law of the domicile of the owner or in-

testate governs the distribution of his personal estate.

[5] If the question involved related to the descent of real estate in this state, the remaining citations in plaintiff's brief would be in point; but where, as in this case, the only question is one relating to personal property, the law of the domicile of the intestate must control, and the proper course for a distributee is to apply to the probate court for a decree of distribution. Upon the passing of such decree in his favor, he has a plain remedy against the administrator, who also is protected by the decree. *Cathaway v. Bowles*, 136 Mass. 54.

All distributive shares must be determined in the probate court before they become payable to the distributee. *Hawes v. Williams*, 92 Me. 492, 43 Atl. 101; *Graffam v. Ray*, 91 Me. 234, 39 Atl. 569.

So far as the case shows, the plaintiff did not apply to the probate court in the state of Nevada for a decree in his favor. It is apparent that he has no remedy in this state, even upon proof of the relationship claimed by him. In accordance with the stipulation in the agreed statement, the entry will be:

Plaintiff nonsuit.

CARNEY et al. v. AVERILL.

(Supreme Judicial Court of Maine. Dec. 27, 1912.)

1. EVIDENCE (§ 853*) — DOCUMENTARY EVIDENCE—RECEIPT AND WARRANTY.

In an action against a trustee in bankruptcy, individually, to recover money paid for hay on the bankrupt's farm, which plaintiff did not cut because of objection by a mortgagee, the receipt of the purchase price and a warranty of title, though signed by the trustee as such, were admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1404-1428, 1430, 1431; Dec. Dig. § 353.*]

2. BANKRUPTCY (§ 189*)—PROPERTY VESTED IN TRUSTEE—PERSONAL PROPERTY—CROPS.

Where a bankrupt was in possession of a farm at the time of the adjudication, whatever interest he had in the real and personal estate, including growing crops, passed to and vested immediately in the trustee.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 198, 199, 210-219; Dec. Dig. § 189.*]

3. BANKRUPTCY (§ 257*)—ADMINISTRATION OF ESTATE—"JUDICIAL SALE."

A sale of personal property by a trustee in bankruptcy, under an order to sell issued by the court, is a "judicial sale."

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 356, 357; Dec. Dig. § 257.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3867-3870.]

4. BANKRUPTCY (§ 268*)—ADMINISTRATION OF ESTATE—SALE—AUTHORITY OF TRUSTEE.

A trustee in bankruptcy has authority to sell only such rights and interests as the bankrupt had.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 372-379; Dec. Dig. § 268.*]

5. BANKRUPTCY (§ 268*)—ADMINISTRATION OF ESTATE—SALE—RIGHTS OF PURCHASER.

The rule of caveat emptor prevails in bankruptcy sales, unless special direction otherwise is made in the order of sale, so that a purchaser with knowledge of all the facts cannot expect to receive a greater interest than that conveyed by the sale.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 372-379; Dec. Dig. § 268.*]

6. BANKRUPTCY (§ 268*)—SALE BY TRUSTEE—LIABILITY ON WARRANTY.

A warranty of title to personal property, signed by a trustee in bankruptcy as such, executed four days after the sale, without any further consideration and assuming no personal liability, imposed no such liability on the trustee.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 372-379; Dec. Dig. § 268.*]

7. BANKRUPTCY (§ 285*)—ACTION BY TRUSTEE — LEAVE TO SUE — "TRUSTEE IN BANKRUPTCY."

A "trustee in bankruptcy" is an officer of the court, and cannot be subjected to suits by the purchaser of personal property belonging to the estate without leave of the bankruptcy court.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 285.*]

For other definitions, see *Words and Phrases*, vol. 8, p. 7134.]

8. MORTGAGES (§ 323*)—ENTRY TO FORECLOSE — EFFECT AS TO POSSESSION OF CROPS.

An entry by a mortgagee for the purpose of foreclosure, not followed up by the acts requisite to acquire rights thereunder, negated his claim that he entered and took possession of a hay crop, and constituted an abandonment of whatever intention he may have had with respect to the crop, or purpose to foreclose his mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 965-972; Dec. Dig. § 323.*]

9. BANKRUPTCY (§ 268*)—SALE—LIABILITY OF TRUSTEE.

Where a trustee in bankruptcy in possession of a hay crop on the bankrupt's estate sold it by order of court, the fact that the purchaser failed to cut it by reason of a mortgagee's invalid claim, and in consequence lost by the purchase, created no personal liability on the part of the trustee.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 372-379; Dec. Dig. § 268.*]

Exceptions from Supreme Judicial Court, Penobscot County, at Law.

Action by George A. Carney and others against Albert G. Averill. Judgment for plaintiffs, and defendant brings exceptions. Exceptions sustained.

Argued before WHITEHOUSE, C. J., and SPEAR, CORNISH, BIRD, HALEY, and HANSON, JJ.

P. H. Gillin, of Bangor, for plaintiffs. A. G. Averill and F. W. Knowlton, both of Old Town, for defendant.

HANSON, J. This is an action of assumpsit to recover \$40 paid by plaintiffs to the defendant for the stumpage of hay sold in July, 1910. There are two counts in the writ, one upon a special warranty; the other for money had and received.

The defendant was trustee in bankruptcy

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the estate of Clarence Scott, which consisted of a farm of about 200 acres, located in the town of Greenbush, and also certain machinery and farming implements.

The property was mortgaged to W. S. Marshall for \$400, and he was assignee of two other mortgages, all amounting to \$1,650.

Clarence Scott was adjudicated a bankrupt on April 23, 1910, and was then in possession of the farm. The defendant qualified as trustee on May 19th, and on May 25th filed a petition for leave to sell the real and personal property, which petition was granted on June 6th. On July 8th the defendant took possession of the real and personal property, and appointed an agent to hold possession and care for the property. On July 10th the defendant, as trustee, sold to the plaintiffs the standing grass on the premises, and gave them a bill of sale and receipt for the purchase price thereof, as follows:

"Greenbush, Me., July 10, 1910.

"Sold this day stumpage of hay on Scott farm so-called in town of Greenbush for consideration of forty dollars (\$40) to be paid within five days.

"G. A. Carney and B. R. Wheeler.

"A. G. Averill, Trustee.

"Received payment in full of above.

"A. G. Averill, Trustee."

The plaintiffs undertook to cut the grass, but "got a letter from Mr. Fletcher [attorney for the mortgagee] forbidding us on the place; said he would hold us for damages." They notified the defendant by telephone, and he thereupon sent the plaintiffs a writing, dated July 14, 1910, which reads as follows:

"Old Town, Me., July 14, 1910.

"To George Carney and B. R. Wheeler, Greenbush, Me.:

"Gentlemen: This is to certify that I, Albert G. Averill, trustee of Clarence Scott estate, bankrupt, have sold the stumpage of the hay on the Scott farm in Greenbush, and that as said trustee I had the title to same in me, and I did and hereby do give good title to said Carney & Wheeler and will warrant and defend the same to them and will stand by them otherwise in this regard.

"Yours very truly,

"Albert G. Averill, Trustee.

"P. S.—Get the hay as soon as possible as we talked, and it would be a great favor to me if you didn't show this paper to Scott's attorney and his friends. If you have the least doubt of my ability to sell you the hay and give you a good title go to *your own* attorney. This other crowd are only trying to bluff and to bother me.

"A. G. A."

The plaintiffs, however, did not cut the grass, but commenced this action against the defendant as an individual. The defendant pleaded the general issue, with a brief

statement that "whatever he did in the premises he did in the capacity of and by force and virtue of his appointment and qualification as trustee in bankruptcy of the estate of Clarence Scott."

At the close of the evidence the presiding justice ordered a verdict for \$40. The case comes to this court on exceptions. The plaintiffs claim that after the defendant took possession of the farm, but on the same day, W. S. Marshall, the mortgagee, "went to the farm for the purpose of taking possession to secure the hay crop"; that he found the agents of the defendant in possession, and gave them notice to quit; that he returned on the following day and left a notice, which reads as follows:

"Greenbush, July 8, 1910.

"To Whom It May Concern:

"This is to certify that I, Willie S. Marshall, in the presence of Mr. and Mrs. George Spencer and the undersigned, have this day taken peaceful possession of the so-called Scott farm property, both personal and real. By right of mortgagee.

"Willie S. Marshall.

"Witnesses: Alfred Folsom.

"Maude M. Folsom."

Immediately thereafter he sold the grass to one Alfred Folsom. It appears that before July 14th conferences were held, in which all the parties interested took part, and the advice of the referee in bankruptcy was sought. It further appears that through fear of litigation on the part of the plaintiffs, and because the "amount was so small the mortgagee did not care to bother with it," the grass was not harvested. The mortgagee returned the purchase price to Mr. Folsom, and later foreclosed his mortgages by publication.

The plaintiffs contend that the mortgagee had the right to take possession of the farm, as against the trustee, at any time before the grass was cut, and that the license to sell, under which the defendant was acting, conferred no authority that the mortgagee was bound to respect "when the mortgagee took possession for the purpose of harvesting the hay, and kept such possession."

The defendant contends that he sold the hay to the plaintiffs in his official capacity; that the proceeds were placed in the depository of the court, and he paid out the same by order of court. It further appears that the plaintiffs knew that defendant was acting in his official capacity only, and nothing was paid by them as consideration for the warranty, so called.

[1] The receipt and warranty were admitted against the objection of the defendant, and are the subjects of the first and second exceptions. Objection to their admission was made (1) because each was signed by the defendant in his official capacity, while the action was brought against him as

an individual; and (2) because the warranty, which was signed four days later than the receipt, was without consideration.

We think the evidence was admissible. They were original documents, executed by the defendant in the transaction in question, and under well-known rules clearly competent. No reason appears why the information they contain should be withheld from the court.

[2] Several of the remaining exceptions relate to one question, that of jurisdiction, and may be considered together. The bankrupt was in possession of the farm at the date of adjudication. Being in possession, whatever interest he had in the real and personal estate, including the growing crops, passed to and vested immediately in the trustee. *Crosby v. Spear*, 98 Me. 544, 57 Atl. 881, 99 Am. St. Rep. 424; *Jones on Mortgages*, vol. 2, § 1231.

[3] It is admitted that the defendant was acting under an order to sell issued by the court of which he was an officer. The sale was therefore a judicial sale. In *re Maloney*, 21 Am. Bankr. Rep. 502; *Savings Bank v. Alden*, 103 Me. 237, 68 Atl. 863, 14 L. R. A. (N. S.) 1220, 13 Ann. Cas. 806.

[4, 5] The defendant had authority to sell such rights and interests as the bankrupt had. He could sell no more. The plaintiffs having knowledge of all the facts could not expect to receive a greater interest than that conveyed by the sale on July 10th. *Roberts v. W. H. Hughes Co. (Vt.)* 83 Atl. 807, June, 1912.

The rule of caveat emptor prevails in bankruptcy sales as in all judicial sales, unless special direction otherwise is made in the order of sale. In *re Muhlhauser Co.*, 10 Am. Bankr. Rep. 240, 121 Fed. 669, 57 C. C. A. 423; *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617.

[6] The warranty of title, so called, was not a special warranty in which the defendant assumed individual liability, inasmuch as the document contains no promise or undertaking imposing such liability. Like the receipt, it was signed by the defendant in his official capacity; and having been so executed four days later than the original sale, without any further consideration, no personal liability is imposed on the defendant. 34 Cyc. 408; *White v. Oakes*, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; *Brawn v. Lyford*, 103 Me. 362, 69 Atl. 544.

[7] A trustee in bankruptcy is an officer of the court, and cannot be subjected to suits of this character without leave of the bankruptcy court. 34 Cyc. 411; *Id.* 167; *Jones on Mortgages*, vol. 2, § 1231. It is so held even when the action is brought upon a paramount title. 34 Cyc. 411.

[8] It is manifest that the entry made by

the mortgagee was for the purpose of foreclosure. The character of the notice indicates the purpose and intention of the mortgagee to foreclose his mortgages by taking possession "peaceably and openly, if not opposed, in the presence of two witnesses," and this is corroborated by the testimony of Caroline Spencer, who states: "He told me he came there to take possession of the farm, and what there was on it, under a foreclosure." The mortgagee acquired no rights by such entry. His attitude thereafter negatives the claim that he entered "for the purpose of taking possession to secure the hay crop," and constitutes an abandonment of whatever intention he may have had with respect to the crops, or purpose to foreclose his mortgage.

In *Potter v. Small*, 47 Me. 293, the facts are nearly identical, and the legal principles involved are the same. There the court held: "But such an entry must be accompanied with evidence of the intention for which it is made. The declarations of the party making the entry, being part of the res geste, are usually this evidence. It was so in this case. It appears that at the time of making the entry the plaintiff said 'he had a mortgage on the premises, and that the condition of the mortgage had been broken, and he therefore foreclosed.' This is the only evidence of intention explanatory of the act. It is apparent, therefore, that he had no design to enter for the purpose of taking the rents and profits, under the second section of the statute. His intention was to foreclose. An entry for this purpose, to be effectual, if not by consent in writing of the mortgagor, or the person holding under him, must not only be open, peaceable, and unopposed, but followed up by the certificate and record required by the statute, or otherwise it becomes a nullity. In this case this was not done. The plaintiff therefore acquired no rights by his entry. To permit him now, after such a failure on his part, to ascribe a new intention to his act, and to set up his entry for a different purpose, would be manifestly unjust. To do so would be, in effect, to cast reproach upon the law."

[9] The defendant, as trustee, being then in possession, and holding as such all the rights and interests belonging to the bankrupt as of the date of adjudication, had the right, and it was his duty under the order of the court whose agent he was, to sell the crops growing on the farm. The fact that the plaintiffs failed to cut the grass, and in consequence were losers in the transaction, creates no personal liability on the part of the defendant. These exceptions must be sustained. The others need not be considered.

Exceptions sustained.

CARR v. PISCATAQUIS WOOLEN CO. et al.
(Supreme Judicial Court of Maine. Dec. 29, 1912.)

1. WATERS AND WATER COURSES (§ 160*)—DAMS—"EFFECTIVE HEIGHT."

The "effective height" of a milldam is the height at which the dam in good condition will flow land, unaffected by changes in seasons or the occasional leakage of the dam.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 193; Dec. Dig. § 160.*]

2. WATERS AND WATER COURSES (§ 160*)—DAMS—RIGHT TO REPAIR.

Millowners, having a prescriptive right to maintain a dam at a certain height, had a right to make necessary repairs.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 193; Dec. Dig. § 160.*]

3. WATERS AND WATER COURSES (§ 179*)—DAMAGES FROM RAISING DAM—EVIDENCE.

Evidence on a complaint for flowage due to the raising of a milldam merely that during a spring freshet of unusual severity the water reached a height unusual before the change in the dam did not authorize a finding that a radical and unauthorized raising of the dam had occurred.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 258-259, 263, 264; Dec. Dig. § 179.*]

Report from Supreme Judicial Court, Piscataquis County, at Law.

Action by Sumner M. Carr against the Piscataquis Woolen Company and another. Judgment for defendants.

Argued before WHITEHOUSE, C. J., and CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

J. S. Williams, of Guilford, and Warren C. Philbrook, of Augusta, for plaintiff. Hudson & Hudson, of Guilford, for defendants.

HANSON, J. This is a complaint for flowage inserted in a writ of attachment, and comes before the court on report.

The plaintiff is the owner of several lots of land in the town of Abbott, in Piscataquis county, bounded by the Piscataquis river, or near said river and its tributaries.

The defendants are owners of woolen mills in the town of Guilford. The complaint alleges:

"That the said Piscataquis Woolen Company a long time ago, to wit, A. D. 1881, erected and have ever since maintained a water mill, to wit, a woolen mill or factory, so called, at Guilford village, in said county, on the north side of said Piscataquis river, and upon its land, and the said M. L. Hussey Woolen Company a long time ago, to wit, A. D. 1906, erected upon its land and has since maintained a water mill, to wit, a woolen mill or factory, so called, at Guilford village aforesaid, on the south side of said river, which said river is not navigable, and the said defendants in a certain year, to wit, A. D. 1909, erected a milldam and have maintained the same to

the date of this complaint upon and across said river at said Guilford village to raise water for working said mills and still maintain the same to this date, and still maintain said mills, said dam extending from and upon land of the said Piscataquis Woolen Company on the north side of the said river across to and upon land of the said Hussey Woolen Company on the south side of said river, and said dam was erected and maintained, and is still maintained, by said defendants for the purpose of raising the water in said river to work and operate said mills.

"That by means of said dam the said defendants have caused the water in said river to overflow and drown, damage, injure, and destroy from the date aforesaid, to wit, the year of our Lord 1909, to the present time, the complainant's land aforesaid, whereby said land has been rendered useless, and your complainant has sustained great damage in his said land by reason of said flowage by said milldam yearly, since the erection and during the maintenance of said dam as aforesaid in a large sum of money, to wit, the sum of \$1,000."

The defendants pleaded the general issue, and by brief statement say:

First. That they have a right to maintain the dam set out in the complaint of said plaintiff and flow the lands of said plaintiff without any compensation.

Second. That said dam has been maintained at its present height for more than 50 years, and that said defendants have acquired the right by prescription to have and maintain said dam at its present height.

Third. That, when the concrete dam which now exists across said river was built in the summer of 1909, it was not built to any greater height than the wooden dam which was taken down at the time said concrete dam was built.

The land described in this complaint is located about 1½ miles above defendants' dam. The first dam in the river at this point was built in 1823, was replaced in 1864 by a new dam similar to the first. This was rebuilt in 1881, and continued in use until 1903, when it was repaired by one Trafton. In 1906 it was again repaired, and in 1909 it became necessary to make more extensive repairs on the dam, and the work had progressed to some extent when the owners concluded to build a new dam of concrete, which was done in that year. That the defendants had the right to construct a new concrete dam a few feet below the old dam is not questioned.

The plaintiff claims that the new dam has been raised above the level existing before 1903, when repairs were made by Trafton, making a radical change in the actual height of the dam, and necessarily a change in its effective height, and that the damage com-

plained of followed the repairs of 1903 to some extent, but became greater after the year 1909, when the new concrete dam was built to supply the place and purposes of the old dam.

After the plaintiff introduced the testimony of civil engineers, and his own testimony as to the location of the dam, the property claimed to be flowed, the course of the river, and distance of the land flowed above the dam, the presiding justice ruled that the defendant's plea admitted the flowage as claimed by the plaintiff, that plaintiff had made out a prima facie case, and that under the pleadings the burden of proceeding changed.

The defendants thereupon introduced evidence tending to show:

(1) That since 1864 the actual height of the various dams, when in good repair, has been the same.

(2) That since 1881 a mark in the granite wall of the Piscataquis Woolen Mill which then showed the upper side of the top log of the old dam has been used as a guide in all repairs since made, and was especially used in determining the height of the new concrete dam which was built in 1909, and that it was built no higher than the dam which it replaced, allowance being made for the planking which projected above the top log about four inches.

(3) That the new dam did not, and does not, flow any more land than the dams of 1864, 1881, 1903, and 1906 flowed when in repair and in good order.

(4) That any additional flowage occurring in April or May, 1911, as claimed by plaintiff, was due to an unusual freshet at the time, and also due to the presence of a large boom of logs in the river at a point one-half mile above the dam belonging to the Piscataquis Lumber Company, and over which the defendants had no control.

The testimony on both sides was directed mainly to the actual height of the various dams, and the extent of the flowage at different periods. The plaintiff insists that the case should proceed and be governed by the points shown upon a plan to have been reached by the water on April 29, 1911, as conclusive that a larger area was flowed on that date than ever before.

In answer to this contention, the defendants claim that on April 29, 1911, there was an unusually high run of water due to the spring freshet, and the case shows that on that day the level of the river was 32 inches above the dam, a point so high, defendants claim, that no act of theirs could influence the flow, and while at such stage their mills could not be used.

The defendants introduced the testimony of one Elmer Crowley, a civil engineer, who had made a survey of the river in January, 1911, and again on May 15, 1911, after the freshet had subsided and defendants' mills

were in operation. On May 15, 1911, he found a boom of logs in the river at a steam sawmill located one-half mile above the concrete dam, and while there ascertained the level of the water below and above the logs, and found the elevation of the water above the logs to be five inches higher than below the logs, "and the water was at the top of the dam, but not running over."

This testimony is uncontradicted, and corroborates the theory of the defendants that the increase in the height of the water in the river above the logs on April 29th and May 15th was not due to the height of the dam, or the fault of the defendants. It is "admitted that the defendants in 1903 had acquired a prescriptive right to flow the plaintiff's land to the extent that it would be flowed by the water held back by the dam at its effective height as said dam existed in that year prior to any repairs, changes, or additions made in said year."

[1] What was the effective height of the dam in 1903 before it was repaired? Counsel disagree as to the actual height of the structure of 1903 and 1909, but are in agreement that the definition of "effective height," as given in *Voter v. Hobbs et al.*, 69 Me. 19, is correct and accurate. In that case the complaint and pleadings were the same as in the case at bar. The issue to the jury was on the defendants' right by prescription, and it was found in their favor and upon exceptions was sustained. It was there held that "the effective height of the dam is the height which flows." That is what is to govern, and that is precisely what the presiding justice instructed the jury was to govern. The amount of land flowed would depend on the effective height of the dam, and the right to flow would be limited by it. Dams need repairing. They vary in tightness. The water may be used with more or less economy, at different times, depending upon the exigencies of business. As was remarked by Shaw, C. J., in *Ray v. Fletcher*, 12 Cush. (Mass.) 200: "Although the water actually raised by it (the dam) may to some extent vary from one season, or one year to another, owing to the tightness of the dam, the mode of using the water, the different seasons, as being dry or wet and the like, yet these considerations are too variable and uncertain to be adopted or relied on as the basis of a right acquired by grant or prescription. * * * The prescriptive right having been acquired, the right to flow with a dam of the prescribed effective height necessarily follows. It is not what the dam may absolutely flow at a particular time, but what the dam in good condition ordinarily will flow. The dam is assumed to be in good condition, and, being in such condition, the flowage is what must result from such condition, unaffected by the changes of the seasons or the occasional leakage of the dam." In reaching the conclusion quoted from *Ray v. Fletcher*, 12 Cush. (Mass.) 200, Shaw, C.

J. said: "It is not the actual height of the dam which will regulate the prescriptive right of the party holding it, but its efficient height, according to its structure and operation, to maintain the height of the water, when in repair and in good order."

[2, 3] The defendants admittedly had the right to maintain a dam as it was before the repairs in 1903. If repairs were necessary, they had the right to make them. Plaintiff introduced testimony of Elmer Harrington as to additional flowage after such repairs in 1903. Mr. Harrington had knowledge of the river for a period of 20 years. He was asked: "Q. Has your attention been called to an increase in the rise of water along the farms by your farm and the adjacent farms along the river? A. It has. Q. Since the repairs of L. B. Trafton (1903)? A. No; I didn't notice that in particular after the repairs by Trafton; not particularly. Q. I say since then, any time? A. Since then, yes; I have since then. * * * Q. When the water to your knowledge was at the height of the new dam? * * * A. Well, I have some. Well, I have a road, a driveway, I say I have it, that goes from my high land down on to my low intervals, and, when it is to the height of the dam there, I have noticed in particular, just comes up so it makes it muddy for me to get across on to my low intervals. There is no water particularly across the road, just comes up to the road, and makes it deep and undermines it so it is impossible to haul a good load across there. Q. What was the condition of that road before the new dam was put in? A. It was always all right, without it was in a very big—else in a freshet, or something of that kind, it never bothered me at least carting across it."

Other testimony introduced by the plaintiff tends to show a noticeable, but not a substantial, additional flowage after the repairs of 1903, and it appears that extensive repairs were made in 1906. In 1909 the dam had worn down to such an extent that the owners decided to build a new concrete dam. The claim that the dam as repaired in 1903 caused actionable damage is not sustained by the evidence, and this conclusion is supported by the fact that no complaint was made or action taken by any riparian proprietor after the repairs in 1903 or 1906, and the testimony adduced as to flowage on other dates than April 29, 1911, is so unsatisfactory, and it is so evident that the logs in the river at and after that time contributed to the injury complained of we are unable to agree with the complainant that the evidence justifies further proceedings.

We have before us a record of what is manifestly the highest point reached by a spring freshet of unusual severity, and with no intermediate marks or data upon which a report of commissioners could be based without working an injustice to one side or the other. Complainant urges that a radical

change was made in the dam, and, if such is the fact, a further preparation of the case may establish the rights sought to be enforced. We cannot assume that such radical, unauthorized raising of the dam has occurred, especially in view of the fact that it does not appear in evidence that a corresponding change was made in the bulkheads or wheels of either mill served by the new concrete dam.

The entry must therefore be:

Judgment for defendants, with costs.

STATE v. INTOXICATING LIQUORS (HUNT, Claimant).

(Supreme Judicial Court of Maine. Dec. 29, 1912.)

SEIZURE OF INTOXICATING LIQUORS—CLAIM BY CONSIGNOR.

In a proceeding to forfeit intoxicating liquors shipped into the state, seized while in the hands of the carrier, in which the consignor claimed the liquors under his right of stoppage in transitu, but proved neither a sale on credit nor the insolvency of the consignee, *held*, that the seizure should be sustained.

Appeal from Supreme Judicial Court, Androscoggin County, at Law.

Proceeding by the State to forfeit intoxicating liquors; Frank A. Hunt, claimant. Judgment for the State, and the claimant appeals. Heard on report of agreed statement of facts, and claim disallowed.

Argued before WHITEHOUSE, O. J., and SPEAR, CORNISH, KING, and HALEY, JJ.

L. J. Brann, of Lewiston, for appellant. W. H. Hines, County Atty., of Lewiston, for the State.

CORNISH, J. This is a proceeding to enforce the forfeiture of intoxicating liquor alleged to have been intended for unlawful sale within this state.

The libel was duly issued, notice given, and at the hearing in the lower court Frank A. Hunt, one of the firm of F. W. Hunt & Co., of Boston, the consignors, appeared and filed his claim to the "right, title, and possession in the items of property hereinafter named, as having a right to the possession thereof at the time when the same were seized; and the foundation of said claim is that they were in the possession of the American Express Company, whose business is that of a common carrier, and were in transit, from Boston, Mass., to Lewiston, in the state of Maine, and were taken from the lawful possession of said company and of your claimant * * * before the same had been delivered to the consignee and had reached its destination."

After hearing, the lower court held that the liquors were kept for unlawful sale as alleged, and that the claimant was entitled to no part of the same.

The claimant appealed to the Supreme Judicial Court, and the case was then reported

to the law court on the following agreed statement of facts:

"On July 18, 1911, Dudley F. Hunt and Francis A. Hunt, both of Boston, in the commonwealth of Massachusetts, copartners as F. W. Hunt & Co., wholesale liquor dealers in said Boston, shipped from said Boston to S. Malo, Lewiston, Me., by American Express, two boxes, each containing ten gallons, of whisky, and addressed to S. Malo, Lewiston, Me. S. Malo is not a fictitious name. Said shipment was a continuous interstate shipment.

"On July 19, 1911, said shipment, before delivery, and while in transit, and in the possession of the common carrier, was seized by a deputy sheriff for the county of Androscoggin, libeled, and claim made by this claimant, the shippers.

"The question presented is whether F. W. Hunt & Co., as the shippers of said goods, are entitled to a return of said seizure, when seized from the possession of the common carrier, while in transit and before delivery to the consignee."

The precise question at issue is not whether the liquors were still in transit at the time of their seizure, but whether the claimant has any legal standing in court. If he has not, he is a mere stranger to the proceeding, and cannot raise the point of noncompletion of shipment.

It is only a person who is found to be "entitled to the custody of any part" of the seized goods who can be regarded a lawful claimant. R. S. c. 29, § 51; *State v. Intox. Liquors*, 50 Me. 506. If his claim is sustained, it must be on the ground that he is either the owner or has a right to the possession of the property, which shall thereupon be taken from the custody of the officer and delivered to him. Such delivery could not be made to a stranger.

The claim is not made in the case at bar, by the consignee or owner, as in *State v. Intox. Liquors*, 101 Me. 430, 64 Atl. 812, and *State v. Parsley*, 108 Me. 410, 81 Atl. 484, 37 L. R. A. (N. S.) 444, the last case being cited by the claimant in his brief. Nor is it made by the common carrier, as having the right of possession on the ground that the shipment had not been terminated, as in *State v. Intox. Liquors*, 102 Me. 206, 66 Atl. 393, 11 L. R. A. (N. S.) 550, Id., 102 Me. 385, 67 Atl. 312, 120 Am. St. Rep. 504, Id., 104 Me. 463, 72 Atl. 331, 23 L. R. A. (N. S.) 1020, and Id., 106 Me. 135, 76 Atl. 268.

The claim is made here by the consignor on the sole ground of his right of stoppage in transitu. This raises a new question in this state, but the application of well-established principles of law leaves no doubt as to the solution.

The doctrine of the right of stoppage in transitu is well expressed as follows: "An unpaid seller, who has parted with the possession of the goods, may, if the buyer is or

becomes insolvent, stop the goods in transit; that is to say, he may resume possession of the goods so long as they are in the course of transit, and may retain them until payment or tender of the price." 35 Cyc. p. 493.

The logic of the doctrine is clearly worked out in the early cases of *Arnold v. Delano*, 4 Cush. (Mass.) 33, 50 Am. Dec. 754, and *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489.

The two indispensable prerequisites to the exercise of the right by the vendor are: First, a sale upon credit; and, second, the insolvency of the vendee. Neither of these facts is established in the case at bar. The agreed statement is silent as to the terms of sale. It simply recites that the claimant shipped the liquors to one S. Malo by American Express. The price may have been paid in advance. It is more than possible that it was, as an action for the purchase price could not be maintained in this state if the liquor was intended for illegal sale. R. S. c. 29, § 64.

In any event, the sale on credit is not proved.

Nor is there any claim, or even suggestion, of the insolvency of the consignee. The agreed statement simply alleges that before delivery to the consignee the liquor was seized by an officer. The fair inference is that, but for the seizure, delivery would have been made in the regular course of business, and that certainly tends to negative the insolvency of the consignee.

In fact, the idea of stoppage in transitu apparently did not occur to the consignor until after the seizure was made, and then, as neither the common carrier nor the consignee cared to appear as a claimant, the consignor took it upon himself to recover property, the title to which had passed from him on delivery to the carrier, only to be regained upon two conditions, neither of which he has established.

The claimant relies upon the decision in *Allen v. M. C. R. Co.*, 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 810. The court there held that, as between consignor and a common carrier, a notice to the latter not to deliver goods in transit to the consignee need not state the reason. That is undoubtedly sound law, but has no application here. In that case the sale was upon credit, the consignee was admittedly insolvent, the consignor therefore had a legal right to stop the goods in transit, and the court held that in the exercise of that right he was not obliged to give his reason to the carrier. In the case at bar there is no evidence of a sale on credit, nor of the insolvency of the consignee, and the consignor gave no notice of any kind to the carrier. He simply set up his claim to the liquors after they had been seized. To hold that under such circumstances the wholesale dealer outside the

state can successfully step in, and recover what he has once sold and has no legal right to retake, would be to nullify in a large measure the efficiency of the search and seizure process in the prohibitory law of this state.

The claim of the consignor must therefore be disallowed.

The liquors will remain in the custody of the sheriff, to be disposed of as provided by statute.

So ordered.

BACKUS v. STATE.

(Court of Appeals of Maryland. Nov. 18, 1912.)

1. RECOGNIZANCES (§ 2*)—NATURE AND ESSENTIALS.

An instrument reciting, "Fine and costs superseded by us for six months," signed by one sentenced to pay a fine, and by two others, is not a recognizance within Code Pub. Civ. Laws, art. 87, § 40, providing that a person adjudged to pay a fine may enter into a recognizance with security for payment of it within 60 days, and execution shall not issue for it till expiration of 60 days.

[Ed. Note.—For other cases, see Recognizances, Cent. Dig. §§ 1-19; Dec. Dig. § 2.*]

2. RECOGNIZANCES (§ 7*)—EXECUTION.

Till a recognizance has been properly forfeited, execution cannot issue on it.

[Ed. Note.—For other cases, see Recognizances, Cent. Dig. § 26; Dec. Dig. § 7.*]

3. SUPERSEDEAS (§ 2*)—POWER TO GRANT—CRIMINAL CASES.

Intention to confine the right of supersedeas to judgments and decrees in civil actions is shown by Code Pub. Civ. Laws, art. 17, § 28, providing that the clerks of certain courts, not including the criminal court of Baltimore, shall have power to take supersedeas of judgments and decrees to their respective courts as a justice of the peace has, and by the form of supersedeas given in article 52, § 56, whereby judgment is confessed in favor of plaintiff in the original judgment.

[Ed. Note.—For other cases, see Supersedeas, Cent. Dig. § 2; Dec. Dig. § 2.*]

4. SUPERSEDEAS (§ 5*)—FORM.

Even if there were power to take supersedeas of a judgment in a criminal case, an instrument signed by one sentenced to pay a fine and by two others, merely reciting, "Fine and costs superseded by us for six months," is invalid as disregarding the substantial requirements of Code Pub. Civ. Laws, art. 52, § 56, prescribing the form of supersedeas.

[Ed. Note.—For other cases, see Supersedeas, Cent. Dig. §§ 5, 9; Dec. Dig. § 5.*]

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Herbert Backus was indicted, pleaded guilty, sentenced to pay a fine, with others executed a so-called supersedeas, on which a writ of fieri facias issued, and from an order overruling a motion to quash the writ, appeal is taken. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Lewis Hochheimer, of Baltimore, for appellant. Edgar Allan Poe, Atty. Gen., for the State.

BURKE, J. [1, 2] The facts contained in this record are simple and undisputed. On May 24, 1911, Herbert Backus was indicted by the grand jury of Baltimore county for the statutory crime of gambling. He pleaded guilty to the charge and was sentenced by the court to pay a fine of \$200 and costs. This sentence was imposed on the 15th day of August, 1911, and on the following day Backus went before the clerk of the court accompanied by John E. O'Connor and Julia O'Connor, and each signed the following paper, presumably written upon the docket containing the record of the case and the sentence of the court: "Aug. 16, 1911. Fine and costs superseded by us for six months. Witness our hands and seals this 16th day of August 1911. Herbert Backus. [Seal.] John E. O'Connor. [Seal.] Julia O'Connor. [Seal.] Witness: Thomas R. Jenifer." After this paper had been signed, Backus was permitted to go at large. He has never since been apprehended, and has not paid the fine and costs imposed upon him. In December, 1911, a writ of fieri facias was issued upon this so-called "supersedeas," and was levied upon certain described property of John E. and Julia O'Connor. Thereafter John E. O'Connor filed a motion to quash the writ, and for such other relief as might be proper in the premises. The appeal before us is from the order of the lower court overruling this motion.

We are of opinion that the writ should have been quashed for the reason that the paper we have transcribed is a mere nullity. The clerk had no authority to take it, and it did not supersede or affect in the slightest degree the execution of the sentence of the court, and is not such a judgment upon which an execution may be issued. Under article 38, § 1, Code 1911, Backus in default of payment of the fine and costs imposed upon him should have been committed to jail until the fine and costs were paid; and, as the fine and costs exceeded \$150 and did not exceed \$500, he should have remained in custody for the space of 90 days as provided by section 3, art. 38, of the Code. The sentence imposed upon Backus could have been stayed, first, by a new trial granted by the court; and, secondly, by an appeal taken in conformity to article 5, § 80, of the Code of 1911. That section provides that "no appeal in a criminal case shall stay execution of sentence unless the counsel for the accused shall make oath that the appeal is not taken for delay, and such appeal shall be heard at the earliest convenient day after the same shall have been transmitted to the Court of Appeals; and the accused, upon taking such

appeal, shall, in all cases not punishable by death or imprisonment in the penitentiary, be entitled to remain on bail, and in other cases not capital the court from which the appeal is taken shall have the discretionary power to admit to bail, provided nothing herein contained shall be construed to prohibit the court from requiring additional or greater bail, pending an appeal, than the accused may already have given before conviction."

The appellee relies upon section 40, art. 87, of the Code, to sustain the order appealed from. Section 39 of that article declares that the sheriff shall be answerable for all fines, penalties, and forfeitures imposed on the inhabitants of his county or of Baltimore city by any court of record of this state unless he can show that the party on whom the same was imposed is insolvent. By section 40, art. 87, it is provided that the sheriff "may require the state's attorney to issue an execution for all fines, penalties or forfeitures so imposed and the costs, provided that any person adjudged to pay a fine or penalty may enter into a recognizance with security for the payment of the same and costs within sixty days and no execution shall issue for the same until the expiration of sixty days." This section is a codification of the Act of 1795, c. 74, as amended by the Act of 1828, c. 11. The first-named act was passed, but, as its preamble recited, to remove the doubts which then existed whether a writ of *capias ad satisfaciendum* could be issued for the recovery of any fine, penalty, or forfeiture. By the latter act the person upon whom any fine had been imposed was authorized to give security in the usual manner for the payment of the same and costs, and, when such security had been given, no execution could lawfully be issued until the expiration of 60 days from the date upon which such security had been given. Assuming, without so deciding, that a recognizance taken in conformity to section 40, art. 87, would stay the execution of sentence as well as execution on the judgment, that section cannot be invoked to sustain the order appealed from, first, because no recognizance was given as provided by that section; and, secondly, no execution could be issued on such a recognizance, had one been given, until the recognizance had been properly forfeited. "A recognizance is an obligation of record, and, when forfeiture is declared and entered by the court, it becomes a judgment. It is then like an ordinary judgment enforceable by execution." *Schultze v. State*, 43 Md. 295.

[3, 4] It is obvious that the clerk acted under what he supposed to be the authority conferred upon him by section 28, art. 17, of the Code. That section provides that: "The clerks of the circuit courts of the several counties, of the superior court of Baltimore city, the clerk of the court of common

pleas, the Baltimore city court, and the circuit court and the circuit court No. 2 of Baltimore city shall have the power and jurisdiction to take supersedeas of judgments and decrees in their respective courts, as a justice of the peace in the counties has by law, and the supersedeas so taken shall have the same effect as if taken by a justice of the peace."

A supersedeas properly taken by the clerk under this section, is in itself a judgment upon which an execution may issue, and it operates to stay the execution of the original judgment for six months thereafter. The power and jurisdiction conferred upon justices of the peace to take supersedeas of judgments and decrees are found in section 56, art. 52, of the Code. The form of the supersedeas is therein given, and the judgment is confessed in favor of the plaintiff in the original judgment. Section 58 of article 52 provides that, when a judgment has been confessed in the circuit court at the second term thereof with stay of execution until the next term, the stay of execution by supersedeas on such judgment shall be computed from the first Thursday of the term next ensuing the said second term; and, when the judgment of the justice of the peace is superseded, the stay of execution shall be computed from the date of the judgment and not from the date of the supersedeas. Administrators are also given the right to supersede judgments rendered against them. No power is conferred upon the clerk of the criminal court of Baltimore city to take supersedeas of a judgment rendered in that court. On the contrary, that court is omitted in the enumeration of the courts whose judgments may be superseded. This circumstance, taken in connection with the language employed in the legislation upon the subject, indicates an intention on the part of the Legislature to confine the right of supersedeas to judgments and decrees recovered in civil actions. This conclusion is strengthened by an examination of the Act of 1791, c. 67, for regulating the mode of staying an execution upon a judgment or decree. The form of the supersedeas there given indicates clearly that the Legislature did not intend it to apply to a judgment in criminal cases.

But if it be admitted that section 28 of article 17 of the Code is applicable to judgments in criminal cases, the *fi. fa.* should have been quashed, because the supersedeas upon which it was issued is utterly invalid. It is invalid because it disregards the substantial requirements of the statute. In *Bowes v. Isaacs*, 33 Md. 535, the record showed that a judgment had been recovered in the superior court of Baltimore city against Judson H. Smith, which, as the docket entries showed, had been superseded by a supersedeas filed on the 15th of January, 1869, with John Bowes and Andrew B. Wise, "sureties, due July 15, 1869." The form of

the supersedeas, as it appeared in the record, showed that the sureties on the 15th of January, 1899, appeared before the clerk and confessed a judgment in the usual way to be levied of their goods, chattels, etc., in case the defendant, Smith, did not pay the original judgment "on the 7th of July next," and the supersedeas was signed by the sureties and attested as taken and subscribed before the clerk. It appeared by the evidence and the admission of facts that the superseding defendants appeared before the clerk and were informed that the supersedeas would be for six months from the date of superseding the same, and the usual terms of the confession of judgment as prescribed by the Code were repeated to them in which the dates were correctly stated, and they signed the blank form as is customarily done at the clerk's desk; he making the correct docket entry at the time. But, in filling up the blank signed by them, he inadvertently wrote June instead of July, and on discovering his mistake changed the last two letters "ne" to "ly." This supersedeas was held to be invalid and that it should have been stricken out by the lower court. After discussing the provisions of the law relating to supersedeas, and holding that the clerk in taking the supersedeas acts by virtue of special power and authority conferred upon him by law, Judge Miller, speaking for the court, said: "We are clearly of opinion, upon the facts stated by the learned judge in his opinion, that this supersedeas was not taken in conformity with law, and should therefore have been stricken out on the appellant's motion. The path of duty and the mode of procedure is so plainly pointed out by the law that there can be little excuse for erring therein. The clerk must first be satisfied of the sufficiency of the supersedeas as provided in Code 1904, art. 18, § 24, and then fill up with the proper dates and amounts and names of parties, a blank form of confession prescribed by Code 1904, art. 51, § 45, or one similar in substance and meaning, and read it over to the parties, who, if they consent thereto, must sign it, or, if they cannot write, make their mark, attested by himself. This is a very simple procedure, and when done the supersedeas is perfect to operate for the purpose for which the law designed it, and it cannot afterwards be mutilated or corrected out of the presence, and without the assent, of the parties who signed it, either by the clerk or any one else." An inspection of the writing which we have transcribed and which is called in the record a supersedeas, when tested by these rules, shows that it would have been invalid had it been taken in a civil case. In taking a supersedeas, the safe course for the clerk to pursue is to follow the simple form contained in section 56 of article 52 of the Code. In *Smith v. Bowes*, 38 Md. 463, in re-

ferring to the case of *Bowes v. Isaacs*, supra, Judge Alvey said that the court in that case held the supersedeas to be void, and that it should have been stricken out and set aside on the motion made for that purpose.

For the reasons we have stated, the order of the lower court must be reversed.

Order reversed and case remanded that an order may be passed in conformity with this opinion.

CLARK, Sheriff, v. HARFORD AGRICULTURAL & BREEDERS' ASS'N.

(Court of Appeals of Maryland. Nov. 15, 1912.)

1. INJUNCTION (§ 105*)—SUBJECTS OF RELIEF—CRIMINAL PROSECUTIONS—ACTS AFFECTING PROPERTY.

Where complainant, a horse racing association, had complied with Acts 1912, c. 132, regulating the licensing of horse racing in H. county, and had spent a large sum of money in preparing grounds and carrying forward a horse race meet on the faith of the validity of such act, and the prosecution of its officers, servants, and patrons for gaming on the theory that the act was invalid, before the termination of the meet as threatened, would result in irreparable injury to complainant's property rights, a court of equity had jurisdiction to enjoin or stay such criminal proceedings pending determination of the constitutional question, under the rule that equity has jurisdiction to issue such an injunction when necessary to protect property rights which without it would be destroyed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.*]

2. OFFICERS (§ 36*)—HORSE RACING COMMISSION—OATH OF OFFICE—DUTY TO TAKE.

Members of a horse racing commission appointed under Acts 1912, c. 132, regulating horse racing in H. county, were not persons elected or appointed to any office of profit or trust under the Constitution, and were therefore not required to take the oath of office prescribed by Const. art. 1, § 6, before entering on the duties of their office, and no oath being required of them by the act, providing for their appointment and no civil commission being issued to them, they were not required to take such preliminary oath by Code 1904, art. 70, § 10, declaring that any person whether elected or appointed to office who shall decline or neglect to take or subscribe the oaths prescribed by the Constitution for 30 days from the date such commission has been received at the office of the clerk shall be deemed to have refused the office, etc.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 53; Dec. Dig. § 36.*]

3. CONSTITUTIONAL LAW (§ 208*)—EQUALITY—UNREASONABLE CLASSIFICATION.

Acts 1912, c. 132, providing for the licensing and regulation of horse racing in H. county, was not unconstitutional as creating an arbitrary and unreasonable classification, in that it limited the right to procure a license to conduct horse racing in that county to corporations formed to race, develop, or improve the breed of horses regularly incorporated agricultural associations, or associations organized to conduct fairs or hunt clubs.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.*]

4. THEATERS AND SHOWS (§ 2*)—HORSE RACING—REGULATION—POLICE POWER.

Acts 1912, c. 132, providing for the regulation and licensing of horse racing in H. county, was a proper exercise of police power to regulate and restrict horse racing, bookmaking, and betting at race tracks, or to abolish the same.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 2; Dec. Dig. § 2.*]

5. CONSTITUTIONAL LAW (§ 46*)—OBJECTION—NECESSITY OF DETERMINATION—SELF-PERPETUATING COMMISSION.

Four commissioners having been named in Acts 1912, c. 132, providing for the appointment of a racing commission and to regulate horse racing in H. county, and having entered on their duties for a term of four years, such commission being a creature of the Legislature, the court during such term would not hold the act invalid because the commission was made self-perpetuating.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

6. CONSTITUTIONAL LAW (§ 63*)—DEPARTMENTS OF GOVERNMENT—LEGISLATIVE POWERS—DELEGATION TO COMMISSION.

Acts 1912, c. 132, providing for the licensing of horse races in H. county, and for a commission to supervise such races and betting thereat according to specified rules, was not unconstitutional as delegating legislative powers to the commission.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. § 63.*]

Appeal from Circuit Court, Harford County; Wm. H. Harlan, Judge.

Suit by the Harford Agricultural & Breeders' Association against William L. Clark, sheriff. Decree for complainant, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Edgar Allan Poe, Atty. Gen., for appellant. Phillip H. Close and S. A. Williams, both of Bel Air, for appellee.

BRISCOE, J. On the 24th of September, 1912, the Harford Agricultural & Breeders' Association, a corporation duly incorporated under the general laws of the state, and the plaintiff below, filed the bill in this case for an injunction to restrain the defendant Wm. L. Clark, the sheriff of Harford county, from interfering with the plaintiff corporation or any of its officers in the conduct of a race meeting being held at the time near Havre de Grace, in Harford county, and from arresting any person or persons engaged in taking bets or in bookmaking or in betting at this meeting. The application for injunction was set for hearing on the bill, and after argument by counsel for the plaintiff and defendant an injunction was directed on the same day to be issued in accordance with the prayer of the bill. By an agreement of counsel filed in the case, it was agreed that the bill of complaint should be considered as amended by adding to the end of paragraph 11 the following: "And that, in fact,

the members of said racing commission did not take and subscribe the oath prescribed by section 6 of article 1 of the Constitution." The docket entries as set out in the record contain the following entries: "Sept. 25, 1912. Injunction writ issued and copy court's order attached. Process, Sum'nd. Writ of injunction accepted by Wm. L. Clark, sheriff of Harford county, on the 25th of September, 1912. On September 27, 1912, demurrer of defendant filed. Same day—Order filed to enter an appeal to the Court of Appeals, from the order of the court dated the 24th day of September, 1912, granting writ of injunction." No point, however, was made at the hearing in this court upon the state of the pleadings or the scope of the order for injunction; but as the decision of the case will ultimately turn upon the validity or invalidity of Acts 1912, c. 132, and the validity of the racing commission, as constituted by the act, we shall proceed to consider the questions of law raised on the record, and by the various contentions of the parties to the suit.

The facts of the case appearing from the record that are necessary to be stated for the purposes of this opinion are these:

At the January session, 1912, of the General Assembly of Maryland, an act was passed (chapter 132, Acts 1912), the title of which is as follows: "An act to provide for the regulation, control and licensing of horse racing within Harford county, to create the Harford county racing commission and prescribe its powers and duties, to provide license fees for the conduct of horse racing within said county and to repeal sections 204, 205 and 206 of art. 27, of the Code of Public General Laws of Maryland, of 1904 title 'Crimes and Punishments' subtitle 'Gaming,' said section 206 having been amended by chapter 127, of the Acts of the General Assembly of Maryland of 1906, so far as said sections apply to Harford county." It appears from the record, and it is admitted by the pleadings in the case, that the plaintiff is a Maryland corporation, and organized for the purpose of conducting, driving, and running races and maintaining a race track in Harford county and other kinds of public exhibitions, not prohibited by law. It further appears that four members of the racing commission named by the act accepted their appointment, and on the 10th of May, 1912, met and duly organized under the law; that one, Robert C. Richardson, named as a member of the commission, declined to serve, but on the 2d day of September, 1912, Lewis J. Williams was elected as his successor, and has since that date acted as a member of the commission; that James T. Jones was elected president and Thomas C. Hopkins was made secretary and treasurer of the commission, and are now acting as such officers, but, in fact, the members of

the commission did not take and subscribe the oath prescribed by section 6 of article 1 of the Constitution.

The bill avers that on the 20th day of May, 1912, the plaintiff applied to the racing commission for a license to hold race meetings under the act, and on the 14th day of August a license was granted it to hold meetings on the dates named therein. The bill further avers that the plaintiff, in pursuance of the permission and the privilege granted by the license, and in preparation for the race meeting, purchased a large piece of land in the second election district of Harford county, and expended a sum in excess of \$80,000 in preparing the land for the race meeting, that the meetings were opened on the 24th of August, 1912, and continued successfully until and including the 21st of September, 1912. The bill also avers that amongst other privileges sold during the meeting was the privilege to bookmakers, of whom there are more than 20, to conduct betting or pool selling on the races, and the privilege was to continue during the 30 days of the meetings; that the owners of horses were induced to send their horses to the meetings by the stakes and purses which were advertised by the plaintiff, and the privileges granted to the bookmakers and others were valuable and brought revenues to the plaintiff because of the length of the meeting, and each day of the continuance of the meeting is important in enabling the plaintiff to fill its engagements with the horse owners and renters of the privileges. By the seventh paragraph of the bill it is averred that for the privilege of conducting the meetings the plaintiff has paid to the said racing commission a large sum of money—that is to say, the sum of \$4,470—and, in addition thereto, has paid to the treasurer of Harford county the sum of \$2,479.05, the same being 5 per cent. of the gate receipts at the meetings up to and including the 21st day of September, as required by the act, and the plaintiff has, in all respects, complied with the law and all other laws of the state of Maryland, and is entitled under the license to complete its meetings and to conduct its races and permit betting up to and including the 30th day of September.

The bill then charges that the law officers of the state have advised the defendant, the sheriff of Harford county, that the racing meetings of the plaintiff are illegally held, and that betting and bookmaking is illegally permitted upon its grounds because the members of the commission failed to qualify by taking the oath required by the Constitution of the state, and that, therefore, the members of the commission refused to accept the office, and all their acts are void; that the defendant has been instructed to cause the arrest of all persons betting, conducting betting, bookmaking, or

pool selling at the meeting, and of the officers of the plaintiff who permit the same. The bill also avers that it will work an irreparable injury for reasons alleged in the bill should the plaintiff be prevented from holding the meetings for the remaining six days, and from permitting the exercise of the privileges which have been granted and let by it, and that the plaintiff is without remedy at law as against these threatened wrongs and trespass, and is entitled to the interposition of a court of equity by the writ of injunction to prevent the same.

The prayer of the bill is: (1) that the plaintiff's rights under the license mentioned may be established; (2) that the validity of the acts of the Harford county racing commission may be determined and established; (3) that the defendant and all persons acting by and under him may be restrained by injunction from interfering with the plaintiff or its officers in the conduct of the race meeting, and from arresting any person or persons engaged in taking bets or in bookmaking or in betting at the meeting; (4) and for all such other and further relief as its case may require.

Having thus fully set out the facts of the case as made by the bill, we come now to consider the questions of law as presented on the appeal.

[1] There can be no doubt, it seems to us, upon both principle and authority, that a court of equity has jurisdiction to grant an injunction to stay and restrain a criminal proceeding where it is necessary to protect property rights, and where those rights would be destroyed by such prosecution. In *Dobbins v. Los Angeles*, 195 U. S. 241, 25 Sup. Ct. 22, 49 L. Ed. 169, it is said: "It is also urged by the defendants in error that a court of equity will not enjoin prosecution of a criminal case, but, as we have seen, the plaintiff in error in this case had acquired property rights which, by the enforcement of the ordinance in question, would be destroyed and rendered worthless. If the allegations of the appellee be taken as true, she had the right to proceed with the prosecution of the work without interference by the city authorities in the form of the arrest and prosecution of those in her employ. It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity." The doctrine announced in *Dobbins v. Los Angeles*, supra, is well-settled law and established by numerous cases and text-writers. *Davis F. Mfg. Co. v. Los Angeles*, 189 U. S. 217, 23 Sup. Ct. 498, 47 L. Ed. 778; *Daly v. Elton*, 195 U. S. 242, 25 Sup. Ct. 22, 49 L. Ed. 177; *Baseball Co. v. New Orleans*, 118 La. 228, 42 South. 784, 7 L. R. A. (N. S.) 1014; 1 High on Injunctions, 68; *Page v. Baltimore*, 84 Md. 559; *Deems v. M. & C. C.*, 80 Md. 172,

30 Atl. 648, 26 L. R. A. 541, 45 Am. St. Rep. 339.

In the case at bar, assuming that Acts 1912, c. 132, is valid and constitutional, then it repealed in terms sections 204, 205, and 206 of article 27 of the Code, subtitle "Gaming," so far as said sections apply to Harford county. In *Mayor, etc., v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, Judge Miller said: "As to the question of jurisdiction we have no doubt. It has been decided by this court in too many cases to be longer open to question that, where a municipal corporation is seeking to enforce an ordinance which is void, a court of equity has jurisdiction at the suit of any person injuriously affected thereby to stay its execution by injunction." And this mode of procedure in like cases has been approved and sanctioned by this court in *Deems v. M. & C. C.*, 80 Md. 172, 30 Atl. 648, 26 L. R. A. 541, 45 Am. St. Rep. 339; *Holland v. Baltimore*, 11 Md. 187, 69 Am. Dec. 195; *Page v. Baltimore*, 84 Md. 558; *Bouldin v. Baltimore*, 15 Md. 18; *Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 686. And to the same effect are the cases of *Ex parte Young*, 209 U. S. 165, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *St. Louis v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402.

But it is urged upon the part of the appellant that the court below committed an error in granting the injunction because, first, there never was any legally constituted racing commission under Acts 1912, c. 132, because the members of the commission failed to take and subscribe the oath prescribed by section 6 of article 1 of the Constitution, and therefore the license granted by the commission to the plaintiff was null and void, and afforded it no protection; secondly, because chapter 132 of the Acts of 1912 is unconstitutional, illegal, and void, and therefore the license issued thereunder was null and void, and afforded no protection to the plaintiff or its officers or persons betting or conducting betting, bookmaking, or pool selling at the race meetings.

[2] The question raised by the appellant's first contention is one of public importance, and is presented on this record for the first time before this court. The question briefly stated, is this: Are the members of the racing commission appointed by Acts 1912, c. 132, persons "elected or appointed to any office of profit or trust under the Constitution or under the laws made pursuant thereto," and as such required to take and subscribe the oath required by the Constitution before they enter upon the duties of the position to which they were appointed. Section 6,

art. 1, of the Constitution, provides that every person elected or appointed to any office of profit or trust under this Constitution or under the laws made pursuant thereto shall, before he enters upon the duties of such office, take and subscribe the following oath. Section 7, art. 1, declares that every person hereafter elected or appointed to office in this state who shall refuse or neglect to take the oath or affirmation of office provided for in the sixth section of this article shall be considered as having refused to accept the said office, and a new election or appointment shall be made, as in case of refusal to accept, or resignation of an office.

The case of *Sappington v. Slade*, 91 Md. 640, 48 Atl. 64, relied upon by the appellant, and urged in argument, differs from this, in that the statute creating the board of supervisors of elections of the counties and the city of Baltimore provided in terms that, before entering upon the duties of their office, they should each take and subscribe the oath prescribed in the sixth section of the first article of the Constitution, and also an oath to perform faithfully and honestly the duties imposed upon them by law. Acts 1896, c. 202, § 3. Besides this, a civil commission was issued by the Governor to each supervisor and was sent by the Secretary of State to the clerks of the respective circuit courts, and they were required by law to deliver them immediately to the persons to whom the commissions were directed, and who might apply for them. Section 1 of article 70 of the Code also provided that any person whether elected or appointed to office who shall decline or neglect to take and subscribe the oaths prescribed by the Constitution for the period of 30 days from the date when the commission of such officer has been received at the office of the clerk shall be deemed to have refused said office. The clerks of the courts are also required to report to the Secretary of State at least once a month the names and offices of all officers who have not taken and subscribed the oath, as required by law, to be taken before them. Code of Public General Laws 1904, art. 17, §§ 67, 68, 69. There is no provision in the act now in question requiring the members of the racing commission appointed by the act to take an oath of office, and, as no civil commission was issued to them, they manifestly do not come within the requirements of the Code just stated. There is nothing in the act itself now before us to indicate an intention upon the part of the Legislature to create or establish a public office, or to confer upon the racing commission as individuals the powers and duties that are committed to the commission itself as a board or quasi corporation. The commission must act by a majority vote, and like other boards or corporations the individual members thereof exercise no powers except by and through a majority of

the body itself. It was not the design or the purpose of the act that the members of the commission should be independent officers, or to impose upon them personally the powers and duties that were committed to the commission itself under the act. In other words, the Legislature created a commission, and invested it with power and authority to carry out and make effective the purposes of the act; and, while a corporation was not created by the act, it was not contemplated that the members of the commission should be independent officers or persons otherwise than as members of a quasi corporation, and it was not intended that they should act as individuals. It is conceded that the members of the commission are not civil officers, but it is contended that they are persons who hold an office of profit and trust, and come within the purview of section 6 of article 1 of the Constitution.

In *School Commissioners v. Goldsborough*, 90 Md. 193, 44 Atl. 1055, this court held that school commissioners as members of the respective school boards of the state were not civil officers, and they were not required as they would have been if the lawmakers supposed they were civil officers to take an oath to support the Constitution of the state or the United States. There was nothing in the school law requiring them to take an oath of office. Judge McSherry in delivering the opinion of the court said: "Speaking generally, it may be said that a public office is an agency for the state and the person whose duty it is to perform this agency is a public officer. This we consider to be a true definition of a public officer in its original broad sense. The essence of it is the duty of performing an agency; that is, of doing some act or acts or series of acts for the state. * * * The nature of the duties, the particular method in which they are to be performed, the end to be attained, the depository of the power conferred and the whole surroundings must be all considered when the question as to whether a position is a public office or not is to be solved. * * * Civil officers, therefore, are governmental agents. They are natural persons in whom a part of the state's sovereignty is vested or reposed to be exercised by the individual so intrusted with it for the public good. The power to act for the state is confided to the person appointed to act. It belongs to him upon assuming the office. He is clothed with the authority which he exercises, and the official acts done by him are done as his acts, and not as the acts of a body corporate." In *Baltimore City v. Lyman*, 92 Md. 611, 48 Atl. 145, 52 L. R. A. 406, 84 Am. St. Rep. 524, this court held that the superintendent of public instruction was not a municipal official within the meaning of the city charter. In *Bunn v. People*, 45 Ill. 397, it was held that commissioners to build a statehouse were not officers, because, among other things, there was no intention manifest in the

act itself to establish an office. In view of the authorities cited and after a careful examination of the act itself creating the racing commission of Harford county, we hold that the members of the commission are not persons elected or appointed to an office of profit or trust under the Constitution or under the laws made pursuant thereto within the meaning and contemplation of article 1, § 6, of the Constitution, and, not being such persons, they were not required, independent of statute, to take and subscribe the oath required by the Constitution before entering upon the duties of their office as members of the commission.

[3] It is contended, however, that the act in question is invalid and unconstitutional for certain reasons, and they are, first, because the act creates an arbitrary and unreasonable classification in that it provides by the fifth section of the act that "no person or persons, association, or corporation shall hereafter hold or conduct any meeting in Harford county whereat horse racing shall be permitted for any stake, purse or reward, except corporations formed for the purpose of racing or developing or improving the breed of horses, regularly incorporated agricultural associations, or associations for conducting county, city or state fairs, or associations of regularly organized hunt clubs;" second, that the act is illegal, because it authorizes the commission to fill all vacancies occurring in the commission and to appoint their successors; and, third, because legislative powers are conferred upon the commission. There can be no question that the Legislature may, as was said by this court in *Luman v. Hitchens Bros. Co.*, 90 Md. 25, 44 Atl. 1051, 46 L. R. A. 393, under conditions create classes, and subject all persons coming within the classifications to burdens or duties not imposed upon individuals outside of the classes. These classifications, however, must not be arbitrary or unreasonable, but must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. Judge Cooley in his work on *Constitutional Limitations*, 249, says: "The guaranty of equal protection is not to be understood, however, as requiring that every person in the land shall possess the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection given by the law is to be deemed equal if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred and liabilities imposed. The classification must be based on reasonable grounds. It cannot be a mere arbitrary selection." *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 850, 30 L. Ed. 578; *Barbier v. Connolly*, 113 U. S. 81, 5 Sup. Ct. 357, 28 L. Ed. 923; *St. Louis R. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611.

[4] The state can through its Legislature

by the proper exercise of its police powers pass such laws and regulations as it may deem necessary to control, regulate, and restrict horse racing, bookmaking, and betting at race tracks or it may abolish the same altogether. *Singer v. State*, 72 Md. 466, 19 Atl. 1044, 8 L. R. A. 551; *Long v. State*, 74 Md. 568, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268; *Cochran v. Preston*, 108 Md. 227, 70 Atl. 113, 23 L. R. A. (N. S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048; *State v. Broadbelt*, 89 Md. 578, 43 Atl. 771, 45 L. R. A. 433, 73 Am. St. Rep. 201. The object and purpose of the act in question was to restrict and to regulate horse racing, pool making, and betting at such races in Harford county and to limit it to certain corporations formed for this purpose, and to certain associations mentioned in the fifth section of the act. The control was put in a commission appointed by the act, and with power to license those who would conduct the racing under the provisions of the act. The restriction was not, therefore, by any way of class discrimination, but by selection and designation, so as to promote and safeguard the object and purposes of the legislation. It is apparent, both from the previous legislation in this state, and from Acts 1912, that it was not the intention of the Legislature to suppress horse racing or to prohibit betting thereon, except as limited by the various acts. Section 203, art. 27, vol. 1, Code 1904; *James v. State*, 63 Md. 242; *State v. Dycer*, 85 Md. 246, 36 Atl. 763; *Spies v. Rosenstock*, 87 Md. 18, 39 Atl. 268; Acts 1882, c. 271; Acts 1890, c. 206; Acts 1894, c. 232; Acts 1902, c. 572; Acts 1906, c. 127; Acts 1898, c. 286; Acts 1912, c. 77; Acts 1912, c. 132. The only real difference between the provisions of the Public General Laws as they were at the time of the enactment of Acts 1912 and the act under consideration lies in the method by which the license may be granted. The act involved did not repeal the entire general law with regard to betting, bookmaking, and pool selling on horse races, even so far as Harford county was concerned, but merely substituted a commission as the source from which the license should emanate in lieu of that provided by the general laws. Section 8 of the act then provided that the license shall be for all purposes in substitution for that theretofore required by law. In any criminal prosecution such a provision would necessarily be given a liberal interpretation, and must be regarded as superseding the provisions of the general law, in so far as the granting and effect of the license is concerned. While the classifications under the act are in some respects necessarily special in their character, we do not think they afford a proper ground for complaint because they are just and reasonable, and in no way arbitrary. In other words, "they operate alike upon all persons and property under the same circumstances and conditions, and bear a reasonable and

just relation to the act in respect to which classification is proposed." *Storck v. Baltimore City*, 101 Md. 484, 61 Atl. 333. The act in question is founded and based upon the right of the state in the exercise of its police power to regulate and control horse racing and bookmaking on such races. *State v. Broadbelt*, 89 Md. 582, 43 Atl. 771, 45 L. R. A. 433, 73 Am. St. Rep. 201; *Jones v. Brim*, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677; *Barbier v. Connolly*, 113 U. S. 81, 5 Sup. Ct. 357, 28 L. Ed. 923.

[5] We find no force in the second objection to the act, to wit, that the commission is self-perpetuating. Four of the commissioners named in the act have entered upon their duties, and hold for a term of four years. The commission is a creature of the Legislature, and, if the method of the appointment of their successors is objectionable, the act creating them can be amended or repealed in this respect by any Legislature and a new mode of appointment adopted. *Storck v. Baltimore City*, 101 Md. 476, 61 Atl. 330; *Anderson v. Baker*, 23 Md. 531; *Warfield v. County Commrs.*, 28 Md. 76.

[6] The third objection, to wit, that legislative powers have been conferred upon the commission, seems to have been settled by the Supreme Court of the United States in the cases of *Interstate Commerce v. Goodrich*, 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729, and *U. S. v. Grimaud*, 220 U. S. 514, 31 Sup. Ct. 480, 55 L. Ed. 563. In the *Grimaud Case*, Justice Lamar said the determination of such questions, however, was a matter of administrative details. He also said: "From the beginning of the government various acts have been passed conferring upon executive officers the power to make rules and regulations, not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power, but, when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions power to fill up the details by the establishment of administrative rules and regulations, the violation of which could be punished by a fine or imprisonment fixed by Congress or by penalties fixed by Congress or measured by the injury done." In *Goodrich's Case* the court said: "Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by Congress. This rule has been frequently stated and illustrated in recent cases in this court, and needs no amplification here. *Buttfield v. Stranahan*, 192 U. S. 470 [24 Sup. Ct. 349, 48 L. Ed. 525]; *Union Bridge Co. v. United States*, 204 U. S. 384 [27 Sup. Ct. 367, 51 L. Ed. 523]; *United States v. Grimaud*,

220 U. S. 506 [31 Sup. Ct. 480, 55 L. Ed. 563].” In the act in question it appears that the Legislature has laid down certain rules which are to govern in the conduct of horse racing and betting on horse racing. A commission has been appointed by the act to supervise such races and betting, has indicated on general lines how the law is to be enforced, and has directed the commission to make rules and regulations to that end. These facts, as stated by the act, we think bring this case within the principles established and within the reasoning of the Supreme Court in the cases just cited, and they must determine the question here raised on the appellant's third contention. As to the policy and wisdom of this class of legislation we express no opinion. This is a matter for the legislative branch of the state. If the act is valid and free from constitutional objections, it is the duty of the court to sustain it. If invalid, it would be our plain duty to strike it down, and so declare.

We have examined the case with much care, and hold that Acts 1912, c. 132, is a valid exercise of the police power of the state, and for the reasons stated it is free from the constitutional objections urged against it, and, this being so, the order appealed against will be affirmed.

Order affirmed, with costs.

GOODSELL et al. v. McELROY BROS. CO.
(Supreme Court of Errors of Connecticut.
Dec. 19, 1912.)

1. PARTIES (§ 76*)—WANT OF CAPACITY—SUFFICIENCY OF PLEADING.

Where defendants did not in their answer specifically deny plaintiffs' right to sue as trustees, as required by Gen. St. 1902, § 609, but merely denied an allegation of the complaint that plaintiffs accepted the trust under the will, they were only entitled to attack plaintiffs' standing as trustees because of a failure to accept the trust.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 117-121; Dec. Dig. § 76.*]

2. TRUSTS (§ 44*)—ACCEPTANCE OF TRUST—EVIDENCE—SUFFICIENCY.

Evidence that parties named in a will as executors and trustees after the settlement of their accounts as executors collected the income of the residuary estate, paid it to the beneficiaries in accordance with the terms of the trust, invested and reinvested the trust property, rendered statements to the beneficiaries as trustees, obtained leave from the probate court to sell realty forming a part of the trust estate, carried on extensive building operations thereon, and dealt with the property in accordance with the terms of the trust in connection with the presumption arising from their qualification as executors, supported a finding that they accepted the trust; no action by the court being necessary to give effect to such acceptance.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.*]

3. TRUSTS (§ 44*)—ACCEPTANCE OF TRUST—EVIDENCE—ADMISSIBILITY.

In an action brought as trustees by persons named in a will as executors and trustees,

evidence of their acts in relation to the trust estate after allowance of their final account as executors was competent on the issue of whether they had accepted the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.*]

4. TRUSTS (§ 44*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on notes payable to a decedent by trustees named in his will, where an acceptance of the trust was shown, and there was evidence that after settling their accounts as executors they had dealt with the trust property in accordance with the terms of the trust, a finding on the issue of whether they held the property as trustees that they undertook the execution of the trust and the management of the trust estate in the capacity of trustees was supported by the evidence.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.*]

5. TRUSTS (§ 156*)—EXECUTORS AS TRUSTEES—FORMALITIES OF TRANSFER OF PROPERTY.

Where persons named in a will as executors and trustees, and who were not required to give a bond in either capacity, after the settlement of their final account as executors and the ascertainment of the balance remaining subject to the trust, by their conduct unequivocally indicated their intention to hold and administer the fund under the terms of the trust, they held such property as trustees, although there had been no distribution by the court of probate, no inventory of the trust fund or trust account filed, and no assignment, transfer, or delivery of the fund, as executors, to themselves as trustees.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 201, 202; Dec. Dig. § 156.*]

6. TRUSTS (§ 249*)—EXECUTORS AS TRUSTEES—FORMALITIES OF TRANSFER OF PROPERTY.

Trustees named in a will who were also executors may sue on notes payable to the decedent, although not indorsed or otherwise assigned, as executors, to themselves as trustees, in view of Gen. St. 1902, § 4219, providing that negotiable paper can be transferred by delivery without indorsement.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 355; Dec. Dig. § 249.*]

Appeal from Superior Court, Fairfield County; Lucien F. Burpee, Judge.

Action by Stiles E. Goodsell and others, trustees, against the McElroy Bros. Company on six promissory notes payable to the order of the decedent, of whose estate plaintiffs were alleged trustees. Judgment for plaintiffs, and defendant appeals. Affirmed.

The complaint contains six counts. In each it is alleged that the defendant corporation on a date specified by its note promised to pay to the order of one Charles H. Hawley, of Bridgeport, a certain sum of money, in one case six months after date, and in the others on demand, and in each case with interest at 6 per cent. It is further alleged that these notes have not been paid, except for some partial payments set out. It is also averred that Hawley died subsequent to the making and delivery of the notes, leaving a will duly probated, in which the plaintiffs were named as executors and as trustees of the entire residuary estate, and excused from giving bond in both capacities; that the plaintiffs accepted the trust under

the will, and were by the court of probate confirmed as executors; that as such executors they settled the estate, and in due course filed with the court of probate their account as executors; that said account was afterward accepted by said court; that such accounting showed a balance on hand in the form of both realty and personalty constituting said residuary estate; that upon the day that said account was accepted the plaintiffs completed their duties as executors, except such as should arise after the termination of said trust; that they thereafter held said residuary estate, and were still holding the same under their appointment as trustees; and that the notes in suit constituted a part of said trust fund. The answer admitted all of the allegations of the complaint except three, to wit, that the plaintiffs accepted the trust under the will; that they, after the acceptance of the account, held and were still holding the residuary estate as trustees; and that the notes sued upon constituted a part of the trust fund so held by them.

The court found the following additional facts: The balance remaining in the hands of the executors upon the settlement of the estate and forming the residuary estate impressed with the trust amounted to \$950,000. This fund, which included the notes in suit, which were owned by Hawley at his death and during the settlement of the estate had been in the possession of the plaintiffs, was by the will given to them as trustees for the use and benefit of the testator's widow and children. During the settlement of the estate, the plaintiffs made certain distributions of income in conformity with the terms of the trust, and during the period of nearly two years succeeding the settlement of the account and antedating the commencement of the action they collected the income on the residuary estate, including the interest on the notes in suit, paid it over to the beneficiaries under the trust in accordance with the terms thereof, invested and re-invested the property included in that estate, rendered monthly statements to the beneficiaries, as trustees asked and obtained leave from the court of probate to sell the realty which formed a part of the residuary estate, carried on extensive building operations upon such real estate, and dealt with both the real and personal property devised and bequeathed to them in trust in accordance with the terms of the trust. Upon the same day that the account of the executorship was accepted the plaintiffs and the beneficiaries under the trust entered into a written agreement by the terms of which the compensation of the plaintiffs as trustees was fixed, certain expenses by them as trustees arranged for, and the rendition of monthly statements to the beneficiaries agreed upon. The plaintiffs, as trustees, never filed with the court of probate an inventory of property held by them in that capacity. Their executors' account

contained a full and complete inventory of the estate which was to pass under the trust. They never filed an annual account. No order of distribution of the testator's estate was shown. The notes were never indorsed or otherwise assigned by the plaintiffs as executors to themselves as trustees. The defendant objected and excepted to the admission of the testimony as to the action of the plaintiffs in the distribution of income to the beneficiaries under the trust during the period prior to the allowance of the account of the executors, and as to all their acts and conduct subsequent thereto in the management of the residuary estate, the disposition of its income, and their dealings with the trust beneficiaries as being either irrelevant or incompetent.

The court found the three issues raised by the pleadings in favor of the plaintiffs. The errors charged relate to the court's action in reaching these conclusions, and in admitting the testimony objected to.

John C. Chamberlain and Alfred B. Beers, both of Bridgeport, for appellant. John S. Pullman and Samuel F. Beardsley, both of Bridgeport, for appellees.

PRENTICE, J. (after stating the facts as above). [1] The defendant in its answer has not put in issue the right of the plaintiffs to maintain their action as trustees under the will by specifically denying such right as required in section 609 of the General Statutes. It has simply denied an allegation of the complaint that the plaintiffs accepted the trust under the will. The utmost effect, in any view of this denial, which could be given to it, was to entitle the defendant to call in question the plaintiffs' standing as trustees by reason of a failure on their part to accept the trust.

[2] The trial court gave the defendant the full benefit of the narrow issue of fact thus presented, and determined it against its contention. There was ample justification for such a conclusion in both the presumption which the law would raise from the plaintiffs' qualification as executors, and the affirmative evidence admitted of their conduct in their official relation to the estate both before and after the allowance of their final account as executors. *Baldwin v. Porter*, 12 Conn. 473, 481. No action of any court was necessary to give effect to such acceptance.

[3] It was a matter for individual decision and action, and there could be no surer indication of that decision and action than their conduct touching the property which was to form the trust fund. Proof that the plaintiffs before the allowance of their final account as executors did acts in relation to the estate in their hands which were those of trustees, and after such allowance dealt with the estate and with those who were beneficiaries thereof under the terms of the trust as

trustees under such terms would, and as persons in other capacities would not, was, therefore, most pertinent, and was rightfully admitted.

[4] The second of the issues arises from the denial of the allegation of the complaint that the plaintiffs after the allowance of their final account as executors held the residuary estate remaining in their hands as trustees under the provisions of the will, and were so holding it at the time of the commencement of the action. The question already discussed is closely related to that here presented, and the answer to the former enters as an important factor into a determination of the answer to be given to the latter.

It having been found that there had been an acceptance of the trust, it only remained to inquire (1) whether the plaintiffs undertook the execution of the trust and the management of the trust estate in the capacity of trustees, and (2) whether, if so, there was any reason why the possession which they then had of that estate was not in contemplation of law to be regarded as possession by them in that capacity. The first of these inquiries is one of fact, and the court has answered it affirmatively. The evidence already considered was plainly pertinent to it, and upon the strength of it no other conclusion than that reached could well have been arrived at.

[5] The defendant, however, urges that whatever may have been the plaintiffs' notion of the capacity in which they were acting after the final settlement of the estate, and whatever capacity they may have undertaken to assume, they must be legally regarded as acting as executors and not as trustees, for the reason that there had never been such formal action taken as the law requires as a condition precedent to a change of capacities. In this connection, it is said that the legal consequence claimed must attach because there was no distribution by the court of probate, no inventory of the trust fund or trust account filed in that court, and no assignment, transfer, or delivery of the fund made, nor any one of these things. Under the conditions present in this case, no one of these formalities was necessary to a change in the character of the holding. The plaintiffs were by the will given the residuary estate of the deceased in a double fiduciary capacity, that estate came into and remained in their hands, the balance thereof remaining after the execution of one trust belonged to another, the amount of such balance had been definitely ascertained by the settlement of the final account of the executorship, and no bond or other formality was a prerequisite of qualification for the trusteeship. The court has found conduct on the part of the plaintiffs unequivocally indicating their intention, and declaring their elec-

tion, to hold and administer the fund under the terms of the trust created by the will. The law will accordingly regard the fund as transferred and held in the new capacity. *State v. Whitehouse*, 75 Conn. 410, 417, 53 Atl. 897; *Id.*, 80 Conn. 111, 120, 67 Atl. 503; *State v. Cheston*, 51 Md. 352, 376, et seq.; *Ruffin v. Harrison*, 81 N. C. 208, 221; *Bell v. People*, 94 Ill. 230, 237; *Pratt v. Northam*, 5 Mason, 95, 108, Fed. Cas. No. 11,378.

[6] The complaint alleges that the notes in suit constituted a part of the trust fund. This allegation is denied, thus creating the only remaining issue. The contention here is that they do not belong to the fund, for the reason that they have never been indorsed or otherwise assigned to the plaintiffs as trustees. It is urged in support of this contention that the defendant cannot and ought not to be compelled to pay the amount due upon this paper except to persons who have title thereto, and thus are legally entitled to receive the money. Section 4219 of the General Statutes furnishes a complete answer to this claim. Under its provisions, negotiable paper can be transferred by parol and delivery and without indorsement, thereby giving title to it. *Meuer v. Phenix Nat. Bank*, 94 App. Div. 831, 88 N. Y. Supp. 83; *Goshen National Bank v. Bingham*, 113 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 16 Am. St. Rep. 765.

There is no error. The other Judges concurred.

PATCHIN et al. v. ROWELL et al.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1912.)

1. SALES (§ 202*)—TITLE OF BUYER—PAYMENT OF PRICE.

An absolute sale followed by delivery to the buyer vests the title in him though he does not then or subsequently pay the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 542-551; Dec. Dig. § 202.*]

2. SALES (§ 234*)—SALE BY BUYER—BONA FIDE PURCHASER—TITLE ACQUIRED.

Where a buyer obtains possession under an absolute sale without paying the price, and sells the goods to a third person for the consideration of an existing debt and in good faith, the sale to the third person is good as between the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 645, 657-677, 679, 680; Dec. Dig. § 234.*]

3. FRAUDULENT CONVEYANCES (§ 139*)—SALES (§ 234*)—FAILURE TO TAKE POSSESSION—RIGHTS OF SUBSEQUENT ATTACHING CREDITORS AND BONA FIDE PURCHASERS.

The title of a buyer who does not take possession is not good as against a subsequent attaching creditor without notice, or against a bona fide purchaser without notice, who secures possession.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 439-442, 443, 448-452; Dec. Dig. § 139.* Sales, Cent. Dig. §§ 645, 657-677, 679, 680; Dec. Dig. § 234.*]

4. SALES (§ 234*)—FRAUDULENT CONVEYANCES (§ 147*)—CHANGE OF POSSESSION—TITLE.

Where a buyer, in possession without paying the price, verbally declared that he placed the goods in the possession of the seller who thereupon gave the buyer a conditional bill of sale of the goods together with other goods then sold, but there was no change of possession, the transaction, even if construed to constitute a sale, did not convey title as against an attaching creditor without notice, or against a subsequent purchaser acquiring possession without notice, or against a prior purchaser subsequently acquiring possession without notice.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 645, 657-677, 679, 680; Dec. Dig. § 234.* Fraudulent Conveyances, Cent. Dig. §§ 467-470, 473-478, 481; Dec. Dig. § 147.*]

5. CHATTEL MORTGAGES (§ 187*)—TRANSACTION CREATING.

The transaction at most created a mortgage to secure the payment of the price, and the mortgage was not good as against a prior purchaser subsequently acquiring possession without notice.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 372-392; Dec. Dig. § 187.*]

6. SALES (§ 234*)—ACQUISITION OF TITLE—CHANGE OF POSSESSION.

A buyer in possession under an absolute sale, without paying the price, sold the goods to a third person for an indebtedness then due. There was no change of possession for some time, but subsequently the third person took possession and retained them for over a year, without notice of any claim of the seller for the price. *Held*, that the third person on taking and retaining possession acquired good title as against the seller, who claimed the goods as mortgagees from the buyer or as purchaser from him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 645, 657-677, 679, 680; Dec. Dig. § 234.*]

7. REPLEVIN (§ 11*)—DEMAND AND REFUSAL—REQUISITES.

Where one has come lawfully into possession as a bona fide purchaser, a demand for the surrender of the possession and refusal to comply therewith within a reasonable time are prerequisites to action of replevin.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 85-97; Dec. Dig. § 11.*]

8. PARTIES (§ 25*)—ACTION (§ 50*)—MISJOINDER.

An action in replevin against two persons for goods in possession of each, in which the other has no interest, presents a case of misjoinder of parties and causes of action.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 31, 38-40; Dec. Dig. § 25.* Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

Appeal from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Action of replevin by Walter E. Patchin and another against George P. Rowell and others. From a judgment for defendant named, plaintiffs appeal. Affirmed.

The defendant Rowell subleased two offices adjoining and connected with his own office to Lanyon. Rowell owned all of the furniture and fixtures in Lanyon's offices except the goods replevied, and used the offices at his convenience. The plaintiffs sold the goods, which are the subject of the replevy as against Rowell, on July 25, 1908, and

which Lanyon has not paid for, and these were placed in Lanyon's offices. Within a week prior to October 3, 1908, Lanyon sold said goods to Rowell for value, viz., an indebtedness then due Rowell by him. There was no change of possession of said goods at the sale. The plaintiffs prior to October 26, 1908, arranged to sell Lanyon further office furniture upon his giving them a conditional bill of sale of the goods to be sold, the said goods sold July 25, 1908, and certain personal property located in Lanyon's house and purchased of plaintiffs. Prior to the execution of the bill of sale on said October 26th Lanyon verbally told plaintiffs that he placed said goods in their possession. There was in fact no other change of possession as to the plaintiffs than this, and Lanyon continued to occupy said offices, conduct said business, and have possession of said goods as before the execution of the bill of sale, and so remained until about November 1, 1908, when he ceased to occupy said offices, and Rowell went into their occupancy and took and held possession of said goods until replevied, without knowledge of plaintiffs' claim or said bill of sale until November 13, 1908. This bill of sale was given for the purpose of securing the plaintiffs for the goods sold at that time to Lanyon, and to secure the indebtedness from him to them by reason of the sale of July 25th and other sales up to October 26, 1908.

The only motive moving the plaintiffs to procure said bill of sale was to obtain security for the balance owed them and for the new purchase. This bill of sale as to the goods replevied of Rowell was duly recorded November 13, 1908, and the plaintiffs did not know at this date that the said goods included in the sale of July 25th were not the property of Lanyon, and their first knowledge that their ownership was claimed by Rowell, by virtue of said sale to him by Lanyon, was on November 13, 1908. No demand was ever made on Rowell for said goods which were replevied March 8, 1910, and at said time the officer replevying scattered the contents of a filing case over and about the floor of the offices of Rowell, which compelled a rearrangement of the papers and the purchase of a new filing case. The replevy occasioned considerable comment both in the public prints and otherwise, and said Rowell was subjected to annoyance and mortification. Judgment was rendered for defendant for return of said goods and for \$25 damages.

This action is against Rowell and Clark replevying certain goods in the possession of Rowell, in which Clark had no interest, and certain goods in the possession of Clark, in which Rowell had no interest, and joined Lanyon as a party defendant. All of said goods had originally been sold by plaintiffs to Lanyon. By agreement of the plaintiffs

and Rowell, and with the consent of the court, a separate trial of the issues between them was had, and the Supreme Court is requested to review these issues, although the issues between the plaintiffs and the other defendants have not yet been tried.

Edward K. Nicholson, of Bridgeport, for appellants. Russell Porter Clark, of Greenwich, for appellee Rowell.

WHEELER, J. (after stating the facts as above). [1] The facts found show that the sale of goods by the plaintiffs to Lanyon on July 25, 1908, was an absolute sale, and that delivery was then made of the goods so sold. The title to these goods, therefore, passed to Lanyon notwithstanding that they were not then nor subsequently paid for.

[2] Lanyon's sale of these goods about the 1st of October, 1908, to Rowell was bona fide and made upon a valuable consideration, and hence was a good sale between the parties. *Meade v. Smith*, 16 Conn. 343, 361; *Price v. Heubler*, 63 Conn. 374, 376, 28 Atl. 524. The plaintiffs' claim that the sale was void between the parties is without merit.

[3] Since Rowell did not take possession of the goods, his title, as against a subsequent attaching creditor without notice, could not stand; nor could it stand against a bona fide purchaser without notice who secured possession. This is a rule of policy of our law and inflexibly maintained. *Capron v. Porter*, 43 Conn. 383, 388.

[4] Lanyon after his sale to Rowell and while in possession of these goods verbally declared that he placed these goods in the possession of the plaintiffs, and thereupon the plaintiffs gave him a conditional bill of sale of these goods, together with other goods then sold. If we assume that this constituted between Lanyon and the plaintiffs a bona fide sale for a valuable consideration, and that the instrument given was a valid bill of sale, neither of which questions do we feel it necessary to decide, we must conclude that the verbal declaration that Lanyon placed the plaintiffs in possession of these goods without any act indicating a change of possession did not constitute a change of possession sufficient to convey title as against an attaching creditor.

The plaintiffs conceding this rule, in their brief they say: "General creditors, without a doubt, might have attached upon a claim against Lanyon the property which had been sold by the plaintiffs to Lanyon prior to the date of the execution of the conditional bill of sale; that is, creditors whose claims were in existence at that time." Equally ineffective would such a claimed change of possession be against a subsequent purchaser acquiring possession without notice, or against a prior purchaser who subsequently acquired possession without notice.

[5] The finding shows that the plaintiffs

never purchased of Lanyon these goods. At most, all that they obtained was a mortgage of these goods as security for the payment of their debt. *Morin v. Newbury*, 79 Conn. 338, 340, 65 Atl. 156. "When a mortgagee leaves the property in the possession of the mortgagor, possession under such circumstances may be treated as an index of title; it is inconsistent with the real transaction which demands a change of possession, and the mortgagee deliberately puts himself in a false position." *Romeo v. Martucci*, 72 Conn. 504, 510, 45 Atl. 1, 3 (47 L. R. A. 601, 77 Am. St. Rep. 327). However good this security may have been between the parties to the conditional bill of sale, it cannot prevail against Rowell who took possession having neither actual nor constructive notice of it.

[6] Rowell had the right to take possession of the goods he had previously purchased, and his right to take possession would have been no better had it been coeval in time with his purchase. Lanyon retained possession of these goods until he vacated his offices. There was and there had been nothing to indicate his sale to the plaintiffs. Upon his vacation of the offices Rowell took possession of them and of these goods, and held possession of the goods until the replevy from him some 16 months later. Rowell had no notice of the plaintiffs' claim to these goods, he came into their possession by virtue of a prior bona fide purchase for value, and his possession and title are unquestionably good against the plaintiffs. Whether the plaintiffs be regarded as purchasers or mortgagees of these goods, the position in which they find themselves was of their own making, and their loss is due to their direct failure to take the goods out of Lanyon's possession into their own. Their loss is in no legal sense attributable to Rowell, and the finding explicitly negatives any suggestion of fraud on his part.

[7] The facts found show that Rowell had the lawful possession of the goods as a bona fide purchaser at the time of the replevy. Under such circumstances, a demand and refusal to comply therewith within a reasonable time were necessary prerequisites to the action of replevin. *Lynch v. Beecher*, 38 Conn. 490, 493. None such were made in this case.

[8] The appeal does not raise the question of the right of the plaintiffs to bring a single action of replevin against the three defendants, each of whom was in the separate possession of some of the goods replevied. Lest our silence be construed as approval of the method adopted in bringing this action, we observe that the case presents a clear instance of misjoinder of parties and causes of action.

There is no error. The other Judges concurred.

ALEXANDER v. R. A. SHERMAN'S SONS CO.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1912.)

1. MASTER AND SERVANT (§ 330*)—INJURIES TO THIRD PERSONS—EVIDENCE.

Where the complaint alleging that plaintiff was injured by a piece of stone thrown from a blast negligently set off by defendants' servant was denied by defendant, evidence showing that the person who set off the blast was the servant of an independent contractor who was doing the blasting for defendant is admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.*]

2. MASTER AND SERVANT (§ 316*)—"INDEPENDENT CONTRACTOR."

An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own method and without being subject to the control of his employer save as to the result of his work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.*]

For other definitions, see Words and Phrases, vol. 2, pp. 3542-3543.]

3. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for personal injuries from a negligent blast, the defense of independent contract was urged, and, though it was claimed that the work which the contractor was called on to perform was so inherently dangerous that an independent contract would not shield defendant from liability, it was not contended that defendant actually interfered in the conduct of the work. *Held* that an instruction which merely stated the general rule that defendant was not liable if he intrusted the execution of the work by contract to a skilled and competent contractor, who had entire charge over it, was sufficient though not presenting the question of actual interference.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

4. MASTER AND SERVANT (§ 319*)—INDEPENDENT CONTRACTORS—INHERENTLY DANGEROUS WORK.

That work is done by an independent contractor is no protection to the contractee, where it is of such a dangerous character that injury necessarily results to the person or property of another.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1259, 1260; Dec. Dig. § 319.*]

5. MASTER AND SERVANT (§ 332*)—NEGLIGENCE OF INDEPENDENT CONTRACTOR.

In an action for damages from a negligent blast where the defense of an independent contract was urged, an instruction that, if the independent contractor did not use such care as the defendant had the right to expect and by reason of the lack of such care the injury occurred, defendant is not responsible was proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.*]

6. TRIAL (§ 251*)—PLEADINGS.

In an action for injuries from a blast alleged to have been negligently discharged without proper notice and sufficient covering, plaintiff cannot base liability on the theory that defendant is liable regardless of negligence be-

cause his blast caused rock to be thrown on the land of another.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

Appeal from Superior Court, New London County; Milton A. Shumway, Judge.

Action by John E. Alexander, Jr., against the R. A. Sherman's Sons Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Herbert W. Rathbun, of Westerly, B. I., and C. Hadlai Hull, of New London, for appellant. Christopher L. Avery, of New London, and Harry B. Agard, of Westerly, for appellee.

THAYER, J. The plaintiff sues to recover for the loss of one of his eyes which as he claims was destroyed by a piece of stone thrown from a blast which was negligently set off by the defendant's servants. His complaint alleges, in substance, that at the time of his injury the defendant was engaged in constructing upon land of the Stonington Building Company of Stonington an addition to the mill of the American Velvet Company; that while so engaged, and while preparing the foundation for such addition in blasting out rocks and stones therein by the use of dynamite, gunpowder, and other explosives, it was engaged in a dangerous operation, one that was intrinsically dangerous, and which by its nature exposed others to unusual peril; and that by its servants and employes it negligently and carelessly exploded a charge of dynamite or gunpowder or other high explosive without giving any sufficient warning to the plaintiff, who was then about 200 feet away at play in an adjoining lot, and carelessly and negligently failed to protect, blanket, or cover one of the rocks or boulders so blasted so that pieces of rock or stone therefrom were thrown in several directions, and one of them struck the plaintiff and inflicted the injury complained of while he was in the exercise of due care. All of these allegations were denied or, for want of information, left for the plaintiff to prove. No question appears to have been raised upon the trial as to the fact that the plaintiff was injured by a piece of rock thrown from a blast discharged in the operation of excavating for the foundation in question, nor that the throwing of the piece of rock which caused the injury was due to the negligence of the workman who discharged the blast in failing to blanket or cover properly, upon the side toward the lot where the plaintiff then was, the rock which was blasted.

It appears from the finding that evidence was offered by the plaintiff to prove that the defendant had a contract with the Stonington Building Company to erect upon its land the mill addition described in the complaint; that the defendant at once placed one O'Neil in charge of the work of excavat-

ing for the foundation; that while this was going on the workmen engaged on the work blasted a large boulder, covering it upon the sides toward the mill and some adjacent houses with ties and bags, but leaving it partially uncovered on the side toward the vacant lot in which the plaintiff and other children were at play; and that the plaintiff was struck by a piece of the stone so blasted. He also offered evidence to prove that the contract between the defendant and O'Neil contemplated the blasting of any rock more than two cubic yards in size encountered in the work of excavation.

The defendant, against the plaintiff's objection, was permitted to offer evidence to prove that it sublet to O'Neil the erection of the foundation of the mill addition according to the plans and specifications therefor contained in its contract with the Stonington Building Company; that the contract with O'Neil provided that he should take entire charge of the work of excavating for and constructing the foundation and select and employ his own workmen and have charge of the whole work and be responsible therefor; that he was a competent and skillful contractor engaged in this kind of work; that the blasting of rock encountered in the work was not calculated or likely, in the ordinary course, to expose either the persons or property of the public or any one in the neighborhood to any unusual peril or liability to injury providing it was done in an ordinarily skillful and competent manner; and that due warning was given of the blast which caused the plaintiff's injury.

[1, 2] The court's action in admitting the evidence tending to show that O'Neil was an independent contractor and in submitting to the jury the determination of the question whether he was such are assigned as errors in the plaintiff's reasons of appeal. The pleadings raise the question whether the plaintiff's injury was caused by the negligence of the defendants' servants. If O'Neil was an independent contractor doing this work, his workmen were not servants of the defendant. Evidence showing that he was an independent contractor tended directly to disprove one of the plaintiff's allegations which was in issue. The evidence was therefore admissible under a denial of such allegations. *Alpert v. Bright*, 74 Conn. 614, 615, 51 Atl. 521; *Robbins v. Harvey*, 5 Conn. 335, 346; *Munson v. Mallory*, 36 Conn. 165, 172, 4 Am. Rep. 52. It was proper to admit the evidence and to leave it to the jury to determine whether O'Neil was doing the work as an independent contractor. "An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of his work." 2 *Cooley on Torts*, 1098; *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W.

691, 17 Am. St. Rep. 925; *Humpton v. Unterkircher*, 97 Iowa, 509, 66 N. W. 776.

[3] The court instructed the jury in effect that, if the defendant intrusted the execution of the work by contract to a skilled and competent contractor, the latter exercising an independent employment, doing a specific work for a specified sum, selecting and employing and having the immediate control over the workmen engaged in the work, and having charge and control over the entire work and being held responsible therefor, and, through the carelessness and negligence of such contractor or his workmen in the performance of the work, the plaintiff was injured, the defendant would not be liable. This is assigned for error upon the ground that it does not differentiate between the right to control and actual control and interference by the defendant. As was held in *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 525, 28 Atl. 32, it is the right on the part of the contractee to control the method of conducting the work and not his actual interference which makes the difference between an independent contractor and a servant or agent. The finding shows no question raised by the plaintiff upon the evidence or in the request to charge that, if O'Neil was an independent contractor for this work, the defendant interfered in the method of doing it so as to render itself liable to the plaintiff. The claim was that he was not an independent contractor and that, if he was, the work which he was called upon to perform under his contract was inherently dangerous to others, and the independent contract did not shield the defendant from liability. Under the claims of the parties, the court was not called upon to state the effect of such interference on the part of the defendant if O'Neil was an independent contractor. It was only necessary to give a charge adapted to the facts and claims in the case. To excuse the defendant from liability under the charge given, the jury must have found that, under the contract between the defendant and O'Neil, which was by parol, the latter was employed to do, independently or without subordination to the defendant, the work in question, and that he was to have the selection and control of the workmen and other agencies employed, and to have control over the whole work and be responsible to the defendant only for the result. If they found this to be the contract, it excluded the right of the defendant to control the work, and, under the authorities cited above, made O'Neil an independent contractor. In view of the claims made in the case we think the charge upon this point was sufficient.

[4] The plaintiff claimed that the work of excavating for the foundation required the removal of rock by blasting; that such blasting is ordinarily done and was done in this case by the use of dynamite; that such blast-

ing is intrinsically dangerous and likely to cause injury to others however carefully done. The court instructed the jury that the operation of blasting with dynamite is intrinsically dangerous, and that it was a question for them whether, under all the evidence in the case, the work contracted to be done, in its nature and reasonable execution, called for the use of such an intrinsically dangerous agency and means as would obviously have exposed the plaintiff to probable injury therefrom; that, stated in another way, when the work to be done is in itself a nuisance—that is, dangerous to life or health in and of itself—then all the parties engaged in it or contracting to do it are responsible for its results; and that the question usually is whether the situation is such that mischief will probably ensue to others no matter how carefully the work of blasting is done, and, if it is, both the contractor and the contractee are responsible for damages which ensue, but, if it is not, then the contractee is not liable for such damages. The plaintiff in several of his reasons of appeal complains of different parts of this portion of the charge. But it is to be considered as a whole, and, so considered, it conforms to the rule which has been adopted in this state by the decisions above referred to.

The general rule is that the contractee is not liable for injuries caused by an independent contractor. But he is liable where the work which is contracted to be done, when duly performed, necessarily causes injury to the person or property of another. He is also liable when he employs a contractor to do work which in its ordinary and reasonable execution calls for the use of such means and agencies as will obviously expose the person or property of others to probable injury, and when the work is being properly performed such injury occurs. *Lawrence v. Shipman*, 39 Conn. 586; *Norwalk Gaslight Co. v. Borough of Norwalk*, supra; *Willmot v. McPadden*, 78 Conn. 276, 282, 61 Atl. 1069. In neither of the exceptions to the rule which have been stated is the contractee made liable because of the negligent performance of the work by the independent contractor or his workmen. He is liable because he caused something to be done which, when properly done, he knows or ought to know will cause, or probably will cause, the injury complained of. If it results in another's injury, as he ought to have expected it would, he is held liable. He is not liable for injuries caused by the contractor's negligence in performing the work contracted for where its reasonable performance will not necessarily or obviously expose others to probable injury, but, where it will so expose

others to such injuries, he cannot escape liability therefor although the injuries are caused in the proper performance of the work. The charge complained of told the jury that, if the work in question in its natural and reasonable execution called for the use of such agency or means as would obviously have exposed the plaintiff to probable injury, the defendant would be liable for the results. In this the plaintiff has no substantial ground of complaint.

[5] The court at the request of the defendant instructed the jury that "if the independent contractor did not use such care as the defendant had the right to expect, and by reason of the lack of such care and not in the due and natural performance of the contract the injury occurred, the defendant is not responsible." The purpose of this instruction was to inform the jury that, in case they should find under the previous instructions that the defendant would not be liable because the due performance of the work was not likely to endanger the plaintiff or others, the negligence of the contractor in not duly performing it would not render the defendant liable. This was the defendant's case. He claimed that, properly performed, the work did not expose the plaintiff to unusual danger. If the jury so found, the defendant was not liable, and it was proper to instruct them that the neglect of the contractor or his workmen to duly perform the contract did not change the defendant's situation. The jury could not have understood the charge, as the plaintiff's counsel interprets it, to mean that, although the defendant would be liable if the contract had been duly performed, he would not be liable if it was negligently performed.

[6] The plaintiff complains of the court's refusal to charge, as requested by him, that one who is blasting on his own land and causes rocks to be thrown upon land of another, causing injury to persons or property, is liable for the injuries inflicted without proof of negligence on his part. The pleadings lay no foundation for this request. The tort alleged in the plaintiff's complaint is the negligence of the defendant's servants in discharging a blast on land of the Stonington Building Company without giving notice of the blast and without properly covering and protecting it. This gave the defendant no notice that the claim suggested in the request was to be made upon the trial. The request was properly refused. The appeal upon the ground that the court refused to set aside the verdict and grant a new trial has not been seriously pressed, and is without merit.

There is no error. In this opinion the other Judges concurred.

RAUGHTIGAN v. NORWICH NICKEL & BRASS CO.

(Supreme Court of Errors of Connecticut. Dec. 19, 1912.)

1. EASEMENTS (§ 69*)—ACTIONS FOR OBSTRUCTION—ADMISSION OF EVIDENCE.

In an action for damages for obstructing a right of way claimed over a lane adjoining plaintiff's property, the will under which plaintiff claimed his land was properly admitted in evidence.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 143; Dec. Dig. § 69.*]

2. WILLS (§ 587*)—CONSTRUCTION.

A will specifically disposed of certain real estate in the second clause, not including the land in controversy, and the third clause devised "all the rest and residue of my real estate, namely, all the land situated on the northerly side" of a certain lane, and the seventh clause devised "all the rest and residue of my estate" to plaintiff. The land in controversy lies south of the lane mentioned. *Held*, that the land in controversy was devised to plaintiff by the seventh clause.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1279, 1281-1291; Dec. Dig. § 587.*]

3. BOUNDARIES (§ 36*) — EVIDENCE — OTHER LANDS.

Where, in an action for damages for obstructing a right of way claimed over a lane adjoining plaintiff's land, the exact location of the land claimed by plaintiff was uncertain, deeds of adjacent pieces of land were admissible to locate the land as it formerly existed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 160-162, 164, 166-176; Dec. Dig. § 36.*]

4. EXECUTORS AND ADMINISTRATORS (§ 35*)—ORDERS OF PROBATE COURT—COLLATERAL ATTACK.

Orders of the probate court removing an executor and appointing an administrator de bonis non could not be collaterally attacked for irregularities in the preliminary proceedings leading up to them.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.*]

5. EASEMENTS (§ 69*)—ACTIONS FOR OBSTRUCTION—ADMISSION OF EVIDENCE.

Where, in an action for damages for obstructing a way claimed by plaintiff over an adjoining lane the location of which and of the land directly involved was uncertain, a conveyance which was essential to the chain of title which purported to be executed by an administrator de bonis non, but was in the form of an ordinary warranty deed, was admitted in evidence, probate records showing the removal of the executor preceding such administrator de bonis non and the latter's appointment, which also showed the administrator's accounts, including his receipt of the purchase price of the property sold by him and his account therefor, were admissible though not affecting plaintiff's case.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 143; Dec. Dig. § 69.*]

6. TRIAL (§ 330*) — VERDICT — SEPARATE COUNTS.

Each count in an action for damages for the obstruction of a right of way alleged plaintiff's ownership of the realty described, with a right of way over an adjoining lane, giving access to a street, and the first count alleged the construction and maintenance of the building on the land interfering with the right of passage, while the second count alleged such ob-

struction by a fence maintained across the lane. A verdict was directed for defendant on the first count, and the jury returned a verdict finding "the issues in favor of defendant on the first count, and in favor of plaintiff on the second count." *Held*, that the verdicts on the two counts were not inconsistent as finding both that plaintiff did and did not own the land involved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 777-781½; Dec. Dig. § 330.*]

7. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—FINDINGS.

Error in finding facts in a jury case as though the case had been tried to the court was not reversible where no prejudice could have resulted therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

8. TRIAL (§ 139*) — PROVINCE OF JURY — WEIGHING EVIDENCE.

The court should not substitute its own estimate of the weight and value of the evidence for the estimate of the jury fairly made without disregarding any rules of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

9. TRIAL (§ 139*) — PROVINCE OF JURY — WEIGHING EVIDENCE.

It is the exclusive province of the jury to weigh the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

Appeal from Superior Court, New London County; Milton A. Shumway, Judge.

Action by Emma J. Raughtigan against the Norwich Nickel & Brass Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

The complaint was in two counts. Each alleged the plaintiff's ownership of a described piece of real estate, with a right of way over an adjoining lane which gave access to a nearby street. The first count averred the construction and maintenance of a building upon this lane by the defendant, and a consequent interference with the plaintiff's right of passage. The second count charged the same effect upon the plaintiff's right from a fence erected and maintained across the lane by the defendant. The main disputed question upon the trial was as to the precise location of the land directly involved, which was a small rectangular block of about 12 feet by 20 feet in size. If the land was located to the west of the fence described in the second count, the obstruction barred the plaintiff's passage to the street; but, if it lay to the east of the fence, then the plaintiff was in no way affected in her rights by the maintenance of the fence.

The plaintiff claimed title from her deceased father-in-law, and in support of her claim offered his last will. This instrument disposed of specifically described real estate in its second clause, not embracing the piece involved here. A third clause of the will devised "all the rest and residue of my real estate, namely, all the land * * * situat-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed on the * * * northerly side" of the lane involved. The small piece with which this action is concerned lies south and outside of these described limits. The seventh clause of the will was this: "All the rest and residue of my estate, I hereby give, devise, and bequeath absolutely unto the said Emma J. Raughtigan (the plaintiff) to be hers forever." The plaintiff claimed that the small piece of land referred to was disposed of by this clause. For the same purpose—of showing title—and for the further purpose of locating the precise position of the land, and of other land in the immediate locality, and also for the purpose of defining the actual limits and course of the lane, the position of which had changed in the course of years, certain deeds were offered by the plaintiff. One of these conveyances, essential to the chain of title, although purporting to be given by the administrator *de bonis non* of a certain deceased person's estate, was in fact not in form an administrator's, but the usual warranty deed. This transfer took place in 1882.

Certain probate records of a period shortly prior to the execution of the last-named instrument were offered to show the due removal of the executor who preceded in office the administrator just referred to, and the latter's appointment. They were also offered to show the doings of the administrator with reference to the sale of the property involved, and his receipt of and accounting for the purchase price. It appeared that the removal of the executor by the court of probate was not preceded by the complaint in writing of an interested person, and the notice to appear, as required by the statute then in force. All the papers so offered were admitted over the defendant's objection, and an exception noted in each instance.

In its charge to the jury, the court, after referring briefly to the deeds and the will, said: "These are the papers under which the plaintiff claims title, and I say they are sufficient to give her title to the land described, although there appears to be defect in the title of Thresher (the administrator *de bonis non* already referred to) to John Raughtigan, but this defect I think was cured in act of Legislature in 1909. That is purely a question of law, and nothing you have anything to do with further than to apply to the facts in this case." The court also charged the jury in effect that the property directly involved passed to the plaintiff by the seventh clause of the will. The defendant had moved the court to direct a verdict for it. This was done as to the first count only, and the jury returned a verdict finding "the issues in favor of the defendant" on that count, and "the issues in favor of the plaintiff on the second count." In making up his finding, the trial judge found the facts in the form prescribed where the trial is to the court rather than to the jury.

The defendant assigns as error the rulings on evidence, the charge of the court in the matters referred to, the refusal of the court to direct a verdict as asked, and the form of the finding. Error is also assigned on the denial of the motion to set aside the verdict, and the evidence has been certified to this court.

Charles F. Thayer and Charles V. James, both of Norwich, for appellant. Charles Hadlai Hull, of New London, and John H. Barnes, of Norwich, for appellee.

CASE, J. (after stating the facts as above).

[1, 2] The will of John Raughtigan was properly admitted and rightly construed by the court in the charge to the jury. It is true that the third clause starts by devising "all the rest and residue of my real estate," but this is carefully qualified and restricted by what follows to property clearly located on the north side of the lane in question. Whatever uncertainty may have existed as to the precise position of the small strip of land involved in this action, it confessedly lies outside the limits of the tract so devised. If the effect of bringing this strip within the control of the third clause of the will were to carry out a manifest intention of the testator to prevent intestacy, the argument to that end would be more persuasive, but the seventh clause of the will disposes of the residuum of the estate, and is drawn with the obvious purpose of embracing real as well as personal property.

[3] The deeds offered in evidence were admissible not only where they deal directly with the tract involved, but also where they are concerned with other pieces of land adjacent to it or in its immediate locality. It was necessary, in order to solve the apparent uncertainty as to the exact location of this strip, to plot the surrounding tracts, determine the general relations to each other of the different properties, and to definitely locate the land as it formerly existed. These papers were pertinent upon all these matters, and, with such proper extrinsic evidence as served to clarify the situation, were properly admitted for these purposes. They also formed an important basis for the map which was used to give the jury some intelligent idea of the situation.

[4] The probate orders removing the executor and appointing an administrator *de bonis non* in his place were not open to attack in this action for any mere irregularity in the preliminary proceedings leading up to them. *Emery v. Cooley*, 83 Conn. 235, 240, 76 Atl. 529. Since the administrator's appointment must be regarded here as a regular and valid one, whatever defects his subsequent deed discloses upon its face were cured by chapter 263 of the Public Acts of 1909, validating and confirming certain irregular sales of real estate by an administrator, more than 15 years prior to the passage of the act. Pages 1237, 1238.

[5] His account, while of no vital consequence to the plaintiff's case, was pertinent enough as showing his receipt of the purchase price of the property so sold by him, and his accounting for it. These papers were properly admitted, and the court's instructions to the jury with reference to the effect of such of them as the charge dealt with were correct.

[6] We are asked to render the jury's verdict of no effect on the ground that their conclusion on one count is inconsistent with that on the other; that by its terms they have necessarily found that the plaintiff both owned and did not own the described property. This highly technical criticism rests upon a strained construction of the language framing the verdict. The jury's meaning is too obvious to warrant discussion, and fully supports the judgment which followed it.

[7] Upon the trial of the cause there was little in actual dispute between the parties, save the precise location of the land. This apparently led the trial judge into the in-advantage of finding the facts as though the case had been tried to the court. Cases may arise where such an error would seriously, if not fatally, embarrass the record in this court, and the practice is of course one to be avoided. But no possible prejudice can have resulted to the defendant here, and we find no occasion to correct the finding, or to order its correction by the lower court. The facts in controversy and such questions as we are called upon to determine appear with sufficient clearness upon the record.

The only question of serious importance as the case is presented arises on the denial of the motion to set aside the verdict as against the evidence. The description of the property in the deeds gives it no definite anchorage. The framing of the first count of the complaint, in which the obstruction of the lane by a building is charged, shows the distinct uncertainty of the plaintiff herself as to the location of the lane with reference to her property. There was, however, positive testimony from the witness Pitcher as to the location of the small strip at a point to the west of the obstructing fence. He had made an apparently careful survey of the immediate surrounding territory, had prepared the map used upon the trial, and by a process of elimination located the strip as described. If also appeared that he had been familiar with that particular section for more than 30 years. There was testimony from other witnesses long familiar with the locality tending to show an occupation of the strip some years back by Raughtigan.

[8] By repeated decisions we have held that it is not for the court to substitute its own estimate of the proper weight and value of testimony for one that the jury, traveling by fair methods and disregarding no rule of law, find reasonably open to them.

[9] We think there was evidence to go to the jury upon this essential feature of the case, that the weight accorded to it by the jury was within their exclusive right as the sole triers of fact, and that the court properly refused to disturb their verdict.

There is no error. The other Judges con-
curred.

STODDARD et al. v. SAGAL

(Supreme Court of Errors of Connecticut.
Dec. 19, 1912.)

1. ATTORNEY AND CLIENT (§ 166*)—ACTION FOR SERVICES—ADMISSION OF EVIDENCE.

In attorney's action for payment for services resisted on the ground that the fee charged was excessive, evidence as to plaintiff's practice and experience as attorney and judge and as to his professional standing was admissible.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 368-372; Dec. Dig. § 166.*]

2. EVIDENCE (§ 555*)—OPINION EVIDENCE—QUESTIONS.

A question to a lawyer who had acted as counsel in the case whether in his judgment \$5,000 was a reasonable sum for the services performed by plaintiff's attorney was objectionable where it did not appear from the question or answer upon what facts his opinion was based.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2376; Dec. Dig. § 555.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for counsel fees for services in a divorce action in which defendant herein was plaintiff, the admission of evidence by a witness who acted as defendant's counsel in the other case that he told plaintiff herein that he thought they had a good fighting chance on a certain question, and asked him whether he had looked up the law thereon, for the improper purpose of proving the extent and character of plaintiff's services by plaintiff's own declaration, was not sufficient to require a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

4. INTEREST (§ 19*)—UNLIQUIDATED DEMANDS—ATTORNEY'S FEE.

Interest was properly allowed in an action for legal services, upon the balance found due when the bill was presented, from the date of its presentation to the date of the verdict; the rule that interest is not allowable as damages upon unliquidated demands not being adopted in this state.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 35-40; Dec. Dig. § 19.*]

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Action by Henry Stoddard and others against Louis M. Sagal. Judgment for plaintiffs, and defendant appeals. Affirmed.

Benjamin Slade, of New Haven, and Spotswood D. Bowers, of Bridgeport, for appellant. Robert C. Stoddard, of New Haven, for appellees.

HALL, C. J. The plaintiffs, who are co-partners in the practice of law in New Haven, seek by this action to recover for profes-

sional services rendered between the first of May and the last of November, 1911, by Judge Henry Stoddard personally, a member of the plaintiff firm, in the conduct and management, for the defendant, of a divorce suit instituted by the latter against his wife, and of proceedings regarding the custody of the defendant's minor child, and of other matters connected with said divorce suit. The divorce suit and said proceedings connected with it having resulted favorably to the present defendant, the plaintiffs in November sent the defendant a bill in which they charged him \$5,000 for such services, and \$44.62 for expenses, and credited him with a payment of \$250. The defendant informed Judge Stoddard that he was perfectly able to pay the bill, and that payment of it would in no way embarrass him, but refused to pay it upon the ground that it was too large. No part of the bill so rendered has been paid except the \$250 credited upon it. Judge Stoddard as a witness testified regarding the peculiar character of the divorce suit, and of the questions involved in it, and the services rendered by him, and regarding his practice and experience as an attorney, and as a judge, and several prominent attorneys testified as to his standing at the bar, and either from their personal knowledge of the services rendered by Judge Stoddard, or from the facts embraced in a hypothetical question, testified that in their opinion the plaintiffs' charge of \$5,000 for services was reasonable. No witness testified that such charge was excessive excepting the only witness called by the defendant, who testified that \$800 would be a reasonable charge. The jury allowed the plaintiffs \$3,000 for services, and rendered a verdict in their favor for \$2,871.47, which included an item of \$76.85 for interest from the date the plaintiffs' bill was rendered to the defendant. There are 68 errors assigned in the defendant's reasons of appeal. We have no occasion to repeat them here or to discuss many of them.

[1] Numerous objections were made to the evidence offered by plaintiffs respecting the practice and experience of Judge Stoddard, as an attorney and as a judge, and regarding his standing in the legal profession. Such evidence was clearly admissible. In *Phelps v. Hunt*, 40 Conn. 97, 100, this court said: "The value of professional services may depend very considerably upon the character and standing of him who performs them; * * * then the period of time passed in the profession, the experience acquired, the degree of skill, the faculty of using professional knowledge make great differences in individuals; * * * where the nature of the services performed makes the possession of certain qualifications to constitute an important element in the value of those services, evidence of professional standing is clearly admissible and is entitled to much consideration."

Plaintiffs' counsel asked of one of their wit-

nesses, Mr. Webb, who acted as one of the counsel for the defendant in the divorce suit, this question: "From your observation of the conducting of the case by Judge Henry Stoddard, from the first knowledge that you had of it, your observation of him in his conference with you, from the examination of the witnesses, from the general conduct of the case, I will ask you whether or not in your judgment the sum of \$5,000 is a reasonable sum for the services that you saw that he performed?" The ruling of the trial court permitting this question against the defendant's objection does not furnish a sufficient ground for granting a new trial.

[2] The question was open to the criticism that it did not properly appear either from the question asked or from the answer of the witness upon just what facts the opinion of the witness was based. *Worden v. Gore-Meenan Co.*, 83 Conn. 643, 78 Atl. 422; *Barker v. Lewis Storage & Transfer Co.*, 79 Conn. 343, 65 Atl. 143, 118 Am. St. Rep. 141. Had the question been objected to upon that ground, the witness would probably have been asked to state, and would have stated, the facts upon which he based his opinion. It does not appear that any other objection was made to the question than that it was immaterial. It is further to be said that the character and extent of the services rendered by Judge Stoddard had already been fully stated to the jury, and were evidently well known to the witness, and, as the court properly said to the jury, there was practically no controversy respecting them, excepting as to what was a reasonable charge for them.

[3] Judge Edmund Zacher, one of the counsel for Mrs. Sagal in the divorce proceedings, having been called as a witness for the plaintiffs in the present case, in describing one of his interviews with Judge Stoddard, said among other things: "I told him (Judge Stoddard) that I thought we had a good fighting chance on the question of condonation, and I think I asked him the question whether he had looked up the law on that subject * * * and he said he had given the matter a great deal of thought and I said," etc. The court overruled the defendant's objection to this testimony. No ground of the objection to this testimony appears to have been stated. In his brief the defendant claims that the ruling permitted the plaintiffs to prove the extent and character of the services rendered by the declarations of Judge Stoddard in his own favor. We think it was not admitted for that purpose, but only as descriptive of one of the several interviews between Judge Stoddard and the witness. But, if the declaration was admitted for the purpose claimed by the defendant, the erroneous ruling was not, under the circumstances, of sufficient importance to justify the granting of a new trial.

[4] There was no error in the charge of the court that interest should be added to the balance found due when the bill was pre-

sented from that date to the date of the verdict. The arbitrary rule invoked by the defendant that interest will not be allowed as damages upon unliquidated demands has never been adopted for general application in this state. *Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388, 398, 65 Atl. 134, 8 Ann. Cas. 298.

The amount awarded by the verdict is not excessive. There was evidence which would have justified the jury in awarding the plaintiffs even a larger sum than that fixed by the verdict.

There is no error. The other Judges concurred.

NEW YORK, N. H. & H. R. CO. v. CELLA.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1912.)

1. RAILROADS (§ 82*)—RIGHT OF WAY—ABANDONMENT.

While by express provision of Gen. St. 1902, § 4047, one cannot by adverse possession acquire title to any part of the land of a railroad, abandonment of its easement in part of its right of way, which is, in part at least, a matter of intention, and need not appear of record, may be found from nonuser, accompanied by adverse possession, under claim of title, with recognition by the railroad that such claim is well founded, or when such adverse use and occupation is inconsistent with existence of the easement.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 218-219; Dec. Dig. § 82.*]

2. RAILROADS (§ 82*)—LOCATION OF ROAD—EVIDENCE.

Statements of a decedent as to the location of the road as originally constructed on land of deceased, being entirely different from the one now claimed and used, are properly excluded in an action by a railroad for land claimed to be part of right of its way; they not appearing to have referred to the place in controversy.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 218-219; Dec. Dig. § 82.*]

3. APPEAL AND ERROR (§ 694*)—REVIEW—RECORD.

The evidence not being in the record, it cannot be said the court erred in charging, as matter of law, as to the width and location of the right of way as condemned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2910; Dec. Dig. § 694.*]

4. APPEAL AND ERROR (§ 728*)—ASSIGNMENTS OF ERROR.

The record showing three exceptions relating to the testimony of C., an assignment that the court erred in ruling out and excluding the testimony of C., as stated in the stenographer's notes, is insufficient; a special or specific assignment of each claimed error being necessary.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8010-8012; Dec. Dig. § 728.*]

Appeal from Superior Court, New London County; Milton A. Shumway, Judge.

Action in the nature of ejectment by the New York, New Haven & Hartford Railroad Company against Louis Cella to recover possession of land. Verdict and judgment for

plaintiff, and defendant appeals. Reversed and new trial ordered.

Abel P. Tanner, of New London, and Herbert W. Rathbun, of Westerly, for appellant. Hull, McGuire & Hull, of New London, for appellee.

RORABACK, J. The piece of land in controversy is situated in the village of Pankatree in the town of Stonington, county of New London, and is bounded southerly and westerly by the railroad tracks and abutments to a bridge belonging to the plaintiff company. The plaintiff alleged in its complaint that this land was a portion of its right of way which had been condemned for railroad purposes. The defendant's answer, in addition to a general denial, contained two special defenses: First, that he and his predecessors in title had acquired title to the property by adverse user; second, that if any right of entry and possession ever belonged to the plaintiff it had abandoned it. The trial court in its charge withdrew the issues of adverse user and abandonment from the consideration of the jury, and submitted only the question as to whether or not the defendant's store building was upon the plaintiff's right of way. The errors properly assigned relate either to the instructions given to the jury or to the rulings upon the admissions of evidence. Error is assigned to several passages in the charge relating to the issues presented upon the question of adverse user and abandonment.

The plaintiff claimed and offered evidence to prove that in September, 1833, the New York & Stonington Railroad Company lawfully condemned a strip of land six rods wide for railroad purposes through the Noyes property, which easement the plaintiff now owns, and that the land described in the complaint is a portion of the Noyes tract. The defendant denied that the plaintiff had ever obtained title to this property, and also offered evidence to prove, and claimed to have proven, title by adverse possession for a long term of years, and that the plaintiff's right to the possession of this land had been abandoned.

It was conceded that one Thomas Noyes obtained title to these premises April 17, 1800, from Jonathan Denison. Noyes died in the year 1844, owning the fee to the land in question. Prior to his death he permitted an old blacksmith shop to stand upon this lot. By successive conveyances from representatives and assigns of Thomas Noyes, the title became vested in the defendant. None of these conveyances recognize any right or title to this piece of land in the plaintiff or the parties under which the plaintiff claims. Several of these muniments of title, some of which were warranty deeds, described the property therein conveyed as "a tract or

parcel of land with a blacksmith shop thereon situated." The defendant obtained title by warranty deed in 1907. Subsequently he erected upon the land a two-story building with a store and tenement.

[1] The court said to the jury in part: "Perhaps upon the face of it it may appear to you somewhat unjust that this land which may have been occupied by Cella and his predecessors in title continuously for 80 years that they should not have obtained title to it by possession and occupation. Of course ordinarily the possession and occupation of land adversely to every other person gives the party occupying it absolute title if that possession and occupation continues for 15 years. But the law of this state, as fixed by the Legislature, has provided that no occupation of land sequestered by a railroad for its location or right of way can be lost to the railroad by mere occupation by another, however long that occupation may continue. Whether for 1 year or 80, it makes no difference. No person gets title to land which a railroad has taken by occupation, however exclusive that occupation may be." In another portion of the charge the court stated to the jury that, if the defendant's building "is within that right of way, it makes no difference how long it has been there, he has acquired no right to the land and can acquire none to it under the law of this state." This was error. The statute referred to by the trial court in its instructions was section 4047 of the General Statutes, Revision of 1902, which reads as follows: "If the owner or occupant of any land adjoining any railroad or canal has, since the tenth of June, 1831, taken, or shall take, into his inclosure any part of the land belonging to said railroad or canal, as located and established, or since that time has erected, or shall erect, any buildings upon any such land, no adverse possession of the land so inclosed or built upon shall confer any title thereto." There is nothing in this statute which prevents the application of the law relating to abandonment. Clearly the defendant could not claim title merely by adverse user on account of the statute, but this did not preclude him, as a matter of law, from testing the question of abandonment. In effect the court instructed the jury that the statute alone controlled the question of abandonment. Abandonment in part at least is a question of intention, and it may be found as a fact from all the circumstances of the case. *Russell v. Davis*, 38 Conn. 562, 564; *Derby v. Alling*, 40 Conn. 410, 436; *McArthur v. Morgan*, 49 Conn. 347, 350.

The interest of the railroad company was limited to a right of way acquired under condemnation proceedings over land now owned by the defendant. An abandonment of a right of way is usually shown by acts which do not appear of record, and it need

not appear of record to be effectual. *Wescott v. New York & New England Railroad Co.*, 152 Mass. 465, 468, 25 N. E. 840. An abandonment of an easement may be found by nonuser accompanied by adverse occupation under claim of title with recognition on the part of the owner by a railroad company that such claim of title is well founded. *New York, New Haven & Hartford Railroad Co. v. Benedict*, 169 Mass. 262, 267, 47 N. E. 1027. Mere nonuser and lapse of time, unaccompanied by any other evidence showing an intention to abandon, may be enough to constitute abandonment. Such facts are competent evidence of an intention to abandon and, if united with an adverse user of the servient estate inconsistent with the existence of the easement, may extinguish it. *Smith v. Langewald*, 140 Mass. 205, 207, 4 N. E. 571, and cases there cited. See, also, *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149, 173; *Town of Derby v. Alling*, 40 Conn. 410. The question of abandonment by the railroad company was one of intention to be gathered from all the facts.

The finding as to the claims of the defendant on the subject of abandonment apparently were not set forth fully and in detail, and the evidence is not before us, but enough appears to show that the trial court was not warranted in taking this question from the jury. As we have seen, there are cases in which an abandonment of a right of way or a portion thereof may be inferred from nonuser, accompanied by adverse occupation, under a claim of title with recognition on the part of the owner that such claim of title is well founded, or when such adverse use and occupation is inconsistent with the existence of the easement. In the present case it appears that the defendant and his predecessors in title had been in the adverse use and occupation of this strip of land under such circumstances as to render the question whether in fact there had been an abandonment one for the consideration of the jury.

[2] Thomas D. Sheffield, a witness for the defendant, was questioned as to declarations claimed to have been made by his deceased father in relation to the location of the railroad of the plaintiff as it was originally constructed on land which was owned by the deceased. It was said that these declarations would show that the location of the railroad was entirely different from the one now claimed and used by the plaintiff. It is enough to point out that these statements did not appear to have referred to the place now in controversy, and they were properly excluded.

[3] The defendant complains of certain passages in the charge relating to the location of the right of way of the railroad company. One part of the charge upon this subject contains the following statement: "I think with the evidence before you it is suf-

ficient, perhaps as a matter of law, I should instruct you on the evidence before you that you should find that the right of way condemned was three rods wide each side of the center line of the railroad, as laid out on the map of 1835." It does not appear that the defendant made any claim of law upon this branch of the case in the trial before the court below. No objections were interposed by the defendant to the admission of this class of evidence upon the hearing before the jury. In the absence of the evidence which was not made part of the record, we cannot say that the trial court was in error in charging, as a matter of law, as to the location and width of the right of way.

[4] One reason of appeal which involves the action of the superior court in rejecting certain testimony of the defendant Cella states that "the court erred in ruling out and excluding the testimony of the defendant Louis Cella, as stated in the stenographer's notes filed herein." An examination of the record discloses that there were three exceptions relating to the testimony of Cella. We cannot sustain such an assignment. A special or specific assignment should be made of each alleged error which it is intended to pursue on appeal. *Hull v. Thoms, Adm'r*, 82 Conn. 647, 74 Atl. 925.

There is error, and a new trial is ordered. The other Judges concurred.

KATSCH v. CITY OF NEW HAVEN.

(Supreme Court of Errors of Connecticut. Dec. 19, 1912.)

1. MUNICIPAL CORPORATIONS (§ 511*) — ASSESSMENTS—BUILDING LINES—APPEAL.

Under City Charter of New Haven (Sp. Laws 1899, p. 413) § 81, providing that assessment for benefits and damages in the establishment of a building line shall be deemed made when the damages are paid, and that such assessments shall be published three times, where the damages and benefits are equal the assessments will be deemed to have been made when the council accepts the report of the department of public works, and the 30 days within which an appeal could be taken under section 85 begin to run then, and the publication formed no part of the completing of the assessments.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1183, 1184; Dec. Dig. § 511.*]

2. MUNICIPAL CORPORATIONS (§ 511*) — BUILDING LINES—ASSESSMENTS.

On appeal from the assessment of damages for the establishment of a building line in the absence of averments to the contrary, it will be assumed that notice of the public hearing was given as provided in sections 78 and 79 of the New Haven city charter (Sp. Laws 1899, p. 412), and of the public hearing before the bureau of compensation provided for in section 80.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1183, 1184; Dec. Dig. § 511.*]

3. MUNICIPAL CORPORATIONS (§ 486*)—BUILDING LINES—NOTICE.

In the establishment of a building line, one who received, as provided by New Haven City Charter (Sp. Laws 1899, p. 412) §§ 78-80, notice of the public hearing and of the hearing before the bureau of compensation was chargeable with notice of the entire proceedings down to the accepting and recording of the report of the department of public works.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1084-1090, 1161; Dec. Dig. § 486.*]

4. PLEADING (§ 251*) — DEMURRER — AMENDMENTS—SUFFICIENCY.

Where a demurrer to a complaint for equitable relief from the alleged illegal establishment of a building line was sustained on the ground that plaintiff lost her right to object to the assessments by failing to appeal within 30 days as provided by New Haven city charter, a requested amendment "that since her petition had been filed, section 78 of the charter had been amended, making it more difficult than before to obtain from the board of aldermen any change of a legally established line," was properly refused as it did not affect the sufficiency of the complaint or the decision of the court.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 734, 735; Dec. Dig. § 251.*]

Appeal from Superior Court, New Haven County; *Marcus H. Holcomb, Judge*.

Action by *Fredricka M. Katsch* against the City of New Haven. Judgment for defendant, and plaintiff appeals. Affirmed.

The substituted complaint alleges in substance these facts: The plaintiff is, and for more than 20 years has been, the owner of land in New Haven bounded northerly on Irving street 112 feet, easterly on Ellsworth avenue 33½ feet. The south and west boundary lines, on private property, are of the same length, respectively, as said north and east boundary lines. In 1908 the defendant commenced proceedings for the establishment of a building line on both sides of Irving street. On November 1, 1909, the report of the bureau of compensation to the board of aldermen, recommending the adoption of a 15-foot building line on both sides of Irving street, and assessing the benefits and damages to all persons affected, including the plaintiff, as equal, was accepted, and an order passed and recorded, and said assessments levied as reported, and said report was afterwards approved by the mayor.

"Said assessment of benefits and damages was never published in any of the daily newspapers of said city, and the plaintiff never received any notice, official or otherwise, from said city, or any of its officers or agents, that said building line had been adopted by the board of aldermen, or approved by the mayor of said city, or that the assessment of benefits and damages by reason of its adoption had been reported as equal, and the first information thereof was not received by the plaintiff until several months after the acceptance of said report by the then mayor of said city, as aforesaid."

By reason of the facts alleged in the preced-

ing paragraph, the plaintiff was deprived of her right to appeal to the superior court within the time limited by the city charter, either from said assessment of benefits and damages or from the order adopting said building line, or from the approval thereof by the mayor. The establishment of such building line would confer no benefits on the plaintiff, but would render the plaintiff's said lot practically worthless. The board of aldermen have refused the plaintiff's petition for the repeal or change of said building line, and the building inspector has refused to permit the plaintiff to build a two-story house on her said lot on account of said building line. The prayer for relief asks for damages in case it should be held that the building line is valid, and for a decree declaring it void in case it should be held to be invalid.

The defendant demurred to the substituted complaint upon the grounds which may be stated in substance as follows: The complaint does not allege that the plaintiff did not have notice of the proceedings to establish the building line, and of the hearing on the assessment of benefits and damages, but does allege that the report of benefits and damages was accepted and recorded in the records of the board of aldermen. The plaintiff through her own fault failed and neglected to appeal, by application to the superior court for relief, from the order by which said report was accepted and recorded and said assessment made, and said building line established, as she had the right to, by the city charter, at any time within 30 days after the time when said report was accepted and said assessment of benefits and damages made, and her right to take such appeal was in no way affected by the fact that no notice was published in any newspaper, that such assessment had been made, nor did the fact that there was no such publication affect the validity of the establishment of said building line. The trial court sustained the demurrer upon the grounds therein stated.

Sections 78, 79, and 80 of the city charter (Special Acts of 1899, pp. 412, 413, and 414) provide that, when the common council shall decide to establish any building line, the department of public works shall, after notice mailed to all owners residing in the city, and after a public hearing, cause a survey of the land or layout of the public work to be prepared, and an assessment of benefits and damages to be made; that the bureau of compensation shall advertise in two or more daily papers three times the time fixed for a hearing before them, and the subject-matter thereof; that they shall estimate the probable expense of establishing the building line, shall assess benefits and damages for or against all persons interested; that the assessments shall be made of the excess of benefits over damages, if any, or vice versa; that they shall report their doings to

the department of public works; and that that department shall report its doings to the common council (by amendment of the city charter the board of aldermen now take the place of common council [Special Acts 1901, p. 114]), in writing, showing a particular designation of the land to be taken or the layout of the proposed public improvement.

The following is the language of portions of sections 81 and 85 of the city charter:

"Sec. 81. Said court of common council may, after all necessary appropriations have been made, accept said report, and adopt such layout, or assessment, or may modify the same as it may deem best, and when such report or modification shall have been accepted and recorded in the records of the court of common council, and when the damages shall have been paid to the person whose property has been taken or damaged for such public purpose, or shall have been deposited with the city treasurer to be paid to such person when he shall apply for the same, then each of said assessments shall be legally deemed to have been made, and if the matter relate to the taking of land, the land described in the order of said court of common council shall be and remain taken and devoted to the public use for which it shall have been so designated. Such assessment shall be published three times in each of two or more daily newspapers published in said city, within one week after compliance with the foregoing provision in regard to the payment of damages, and after the report of the director of public works that the improvements have been completed. All assessments of benefits shall be payable immediately after the last day of publication of such assessments. The city clerk shall, with any such assessment, also publish the descriptive part of the order of the court of common council on which such assessment is based, and the date when the same is payable."

"Sec. 85. Any party who shall be aggrieved by any order of the court of common council, making any such assessment of benefits or damages, or requiring the construction of any sidewalk, curb, or gutter, or the payment of any part of the expense thereof, may make written application for relief to the superior court, to be held in and for New Haven county: Provided, however, that he shall cause a copy of said application to be served upon the city clerk within thirty days after the doing of the act complained of. Said court may, by a committee or otherwise, inquire into the allegations of such application, and may confirm, annul, or modify the assessment or other action therein complained of, or make such order in the premises as equity may require, and may allow costs to either or neither party at its discretion; and said court may inquire into the validity of all the proceedings upon which said assessments or other action is based. No land taken as aforesaid shall be occupied

by the city until the time for taking appeals shall have expired, and until all appeals have been finally disposed of."

Elliot Watrous, of New Haven, for appellant. Charles Kleiner and Henry H. Townsend, both of New Haven, for appellee.

HALL, C. J. (after stating the facts as above). The principal questions discussed before us were whether the plaintiff was entitled to the notice by publication in the newspapers, provided for in section 81 of the city charter, as affecting her right of appeal given by section 85; and, if so, whether the failure of the defendant to publish such notice rendered the proceedings for establishment of the building line void. Section 85 gives the right of appeal to any one aggrieved by the order of the common council (board of aldermen) making the assessment "within thirty days after the doing of the act complained of." The act by which the plaintiff was aggrieved was the establishment of the building line, without awarding damages to the plaintiff.

[1] Since, by the acceptance and approval of the report of the bureau of compensation and the department of public works, the benefits and damages were assessed as equal, and there were therefore no damages to be paid, the act of making the assessment and adopting the building line and devoting the plaintiff's property to the designated public use was by the language of section 81 fully completed when the report of the department of public works was accepted and recorded in the records of the board of aldermen, and the time within which an appeal could be taken began to run then, and was limited to 30 days from that time. The publications in the newspapers, provided for in section 81, formed no part of the making and completing of the assessments and the establishing of the building line. By the express provisions of the charter, the assessments were completed and the building line established when the report of the department of public works was accepted and recorded and the damages paid, if there were any damages to be paid. The publications in the newspapers were, by the language of section 81, not to be made until after the assessments were thus legally completed and the building line so established. Again, as the charter does not expressly provide for the publication of but one notice, which was to be published within one week after compliance with the provision in regard to the payment of damages, *and after the report of the director of public works that the improvements "have been completed,"* it is not clear when that notice was to be published when the work was not completed until more than one week after compliance with the provision in regard to the payment of damages.

But whether section 81 provided for the publication of only one notice, or of two

notices, one of which was to be made within one week from the time the damages had been paid, and the other after the public work had been completed, they were not notices which interested parties were entitled to receive as affecting their right of appeal. Such notice or notices are in no way referred to in the provision of section 85 fixing the time when an appeal may be taken. They seem to have been intended to be published only in cases where, by the assessment, damages were awarded or benefits were required to be paid, and as notices to persons interested that the damages awarded them had been paid in the manner provided in section 81, and as notices to persons who had not paid the benefits assessed against them that such benefits were due and payable. The publication of such notice or notices was undoubtedly omitted in the present case because by the assessment adopted no damages or benefits were to be paid, and it could not therefore properly be said that the damages had been paid or that the benefits had become payable. Section 81 makes no provision for such publication, within one week after the assessment is completed, in cases where there are no damages or benefits to be paid.

[2] But it is claimed that if these publications were only notices that damages had been paid, in the manner provided in section 81, or that benefits were payable, that the proceedings for the assessment of damages and the establishment of a building line were void because in that case property owners received no notice of the assessment, and therefore no opportunity to be fully heard by an appeal to the superior court, as the charter contemplated they might be heard, upon the question of the assessment made. This claim cannot be sustained. In the absence of any averment to the contrary, we must assume that the plaintiff received the notice provided in sections 78 and 79 of the charter of the public hearing regarding the establishment of the building line, and notice of the hearing before the bureau of compensation as to the assessment of benefits and damages, provided for in section 80. *Keating v. MacDonald*, 73 Conn. 125, 130, 46 Atl. 871; *State v. Main*, 69 Conn. 123, 140, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30; *Atwater v. O'Reilly*, 81 Conn. 367, 71 Atl. 505.

[3] Having been notified of the inception of the assessment proceedings and of the hearing before the bureau of compensation, the plaintiff became chargeable with notice of the entire proceedings from the time of the reference to the board of compensation for the purpose of ascertaining benefits and damages to the time the report of the department of public works was finally accepted and ordered to be recorded. The entire matter was in contemplation of law, one proceeding of each step in which the plain-

tiff was not entitled to receive a new notice in order to render the proceedings valid, unless such new notice was required by the provisions of the charter. *Fair Haven & W. R. Co. v. New Haven*, 75 Conn. 442, 454, 53 Atl. 960; *Gilbert v. City of New Haven*, 39 Conn. 467, 472.

The facts averred in the complaint fail to show either that the plaintiff lost her right of appeal by reason of the failure to make the publications provided in section 81 or that the proceedings became invalid by reason of such failure. The plaintiff was not prejudiced by the decision of the court upon the defendant's motion to state in two counts what was claimed to be two causes of action. In the substituted complaint containing but one count, she was permitted to make the two desired prayers for relief based upon the defendant's failure to make the publications described in section 81.

[4] After the trial court had sustained the demurrer to the complaint, the plaintiff asked leave to amend the complaint by alleging, in substance, that since her petition for a change in said building line, as described in the complaint, section 78 of the city charter had been amended making it more difficult than before to obtain from the board of aldermen any change of a legally established line. The court properly refused to permit the amendment upon the ground that such amendment could not affect the sufficiency of the complaint or the decision of the court upon the demurrer.

There is no error. The other Judges concurred.

ABBOTT v. LEE.

(Supreme Court of Errors of Connecticut. Dec. 19, 1912.)

1. BROKERS (§ 60*)—COMPENSATION—RIGHT TO.

To entitle a real estate broker to compensation where an actual sale was not consummated, he is required to show that he produced a purchaser ready, able, and willing to buy the property in accordance with the terms of the owner.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 91; Dec. Dig. § 60.*]

2. EVIDENCE (§ 441*)—BROKERS (§ 54*)—DOCUMENTARY EVIDENCE — PAROL EVIDENCE RULE.

Where a real estate broker prepared a written memorandum of an agreement to sell, which was signed by his principal, the description in such memorandum superseded the principal's statements of opinion as to the length of the shore line of the property, and could not be contradicted by proof of oral representations, and to recover the commissions the broker must produce a purchaser able, willing, and ready to purchase the property as described.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1718, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441; **Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.*]

3. EVIDENCE (§§ 207, 246*)—ADMISSIONS—ADMISSIONS OF COUNSEL.

In an action by a real estate broker to recover commissions, statements by the broker's

counsel to the court at the trial are binding on plaintiff as evidence of the facts so stated.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 707-712, 945-949; Dec. Dig. §§ 207, 246.*]

4. BROKERS (§ 63*)—COMMISSIONS—DUTY OF PRINCIPAL.

Where a vendor of land signed, at the request of the broker, a memorandum describing the property to be sold and refused to sign a contract varying that description, he was not bound to prepare and present another contract which he would sign; the memorandum affording the broker sufficient description.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.*]

Appeal from Superior Court, Fairfield County; Lucien F. Burpee, Judge.

Action by G. Harry Abbott against Joseph P. Lee. From judgment for plaintiff, defendant appeals. Reversed and remanded.

The complaint alleges that on or about the 23d of December, 1909, the defendant employed the plaintiff to procure a purchaser for a certain tract of land consisting of 37 acres, more or less, with the buildings thereon standing, situated on Sasco Hill, in Fairfield, and promised to pay him therefor \$1,650; that the plaintiff procured such purchaser ready and willing to buy upon the terms prescribed by the defendant; and that the defendant has refused to pay the plaintiff said sum.

The trial court has found these facts:

Prior to 1909 the plaintiff, a real estate broker, was informed by one Poillon that he would like to buy some property on the shore of Long Island Sound, in the vicinity of Stamford. Having learned that the defendant and his three sisters were the owners of such property, and desired to sell the same, the plaintiff visited said premises, in company with Mr. Poillon's wife and daughter, and they were shown over the property by one of the defendant's sisters; the defendant himself not being at home. On the same evening the defendant informed the plaintiff that he and his sisters would sell the property for \$35,000, and authorized the plaintiff to sell it at that price, and promised to pay him therefor a commission of 5 per cent. Two or three days later the plaintiff visited the property with Poillon and others, and met the defendant, and the defendant pointed out to them certain objects indicating approximately the limits of the shore front, and in response to a question by Poillon stated that the length of the shore line was between 1,400 and 1,500 feet, and two days later Mr. Poillon told the plaintiff that he would accept the defendant's terms and buy the property, and that he might close the bargain with the defendant accordingly.

The finding of facts states that "at this time Mr. Poillon was ready, willing, and able to buy the defendant's property upon the terms fixed by the defendant, and had the means at his command for that purpose," and that he so notified the defendant.

but that "the defendant then refused to sell the property upon said terms, stating that his sisters were unwilling to sell the dwelling house and the home lot containing about one acre." A short time afterwards the defendant told the plaintiff to tell Poillon that he would allow a reduction of \$2,000 from the original price of \$35,000, and retain the dwelling house and home lot, and this proposition was presented by plaintiff to Poillon, and accepted by the latter, and the plaintiff at once informed the defendant of such acceptance, and it was then agreed between the plaintiff and the defendant that the former should receive \$1,500 for selling the property for said price, and the defendant agreed to pay the same. On the 23d of December, 1909, the plaintiff wrote, and the defendant and his sisters signed, Plaintiff's Exhibit A, which reads as follows: "Received from G. Harry Abbott, agent, the sum of fifty (\$50.00) dollars, to bind agreement to sell to J. E. Poillon all that certain tract or tracts of lands, located on Sasco Hill (so called), in the town of Fairfield, county of Fairfield, state of Connecticut, comprising thirty-seven (37) acres more or less, as described in deeds as follows: Eliza M. Jennings to Patrick Lee, dated April 5, 1888, recorded Vol. 65, page 411; Ebenezer Burr and wife, recorded July 18th, 1893, Vol. 67, page 594; Charles Jennings, Adm., to Patrick Lee, recorded November 1st, 1898, Vol. 69, page 95; except for house standing thereupon, and one (1) acre of ground. It is understood that the purchase price is thirty-three thousand (\$33,000) dollars, payable (\$2,500.00) on signing of contract. Ten thousand, five hundred dollars and a mortgage for \$20,000.00 at 5 per cent. per annum upon delivery of deed on April 1st 1910." The plaintiff showed this paper to Poillon, who then gave the plaintiff \$500 in part payment of the purchase price required by the terms of said writing, "and to make the contract binding," which sum is still kept by the plaintiff, except that he gave his own check to the defendant for \$50 as above indicated. In January, 1910, Mr. Poillon prepared a written contract (Plaintiff's Exhibit E) which provided that the defendant agreed to sell to Poillon, and the latter agreed to purchase, for \$33,000 the premises described as containing thirty-seven acres, more or less, with the buildings thereon, excepting one acre of land with the buildings thereon, and further described by the boundaries, supposed to be in accordance with those described in the three deeds referred to in Exhibit A, the southwesterly boundary being described in said Exhibit E as "the waters of Long Island Sound at high-water mark," and the westerly by "Mill river so called." Added to such description in Exhibit E was the following language, not contained in the deeds referred to in Exhibit A: "Together with all shore and riparian rights in said Sound and

river. It being expressly agreed and warranted that the shore line on said Long Island Sound shall not be less than fourteen hundred and fifty (1,450) feet in length. * * * " No length of the shore line, by number of feet, was given in the deeds referred to in Exhibit A. The defendant refused to sign Exhibit E. No contract, other than Exhibit A, embodying any change in the language of Exhibit E, was ever submitted to Mr. Poillon, and no sale of the property to Poillon was made.

The finding of facts contains these paragraphs:

"(30) The defendant did not offer or make any attempt in any way to carry out the agreement for the sale of his property made by him on December 23, 1909.

"(31) Mr. Poillon was ready, willing, and able at all times to fulfill his part of the agreement Exhibit A, and on several occasions between December 23, 1909, and April 1, 1910, he made efforts to communicate with the defendant and to induce him to make the contract for sale and execute the deed mentioned in Exhibit A, and complete the transfer of the property, but without success.

"(32) The defendant refused and neglected to make any contract for sale of the property and to make any conveyance thereof to Mr. Poillon, and it was his fault that the sale was not consummated."

"(34) It did not appear how long the shore line or shore front of this property is, and no evidence was offered to show that the description of the land contained in Exhibit E is not a correct description of the land referred to in Exhibit A."

Upon the facts found the trial court rendered judgment for the plaintiff for \$1,713.25. The defendant excepted to the finding as made in paragraphs 30, 31, 32, and 34, and also as made in other paragraphs of the finding, and asked for a correction thereof. The evidence respecting the facts so found is certified to this court.

Robert E. De Forest and Thomas M. Cullinan, both of Bridgeport, for appellant. Robert H. Fosdick, of Stamford, for appellee.

HALL, C. J. (after stating the facts as above). [1] To entitle the plaintiff to recover, he was required to prove the averment of his complaint that he procured a "purchaser ready and willing to buy upon the terms prescribed by the defendant." To do this in the present case he was required to prove that Poillon was ready and willing to accept a conveyance of the property, and to pay the agreed price for it, in accordance with the terms fixed by the defendant, or that Poillon was ready and willing to enter into an enforceable contract to do so. *Leete v. Norton*, 43 Conn. 226; *Schlegel v. Allerton*, 65 Conn. 260, 32 Atl. 363; *Clark v. Thompson*, 75 Conn. 161, 52 Atl. 720. It is

conceded that the conveyance was to be by warranty deed. The complaint does not properly describe the property to be conveyed or the sum to be paid to the plaintiff. By the final agreement the dwelling house and one acre of land was to be excepted from the property first proposed to be sold, and the sum to be paid the plaintiff was fixed at \$1,500.

[2] The only property which the plaintiff was finally authorized by the defendant and his sisters to sell was that described in the deeds referred to in Exhibit A, an instrument which was prepared by the plaintiff himself, was signed by the defendant and his sisters, and was also shown to Mr. Poillon. It is expressly stated in Exhibit A that the "tract or tracts of land to be sold to Mr. Poillon" (excepting the house and one acre of land) were "as described in deeds as follows." Following this statement in Exhibit A are the names of the parties to said deeds, their respective dates, and the volumes and pages where they are recorded. From this language of Exhibit A the plaintiff, as well as Poillon, to whom it was shown, were clearly informed just what property was to be conveyed by the defendant and his sisters, and how the "tract or tracts" to be conveyed were to be described in the deed of conveyance.

In view of this language of Exhibit A, the defendant, unless he has modified the terms of Exhibit A, was not required, either by any agreement with the plaintiff or with Poillon, to execute any contract to sell, or any deed of conveyance to Poillon, containing any materially different description of the property or rights conveyed or to be conveyed from those described in Exhibit A, and the deeds therein referred to, or to execute any contract or deed agreeing to warrant any title to any property or right, not included in the descriptions of property and rights contained in Exhibit A, or in said described deeds.

But the plaintiff claims that the description of the property to be conveyed, as contained in Exhibit A, was modified and changed by the statement of the defendant, as found to have been made to Poillon, and in the presence of the plaintiff, that the length of the shore line was between 1,400 and 1,500 feet. But this was not a statement that it was 1,450 feet long. That it was over 1,400 and less than 1,450 feet long would have been consistent with such statement, and proof that such statement was made before the defendant and his sisters had signed the writing (Exhibit A), and in which previous negotiations are presumed to have been merged, was inadmissible to alter the writing; and, furthermore, it is perfectly apparent that such statement was as the trial court ruled but the expression of an opinion by the defendant.

[3] Regarding the questions of the willing-

ness of Poillon to contract to purchase the property in question, or to accept a deed of the same in accordance with the terms of Exhibit A, and of the defendant's unwillingness to make such a contract, or to execute such a deed, which questions the trial court decided adversely to the defendant in paragraphs 31 and 32 of the finding, there seems to have been no conflict of evidence. Poillon never signed or offered to sign Exhibit A. The plaintiff testified that the \$500 paid to him after Exhibit A was signed was to be paid to the defendant "upon the signing of the contract," and that it was not paid to the defendant because the contract was never signed. We find no evidence that Poillon was willing to sign any other contract to purchase the property than Exhibit E, or that he was ever willing to accept a deed of the property which did not contain a warranty that the length of the shore line was 1,450 feet. The plaintiff testified that the property he was negotiating to sell was the property as described in the deeds named in Exhibit A. Poillon as a witness for the plaintiff testified that the basis upon which he calculated to buy the property was the memorandum Exhibit A, and the representations made by defendant as to the length of the shore line; that the memorandum, Exhibit A, was shown but that he was buying it upon representations; and that the negotiations terminated because the defendant would not sign the contract (Exhibit E).

The position of the plaintiff and his claim as to the evidence is made quite clear by the following statements of his own counsel made to the trial court during the trial:

"The Court: * * * But Mr. Poillon hasn't testified that he is ready to take the land described in those three deeds [the deeds named in Exhibit A].

"Mr. Fosdick: No, your honor.

"The Court: And I infer that he isn't, is he?

"Mr. Fosdick: He is not. He stated that he is not. He stated that he was willing to take the land described in these three deeds in connection with the representations which had been made by Mr. Lee to him regarding the distance along the shore. * * *

"The Court: The question is, Have you got a purchaser ready to buy that land?

"Mr. Fosdick: The evidence is we have. He testified he was—

"The Court: What land?

"Mr. Fosdick: The land described in these deeds with 1,450 feet of shore front. * * *

"The Court: Do you also claim that the statements made in regard to the shore front were untrue? * * *

"Mr. Fosdick: Certainly.

"The Court: And that is the reason why Mr. Poillon has not gone ahead with the contract?

"Mr. Fosdick: Certainly, he hasn't got

anything like the shore front that he represented.

"The Court: Then the court is at liberty to interpret the testimony given, as meaning that Mr. Pollon has not found the quantity of land there he expected?

"Mr. Fosdick: That is precisely it.

"The Court: Therefore he is not willing and ready to buy the land described in those deeds (the deeds named in Exhibit A) without any reference to outside statements?

"Mr. Fosdick: Oh, he never was willing to buy the land described in those deeds, unless a survey showed that the distance along the shore was equal to that which was represented the man owned.

"The Court: And the survey doesn't show that?

"Mr. Fosdick: Certainly not; doesn't show it."

Even if the court was not bound to accept these statements of counsel as conclusive upon the questions of fact to which they related, yet as admissions of a duly authorized attorney, made to the court during the trial of a case, they were to be treated as admissions of his client, the plaintiff, and were to be considered as in the nature of evidence of the facts so admitted. *Oliver v. Bennett*, 65 N. Y. 559; *Wilson v. Spring*, 64 Ill. 14; *Marsh v. Mitchell*, 26 N. J. Eq. 497; *Perry v. Simpson Water Proof Co.*, 40 Conn. 316; 1 *Greenleaf on Evidence*, § 186.

[4] After refusing to sign Exhibit E, the defendant was not required to prepare and present another contract, which he would sign. The contract or conveyance which he was willing to sign was sufficiently stated in Exhibit A, and the burden rested upon the plaintiff to prove that he had procured a purchaser ready to sign a contract to buy the property or to accept a deed of it upon the terms there stated. The evidence clearly shows that the purchaser procured was only willing to sign a contract or accept a deed which contained a materially different description of the property to be conveyed from that conveyed in Exhibit A, and which imposed upon the defendant an obligation of warranting the length of the shore line to be 1,450 feet, which was not contained in Exhibit A, and which he had never agreed to assume. The court erred in finding the facts as stated in paragraphs 31 and 32 of the finding, as they were not supported by the evidence, and in not finding the fact which was proved, that the plaintiff failed to procure a person who was willing to purchase the property in accordance with the terms upon which the plaintiff was authorized to sell it.

As there must be a new trial, it is unnecessary to consider other claimed errors.

There is error, and a new trial is granted. The other Judges concur.

MATHEWS et al. v. LIVINGSTON et ux.
(Supreme Court of Errors of Connecticut.
Dec. 19, 1912.)

1. INNKEEPERS (§ 8*)—LANDLORD AND TENANT (§ 1*) — RELATION — TENANT AND LODGER.

There is a substantial distinction between a tenant and a lodger, since a tenant may maintain ejectment *quare clausum fregit* and trespass, while the lodger may not.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. §§ 12-13; Dec. Dig. § 8;* *Landlord and Tenant*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. INNKEEPERS (§ 13*)—LANDLORD AND TENANT (§ 246*)—LANDLORD'S LIEN — ACTS OF LODGERS.

A landlord has a lien upon the goods of a lodger, but has no lien upon those of a tenant.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. §§ 42-46; Dec. Dig. § 13;* *Landlord and Tenant*, Cent. Dig. §§ 991-1002; Dec. Dig. § 246.*]

3. INNKEEPERS (§ 8*)—LANDLORD AND TENANT (§ 1*)—RELATION.

The relation established by the hiring of rooms in another's house depends upon the terms of the contract as interpreted in view of the surrounding circumstances showing the intention of the parties.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. §§ 12, 13; Dec. Dig. § 8;* *Landlord and Tenant*, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. INNKEEPERS (§ 8*)—LANDLORD AND TENANT (§ 1*) — RELATION — "LODGER" AND "TENANT" DISTINGUISHED.

Ordinarily the landlord supplies a lodger with furnished rooms, the care and occupation of which the landlord has, the lodger merely having the use of rooms without the exclusive possession, while the tenant has exclusive possession.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. §§ 12, 13; Dec. Dig. § 8;* *Landlord and Tenant*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4226-4227; vol. 8, pp. 6904-6905.]

5. INNKEEPERS (§ 8*)—LANDLORD AND TENANT (§ 18*)—RELATION.

If the hirer of rooms in a lodging house has exclusive possession, and the keeper retains no control, in the absence of contract or circumstances indicating a contrary intention, the law will presume that it was the intention to create the relation of landlord and tenant, and not that of lodger.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. §§ 12, 13; Dec. Dig. § 8;* *Landlord and Tenant*, Cent. Dig. §§ 45-48; Dec. Dig. § 18.*]

6. INNKEEPERS (§ 8*)—LANDLORD AND TENANT (§ 18*)—RELATION.

That the care of rooms rented was taken by the hirer who procured her own board and furniture, and that the price charged was at the rate made to a tenant rather than a lodger, and the receipt read "for rent," tended to show that the relation of tenant, and not of lodger, existed.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. §§ 12, 13; Dec. Dig. § 8;* *Landlord and Tenant*, Cent. Dig. §§ 45-48; Dec. Dig. § 18.*]

7. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action for damages for the dispossession of plaintiff from two rooms rented,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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and the conversion of certain goods, an instruction that if either party regarded plaintiff as a tenant, "and was justified by the evidence" in so doing, the relation of tenant attached and a lien could not exist, was not reversible error, where the jury, on undisputed facts, were justified in finding the relation of landlord and tenant to exist, even though, without the quoted provision, the instruction might have been understood as making the finding of the relation of landlord and tenant depend upon the opinion of one of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4526; Dec. Dig. § 1068.*]

8. ASSAULT AND BATTERY (§ 7*)—CIVIL LIABILITY—USE OF FORCE.

A landlord was not entitled to use more force than was reasonably necessary to prevent the removal of property on which he had a lodger's lien from the house.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 4; Dec. Dig. § 7.*]

9. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR—FAILURE TO INSTRUCT.

Failure to instruct that, in attempting to enforce a lodger's lien, a landlord had a right to use as much force as is necessary to keep the lodger's property in the house, was harmless, where the jury found that plaintiff was a tenant, and not a lodger.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4526; Dec. Dig. § 1068.*]

10. HUSBAND AND WIFE (§ 214*)—TORTS OF WIFE—LIABILITY.

If a husband acted independently of his wife in ejecting plaintiff from rooms rented, he alone would be liable, but, if she acted alone or he acted as her agent, or if she knew or acquiesced in his acts, she would be liable, and, if they acted in concert, both would be liable.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 791-794; Dec. Dig. § 214.*]

11. LANDLORD AND TENANT (§ 180*)—EVICTION—DAMAGES.

One ejected from rooms rented was entitled to recover the present value of the unexpired term; that is, the rental value, less the amount of rent unpaid.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 715-729; Dec. Dig. § 180.*]

12. LANDLORD AND TENANT (§ 180*)—EJECTION FROM LODGINGS—DAMAGES.

One unlawfully ejected from rooms rented whose goods were converted by the landlord could recover so far as proximately caused by the ejection, for mental suffering, exposure, time lost, the expense in endeavoring to recover possession, and any property lost in the eviction.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 715-729; Dec. Dig. § 180.*]

13. TROVER AND CONVERSION (§ 47*)—MEASURE OF DAMAGES—HOUSEHOLD GOODS.

A requested charge that the damages for the conversion of goods was the fair value of what it would cost to replace the property with other property of like condition, and, in addition thereto, any loss sustained by being deprived of the property, was properly refused, the mere market value of the household furniture converted, not being the measure of damages, but rather the fair and full compensation of the owner for his pecuniary loss, disregarding any sentimental value.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 265, 268, 272; Dec. Dig. § 47.*]

14. EVIDENCE (§ 474*)—OPINION EVIDENCE—VALUE.

A witness who had no knowledge of the market value of property at a certain time and place was not qualified to give an opinion thereon.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

15. LANDLORD AND TENANT (§ 180*)—EVICTION—DAMAGES.

In an action for dispossessing plaintiff from rooms rented and a conversion of goods, plaintiff could recover the expense incurred in sending a team for the goods the first time, and, if the circumstances made it reasonable to do so, in sending a second time.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 715-729; Dec. Dig. § 180.*]

16. NEW TRIAL (§ 76*)—EXCESSIVE DAMAGES.

A new trial will not be granted because of awarding a very inconsiderable and inconsequential sum in excess of what a party was entitled to.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.*]

17. PROPERTY (§ 9*)—OWNERSHIP—EVIDENCE.

Evidence that one leased premises and conducted a lodging house, and rented rooms therein, supported a finding that she owned the premises, in absence of contrary evidence.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9.*]

18. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR—EVIDENCE.

Where, in an action for dispossessing plaintiff of rooms, other evidence would support a finding that defendant owned the house, any error in admitting evidence by her husband that she owned the house was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

19. EVIDENCE (§ 158*)—BEST EVIDENCE—OWNERSHIP OF REALTY.

The evidence of qualified witnesses is not competent to prove the ownership of realty, unless title is merely involved collaterally as in an action for ejectment for rented rooms, in which case the prima facie right of ownership may be proved by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 471-526; Dec. Dig. § 158.*]

20. EVIDENCE (§ 208*)—ADMISSIONS—PLEADINGS.

In an action for dispossessing plaintiff of rooms and assaulting her, the complaint, an amendment thereto, and the substituted complaint which were filed during a period of nearly two years, showing that they did not allege that defendant had assaulted plaintiff, were evidential on the question of assault.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. § 208.*]

21. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Since it cannot be determined what part of the verdict for plaintiff in an action for dispossessing from rented rooms, conversion of goods, and assault was founded upon the assault, the error in excluding evidence that the complaint, an amendment thereto, and the substituted complaint filed during a period of nearly two years, did not charge any assault, was harmful, though part of the pleadings offered were left in the file and went to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Court of Common Pleas, Hartford County; John Coats, Judge.

Action by James M. Logan and Mary Mathews against William F. Livingston and wife. From a judgment for plaintiff Mathews, defendants appeal. Reversed, and new trial granted.

John J. Dwyer, of Hartford, for appellants. James B. Henry and Terry J. Chapin, both of Hartford, for appellee.

WHEELER, J. Mrs. Livingston, one of the defendants, lived with her husband, the other defendant, in a house owned by her, in which she conducted a lodging house and rented to the plaintiff, Mrs. Mathews, two rooms for \$2.50 a week in place of the regular rate of \$4. The plaintiff furnished her rooms, getting her own meals and taking the entire care of the rooms, in which she stored her furniture. She continued in their occupancy for 16 days. She claimed that she had paid part of the rent due in cash and part in work, and that Mrs. Livingston had discharged her from further obligation therefor, and that, while she was preparing to vacate the rooms, the defendant took possession in her temporary absence, demanded a large sum for unpaid rent, forcibly evicted her, converted her goods, and assaulted her, for all of which acts she brings this action to recover damages. The defendants claimed that Mrs. Livingston rented these two rooms to the plaintiff as a lodger, and that she was indebted for their rent; that she had a lien upon the goods of the plaintiff for such debt, but that she did not convert said goods or evict or assault the plaintiff, and that her husband, knowing of the plaintiff's intention to move and of her debt, contrary to her wishes and without her knowledge or consent, evicted the plaintiff, and refused to allow her to remove said goods until the debt due for the rent was paid, and both defendants claimed that at no time did Mr. Livingston assault Mrs. Mathews.

The chief ground of complaint of the defendants with the charge is the manner in which the court submitted to the jury the question of whether the relation arising between the parties in the hiring of these rooms was that of landlord and tenant, or that of lodging house keeper and lodger.

[1] The distinction in law between a tenant and a lodger is a substantial one. The tenant may maintain ejectment, *quare clausum fregit*, and trespass. The lodger may not.

[2] Upon the goods of the lodger his landlord has a lien for unpaid rent. Upon those of his tenant he has no lien.

[3] The relation established by the hiring of rooms in the house of another depends upon the contract of hiring, gathered from its terms and interpreted in the light of the surrounding circumstances, having in end the finding of the intention of the parties to the contract. *Park Co. v. Van Dusen*, 63

Ohio St. 183, 200, 58 N. E. 576; *Jones on Landlord & Tenant*, § 23.

[4] Ordinarily the landlord furnishes the lodger with a furnished room or rooms, whose care the landlord has, and whose habitation and enjoyment he gives to the lodger, while he himself retains the occupation. The tenant has the exclusive possession of his rooms, while the lodger has merely the use without the actual or exclusive possession which remain in the lessor. It is a mixed question of law and fact.

[5] But when it appears that the hirer of rooms in a building devoted to a lodging house secures the exclusive possession of certain rooms therein, over which the lodging house keeper retains no control, the law, in the absence of provision of the contract or extraneous circumstance indicating a contrary intention, will presume that it was the intention of the parties to create the relation of landlord and tenant, and not that of lodging house keeper and lodger. *White v. Maynard*, 111 Mass. 250, 254, 15 Am. Rep. 28; *Swain v. Mizner*, 8 Gray, 182, 184, 69 Am. Dec. 244; *Messerly v. Mercer*, 45 Mo. App. 330; *Oliver v. Moore*, 53 Hun, 474, 475, 6 N. Y. Supp. 413; *Sherman v. Iroquois Hotel & A. Co.*, 42 Misc. Rep. 217, 85 N. Y. Supp. 365; *Tiffany on Land. & Tenant*, § 8; 25 Cyc. p. 1530.

[6] Circumstances showing that the care of the rooms was in the hirer who procured her own board and furniture tend to prove the exclusiveness of possession of the hirer, that the price charged was at the rate made to a tenant rather than to a lodger, and that the wording of a receipt "for rent" for moneys paid for the use of rooms would tend to prove that the parties intended to create the relationship of landlord and tenant rather than that of lodger. In view of the undisputed facts in this case tending to show that the relationship was that of landlord and tenant and that the parties so intended, the court might well have instructed the jury that, if they found the facts to be true as presented by the evidence, they should find the relationship that of landlord and tenant, and therefore that the defendants had no lien for unpaid rent upon the goods of the plaintiff. We think the charge of the court viewed as a whole fairly presented the question of this relation to the jury.

[7] One part of a somewhat lengthy discussion of this question is open to criticism. The court there said that if either party regarded the plaintiff as a tenant, and was justified by the evidence in so regarding, the relation of tenant attached and the lien could not exist. If this instruction limited the finding of the relation to the opinion entertained by one of the parties to the contract, it was obviously erroneous, but it could not have been so understood, since it was coupled with a further condition that this conclusion must be justified by the evi-

dence. And that depended upon the consideration of the several circumstances pointed out by the court as tending to prove the relation weighed in the light of the law, all of which the court had fully stated to the jury. The jury having by their verdict found the relation of landlord and tenant to exist, we should not feel justified upon the evidence in disturbing the verdict, although we might find that the instruction given was in a single particular inaccurate. The court explicitly instructed the jury that if the plaintiff was a lodger, and not a tenant, the defendants had, under section 4165 of G. S., a lien for any unpaid rent due upon the goods contained in the rooms occupied by the plaintiff, and might enforce the same, and that the plaintiff must discharge the lien by paying the unpaid rent before she would have a right to recover her goods. This substantially accorded with the defendants' request to charge, and was all that they were entitled to.

[8] They further asked for an instruction that: "In attempting to enforce said lien, the defendants, and particularly Bridget Livingston, had a right to use so much force as was necessary to prevent any property kept in said house by the plaintiff from being removed therefrom until the amount of said lien was paid." It was properly refused. The defendants were in no event entitled to use more force than was reasonably necessary, and this instruction was not thus limited.

[9] The failure to charge in this particular, had the request been properly framed, became unimportant in view of the verdict of the jury finding that the plaintiff was a tenant and not a lodger.

[10] Mrs. Livingston claimed that the court did not charge the jury in compliance with her request that if the acts complained of were done by her husband without her knowledge, and against her wishes, she was not liable. The court instructed the jury that, if in what was done the husband acted alone and independently of his wife, he alone would be liable, but that if she acted alone, or if he acted as her agent, or if she knew and acquiesced in his acts without objection, she would be liable, and that, if both acted in concert, each would be liable. This instruction was adequate and accurate.

If the jury found the plaintiff was a tenant, and was unlawfully evicted, the court instructed the jury that she might recover "all the damages which she suffered directly on account of the defendants or either of them wrongfully taking possession of her premises, and it would include the mental suffering, the exposure, the time which she had lost, the expense she was put to in endeavoring to recover possession; and also, if in connection with this unlawful eviction, she lost her property, she can recover her property also." This request is complained of.

[11] The court should have included within its specification of the elements of damage directly suffered the rental value of the rooms, less the amount of rent unpaid; in other words, the present value for the unexpired term of the lessees' hiring. 3 Sedgwick on Damages (9th Ed.) § 988; *Amsden v. Atwood*, 69 Vt. 527, 532, 38 Atl. 263; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506. At most, the damages for this element was a nominal sum. In addition, the charge is not complained of on this ground.

[12] The elements specified which are complained of were subjects of damage which might properly have followed as a consequence of an eviction and conversion, and, as these are alleged, they were proper subjects of recovery so far as proved. *Moyer et al. v. Gordon*, 113 Ind. 282, 288, 14 N. E. 476; *Sedgwick on Damages*, § 988. The charge of the court upon exemplary damages followed our rule.

[13] A further ground of complaint is the refusal to charge as requested that the damages for the conversion should be limited to "the fair value of what it would cost to replace the property with other property of like kind and condition, and, in addition thereto, the amount of any damage or loss which you find she has sustained by being deprived of said property." And that damages which are mere speculation, guess, or surmise cannot be awarded. This request was contrary to the rule laid down in *Barker v. Lewis Storage & Transfer Co.*, 78 Conn. 198, 61 Atl. 363, 3 Ann. Cas. 889. The court reiterated this rule in the course of the trial, and in the charge instructed the jury that the mere market value of household furniture was not the measure of damages in case of its conversion, but rather fair and full compensation to the owner for his pecuniary loss, disregarding any sentimental value. The jury were sufficiently instructed under the circumstances of the case, and could not, without disregarding the instruction given, have awarded speculative damages, nor, in view of the repeated instructions during the presentation of the evidence, was there occasion for particularizing as to what fair compensation consisted of. Various rulings on evidence are complained of.

For the purpose of proving the value of a sewing machine, one of the articles of furniture claimed to have been converted, the defendants offered to prove by the witness Phelps the market value of a secondhand machine equally as good as the one converted. The court excluded the question in that form. The defendants thereupon confined the offer to its value in the month of the claimed conversion. The court admitted the question provided the witness could say he knew such machines had a market value at that time. The witness was unable to so testify, and the question remained unanswered.

[14] We see no reversible error in these rulings. If the witness had no knowledge of the market value at the time and place in question, he was not qualified to express an opinion.

In *Barker v. Lewis S. & T. Co.*, supra, we held that, in an action for conversion of household furniture in the use of an owner, evidence of the market value of second-hand furniture of the same kind and condition would not be admissible as tending to prove the measure of loss or an element in it.

[15] The plaintiffs offered evidence of their expense in hiring a team to remove the goods, which the defendants prevented. Such expense was properly incurred in the first instance in which the team was sent for the goods, and, if the circumstances made it reasonable to send it a second time, that expense would have been justified. But in this case nothing in the circumstances showed that it was reasonable to continue to send teams to get these goods after the first demand had been peremptorily and positively refused. The evidence of expense succeeding the first demand was improperly allowed. The judge's statement in admitting the evidence that "if he had sent a team there every day for a month that you (the defendants) would have to pay the bills, providing you were keeping the goods wrongfully," was clearly wrong.

[16] Even though a part of this expense was erroneously incorporated in the judgment, it is an inconsiderable sum, and too inconsequential an error upon which to predicate a new trial. *Chany v. Hotchkiss*, 79 Conn. 104, 108, 63 Atl. 947; *Buddington v. Knowles*, 30 Conn. 28; *Old Saybrook v. Milford*, 76 Conn. 152, 157, 56 Atl. 496; *Bogudski v. Backes*, 83 Conn. 208, 214, 76 Atl. 540. The plaintiff was permitted on cross-examination to inquire of the defendant husband as to the ownership of the house in which were the two rooms from which the plaintiff was evicted, and he replied his wife. It appeared among the undisputed facts that Mrs. Livingston first leased these premises to the plaintiff, and upon their surrender conducted a lodging house in the premises, and in a few days rented the two rooms in question to the plaintiff.

[17, 18] It would have been entirely competent from this evidence of possession of the premises coupled with these acts of ownership, in the absence of all evidence to the contrary, to have found Mrs. Livingston to be the owner of the premises she occupied and treated as her own. *Wigmore on Evidence*, §§ 2575, 1779. So that the testimony of the husband did not introduce into the case a new fact, but one already legally established.

[19] Aside from this, the rule that title and ownership of real property may not as that of personal property be proved by the opinion of those qualified to speak since it

is not the best evidence is well established. *De Wolf v. Williams*, 69 N. Y. 621; *Pichler, Ex'r, v. Reese*, 171 N. Y. 577, 64 N. E. 441; *Steiner Bros. & Co. v. Trnum*, 98 Ala. 315, 318, 13 South. 365; *Murphy v. Olberding*, 107 Iowa, 547, 548, 78 N. W. 205. Nevertheless this rule applies when the issue of title or ownership is directly involved, and not when it is collaterally involved, in which case a prima facie right of ownership may be established by parol evidence from one qualified to speak. *Tucker v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137; 17 Cyc. 494. The wife might have testified to her ownership, since that was only collaterally involved, and her husband living with her in occupation of the property may equally testify to her ownership. Nor should a collateral issue of this nature, whose truth might easily have been contested and was not, and whose effect upon the real issues of the case must have been exceedingly limited, be treated as so material an error as to lead to a new trial.

[20] For the purpose of disproving the claim that the defendants assaulted the plaintiff, the defendants offered in evidence the complaint, an amendment thereto, and a substituted complaint as showing that in these several statements of her cause of action extending through a period of nearly two years the plaintiff did not allege that either defendant had assaulted her. This evidence was excluded. It was clearly evidential. *Loomis v. Norman Printers' Co.*, 81 Conn. 343, 350, 71 Atl. 358; *Miles v. Strong*, 68 Conn. 273, 36 Atl. 55. The ruling of the court excluded it from the consideration of the jury. 'Had it not been for the court's ruling, the defendants' request to charge that "failure to make a claim seasonably is always to be construed against the person making the claim, and such failure is a matter which you should consider in determining whether or not the claim of the plaintiff that she was assaulted or beaten is true," would have been applicable to the situation and should have been given.' *Nichols v. New Britain*, 77 Conn. 695, 698, 60 Atl. 655; *Hurd v. Hotchkiss*, 72 Conn. 472, 481, 45 Atl. 11.

[21] We cannot say that the exclusion of this evidence was not harmful, nor can we say that it was immaterial, since we do not know what, if any, part of the verdict was founded upon the assault. The omission, for a long period of time, from repeated statements of an action for an eviction and conversion of goods of the elements of an assault, claimed to have occurred at the time of the eviction and conversion, unless explained in some satisfactory way, might reasonably have led to doubt of the good faith and seriousness of the assault, one or both. The rejection of this evidence was a harmful error. *Fuller et ux. v. Met. Life Ins. Co.*, 70 Conn. 647, 677, 41 Atl. 4. The fact that the parts of the pleadings offered were

left in the file and went to the jury is of no consequence. The defendants were entitled to have them go to the jury as evidence in the case, together with such instruction as the admission of the evidence required for the guidance of the jury.

There is error, and a new trial is ordered. The other Judges concurred.

**CONNECTICUT STEAM BROWN STONE
OO. v. LEWIS et al.**

(Supreme Court of Errors of Connecticut.
Dec. 19, 1912.)

**1. FRAUDULENT CONVEYANCES (§ 47*)—SALES
IN BULK—STATUTORY PROVISIONS.**

Pub. Acts 1909, c. 21, providing that when a person making it his business to buy commodities and sell the same in small quantities for profit shall, at a single transaction not in the regular course of business, sell the whole or a large part of his stock in trade, the sale shall be void as against existing creditors, unless a notice of intention to sell is filed as therein provided, does not apply to persons selling only at wholesale, whether they produce, manufacture, or purchase the goods so sold or change the form of the goods or material purchased by them.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 34; Dec. Dig. § 47.*]

**2. FRAUDULENT CONVEYANCES (§ 47*)—SALES
IN BULK—STATUTORY PROVISIONS.**

Such act does not apply to persons selling at retail goods which they have not bought, but which they can fairly be said to have produced or manufactured.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 34; Dec. Dig. § 47.*]

**3. FRAUDULENT CONVEYANCES (§ 47*)—SALES
IN BULK—STATUTORY PROVISIONS.**

Whether a person, who by his labor changes materials purchased before selling them as finished commodities, "makes it his business" to sell commodities which he has purchased, within the meaning of such act, depends upon the peculiar facts of each case; the extent to which such materials are changed being an important element for consideration.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 34; Dec. Dig. § 47.*]

**4. FRAUDULENT CONVEYANCES (§ 47*)—SALES
IN BULK—STATUTORY PROVISIONS.**

Whether one selling goods at retail in connection with another business "makes it his business" to sell commodities in small quantities for the purpose of making a profit, within the meaning of that act, depends upon the peculiar facts of each case; the extent to which retail sales are made being given proper consideration.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 34; Dec. Dig. § 47.*]

**5. FRAUDULENT CONVEYANCES (§ 47*)—SALES
IN BULK—STATUTORY PROVISIONS.**

Persons engaged in the stonecutters' trade, who purchase stone slabs, and whose regular business is the furnishing to order of stone articles made therefrom which are chiseled, tooled, cut, dressed, and polished in accordance with the particular order, and the value of which is formed in a large part of the labor and not of the material, do not make it their business to sell for a profit such stone slabs within the meaning of such act, but are rather

engaged in the business of selling for a profit the product of their own labor, and hence a sale by them of their entire stock in trade was not void because that act was not complied with.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 34; Dec. Dig. § 47.*]

Appeal from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Action by the Connecticut Steam Brown Stone Company against Henry L. Lewis and others on a bond given by defendants upon the dissolution of an attachment. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

Henry C. Stevenson, of Bridgeport, for appellants. Thomas M. Cullinan, of Bridgeport, for appellee.

HALL, C. J. On February 11, 1911, the plaintiff company brought an action against William B. Mahoney and Thomas Gill and attached as their goods certain personal property of the value of about \$700, which prior to January 10, 1911, had belonged to Mahoney and Gill as proprietors of a stoneyard conducted by them in Bridgeport, and which on said January 10th they had by written bill of sale transferred to the defendant Lewis, but without having recorded a notice of their intention to make such sale, as the plaintiff claims was required by the provisions of chapter 21 of the Public Acts of 1909. The bond in suit was given by the defendants to procure the release of said attachment. The plaintiff subsequently obtained judgment against Mahoney and Gill for \$714, and afterwards, upon their refusal and that of the defendants to pay said judgment, brought this action.

The only question involved in this case is whether, upon the facts found, the provisions of said chapter 21 are applicable to the sale of January 11, 1911, by Mahoney and Gill, to the defendant Lewis. Said section, which repeals previous statutes upon this subject, reads as follows: "When any person who makes it his business to buy commodities and sell the same in small quantities for the purpose of making a profit, shall, at a single transaction not in the regular course of business, sell, assign, or deliver the whole or a large part of his stock in trade, such sale shall be void as against all persons who are his creditors at the time of such sale, assignment, or delivery, unless he shall, not less than ten days nor more than thirty days previous to such sale, assignment, or delivery, cause to be recorded in the town clerk's office in the town in which such vendor conducts his said business, a notice of his intention to make such sale, assignment, or delivery, which notice shall be in writing, describing in general terms the property to be so sold, assigned, or delivered, and all conditions of such sale, assignment, or delivery, and the parties thereto; and said

notice shall be signed by such person or in his name by his attorney."

Concerning the question of the applicability of this statute the trial court has found these further facts: Mahoney and Gill operated a stoneyard with working benches and tables, grinding wheels and general tools of the stone cutters' trade. They bought building stone, in quantity, sawed into slabs of various sizes and shapes, and delivered to them at their yard, in that form. They, there, cut the slabs into smaller pieces of various shapes and sizes to agree with orders given to them to furnish articles of stone to be used in the construction of buildings or their appurtenances. These articles were made to order for particular jobs, and the stone had to be chiseled, tooled, cut, dressed, and polished in accordance with the particular order. They were not used in the identical size and shape that the slabs were in when received. The value of the finished products of the plant was in a large proportion made up of labor and not of material. No change was made in the structure, and the smaller pieces when cut and dressed were easily recognizable as parts of the larger slabs from which they had been cut. They sometimes cut up the stone into sills and similar articles, before receiving orders therefor, and occasionally sold such stone articles to a purchaser who had not previously ordered them; but their regular business was the furnishing stone articles cut and shaped to order. Prior to and ever since January 10, 1911, the plaintiff has been a creditor of Mahoney and Gill. The bill of sale of January 10th described the goods sold as "all cut and uncut stone, tools, traveling crane, building, office furniture, fences, toolshed, and all the property at our stoneyard at * * *." The sale was made in good faith, for a valuable consideration, and Lewis took immediate possession of the property sold, and held such possession at the time of the attachment. The sale was not in the regular course of the business of Mahoney and Gill, and included all their stock in trade. Upon these facts the trial court held that the statute cited was applicable to said sale, and rendered judgment for the plaintiff for a sum representing only what was found to be the value of the attachable interest of Mahoney and Gill in the stone attached by the plaintiff, with interest thereon.

[1] Manifestly the act in question does not apply to sales by persons who sell only at wholesale, whether or not they themselves produce, manufacture, or purchase the goods so sold by them or change the form of the goods or material purchased by them and which form a part of the commodities sold.

[2] It is also manifest that the act does not apply to persons who sell goods at retail, which they have not bought, but which they can fairly be said to have themselves produced or manufactured. The act in terms

applies only to sales of commodities, by persons who make it a business to *buy* and to *sell* in small quantities the commodities which *they have purchased*. Some difficulties may arise in determining whether the statute applies when an alleged retail dealer substantially changes the form or character of the goods, or materials, which he has purchased, before he offers them for sale, and also when one sells some goods at retail, in connection with another and perhaps much larger business. The questions which arise in these cases are whether it can rightly be said that the alleged retail dealer is engaged in the business of selling the commodities *which he has bought* when the articles which he sells are from his own labor upon them, made materially different in form or character from those which he purchased, and whether one who sells commodities at retail in connection with some other business is, within the meaning of the statute, one who "makes it *his business*" to sell such commodities in small quantities.

[3] We can lay down no definite rule which will always furnish an answer to these questions. The extent to which the materials purchased are changed by the labor of the purchaser before they are sold as finished commodities is always an important element to be considered in determining whether one selling commodities so changed can properly be said to be one who "makes it his business" to sell for the purpose of making a profit *the commodities which he has purchased*.

[4] And so too the *extent* to which retail sales are made by one, in connection with another business, should be considered in deciding whether the person making such retail sales can fairly be said to be one "who makes it his *business*" to so sell commodities in small quantities for the purpose of making a profit. One who purchases metals and wood with which to manufacture and sell sewing machines at retail can hardly be said to make it his business to buy such original materials and sell *the same* for the purpose of making a profit upon the commodities which he has bought, nor can a wholesale dealer or manufacturer, because he has occasionally made a sale of goods at retail, properly be said to *make it his business* to sell commodities in small quantities for the purpose of making a profit upon the goods thus sold. But when the facts, regarding the amount of the labor bestowed by the retail dealer upon the purchased materials or commodities, or regarding the extent of one's sales at retail in connection with another business, differ from the supposed cases just stated, the questions of whether they come within the statute may become more difficult. In such cases each must be determined by its own peculiar facts, rather than by any fixed rule.

[5] In the case at bar these facts appear: The goods which Mahoney and Gill bought

of the plaintiffs, and perhaps of others, were stone slabs to be made into stone articles of a certain kind. Mahoney and Gill never sold these stone slabs in the form and condition in which they bought them, but in a form, size, and condition materially changed by their own labor. In the form and condition in which they were purchased by Mahoney and Gill, the stone slabs were evidently not salable in the business in which Mahoney and Gill were engaged. The regular business of Mahoney and Gill was the furnishing to order, of "stone articles," not of stone slabs. These stone articles were "chiseled, tooled, cut, dressed, and polished in accordance with the particular order." The value of these stone articles so formed was "in a large proportion made up of labor and not of material."

These facts do not bring the case within the statute. We think it cannot fairly be said that Mahoney and Gill made it their business to sell for a profit the stone slabs which they purchased of the plaintiff and others. They were rather engaged in the business of selling for a profit the product of their own labor.

There is error, and the judgment of the court of common pleas is reversed, and the case remanded, with direction to render judgment in favor of the defendants. The other Judges concurred.

SHAW et al. v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut. Dec. 19, 1912.)

LICENSES (§ 36*)—AUTOMOBILES.

Laws 1909, c. 211, § 3, provides that any dealer in motor vehicles may, instead of registering each vehicle "owned or controlled by him," apply for a general distinguishing number, and a certificate of registration of such number may be assigned to him, and every vehicle owned or controlled by such dealer shall until sold or loaned for more than five successive days be regarded as registered under such number, and that such certificate need not be carried on the vehicle, but it shall display the operator's license number. Section 2 provides for registration by the owner. *Held*, that while an owner could not have his unregistered automobile stored in a dealer's garage and continue to use it under the dealer's general registration number, if an unregistered car was placed, in good faith, by the owner in a dealer's garage for sale and the dealer given full control thereof, it could be afterwards loaned to the owner and used under the dealer's general registration number without the owner being deprived of the right to recover for injuries thereto while so used by section 16, which prohibits recovery by the owner of a motor vehicle not registered according to sections 2 or 3.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 70-72; Dec. Dig. § 36.*]

Appeal from Superior Court, Fairfield County; Howard B. Scott, Judge.

Action by Walter B. Shaw and another against the Connecticut Company. From the judgment for plaintiffs, defendant appeals. Affirmed.

Joseph F. Berry, of New Haven, for the appellant. James A. Marr and Frank L. Wilder, both of Bridgeport, for appellees.

THAYER, J. The action is for injury to an automobile which at the time of the injury, November 11, 1910, was being operated upon one of the public highways of this state. It is provided in section 16, c. 211, of the Public Acts of 1909, that "no recovery shall be had in the courts of this state by the owner * * * of a motor vehicle which has not been registered in accordance with section 2 or section 3 of this act, for any injury to person or property received by reason of the operation of said motor vehicle in or upon the public highways of this state," etc.

The defendant claims that the plaintiff's automobile was not duly registered at the time of the injury, and consequently that there can be no recovery. It is agreed that the vehicle was not registered in accordance with section 2 of the act which provides for the registration by an owner. The only question before us on the appeal is whether upon the evidence the jury were warranted in finding that the vehicle was duly registered under section 3, which provides for the registration of such vehicles by a dealer, liveryman, or manufacturer. That section provides that "any dealer, liveryman, or manufacturer of motor vehicles may, instead of registering each motor vehicle owned or controlled by him, make application to said secretary for a general distinguishing number or mark, and the secretary may * * * issue to the applicant a certificate of registration containing the name, place of residence and business address of the applicant and the general distinguishing number or mark assigned to him, * * * and every motor vehicle owned or controlled by such manufacturer, dealer or liveryman shall, until sold or loaned for a period of more than five successive days, be regarded as registered under and have assigned to it such distinguishing number or mark. Manufacturers, dealers or liverymen shall not be required to carry such certificates upon the vehicles registered under the provisions of this section but every person operating a motor vehicle under the provisions of this section shall display on such vehicle in such manner as said secretary may prescribe the operator's license number assigned to such person." Section 4 provides that every motor vehicle shall at all times while in use or operation upon the public highways have displayed upon it at front and rear the registered number plates or markers furnished by the secretary.

The jury would be warranted in finding from the evidence that the plaintiffs purchased the automobile in question from a bankrupt estate, about two weeks before the injury, for \$1,200; that they at once placed

it with one Ford, a dealer in automobiles, for sale at \$1,800, under an agreement that he should keep it at his garage until sold, that he should have absolute and sole charge and control of it, that they should pay him \$5 per month for storage, and when sold that he should receive 5 per cent. commission for selling it. The evidence also warranted a finding that Ford at this time kept a public garage and was a registered dealer in motor vehicles; that on the day of the injury the plaintiffs requested him to permit them to use the automobile to which he consented; that he was told by them that a brother of one of the plaintiffs, a licensed operator, would operate it for them, and Ford thereupon attached the license number of the operator thereto; that when the automobile was taken from the garage by the plaintiffs it had this number attached to it as well as the registration number of the dealer properly attached; and that while being run upon the highway with the numbers so attached, by such operator accompanied by the plaintiffs, a collision occurred between it and one of the defendant's cars resulting in the injury complained of. The question is: These facts being assumed to be established, was the automobile at the time of its injury duly registered in accordance with section 3 above quoted?

Section 2 requires that every "owner of one or more motor vehicles" shall cause each one "owned or controlled by him" to be registered by the Secretary of State. Section 3 in terms excepts manufacturers, dealers, and liverymen from this requirement and permits them to register under one general number or distinguishing mark all the motor vehicles "owned or controlled" by them. The registration fee exacted from a dealer for all his cars is less than that which is exacted from other owners for the registration of a single high-powered car. By reason of their business a preference is thus given to manufacturers, dealers, and liverymen who own or control such cars. It was not intended that others, under cover of the general number or distinguishing mark of the dealer, should be able to operate cars belonging to or controlled by themselves. The law is not to be so construed as to permit this. But a dealer in his business may undertake the sale for another of the latter's car. It is not to be doubted that the intention was that in such cases, where there is a bona fide arrangement between the owner and dealer for the sale, the latter may take the car into his garage for that purpose, and that while so held by him it would be registered under his general number and might be operated by him or by licensed operators authorized by him upon the highways. But it was not the intention to authorize any arrangement whereby an owner could obtain the storage of his unregistered car at a dealer's garage and under the dealer's registration number continue in the use of the car, although the

latter had authority to sell the car. This would be a plain violation of the statute by enabling the owner to evade the proper registration of his car.

In the present case it was claimed that the owners had placed their car in the garage of a dealer for sale, giving him full possession and control of the same. If they had done so, we think that the car was controlled by him within the meaning of the statute, so that it would be registered under his registration number. The arrangement was made by parol, and whether the parties had in good faith made such an arrangement as claimed was a question for the jury under proper instructions. No complaint is made of the charge, it is not before us, and we must assume that it was correct. It results from the verdict, therefore, that the car was properly registered by the dealer.

The defendant claims that, if this be so, Ford was a mere bailee of the car; that the plaintiffs when they took it from his possession on the day of the injury were in control of it and, so far as he was concerned, could do with it as they chose; that it had thus passed out of his possession and control and could no longer be regarded as registered under his registration number or mark. When a car is duly registered, the registration number attaches to the car. Without such registration number it cannot be lawfully operated upon the highways; it is a nuisance there. When duly registered it retains its registration during the remainder of the registration year—that is, until the following January—unless the certificate of registration is revoked for cause, or the ownership of the car is previously transferred or, in the case of a dealer, the car is loaned for a period of more than five successive days. The statute by implication permits the dealer to loan the cars owned and controlled by him after he has obtained his general registration number. It does not provide that he shall not loan a car so registered and controlled by him to the owner of the car. If the plaintiffs had given Ford a written lease of this car for the term of a year, the latter's right to permit them to use the car for a single afternoon would hardly be questioned. The only suggested objection to the owner's use of the car when registered under a dealer's distinguishing number, namely, the opportunity thus afforded him to escape the payment of a registration fee, would exist in the case of the lease as clearly as in the case before us. If the arrangement between the owner and the dealer is made in good faith and not for the purpose of evading the law, there is no reason for prohibiting a loan of the car to the owner in the one case which does not exist in the other. We do not think that the statute intends that the dealer's right to loan the car to the owner shall be lost in the latter by the fact that the owner may end the bailment at any time and that when he obtains possession of the car the

dealer's control of it is technically ended regardless of the intent and agreement of the parties.

The evidence would warrant the jury in finding that it was the intention of the plaintiffs to return the car to Ford's garage and his possession after its use on the day of the injury. We think that the car was to be regarded as registered under Ford's registration number at the time of the injury, and that there was no error in the court's refusal to set the verdict aside. There is no error. The other Judges concurred.

WHITEHEAD v. ROBERTS et al.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1912.)

1. PROHIBITION (§ 5*)—GROUNDS—ASSUMPTION OF JURISDICTION.

The mere act of a probate court in issuing a notice of hearing as required by Gen. St. 1902, § 301, upon the filing of an application for the probate of a will, was not an assumption of jurisdiction and could not as such form the basis for a writ of prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 20-30; Dec. Dig. § 5.*]

2. WILLS (§ 309*)—PROBATE—JURISDICTION—PROBATE COURT—APPEALABLE ORDER.

The probate court has jurisdiction, on application to admit a will to probate, to entertain a claim that the testatrix died a resident of another state, and to make a decision thereon from which an appeal will lie to the superior court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 735-737; Dec. Dig. § 309.*]

3. PROHIBITION (§ 25*)—DEMURRER—EFFECT.

A demurrer to an application for a writ of prohibition to restrain the probate court from entertaining jurisdiction of the probate of a will, where such application claimed that the testatrix died a resident of another state, admitted that the testatrix resided in the other state only for the purpose of testing the sufficiency of the application, and was not an admission that the probate court could not entertain jurisdiction of the probate of the will.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 74; Dec. Dig. § 25.*]

4. PROHIBITION (§ 11*)—GROUNDS—ANTICIPATED ERROR.

That the probate court might render an erroneous decision on the question of the testatrix's residence at the time of her death could not be ground for issuing a writ of prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 36; Dec. Dig. § 11.*]

5. PROHIBITION (§ 10*)—GROUNDS—ADEQUACY OF REMEDY OTHERWISE—PROBATE PROCEEDINGS—"WRIT OF PROHIBITION."

The "writ of prohibition," being a prerogative writ to be issued with great caution to secure order and regularity in all tribunals where there is no other regular and ordinary remedy, will not lie to arrest the proceedings in the probate court upon the ground that the testator was not a resident of the district; the issue of residence being open to contest in the probate court and reviewable by appeal.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5668-5674; vol. 8, p. 7767.]

Appeal from Superior Court, Hartford County; Ralph Wheeler, Judge.

Application for writ of prohibition by Charlotte Lucille Whitehead against Owen F. Roberts and others. From a judgment sustaining a demurrer to and dismissing the application, plaintiff appeals. No error.

William Waldo Hyde and Alvan Waldo Hyde, both of Hartford, for appellant. Lucius F. Robinson and John T. Robinson, both of Hartford, for appellees.

HALL, C. J. The plaintiff is a residuary legatee under the will of Cornelia W. Roberts, deceased. The defendant Owen F. Roberts is an executor under said will, and the defendant Miller is the judge of probate for the district of Avon in this state. The application contains these allegations among others: "The court of probate for the probate district of Avon, and state of Connecticut, is exceeding its jurisdiction in that it has taken cognizance of the application of Owen F. Roberts for the admission to probate of the will of Cornelia W. Roberts, late of the city, county, and state of New York, deceased, and has assumed jurisdiction of the settlement of the estate bequeathed and devised by said will as a will of a resident of the probate district of Avon. The said Cornelia W. Roberts died on the — day of —, 1912, a resident of and domiciled in said state of New York, leaving a will in which the said Charlotte Lucille Whitehead is named as residuary legatee and the said Owen F. Roberts, husband of said deceased, and Louis Case Ledyard, Jr., are named as executors. Subsequent to the death of the said Cornelia W. Roberts, said Owen F. Roberts, her husband, delivered said will into the custody of said court of probate for the district of Avon and filed his application alleging that the said Cornelia W. Roberts died a resident of said district and praying that said will be admitted to probate. Upon said application, said court of probate for the district of Avon issued an order of notice for a hearing upon said application to be held upon the 5th day of September, 1912, and upon said date the parties appeared and said hearing was continued until the 1st day of October, 1912." Upon this application an order was issued requiring the defendants to appear before the superior court and show cause why the application should not be granted, and ordering that no further action be taken by the court of probate in the matter of the probate of said will pending the hearing upon the rule to show cause.

Upon said order to show cause the defendant Roberts appeared and demurred to the application. The demurrer was sustained by the superior court. There were nine grounds of demurrer, which need not be repeated

here. The principal questions presented by the demurrer are these: First. Do the facts alleged in the application show that the probate court has assumed jurisdiction of the settlement of the estate of the testatrix? Second. Does the law give to the plaintiff an opportunity to present in the probate court, and in the superior court by an appeal, the question of the residence of the testatrix at the time of her death? Third. If such opportunity is afforded the plaintiff, is he entitled to the writ of prohibition asked for in the application?

[1] The averment of the application respecting the first question is that the probate court has taken cognizance of the application of the executor Roberts for the admission of the will to probate, and has assumed jurisdiction of the estate of Mrs. Roberts as the estate of one who died a resident of the probate district of Avon. What it is alleged the executor did was to deliver the will into the custody of the court of probate, and to file an application with that court alleging that the testatrix died a resident of said district, and asking that the will be admitted to probate in that district. This the law required the executor to do if he claimed that the testatrix last dwelt in the district of Avon.

The only way in which it is alleged that the court of probate assumed jurisdiction of the settlement of the estate was to issue an order of notice for a hearing on a named day, upon said application. This the law required the court of probate, upon such application, to do before admitting the will to probate. General Statutes, § 301. This hearing, owing to the restraining order upon the application for the writ of prohibition, has never been had. The court of probate has therefore not admitted the will in question to probate, nor has it ever decided whether the averment of the application for the probate of the will that the testatrix died a resident of the probate district of Avon is or is not true, nor whether the probate court of Avon has or has not jurisdiction of the settlement of Mrs. Roberts' estate.

[2] Regarding the second question, the law would have permitted the plaintiff Whitehead to present his claim that Mrs. Roberts died a resident of New York, and to present his evidence in support of such claim at the hearing fixed by the probate court for September 5th, had he chosen to do so, and it would not only have been within the jurisdiction of the court of probate to decide that question, but it would have been its duty to do so. Gen. Statutes, *supra*; Beach's Appeal, 76 Conn. 118, 122, 55 Atl. 596; Mack's Appeal, 71 Conn. 122, 130, 41 Atl. 242; Culver's Appeal, 48 Conn. 165, 171. It is always competent for a court to institute inquiries into matters of fact on which its jurisdiction depends. *Huntington v. Birch*, 12 Conn. 142, 152. In tribunals of limited jurisdiction,

like our courts of probate in which there is no presumption in favor of the existence of jurisdictional facts, they must appear of record in order to give validity to their orders and judgments, and such facts must be found by such tribunals.

[3] The effect of the demurrer to the application for a writ of prohibition which alleges that the testatrix died a resident of New York state is not an admission that the court of probate could not properly entertain the application of the executor for the probate of the will. That application alleged that the testatrix died a resident of the probate district of Avon. The demurrer was a proper method of raising the question of whether the matter of the residence of the testatrix should be first decided by the superior court upon a writ of prohibition or by the court of probate. It admitted the fact that the testatrix resided in New York only for the purpose of testing the sufficiency of the application for a writ of prohibition.

[4] As the court of probate has jurisdiction to primarily decide the question of the residence of the testatrix, it is to be presumed that it will decide it correctly. *Butler v. Sisson*, 49 Conn. 580, 581. If it decides it in favor of the present plaintiff, he will not be so aggrieved as to entitle him to a writ of prohibition merely because the probate court's decision of such jurisdictional question may be collaterally attacked. Such judgment of the probate court would stand as a valid decision of a jurisdictional fact until directly or collaterally impeached. As the court of probate has jurisdiction to so determine the preliminary question of the testatrix's residence, this plaintiff would have a right of appeal from an adverse decision of the court of probate upon that question, and the right to have the question of residence decided by the superior court and the judgment of that court upon that question of fact would be conclusive, and, if in favor of the appellant, the judgment of the probate court would be set aside.

From certain language in the opinion in *Olmstead's Appeal*, 43 Conn. 110, and which is referred to in *Fayerweather v. Monson*, 61 Conn. 431, 443, 23 Atl. 878, it seems to be claimed in this case that an appeal by this plaintiff to the superior court, from a decision adverse to him upon said question of residence, and based upon the alleged fact that the testatrix died a resident of New York and that therefore the probate court of Avon had no jurisdiction of the settlement of her estate, would not lie, and, if attempted to be taken, such appeal, as soon as it was discovered that neither the probate court of Avon nor the superior court had jurisdiction to admit the Mrs. Roberts will to probate or to settle her estate, would be dismissed by the superior court, without any decision of the question of the residence of the testatrix.

We find in *Olmstead's Appeal*, 43 Conn.

113, this language: "If it be true, as the appellant alleges, that the superior court has no jurisdiction; so far from constituting a reason for an appeal to it, it constitutes a conclusive reason why an appeal should not be taken"—and on page 119 of 43 Conn.: "It was the duty of that court (the superior court) to dismiss the case whenever it discovered that it had no jurisdiction over it. * * * That case was an appeal from the doings of commissioners. The allowance of certain claims and the disallowance of others were two of the reasons of appeal assigned. The third was that Mr. Olmstead was not, at the time of his death, a resident of the probate district, the probate court of which had assumed the settlement of his estate and had appointed the commissioners, who had passed upon the claims in question, and that therefore neither said court of probate nor the superior court "had jurisdiction of this case." Evidently no question of jurisdiction had been raised or decided at the hearing before the commissioners or in the probate court. Upon the trial in the superior court the appellant offered evidence to prove that the deceased was not a resident of the probate district in which the estate was in process of settlement, and the superior court rejected it. This court, in granting a new trial, said, in effect, that while the fact of such nonresidence was not a proper reason of appeal from the doings of commissioners, for the purpose of obtaining a rehearing upon the question of the allowance and disallowance of certain claims by the commissioners, it was provable for the purpose of showing that neither the superior court nor the court of probate had jurisdiction of the case; that, if the alleged fact of nonresidence was proved, it would be "quite idle to examine the validity of the claims presented against the estate"; and that, if the superior court should dismiss the appeal for such want of jurisdiction, it would be "a perpetual suspension of proceedings in the court of probate." It follows, therefore, that such dismissal of the case by the superior court would involve a decision by that court that the court of probate had no jurisdiction of the proceeding before it.

The language referred to in the opinion in Olmstead's Appeal does not mean that an erroneous decision or action by a probate court regarding a jurisdictional fact may not be made the ground of an appeal taken to the superior court for the purpose of procuring a reversal of such decision or action. Section 406 of the General Statutes provides that "any person aggrieved by any order, decree or denial of a court of probate in any matter, * * * may appeal therefrom to the superior court. * * *"

In Hoyt v. Brooks, 10 Conn. 188, 192, it is said that "every act of a court of probate is subject to revision by appeal."

In *Sturges v. Peck*, 12 Conn. 139, 141, it is said that, even if an order of a court of probate is void, an appeal may be very appropriate to "place upon the record the real truth of the case and save the proceedings from all appearance of inconsistency. * * *"

In *Beach's Appeal*, 76 Conn. 118, 121, 55 Atl. 596, a court of probate of this state passed an order appointing an administrator on the estate of Beach. An appeal was taken to the superior court upon the ground that Beach at the time of his death resided and was domiciled in New York state, and that neither the court of probate nor the superior court of this state had jurisdiction to appoint such administrator. Upon the reservation of the appeal to this court, we said: "Upon this appeal the superior court had full jurisdiction of the subject-matter, * * * and, within the issues presented by the appeal, the court tries the cause de novo. The issues are these: Was Moses S. Beach, at the time of his death, an inhabitant of this state. The appeal alleges that he was not an inhabitant, and did not leave property in this state. * * * If the court finds that the intestate did not live in this state and did not leave property here, the appellant is entitled to judgment, and the probate order must be set aside."

[5] The plaintiff claims that although she may have such remedy in the probate court, and by appeal to the superior court, it is not an adequate remedy and that she is still entitled to a writ of prohibition, and, among other authorities, cites the case of *Fayerweather v. Monson*, supra, in support of that claim. It is true that it was held that upon the facts in that case the writ of prohibition should be issued. As the question whether the remedies afforded by a hearing in the probate court and by appeal to the superior court are equally effective with that given by a writ of prohibition is to be determined largely by the peculiar facts of each case (*State v. Elkin*, 130 Mo. 90, 109, 30 S. W. 333, 31 S. W. 1037), we have no occasion to question here the correctness of the decision in that case. But, as the facts in that case differ essentially from those in the case at bar, it cannot control the decision of this case. The decision in that case seems to have been based mainly upon the fact, regarding which there was apparently no dispute, that the insolvency petition, under which the probate court was about to appoint a trustee, had been withdrawn, and that the facts apparent upon the record and admitted by the application for a revival of the insolvency petition, and for the appointment of a trustee, therefore clearly showed that neither the probate court nor the superior court could have jurisdiction to appoint the trustee, which the probate court had decided to appoint.

In the case before us it was alleged in the application to admit the will to probate that

the deceased resided in the probate district of Avon, and the truth of that allegation has not been passed upon by the probate court. The plaintiff desires to contest the truth of this averment. That seems to be the only dispute between the parties, and that dispute the plaintiff claims the right to have settled by the superior court upon a writ of prohibition rather than in the ordinary manner by the probate court primarily, to which the settlement of the estates of deceased persons is, in this state, committed by statute and by the superior court only when an appeal is taken to it from the decision of the court of probate.

That the probate court may render an erroneous decision can never be a ground for issuing a writ of prohibition. 1 Swift's Dig. 565. It is a prerogative writ to be issued with great caution and for securing order and regularity in all tribunals, where there is no other regular and ordinary remedy. *Sherwood, Receiver, v. New England Knitting Co.*, 68 Conn. 543, 549, 37 Atl. 388. Where, as in this state, there is a remedy by appeal, it will not lie to arrest the proceedings in a probate court upon the ground that the decedent was not a resident of the district in the probate court of which a will is offered to be proved. *People v. Surrogate Court*, 36 Hun (N. Y.) 218; *State v. Superior Court*, 11 Wash. 111, 39 Pac. 818; *Preston v. Fidelity Trust Co.*, 94 Ky. 295, 22 S. W. 318; *State v. Withrow*, 141 Mo. 69, 41 S. W. 980.

The superior court committed no error in sustaining the demurrer to the application for a writ of prohibition.

There is no error. The other Judges concurred.

HOPE v. VALENTE.

(Supreme Court of Errors of Connecticut. Dec. 19, 1912.)

1. MUNICIPAL CORPORATIONS (§ 706*)—PERSONAL INJURY—ANIMALS ON STREET—NEGLIGENCE—COMPLAINT.

A complaint alleging that plaintiff was kicked by defendant's horse "negligently left unattended, unguarded, and unharnessed and tied to the rear of a wagon," in a street, and further alleging that the horse was a vicious, kicking horse, and that defendant knew of this vice, charges two acts of negligence; one in leaving the horse in such condition and place, independent of its vice of kicking, the other in so leaving it in view of its vice.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—PERSONAL INJURY—ANIMAL ON STREET—NEGLIGENCE—EVIDENCE.

Whether, regardless of its viciousness, it is negligence to leave a horse unharnessed tied to, and eating from, the rear of a wagon at the side of a street, where the sidewalk is obstructed, in going around which in the street a

pedestrian is kicked by it, is a question for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

3. APPEAL AND ERROR (§ 882*) — INSTRUCTIONS—REQUESTS.

One may not complain that the charge used the term "acting within the scope of their authority" without defining it; it in this respect following his request, the court not being required to go further than he requested.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

4. TRIAL (§ 60*)—RECEPTION OF EVIDENCE—PRELIMINARY PROOF—IDENTITY.

Evidence tending to prove that the horse which witness cared for and testified was vicious was the one which kicked plaintiff, and was defendant's horse, is sufficient foundation as to identity for admission of his testimony, though the question whether identity is fully established is still for the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 141-145; Dec. Dig. § 60.*]

5. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—INSTRUCTIONS.

Admission of testimony that information of the viciousness of defendant's horse was communicated to his servant who came to the hospital for it, if improper, because he was not shown to have had general charge of it, was harmless, the jury having been charged that knowledge of a servant was only imputable to the master where acquired when acting within the fair scope of his agency, and that knowledge of any servant of defendant in respect to its viciousness to be imputable to defendant should be acquired while driving it or having the management of it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

6. EVIDENCE (§ 262*)—TESTIMONY ON FORMER TRIAL.

Plaintiff may introduce a portion of defendant's testimony on a former trial, claimed to be an admission of a material fact, without putting in all of defendant's testimony at such trial, that relating to other facts as well as the one in question.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1019-1021; Dec. Dig. § 262.*]

Appeal from Superior Court, New Haven County; William H. Williams, Judge.

Action by Thomas Hope against Pasquale Valente. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Spotswood D. Bowers, of Bridgeport, and Benjamin Slade, of New Haven, for appellant. George E. Beers and Frederick C. Russell, both of New Haven, for appellee.

THAYER, J. [1] The plaintiff alleges that he was kicked by a horse of the defendant which had been "negligently left unattended, unguarded, and unharnessed and tied to the rear of a wagon" in Orange street. He claimed, further, that the horse was a vicious, kicking horse, and that the defendant knew of this vice. The complaint has been construed as charging two acts of negligence. *Hope v. Valente*, 84 Conn. 248, 250, 79 Atl. 583. There was evidence tending to prove that the defendant was engaged in construct-

ing two houses on Orange street, that at the time of the plaintiff's injury there were several piles of brick about four feet high in the street on the grass plat between the sidewalk and the curbstone, and that there were heaps of sand, broken bricks, and pieces of lumber blocking the sidewalk in front of the premises. In the gutter of the street about in front of the premises stood the defendant's wagon with a horse hitched thereto, and to the rear of this wagon was a chestnut mare belonging to the defendant unharnessed and tied by a halter to the rear of the wagon from which it was feeding. The plaintiff claimed that in passing along the street he turned from the obstructed sidewalk into the street proper; that, having passed at the rear of the chestnut mare, he turned to pass parallel with her at a distance of about 10 feet, when she swung around and kicked him.

[2] The defendant assigns as error the court's instruction that, if the jury found it proven that the defendant's horse "was left by him unattended, unguarded, and unharnessed and tied to his wagon at the time and place in question, they should then determine whether in so doing he was negligent—that is, whether he acted as a reasonably prudent man would have acted under the circumstances"—and that if they found that the defendant so left the horse and was in so doing negligent, and the plaintiff without negligence on his part was kicked by it, he might recover. This plainly left it for the jury to determine whether it was negligence to leave the horse tied to the wagon in the street, although she was gentle and free from vicious habits. This is the precise ground of the defendant's complaint of the instruction. It is said that, as the horse is a domestic animal not naturally vicious or inclined to mischief, an owner is not negligent in leaving it tied in the street, unless the individual horse so left is vicious, and the owner knows it. But a person may be negligent in the use of an instrument which in itself is entirely harmless. We have said in the case of a runaway horse that it was a question for the jury whether it was negligence to leave the horse unhitched in the street under circumstances disclosed by the evidence, regardless of its habit of running away. *Haywood v. Hamm*, 77 Conn. 158, 160, 58 Atl. 695. Under the plaintiff's claim in the present case, the defendant was not using the street for the purpose of travel for which it was provided. The horse was not under the restraint which it would have been if attached in the ordinary manner to a vehicle. It was unharnessed. It was feeding, which might or might not render it impatient of strangers in its vicinity. It was tied to the wagon so that it could not escape if startled at its feeding by the approach of passers-by. The sidewalk was obstructed so that travel might thereby

be diverted to the traveled part of the street in the vicinity of the horse. Under the facts claimed to have been proved, it was proper to leave it to the jury to determine whether, regardless of the viciousness of the defendant's horse, he was negligent in leaving it in the street in the manner claimed.

[3] Upon the question of the defendant's knowledge of the vicious propensities of his horse, the jury were instructed that "the knowledge of any servant or agent in respect to any vicious propensity or disposition of the horse in question acquired while driving or having the management, care, or control of said horse by the direction or authority of the defendant will be imputed to the defendant." This is excepted to by the defendant as permitting the knowledge of any one having the management, care, or control of the horse to be imputed to the defendant. This criticism does not take notice of the fact that the charge confines the knowledge to "any servant or agent of the defendant." The jury were later told that this knowledge must have been acquired by the servant or agent while acting within the fair scope of his agency or employment. It is conceded by the defendant's counsel in their brief that this charge could not be complained of had the court defined what constituted "acting within the scope of their authority." But in this respect the charge followed the ninth request of the defendant, and the court was not required to go further than the defendant requested.

[4] The first 33 assignments of error relate to the admission of the testimony of O'May, a witness for the plaintiff, who was a groom at the stable of a veterinary, and testified, in substance, that a chestnut mare which was brought to the stable and treated there and taken away a short time before the plaintiff's injury was a vicious kicking animal, that he informed the servant who came for her that she was a kicker. He testified, also, that he had afterwards seen the same mare in the defendant's possession, and in the possession of one Dominic Manturio, a servant of the defendant, and had also seen her in front of the Orange street premises. It is claimed that this evidence tending to show viciousness was not admissible until the identity of the horse at the stable with the one which did the plaintiff injury had been established, and that the question of identity was one for the court. We said when this case was formerly before us (84 Conn. 248, 254, 79 Atl. 583) that this evidence should have been excluded until the identity of the horse had been shown. And we said that other evidence to the same point should have been admitted because the identity was so clearly shown by it. Without some testimony tending to show that the horse at the stable was the one which injured the plaintiff, the evidence of its viciousness was ir-

relevant and immaterial. Whether a proper foundation for admitting this evidence had been laid was a preliminary question for the trial judge; but whether the identity was fully established was a question for the jury upon all the evidence in the case, and they were so told in the charge, and instructed that, if it was not the same horse, O'May's testimony was to be disregarded. The finding shows that at the time the testimony was admitted there was evidence tending to prove that the horse which O'May cared for and testified was vicious was the horse which injured the plaintiff, and was the defendant's horse. This was sufficient to justify the court in admitting the testimony.

[5] It is also objected to this testimony that that portion of it was improper which tended to show that information of the viciousness of the horse was communicated by O'May to the servant of the defendant who came to the hospital for the horse, because such knowledge could not be imputed to the master, unless the servant is shown to have had general charge of the horse. It does not appear that the testimony was objected to upon this ground at the time it was admitted. So far as appears, the entire testimony was objected to because as claimed there had been no identification of the horse. However this may be, the jury were told in the charge that knowledge of a servant was only imputable to the master when acquired when acting within the fair scope of his agency, and also that knowledge of any servant of the defendant in respect to the viciousness of the horse to be imputable to the defendant should be acquired while driving or having the management of the horse. The defendant could not, therefore, have been harmed by the testimony if improperly admitted.

[6] The plaintiff offered in chief a portion of the defendant's testimony upon the former trial of the case which was claimed as an admission of knowledge by the defendant of the viciousness of the horse. This was objected to upon the ground that the defendant's entire testimony upon the former trial was not offered; the defendant's counsel stating that no objection would be made to the admission of the defendant's entire testimony. An admission by the defendant of a material fact was admissible whether made in court or elsewhere, and we know of no rule which would compel the plaintiff to lose the admission unless he put in the entire evidence of the defendant, that relating to other facts as well as to the one in question. Such procedure would very likely result in the plaintiff being compelled to offer evidence against himself, and perhaps enable the defendant to escape testifying upon the second trial.

The other questions raised by the appeal are either specifically waived in the defendant's brief, or have not been pursued there-

in, or in the oral argument. They therefore call for no discussion here.

There is no error. The other Judges concurred.

STERN v. MAX RIPPS CO.

(Supreme Court of Errors of Connecticut. Dec. 19, 1912.)

1. APPEAL AND ERROR (§ 743*)—ASSIGNMENT OF ERRORS—SPECIFICATION.

Under Gen. St. 1902, § 798, which prescribes a form of appeal, and requires appellant to state distinctly the specific errors complained of, an assignment of error in the rulings and instructions as they appear in the record and bill of exceptions is insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2999, 3011; Dec. Dig. § 743.*]

2. NEW TRIAL (§ 70*)—VERDICT AGAINST EVIDENCE.

The trial court cannot set aside a verdict when it is apparent that there was some evidence upon which the jury might have reasonably reached their conclusion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

3. TRIAL (§ 140*)—QUESTIONS OF FACT—CREDIBILITY OF WITNESSES—INFERENCES.

The credibility of witnesses and the inferences to be drawn from circumstances are questions for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

4. SALES (§ 52*)—TRIAL (§ 142*)—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for the price of goods sold, where defendant claimed that they were sold to him individually, *held* sufficient to sustain a verdict for plaintiff against the company under the name of which defendant did business.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52;* Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

Appeal from City Court of New Haven; Richard H. Tyner, Judge.

Action by P. Stern against the Max Ripps Company. Verdict for plaintiff set aside on defendant's motion, and plaintiff appeals. Reversed and remanded with direction to enter judgment on the verdict.

Carl A. Mears, of New Haven, for appellant. Slade, Slade & Slade, of New Haven, for appellee.

RORABACK, J. The plaintiff sued upon the common counts, and filed his bill of particulars, showing debit item for merchandise sold and delivered to the amount of \$181.81. The defendant answered by a general denial.

The plaintiff claimed and offered evidence to prove that the merchandise was sold and delivered to the defendant, the Max Ripps Company. The defendant offered no evidence, but contended that from the plaintiff's testimony it appeared that the property in question was sold and delivered to Max

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Ripps as an individual, and not to the Max Ripps Company.

A verdict was rendered for the plaintiff to recover the amount set forth in his bill of particulars, with interest. Upon motion that verdict was set aside as against the evidence.

The errors alleged in the reasons of appeal are that the court erred (1) in setting aside the verdict of the jury, on the ground that it was against the evidence, and (2) in the rulings and instructions as they will appear in the record and bill of exceptions.

[1] The second assignment of error leaves it uncertain what the particular errors claimed to have been committed are. Such an assignment does not meet the requirement of the General Statutes, § 798, and the repeated rulings of this court.

The only question properly presented by the appeal is by the first assignment of error, namely: Did the court err in setting aside the verdict of the jury?

[2] It is unnecessary to review the former decision of this court as to the power of the trial court to set aside verdicts, as that has been done in the recent cases of *Cables v. Bristol Water Co.*, 86 Conn. 223, 84 Atl. 923, and *Steinert v. Whitcomb*, 84 Conn. 262, 264, 79 Atl. 676, where it was held that "the verdict should not be set aside when it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion."

[3, 4] A full statement of the testimony would unnecessarily prolong this opinion, and a brief outline will be sufficient. The plaintiff introduced evidence tending to prove these facts: Max Ripps, for some time prior to December 1, 1912, had a place of business at 15 Congress avenue, New Haven, Conn. He had traded with the plaintiff, whose place of business was in New York City. The certificate of organization of the Max Ripps Company was dated December 1, 1910, and duly filed December 5, 1910. In the latter part of November, 1910, Gussie Ripps, a sister of Max Ripps, one of the incorporators of and a buyer for the Max Ripps Company, ordered certain goods for the defendant. In about a week later Max Ripps reordered the goods for the defendant, and upon his order the goods were shipped. Prior to this purchase, the plaintiff heard of the com-

pany, and knew that Max Ripps was a bankrupt. The goods were delivered in two shipments, made in December, 1910, and were afterwards seen in the store of the defendant company.

The defendant offered no evidence to contradict the testimony of the plaintiff, but relied upon apparent inconsistencies in the plaintiff's evidence to sustain its contention that the goods were sold and delivered to Max Ripps individually.

The merchandise was charged upon the books of the plaintiff to Max Ripps, and so marked and shipped. The plaintiff stated that this mistake was made by his bookkeeper, who was uninformed as to the change in Max Ripps' business; that this bookkeeper had been keeping an account upon his book, then unsettled, with Max Ripps; that when the plaintiff discovered that these entries were made against Max Ripps he made a lead pencil memorandum on his books showing that they were charged against "the Max Ripps Company."

If the jury believed the plaintiff's evidence, the defendant was liable. The credibility of the witnesses and the inference to be drawn from circumstances are questions for the jury. These views have been so often reiterated by this court that it is unnecessary to cite authorities to sustain them. It was for the jury to say whether these goods were sold to the defendant, or to Max Ripps individually. The jury found for the plaintiff.

Whether or not the contract for the purchase of the goods was made a few days before the Max Ripps Company was organized is not the only important question at this time. The evidence shows that the jury could have fairly found that the Max Ripps Company received the goods and reaped the benefit from the transaction in which the plaintiff sold and parted with his property.

After carefully reviewing the evidence, we have reached the conclusion that there was evidence from which the jury might have reasonably reached the conclusion represented by their verdict.

There is error, and the order of the court setting aside the verdict is reversed and the cause remanded, with direction that judgment be rendered upon the verdict. The other Judges concurred.

BRIGHT v. JAMES et al.

(Supreme Court of Rhode Island. Jan. 18, 1918.)

SPECIFIC PERFORMANCE (§ 105*)—LACHES.

Where no time was fixed for the performance of a contract for the sale of land, and delivery of the deed and payment of the balance of the purchase price were to be concurrent acts, and the vendor made no tender of, or demand for, performance, the right of the purchaser to enforce the contract within the limitation period was not barred by laches.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. § 105.*]

Appeal from Superior Court, Washington County; Darius Baker, Judge.

Suit by Robert L. Bright against George S. James and others for specific performance. From decree for complainant, respondents appeal. Appeal dismissed, decree affirmed, and cause remanded.

Harry B. Agard, of Westerly, and Tillinghast & Collins, of Providence (James C. Collins, of Providence, of counsel), for appellants. Gardner, Pirce & Thornley, of Providence (William W. Moss, of Providence, of counsel), for appellee.

JOHNSON, J. This is a suit in equity brought in the superior court for the county of Washington for the specific performance of a contract for the sale of certain real estate in said county described in the bill. It was brought by the vendee, Robert L. Bright, against the vendors, George S. James and Abby F. James, his wife, and against Charles Capwell and John H. Capwell, later purchasers from them of certain land and timber included in the contract sued on.

It is admitted that the contract was duly executed on April 25, 1907, and was as follows, omitting the descriptions of the properties included: "Received of R. L. Bright five hundred (\$500.00) dollars, which is to be applied to the payment of the purchase price of eleven thousand two hundred (\$11,200.00) dollars for which sum we have agreed to sell and convey to said Bright or his assigns, with a good and perfect title, the following described tracts and parcels of land. * * * We agree also to accept from said Bright, or his successors, or assigns, a mortgage on said different tracts of land for one-half of the \$11,200.00, if he or they desire it, for three years, bearing interest at five per cent., payable annually, with right to discharge said mortgage at any time with accrued interest thereon. The balance of the purchase price is to be paid on the closing of the title and the passing the deed to said different lots or parcels of real estate and other property above mentioned. Richmond, Rhode Island, April 25, 1907. George S. James. [Seal.] Abby F. James. [Seal.] Witness as to both signatures: Amos E. Whitford." It is admitted that at this time the vendors did not

have full title to all the properties, but undivided interests in some of them were held by near relatives of Mr. James. This was known to the parties when the contract was executed. Mr. James assured the complainant that he could sell these interests because he had contracted to buy them. One of the properties was subject to a small mortgage, which was not paid until that property was sold to the Capwells. There were also other defects in the titles of some of the properties, which neither of the parties learned of until afterwards. Mr. James testified that the complainant told him then that his lawyer would want a week to look up the properties. He also testified that he told the complainant that he, James, would have Judge Lewis draw the deeds when the complainant was ready.

The complainant and Mr. Whitford, who was with him when the contract was signed, both testified that it was then understood that Mr. James would need some time to get the deeds for these other interests, and that, when he was ready to deliver a deed with good title, he would notify the complainant, and give him a reasonable time to pay the balance of the money, and take the deed. The Jameses denied this, and testified that on the contrary they told him that they were ready then and that he said he would let them know when he was ready, which would be in 30 or 60 days. About two months after the making of the contract, Mr. James met Mr. Whitford driving near Usquepaug. He testified that Mr. Whitford was alone, and that they did not talk about the contract. Mr. Whitford and the complainant, however, both testified that they were together, and that they met Mr. James, and talked with him about the contract, and that he said that he had done nothing about getting deeds of the outstanding interests, and was in no hurry for his money, but would let the complainant or Judge Lewis know when he was ready. Near the end of June, 1907, Mr. James, by his wife, wrote a letter to the complainant. Mrs. James said that in this letter she tried to convey the idea that she and her husband were ready to perform, and wanted him to perform. The complainant's recollection was that it was only a letter of inquiry as to when the sale could be completed. He answered by a letter dated June 28, 1907, which was introduced in evidence, stating that, as soon as Judge Lewis could investigate and report upon the respondents' title and furnish proper descriptions, they would be settled with upon proper execution of a deed, provided their title was good and clear. Judge Lewis, in May or June, 1907, had been employed by the complainant to examine the titles to the properties, and began work the latter part of June or early in July. In order to get information to assist him in

*For other cases see same topic and Section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 85 A.—35

that work, he wrote a letter to Mr. James, dated July 16, 1907, and introduced in evidence, in which he asked for further information about several of the properties, explaining what he wanted it for, and said that, if anybody else except Mr. James owned any part of them, he wanted the names and places of residence of every man and woman that was to sign any of the deeds. Judge Lewis testified that he was never employed to draw any deeds, and that his employment was simply to look up and report on the titles to these properties and many others, which he did as rapidly as he could conveniently, consistently with his other duties. In consequence of this letter, Mr. James called upon Judge Lewis, and gave him some information about the properties. He talked about one of them, the Daniel Webster place, of which he had lost the deed, and did not get another and put it on record until about a year after the contract was made. He testified that he told Judge Lewis that the heirs were ready to sign the deeds, and that he would like to have the matter closed up, but Judge Lewis had no recollection of any such statements.

Nothing else occurred in connection with the matter until about October 10th of the same year, when Mr. James, having got from Judge Lewis the complainant's address in New York, had his wife write the complainant a letter, which was duly delivered to him at his New York office. It was introduced in evidence, and was as follows: "Octo. 10/07. Mr. Bright. My Dear Sir: Not having heard from you in so long, I conclude you have given up the lands. You surely have had time to find your titles. The time given to get off the lumber on the South Kingston lot is nearly out. I shall have to begin cutting the lumber at once. The longest time you ever mentioned was 6 mos., and it has been 6 mos. with great damage to me. Yours very respectfully, G. S. James." West Kingston, R. I. To this letter the complainant replied by a letter introduced in evidence, which was dated October 12th, addressed to Mr. James at West Kingston, R. I., and duly received by him. In it he acknowledged receipt of the above letter in reference to the "purchase" of the respondents' properties, and continued: "I have been intending to go to Rhode Island, almost every day for more than two weeks, to see you and other parties from whom I made land purchases, and to assure you and them, not only that those purchases would be carried out to the letter and in perfect good faith, but to arrange with you and them for that purpose." He then stated that he intended to live up to his agreements like a man, but that there had been several causes of delay in getting the sales closed up. One of these he gave as the inability of Judge Lewis to complete more rapidly his investigation of the titles. The other he gave as the opposition of cer-

tain parties. He closed as follows: "I beg to assure you that the purchase from you will be carried out in good faith, and that before many days, as soon as I can hear from Judge Lewis as to your titles and boundaries. I expect to be in Rhode Island some time next week, and, if possible, I will call to see you, or have you meet me somewhere." He did go to Rhode Island a short time afterwards, but said that he was not able to stay long enough to see Mr. James.

After receipt of this letter Mr. James did nothing about repudiating the contract, and testified that he continued to intend to perform on his part for about a year until the time of the sale of the properties to the Capwells. Mr. Whitford testified that six months or more after the date of the contract he saw Mr. James hauling some lumber, and that the latter told him he was cutting some from the land sold to the complainant, but would pay him for it. He did nothing else inconsistent with the contract until the next spring, when he moved the sawmill, and began to cut off some of the timber. He did not at any time tender any deed to the complainant, or make any offer of performance, and did not make any attempt to communicate with him after the letter of October 10, 1907. Judge Lewis' report came in the form of a letter to the complainant dated November 5, 1907, with regard to various titles he was looking up, including those of the properties bought from Mr. James. He said that he had practically completed the examination, but needed explanations as to two or three matters in connection with these latter properties; that there were outstanding interests in some of them; that there was no deed on record of the Daniel Webster lot from Daniel Webster to Mr. James; that the title to nearly all the properties appeared to be good, but that he did not have all his notes typewritten yet. On receipt of this letter, as the complainant testified, he wrote to Mr. James a letter dated November 7, 1907, a copy of which was filed as "Complainant's Exhibit 2." This was addressed to George S. James at West Kingston, R. I. The postage was prepaid upon it, and it was mailed in New York, but Mr. James testified that he never received it. The envelope had on it the complainant's New York address, but it was never returned to him. In this letter the complainant stated that he had been in Rhode Island the last of October, but had been unable to see Mr. James; that Judge Lewis had just reported to him that he, James, had not yet secured deeds to the outstanding interests and had no deed to the Daniel Webster lot; that hence it was not possible for him to make a good and perfect title as required by the contract. He protested that it was not fair or right for Mr. James to expect or demand that the complainant pay the balance of the purchase money until the Jameses were ready on the spot to make a deed conveying good title to

all the properties, or to expect or require him to go to Rhode Island to perfect their titles for them, to pay off mortgages, and any purchase money that Mr. James might have agreed to pay for outstanding interests. He told Mr. James to notify him when he had perfected his titles, and was ready to close the transaction according to contract, and he would meet him in Providence, Wickford, or elsewhere for that purpose.

Shortly after sending this letter the complainant went to his home in Chattanooga, Tenn., to attend the marriage of his daughter, returning in December to New York, where he remained until about February 13, 1908. Then he went back to Tennessee in bad health, and remained there for about a year in such bad health as to be practically unable to attend to any business. During this time Mr. James and Mr. Whitford and Judge Lewis had his address in New York, and mail sent there was promptly forwarded to him. As soon as he was able to get out, in April, 1909, he came to Rhode Island, and then learned that Mr. James had sold some of the land and timber covered by the contract to the other respondents, the Capwells, who were cutting off the timber. He promptly went to Mr. James, and protested against this, and insisted upon the validity of the contract. Notwithstanding this, the Jameses made another sale of timber to the Capwells. The Capwells, when they made their purchase, knew of the complainant's contract and its terms, but were informed by Mr. James that the complainant had forfeited his rights under it by his acts and neglect. The parties had made no attempt to communicate with each other up to this time, after the last letter passed between them late in the fall of 1907, though each had the other's address. Shortly after this the complainant went with Mr. Whitford, and made formal demand of performance from the Jameses, and offered to perform on his part upon proper deduction being made for the value of the timber cut off. This Mr. James refused, taking the position that the complainant had by delay forfeited all his rights under the contract. He did not then or at any other time offer to return to the complainant the \$500 paid by him on the contract, or any part of it. Both the complainant and Mr. Whitford testified that at this last interview Mr. James said that he proposed to keep the land and money, too, and would not give up either, unless 12 men said he had to. This he denied saying. The complainant began his suit August 23, 1909.

The complainant testified that he never intended to abandon this contract, and that he could always have carried out his part of it upon reasonable notice, a few days or a week. A part of the time he had the money himself and a part of the time he had not, but he had arrangements made which would have enabled him to pay the balance due on the purchase price. When Judge Lewis

made a complete report to the complainant on the titles he was examining neither of them was able to state, but he did so some time after the letter from him to the complainant put in evidence. This report and Judge Lewis' evidence at the trial showed that, besides the outstanding interests held by relatives of Mr. James, there were certain other defects in the title to some of the properties, and that in particular there was a gap in the chain of title to the Roger Hill farm, so called. It does not appear that this defect was ever called to the attention of Mr. James, or that he ever inquired from Judge Lewis, or the complainant as to what, if any, defects in his titles they had found. Long after the making of the contract and in part since the beginning of this suit, Mr. James got deeds to himself of the outstanding interests in the properties covered by the contract and apparently, except for the defect in the title to the Roger Hill farm, and for the timber cut off and sold he and the other respondents are now in a position to make a good conveyance to the complainant in accordance with the contract, and the latter is willing to accept such conveyances as they can give, and to pay the balance of the contract price, less a proper deduction on account of the timber cut off and sold and other damage suffered. An interlocutory decree was entered January 27, 1911, declaring certain facts to be admitted which are covered by the foregoing statement, and stating 24 issues of fact.

The cause was heard in the superior court upon oral testimony and certain documentary evidence by Mr. Justice Baker. Upon the issues the judge found the facts substantially as follows:

(1) "Some of the owners of the outstanding interests made oral agreements with the said George S. James before the making of the contract by said James and his wife with the complainant that they would sell and convey their said interests to said James or to the complainant. * * * Other owners of such interests had made no agreement, oral or otherwise, to sell and convey but had expressed their willingness to do so."

(2) Upon the question whether it was orally agreed between the complainant and the respondents James, either at the time said contract was made or afterwards, that they would notify the complainant when they had perfected their title to the said properties, and give him reasonable notice of the time when they would be ready to perform said contract, deliver the necessary deed or deeds to the complainant or his assigns, and receive from him the balance of the purchase money, the judge found that the evidence was so conflicting that it was difficult to decide what the fact was, but he was inclined to the opinion that the answer should be in the negative.

(3) That the said respondents were not ready, willing, and able to perform and com-

ply with all the terms, provisions, and stipulations of said contract in a reasonable time after the execution thereof, and that they did not so inform the complainant and did not offer to perform said contract.

(4) That the complainant did not on or about the 1st day of June, 1907, go to the said respondent George S. James and explain that his counsel, Nathan B. Lewis, was looking into the titles of the property referred to in said contract, and that as soon as this work was completed the complainant would be ready to complete the contract.

(5) That the respondent George S. James did not on or about the 16th day of July, 1907, express to Nathan B. Lewis, attorney for the complainant, the readiness and capacity of himself and wife to perform said contract, and did not then and there complain and protest that the complainant was occasioning a delay in the performance of said contract which was contrary to the terms thereof.

(6) That they had paid the mortgage in November, 1908, at the same time they acquired the interests of Edward K. James and Mary H. James, his wife. That in 1910 they acquired the interests of Susan C. Dawley and Warren Dawley, her husband. That the record title of the Daniel Webster place was perfected apparently in 1908, and that they never fully perfected their title to all the properties.

(7) That said respondents have never been ready to comply fully with the terms of said contract.

(8) That the failure of said respondents to give the complainant any notice of their readiness and willingness to perform their part of said contract after the time of its execution, other than that given the said Nathan B. Lewis as his counsel, was not due to the fact that the complainant had left for parts unknown without leaving with the respondents any directions as to where to address him.

(9, 10) That Amos E. Whitford in November, 1907, was not the agent authorized to bind the complainant by any statement alleged to have been made by him to the respondent George S. James, and that it was therefore not important to determine whether or not Whitford made the alleged statements to said James.

(11) That the complainant did notify said respondents at least twice in the summer and fall of 1907 that he expected and intended specifically to perform said contract on his part whenever they were able and ready to perform it on their part.

(12) That the complainant, just before the filing of his bill of complaint, did demand of said respondents a specific performance of said contract and advise them that he was ready to perform it fully on his part, although just how long before was not clear.

(13) That the said James and wife did then notify him that he had delayed too long,

and could not legally or equitably hold them on said contract, and that they would not perform said contract.

(14) Upon the question whether the said respondents during the month of June or thereabouts, 1907, wrote a letter to the complainant in which they complained that they had been ready at all times since the execution of said contract to carry it out, and that they were being greatly injured by the action of the complainant in neglecting and refusing to carry out his part of said contract, that the properties were depreciating in value by reason of want of proper care and attention, that the taxes were unpaid, that the time for cutting off the wood on the Luke Clarke place would soon expire under the contract with the owners, and that the owners of the outstanding interests in said properties were insisting that the contract be carried out by the complainant without further delay if they were to be longer holden in the matter, as their interests were exposed to injury and loss by the delay in carrying out the contract, and by the want of proper attention to the properties, he found in the negative.

(15) That the complainant up to that time had not signified to the said respondents his readiness and capacity to perform said contract.

(16) Upon the question whether the said respondents during or about the month of October, 1907, wrote another letter to the complainant, notifying him that he must carry out the terms of said contract on his part without any further delay; that they, said respondents, still were, and at all times since the execution of said contract had been, willing, able, and of full capacity to carry out said contract, but that, if the complainant was not prepared to perform his part of said contract at once, the said respondents must, and would, consider the obligations of said contract at an end, and that they would no longer be bound by the terms of the sale, nor recognize any obligations thereunder, and called the attention of the complainant to the condition of said properties and the injuries and risks they were subjected to through lack of proper care and attention, and to the further fact that the taxes were still unpaid, and that the wood on some of said properties needed to be cut at once in order to realize its full value, his finding was as follows: "No; but in October, 1907, George S. James wrote a short letter, saying that not having heard from complainant so long they concluded the complainant had given up the lands, that the delay was with great damage to the writer, and that he would have to commence cutting lumber at once." This letter is quoted *supra*.

(17) That the complainant did not carry out the promises contained in his letter of October 12, 1907, replying to James' letter postmarked October 10, 1907. The judge

proceeded further to say: "The evidence shows that Judge Lewis wrote to the complainant under date of November 5, 1907, informing him, among other things, of defects in the titles of some of the James' property, and that the Jameses had not acquired the outstanding interests. The complainant testified that thereupon, under date of November 7, 1907, he wrote and sent a letter to George S. James, calling his attention to these existing defects, informing him that he must perfect his title, and that, if he would let the complainant know when he was ready to close the transaction, he, the complainant, would meet him for that purpose. The complainant offered an alleged carbon copy of said letter in evidence. The respondent James denies that the alleged letter of November 7, 1907, was ever received by him. I am of the opinion that such letter was not received by the Jameses, and, as there is no claim of any other communication, I am of the opinion that there was no actual communication between the parties respecting the transaction in question within the year after the receipt of complainant's letter October 12, 1907. As it seems to the court that in the existing circumstances it would have been entirely natural for the complainant to write Mr. James after the receipt of Judge Lewis' letter of November 5th, the weight of the testimony justifies the finding that the letter of November 7, 1907, was written and probably sent, although not received."

(18) That the respondent George S. James, in violation of the said contract and without the knowledge or consent of the complainant, did continue after said contract was made to cut the standing timber on the Slocum place, so called, saw it up in the sawmill and shinglemill on said place, and dispose of the sawed lumber for his own benefit.

(19) That at the time when the timber on the Luke Clarke place so called was sold by the said respondents to the other respondents, Charles Capwell and John Capwell, it was not necessary to remove said timber in order to save its value, because by the terms of the purchase of said timber by the respondents George S. James and wife from the owners of said Luke Clarke place a period of two years only was allowed for the cutting and removal of said timber, which period was about to expire at the time when said timber was sold to said respondents Capwell.

(20) Upon the issue, "Did the complainant, as soon as he learned of said sale of timber to the respondents Capwell, go to the respondents George S. James and wife, protest against said sale, and notify them that he stood ready and willing to perform said contract fully on his part upon a fair and equitable adjustment of said sales, and the injury and damage resulting to the complainant therefrom, and of any other injury or damage done to the complainant by other violations of said contract by the respondents

George S. James and wife?" the judge said: "Speaking generally, yes." The sale of timber was made in November, 1908. The complainant returned from Tennessee in the spring of 1909, and says that he heard of this sale of timber on the Luke Clarke lot to John Capwell, and went to Mr. James about it and protested. It appears that this protest was made in May, 1909. He also heard of negotiations for the sale of the Hoxsie lot to the Capwells and protested against such sale before it was made.

(21) That the complainant did in the month of May, 1909, or thereabouts, demand a specific performance of said contract, and state that he was ready to pay whatever balance of the purchase money might be due to said respondents thereunder.

(22) The issue, "Was the complainant ever able to carry out the provisions of said contract, and to perform his part of same according to its terms?" was found in the affirmative.

(23) Upon the question whether the complainant ever offered to perform his part of said contract and express his willingness to do so previous to a date just before the filing of the bill of complaint, the finding was, "No, except as it is contained in his letter of November 7, 1907."

(24) Upon the issue, "Was the complainant guilty of laches which forfeited his right under said contract?" the judge said: "This raises the important question of laches. The stipulations of the contract as to the carrying out of the purchase and sale are mutual and dependent. That is, the deed is to be delivered upon the payment of the price; no time being named in the contract for doing these things. In such case an actual tender and a demand by one party are necessary to put the other in default and to cut off his right to treat the contract as still subsisting. No such tender and demand appear to have been made by either party. By the contract the Jameses agreed to sell and convey the tracts of land in question to the complainant, with a good and perfect title. He was entitled thereunder to have the conveyance by and from them to himself. The testimony shows that the respondents were able, when the contract was made, to discharge the mortgage on one of the parcels, although they did not do so until the fall of 1908. There is no evidence of the expectancy or ability of the respondents James to purchase the outstanding interests in the properties other than by the use of some of the purchase money to be paid by the complainant. The evidence is that they acquired certain of these interests in November, 1908, when they sold standing lumber to the Capwells, presumably using the purchase money received from the Capwells for that purpose, and that they acquired other interests as late as 1910, after the bill in this suit was filed. The record title of the Webster place

was not perfected for perhaps a year after the making of the contract between the parties to this suit. There appears to be now a record defect in the title of the Jameses to the Roger Hill place. The evidence shows that there have been times since the making of the contract when the complainant was individually unable to put up the remainder of the purchase money, but that he could and can do so by the assistance of others. It is possible that the respondents by giving the complainant a notice of intention to rescind the contract, unless it were carried out by a day named, might have in this way rescinded the contract. It is suggested that the complainant was out of the state for a year and a half without leaving an agent here. The respondents had his address in New York, and wrote to him in October, 1907, and received an immediate reply. The evidence shows him to have been in New York City until February, 1908, excepting during portions of the months of November and December, 1907. There is no evidence that the respondents ever attempted to communicate with him after their letter of November, 1907. His absence from the state does not seem to afford an adequate excuse for not attempting to give him notice of their intention to rescind the contract, if that was really their purpose. If they intended to rescind, they should have returned the \$500 paid down by the complainant as part of the purchase money when the contract was signed. This they never have shown any intention of doing. The complainant's letter to them, whether it was the letter of October 12, 1907, or that of November, 1907, expresses his intention of completing the purchase. The only facts showing abandonment of the contract upon his part are his failure to do anything in furtherance thereof, or to communicate in any way with the respondents James from the fall of 1907 until the spring of 1909. He accounts for this delay, so far as he is concerned, by saying that after going to Tennessee in February, 1908, until his return in the spring of 1909, he was ill and unable to attend to business. With the exception of a month, however, he was in New York attending to business until the middle of February, 1908. I think it is fair to infer that for the most of this period of a year and a half the complainant was not pressing the conclusion of the transaction, but was quite willing to acquiesce in the apparent similar delay of the respondents James. There is no evidence that the complainant acquiesced in the sale of the lumber on the Clarke land or on the Hoxsle property so as to charge himself with estoppel, and, after being apprised of said transactions, he does not seem to have delayed unreasonably in objecting thereto and in filing his bill of complaint. The presiding justice in his rescript has said that the Capwells 'could not be bona fide purchasers without notice of the equities in fa-

vor of the complainant. Having notice of the contract, they were bound at their peril to determine the existence of equities arising therefrom.' He bases this finding upon their admission in their answer of notice of the contract between the complainant and the respondents James, and excludes the good faith of the Capwells as an issue in the case. The sales to the Capwells, therefore, do not constitute such a change in the relations of the parties or their circumstances as to affect the right of the complainant to have his contract specifically performed. In the light of all the evidence, I am of the opinion that complainant was not guilty of such laches as to forfeit his rights under the contract, and that, therefore, the answer to issue 24 should be no. Accordingly, I am also of the opinion that he is entitled to have a decree for the specific performance of the contract. The defect in the title of the Roger Hill tract is of such a nature that allowance therefor can be made in ascertaining the balance of the consideration due and payable. The case should be sent to a master in chancery to have an account taken to determine the sum that should now be paid by the complainant to entitle him to a conveyance of the property, and perhaps in what proportion to the different respondents."

A decree was entered in accordance with said decision. From this decree the respondents appealed, assigning as reasons of appeal that the decree is against the law and the facts; that the court erred in finding that the complainant was not guilty of laches, in finding that the respondent Charles Capwell had notice of the equities of the complainant, in finding the fourth, fifth, and seventh issues of facts in the negative, in receiving in evidence the letter of Nathan B. Lewis to the complainant dated November 5, 1907, and copy of alleged letter dated November 7, 1907, of complainant to George S. James, in finding the twelfth issue of fact in the affirmative, in finding that the complainant made a sufficient offer to perform his part of the contract at any time prior to bringing the bill of complaint, and in the findings upon the eighteenth, twentieth, and twenty-fourth issues of fact. From our examination of the transcript of the evidence, we are of the opinion that there was no error in the admission of evidence or in any of the findings of fact.

The decisive question in the case is: Was the complainant guilty of laches which forfeited his rights under the contract? No time was fixed in the contract for performance. The delivery of the deed and the payment of the balance of the purchase price were to be concurrent acts. Neither party tendered performance on his part and demanded performance by the other until such action was taken by the complainant in the spring of 1909. The rule in such cases is stated in 36 Cyc. 730, thus: "Where time is not essential, and the tender of the deed

and payment were to be concurrent acts, and neither party has tendered performance and demanded performance by the other, neither party is in default, and the contract remains in force until barred by the statute of limitations, or until notice is given requiring performance within a specified time, or until the situation of the parties is so greatly changed that specific performance would be inequitable." Pomeroy, *Contracts and Specific Performance*, § 861, says: "Where the stipulations are mutual and dependent—that is, where the deed is to be delivered upon the payment of the price, either on a day named or without any day being specified—an actual tender and demand by one party is absolutely necessary to put the other in default, and to cut off his right to treat the agreement as still subsisting. So long as neither party makes such tender—of the deed by the vendor and of the price or securities by the vendee—neither party is in default, the contract remains in force, and either party may make a proper tender or offer and sue, until barred by the statute of limitations." The principle is well illustrated in the case of *Bank of Columbia v. Hagner*, 1 Pet. (U. S.) 464, 7 L. Ed. 219, where the court says: "In contracts of this description the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property for which he paid it. Although many nice distinctions are to be found in the books upon the question whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent, yet it is evident the inclination of the courts has strongly favored the latter construction as being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration; nor the purchaser to part with his money, without an equivalent in return. Hence in such cases, if either a vendor or a vendee wishes to compel the other to fulfill his contract, he must make his part of the agreement precedent, and cannot proceed against the other, without an actual performance of the agreement on his part or a tender and refusal."

In the case of *Peck et al. v. Brighton Co.*, 69 Ill. 200, at page 203, the court said: "We think it is a clear proposition that appellants had no power to forfeit the contract, unless they at the time were ready and had the ability to convey according to its terms. How should appellants have shown that they could convey, and were ready so to do? The answer to this is obvious. A deed should have been executed by them and the widow, and tendered to Iglehart, and payment demanded." In *Leaird v. Smith*, 44 N. Y. 618,

Leonard, C., at page 624, says: "The contract of the parties names a day when a sum of money is to be paid, amounting, with the sum paid when it was signed, to \$500; the whole consideration being \$900. On the day when the last payment was to have been made, according to the terms of the contract, the defendant Smith was to deliver her deed for the land on receiving the said payment, and the plaintiff agreed to deliver his bond and mortgage for the residue of the consideration, \$400, payable in two years, with half yearly interest, on the delivery of the deed by the defendant Smith, free of incumbrance. On the day named the sum of \$100 was paid, and a note for 60 days for the residue of the cash payment was accepted by the defendants, and the time for the exchange of the deed and the bond and mortgage was extended to the following 14th March, when the note became payable. The defendants notified the plaintiff when the note was accepted and the time extended that the business must be closed when the note became due. The plaintiff paid the note at maturity, but neither party insisted upon closing the contract by the final exchange of papers, as provided by the agreement. The provisions of the contract were dependent upon performance by the other, before either could be put in default. A period was fixed when either of them, by the performance of the stipulated condition, could put the other in default. No such step was taken. The contract remained without further performance by either party for five years. The rights of the parties were not affected by the notice of the defendants that they would insist upon closing the contract at the extended day. They did not do so by a tender of their deed and a demand of the bond and mortgage. This was a condition precedent to the delivery of the mortgage. It is impossible to perceive that either party could complain of the other without first tendering a full performance. Both parties remained passive. The contract was not annulled or abrogated by the omission or neglect to act for the purpose of bringing it to a termination. Slumbering upon their respective rights would terminate the contract only by such an efflux of time as would create a bar by the statute of limitations. Within that period the plaintiff offered to pay up the sum remaining due, and demanded a deed. This was refused, the defendants claiming that the plaintiff had forfeited all right to a deed by his neglect to deliver his bond and mortgage at the appointed time, and that he had no just or legal claim for a repayment of the sums theretofore paid by him. The claim made by the defendants was not as upon a rescission, but for a forfeiture of the contract. The plaintiff had neglected its performance no more than the defendants, and his right of action either to recover damages of the defendant Smith for nonperformance, or for a specific performance, after a tender

of the mortgage or the money, the two years having expired, was still perfect when the deed was demanded." Other cases in the same line are *Marquis of Hereford v. Boore*, 5 Ves. 719; *Byers v. Denver Circle R. Co.*, 13 Colo. 552; 22 Pac. 951; *Mix v. Beach*, 46 Ill. 311; *Crabtree v. Levings*, 53 Ill. 526, 530; *Johnson v. Jackson*, 27 Miss. 498, 501, 61 Am. Dec. 522; *Walton v. Wilson*, 30 Miss. 576, 580; *Van Campen v. Knight*, 63 Barb. (N. Y.) 205; *White v. Butcher*, 59 N. C. 231; *Knott v. Stephens*, 5 Or. 235; *Irvin v. Bleakley*, 67 Pa. 24, 28; *Prothro v. Smith*, 6 Rich. Eq. (S. C.) 324; *Riley v. McNamara*, 83 Tex. 11, 13, 18 S. W. 141; *Jordan v. Rhodes*, 24 Ga. 478; *Williston v. Williston*, 41 Barb. (N. Y.) 635. The respondents' counsel cite many cases, but examination of them discloses no such conflict with the authorities and cases above cited as to cause us to doubt the soundness of the doctrine therein laid down.

We find no error in the court's application of the law to the facts as found.

The appeal is dismissed, the decree below affirmed, and the cause is remanded to the superior court for Washington county for further proceedings.

In re GREENE.

(Supreme Court of Rhode Island. Jan. 8, 1913.)

1. ARREST (§ 9*)—WITNESSES—ATTENDANCE IN COURT—PROTECTION.

Parties and witnesses attending any legal tribunal in good faith with or without a writ of protection are privileged from arrest on civil process during their attendance and for a reasonable time going and returning, whether residents or nonresidents of the state, and whether they attend on summons or voluntarily.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. §§ 20-32; Dec. Dig. § 9.*]

2. ARREST (§ 9*)—PRIVILEGE FROM ARREST—ENFORCEMENT.

Enforcement of a witness' privilege from arrest while attending court in good faith devolves on the court which the witness is attending.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. §§ 20-32; Dec. Dig. § 9.*]

3. ARREST (§ 9*)—PROTECTION—COURTS—AUTHORITY TO PROTECT.

Gen. Laws 1909, c. 307, § 9, provides that any probate court may compel the attendance of witnesses and may issue writs of subpoena. *Held*, that a municipal court sitting in probate had jurisdiction to enforce the privilege of a witness before it against arrest on civil process, and if necessary to issue a writ of protection therefor.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. §§ 20-32; Dec. Dig. § 9.*]

Petition by Howard E. Greene for writ of protection. Denied.

Howard T. Metcalf, of Providence, for petitioner.

JOHNSON, J. The petitioner, a nonresident of the state, asks for a writ of protection, in order that he may attend before com-

missioners appointed by the municipal court of the city of Providence, at a hearing to be held January 17, 1913, and at any adjournment thereof, upon a claim presented against an estate in which he is interested, and states that he is an important witness in said case, that his presence at said hearing is necessary for a complete and full trial thereof, and that he has been threatened with arrest under civil process in this state.

[1] It is well settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning, whether residents or nonresidents of the state, whether they attend on summons or voluntarily, or whether they have or have not obtained a writ of protection. *Waterman v. Merritt*, 7 R. I. 345, 347; *Baldwin v. Emerson*, 16 R. I. 304, 15 Atl. 83, 27 Am. St. Rep. 741; *Capwell v. Sipe*, 17 R. I. 475, 23 Atl. 14, 33 Am. St. Rep. 890; *Ellis v. Degarmo*, 17 R. I. 715, 24 Atl. 579, 19 L. R. A. 580; *Larned v. Griffin* (C. C.) 12 Fed. 590; *Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370; *Wood v. Neale*, 5 Gray (Mass.) 538; *May v. Shumway*, 16 Gray (Mass.) 86, 77 Am. Dec. 401; *Parker v. Marco*, 136 N. Y. 585, 32 N. E. 989, 20 L. R. A. 45, 32 Am. St. Rep. 770. "And this protection extends to the attendance of parties and witnesses before arbitrators, commissioners, and examiners." *Larned v. Griffin*, supra. In Massachusetts, a creditor of a deceased insolvent, while attending a meeting of commissioners appointed by the judge of probate to examine claims against the estate, was held to be privileged from arrest on civil process. *Wood v. Neale*, supra.

The privilege exists without the granting of the writ. As was said in *Parker v. Marco*, supra: "While the granting of the writ is proper, it is not necessary for the enjoyment of the privilege, and the only office which it can perform is to afford convenient and authentic notice to those about to do what would be a violation of the privilege, and to set it forth and command due respect to it." And in the *Case of McNeil*, 3 Mass. 288, the court said: "A juror has no occasion for a writ to protect him. If a juror, or any other person, whose duty brings him to court, whether as a party or a witness, is arrested while attending the court, or eundo et redeundo, the court, upon motion, will take order for his discharge. A writ of protection will not protect one who is not lawfully entitled to it, and is of no other use to one who is so entitled, but as prima facie evidence to the officer who is about to arrest him."

[2] As the writ, therefore, amounts only to convenient and authentic notice to those about to do what would be a violation of the privilege, and as the court which the witness

is attending or expects to attend has the best means of judging the truth of the matter upon which the privilege is claimed, it seems that such court is the proper court to issue the writ.

[3] As to the question of the power of the municipal court to issue the writ of protection, said court is a court of record, and is invested by statute with probate jurisdiction; and by section 9, c. 307, Gen. Laws 1909, "any probate court may require the attendance of any party or person, whom it may see fit to examine or cause to be examined in any proceeding pending in said court, and may examine or cause to be examined on oath parties and witnesses either orally or on written interrogatories or both, or may receive their affidavits and may require any writings or other evidence pertinent in such proceedings to be produced, before itself or otherwise, and may issue writs of subpoena ad testificandum, and of subpoena duces tecum."

In our opinion, the municipal court of the city of Providence, having the power to "require the attendance of any party or person whom it may see fit to examine or cause to be examined in any proceeding pending in said court," has also the power to issue a writ of protection to a witness attending before it, or before a commission appointed by it. Said commission may properly be regarded as simply the arm of the court, and as representing it pro hac vice. The application for the writ of protection should have been made to said municipal court.

The petition is therefore denied and dismissed.

RICE, Atty. Gen., ex rel. PERRY v. TOWN COUNCIL OF TOWN OF WESTERLY.

(Supreme Court of Rhode Island. Jan. 6, 1913.)

1. CERTIORARI (§§ 23, 64*)—PROCEEDINGS REVIEWABLE.

Certiorari is the remedy by which the Supreme Court may review proceedings of town council, and, in case of certiorari to review the determination of the town council as to the result of a liquor election, errors not alleged in the petition for the writ will be considered.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 36, 174, 175; Dec. Dig. §§ 23, 64.*]

2. CERTIORARI (§ 68*)—QUESTIONS REVIEWABLE—MATTERS OF FACT.

While upon certiorari the court can only review questions of law and equity, it may properly determine whether marks upon an election ballot conformed to the requirements of a legal ballot; the question being one of law, instead of fact.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 180-182; Dec. Dig. § 68.*]

3. ELECTIONS (§ 194*)—BALLOTS—VALIDITY.

Under Gen. Laws 1909, c. 11, § 46, providing that no voter shall place any mark of identification upon his ballot, and that one line crossing another at any angle within the voting

square shall be deemed a valid mark, a ballot, where it appeared that the X had been retraced, or that the pencil had been drawn from the top of one line to the top of another, will not be disregarded; the additional marks being apparently due to inadvertence.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

4. ELECTIONS (§ 194*)—BALLOTS—VALIDITY.

Under the above section ballots marked with lines practically forming a Y, which was made by a line slightly bent crossed by another line which did not extend to the same length as the first, should be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

5. ELECTIONS (§ 194*)—BALLOTS—VALIDITY.

Ballots marked with a cross in two places other than the proper voting square should be disregarded under Gen. Laws 1909, c. 11, § 46, prohibiting the placing of identification marks on the ballot.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

6. ELECTIONS (§ 194*)—BALLOTS—VALIDITY.

Under Gen. Laws 1909, c. 11, § 41, providing that every voting shelf or compartment shall be provided with proper pencils which shall be such as will mark with uniform color, and in marking his ballot no voter shall use a pencil marking a different color, and section 46 prohibiting the placing of identification marks on the ballots, ballots marked in ink must be disregarded, the statute impliedly requiring them to be marked in pencil, and the ink marks being means for identification.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

7. ELECTIONS (§ 194*)—BALLOTS—VALIDITY.

Where it appeared that it was not caused by inadvertence, ballots marked with four lines which crossed at the center like an asterisk should be disregarded under Gen. Laws 1909, c. 11, § 46, prohibiting the placing of identification marks on ballots, and providing that two lines crossing at any angle shall be a valid voting mark.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

8. ELECTIONS (§ 192*)—BALLOTS—VALIDITY.

Under Gen. Laws 1909, c. 11, §§ 24, 46, providing for the printing of ballots, and that they should be used unless none were at the polls, a blank ballot on which one voting at an election where the question of the licensing of the sale of intoxicating liquors was submitted wrote "Yes" cannot be counted; printed ballots being at the polls.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 192.*]

9. ELECTIONS (§ 194*)—BALLOTS—VALIDITY.

Where the question of the licensing of the sale of intoxicating liquor was submitted by ballots which were marked "Yes" and "No," a ballot on which the "Yes" had been marked through, and the proper voting mark had been placed in the "No" square, must be disregarded because of the identification mark.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

10. INTOXICATING LIQUORS (§ 35*)—LICENSES—ELECTIONS.

Where the question of the licensing of the sale of intoxicating liquors was submitted the year after such sale had been authorized by general election, and the vote was a tie, the licenses were properly renewed under Gen. Laws 1909, c. 123, § 4, providing that the electors of the several cities and towns shall cast their ballot for or against the granting of licenses if the majority of the ballots shall be for the granting of such licenses, then they shall be granted dur-

ing the 12 months after such election, and until the town or city shall vote not to grant such licenses.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec Dig. § 35.*]

Petition by Herbert A. Rice, as Attorney General, on the relation of Harvey C. Perry, for a writ of certiorari to the town council of the town of Westerly to review the proceedings of that body in determining the result of a liquor election, and the granting of licenses. Licenses held properly granted.

Samuel H. Davis, of Westerly, and William B. Greenough and Nathan W. Littlefield, both of Providence, for petitioners. Harry B. Agard, Town Solicitor, and John W. Sweeney, both of Westerly, and Mumford, Huddy & Emerson, of Providence (Charles C. Mumford, of Providence, of counsel), for respondents.

SWEETLAND, J. This is a petition for a writ of certiorari brought in the name of the Attorney General, at the relation of Harvey C. Perry, a citizen and taxpayer of the town of Westerly, against the town council of said town. The essential allegations of the petition are that at an election held in said town on the 5th day of November, 1912, the question, "Will this town grant licenses for the sale of intoxicating liquors?" was voted upon by ballot according to law; that on the 6th day of November, 1912, the said town council counted the ballots upon said question cast at said election; that said town council, as a part of its proceedings, counted in favor of licenses three defective ballots, and failed to count and rejected, as defective, two legal and valid ballots cast at said election against the granting of licenses; and that said council announced and recorded in the record of its proceedings the result of said counting to be that a majority of two votes had been cast at said election in favor of granting licenses for the sale of intoxicating liquors in said town. The writ was duly issued and returned. The record of said proceedings of the town council has been certified to us by the town clerk of said town, and all the ballots cast at said election upon said question have been transmitted to us. Said record shows the action taken by said council upon objections made before it to the counting and rejection of certain of said ballots. Such objections, according to the record, were made by counsel who represented persons favorable and by counsel who represented persons opposed to the granting of licenses for the sale of intoxicating liquors in said town. Said record also sets forth as follows: "Upon the completion of the counting of the ballots cast in the First representative district, it was voted: That 327 electors had voted 'Yes,' and 272 electors had voted 'No,' in said First district. * * * Upon the completion of the counting of the ballots cast in

the Second representative district, it was voted: That 331 electors had voted 'Yes,' and 384 electors had voted 'No,' in said Second district, making the vote for the whole town 'Yes' 658, 'No' 656. Voted: That this town council does hereby declare that the town of Westerly did on the 5th day of November, 1912, vote in favor of the granting of licenses for the sale of intoxicating liquors in said town." At the hearing before us counsel, representing persons who were in favor of granting licenses in said town, was permitted to appear and to take part. At said hearing it was claimed that certain defective ballots, some for and others against license, were counted by the town council, and that certain other ballots were held to be defective and were rejected by said town council, although said ballots were legally sufficient, and should have been counted. The ballots, in regard to which the action of the town council has been questioned, have been produced before us, and we have reviewed the determination of the council upon them.

[1, 2] In a number of instances the objection made at the hearing in this court was not included in the statement of errors appearing in the petition for the writ of certiorari; and in some instances the objection was made by the representative of persons in favor of granting licenses in said town. We have permitted the hearing upon this writ of certiorari to take so broad a scope, because no other remedy is provided to review the proceedings of the town council in this regard. Certiorari appears to be the appropriate proceeding in which this court may exercise its final revisory jurisdiction upon the questions of law involved in said proceedings before the town council. In reviewing such proceedings, upon this matter involving public interests, we are not restricted to errors alleged in the petition. We will consider any substantial error involved in the record and called to our attention, in order that the will of the people, as legally expressed, may not be defeated, as perhaps it might be, if we merely considered and passed upon the questions raised by the petition. This court has frequently said that certiorari does not lie to review findings of fact, and the constitutional provision giving to this court revisory and appellate jurisdiction to review the proceedings of inferior tribunals by its terms only provides for a review of questions of law and equity. The matters now before us relate wholly to the manner in which the ballots in question were marked by the voters. Whether the marks placed upon his ballot by a voter conform to the statutory requirements for a legal ballot is a question of law rather than of fact, and is one proper to be reviewed in this proceeding.

[3] We will now consider the several objections raised to the action of said council

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in counting and rejecting ballots. Chapter 11, § 46, Gen. Laws 1909, among other things, provides as follows: "No voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him. One line crossing another at any angle within the circle or any voting square, or at the right of any name, shall be deemed a valid voting mark." Except in the two instances which will be considered later, the face of the official ballot blank furnished to the voters at said election by the election officers was in the following form:

To vote in favor of license, mark a cross (X) in the square at the right of the word "Yes."

To vote against license, mark a cross (X) in the square at the right of the word "No."

Will this town grant licenses for the sale of intoxicating liquors?	Yes	No
	<input type="checkbox"/>	<input type="checkbox"/>

The petitioner objects to the action of the council in counting in favor of license five ballots, each of which have been marked by the voter in the square at the right of the word "Yes," but in such voting mark other lines appear besides the two lines crossing each other. Each of these five marks differs from the others, but they all have been referred to at the hearing as "triangles." The additional line in one case is a faint line connecting an end of one of the lines forming the cross with an end of the other line. It is such a mark as would be made if the voter's pencil lightly touched the paper in passing from the marking of one line to the marking of the other. In each of the other so-called triangles, the additional line is such an one as might be made by a voter in an attempt to retrace or make plainer one of the lines of the cross, or is such a mark as might be made unintentionally by a person of defective eyesight or by a person unaccustomed to the use of a pencil. The petitioner claims that these ballots are defective because the voter has not made the vote mark required by statute, and also because the additional line appearing in each ballot constitutes a distinguishing mark. This court has frequently held that to make his ballot effective the voter must use the voting mark prescribed by statute; i. e., one line crossing another at any angle. No vote should be counted unless the voter has conformed to that requirement. The statutory requirement is equally imperative that the voter shall place no mark upon his ballot by which it may be identified afterwards. If the voter places upon his ballot a mark unconnected with the voting mark, which additional mark appears to have been knowingly and intentionally placed, it will render his ballot defective, as bearing a distinguishing mark. So, also, if in connection with the voting mark itself the voter makes an additional mark which appears to have been intentionally made and to be one which may be a means of identification, such additional mark should be held to be a distinguishing

mark, and the ballot is defective; but in our opinion a different question is presented when, upon an inspection of the ballot it appears as most probable that the voter in making the cross required by statute, or in addition to said cross, clumsily or accidentally has made some other mark in connection with said cross, but a mark of such a nature as to raise grave doubt of any improper intention on the voter's part. From old age, defective eyesight, a clumsy or a trembling hand, lack of skill in the use of a pencil, or from other cause some voters are much less expert than others in marking their ballots. Each case must be determined after an examination of the particular mark objected to; but it may be stated as a general rule that if the additional mark or marks in question are not of a kind likely to be used for the purpose of identification, and appear to have been made accidentally, or to have been made by reason of unskillfulness in the use of a pencil or in the making of a cross, and their presence upon the ballot appears consistent with an honest intention in the voter, then a reasonable construction of the statute requires that the voter should not be disfranchised for this reason: That his ballot should be considered valid, and should be counted. As to the five ballots now under consideration, tested by the rule which we have stated, we find a strong probability that the voters intended to make merely the voting mark prescribed by the statute that the slight additional marks were inadvertently made, that they do not amount to distinguishing marks, and that the said ballots were properly counted by the town council.

[4] The petitioner objects to the counting of a ballot marked in the square after the word "Yes" with a mark which at the hearing was called a "Y" mark. This mark is made by a line slightly bent crossed by another line which does not extend to the same length as the first. The lines clearly cross, and the voter has complied with the statute. This ballot was properly counted. *Clarke v. Joslin*, 34 R. I. 376, 83 Atl. 843.

[5] The petitioner objects to the rejection of a ballot as defective which was marked with a cross to the right of the word "No," which is printed in the second line of the instruction to voters at the top of the face of the ballot, also was marked with a cross placed upon the word "No" after the question submitted, and also was marked with a cross in the square at the right of the word "No." The cross at the right of the word "No" in the instruction and the cross placed upon the word "No" after the question submitted were distinguishing marks under the statute, and the ballot was properly considered defective and rejected by the town council.

[6] The petitioner objects to the action of the town council in rejecting ballots marked with ink. Our attention has been called to

three ballots marked with ink which were held to be defective ballots by the town council. Two were ballots against license and one was a ballot in favor of license. We think that this action of the town council was proper. Our statute regulating elections by secret ballot does not in terms provide that the elector shall mark his ballot with a pencil and with a pencil alone. Section 41 of chapter 11, Gen. Laws 1909, provides: "Every voting shelf or compartment shall be kept provided, by the city, town, ward and district clerks with proper pencils for marking the ballots, which pencils shall be by the supervisors kept in condition for use; but all pencils furnished for said purpose in any election shall, in each voting district, be such as will mark a uniform color, and in marking his ballot no voter shall use a pencil marking a different color." The clear intent of this section is to guard against the identification of a voter's ballot by means of the medium used by him in marking his ballot. A ballot marked with ink is as readily distinguishable from those marked with the pencils provided by the clerk in the voting compartments as would be a ballot marked with a pencil of a different color. A voting mark made in ink amounts to a distinguishing mark placed upon the ballot. The ballots in question were properly rejected.

[7] The petitioner objects to the action of the town council in counting in favor of license three ballots, each of which is marked with a symbol in the square to the right of the word "Yes" following the question submitted, which symbols have been referred to at the hearing as asterisks. One of these so-called asterisks has much the same characteristics as the triangles above referred to, and appears to have been made in an unskillful attempt to retrace the two lines of the cross, and not to have been intended as a distinguishing mark. From its appearance the strong probability is that the mark was made by the voter in an endeavor to make the symbol required by statute, and only that. In our opinion this ballot was properly counted by the town council. Another of the so-called asterisks appears to have been made by drawing four lines crossing each other at or near a common point, and then by covering and nearly obliterating the figure so made with a number of more or less circular lines. This figure does not appear to have been made by the voter in an honest attempt to mark his ballot as required by law. This ballot should have been rejected. The action of the town council upon this ballot was erroneous. Another of the so-called asterisks was made by three lines which cross each other at a common point. Neither of the three lines seems to have been made inadvertently, but to have been drawn by a person accustomed to the use of a pencil. It appears to have been the deliberate intention of the voter to mark his ballot with a sym-

bol other than that required by the statute. The action of the town council in counting this ballot was erroneous.

[8] In some manner two of the ballot blanks prepared for said election came from the printer entirely blank upon their faces, although they each had the official indorsement printed upon the back. Each of these ballots was given by an election official to a voter, and was marked by said voter and deposited in the ballot box. Upon one of these ballots the voter wrote the word "Yes," without more, on the face of the ballot, and upon the other ballot the voter wrote the word "Yes," without more, upon the back. The town council rejected as defective the ballot having "Yes" written upon its back and counted in favor of license the ballot having "Yes" written upon its face. Neither of these ballots should have been counted. Upon unfolding the ballot delivered to him and finding it blank, the voter should have returned it to the election supervisor, and received one in proper form. Section 24, c. 11, Gen. Laws 1909, provides that, whenever at elections by secret ballot a question is submitted to the electors of a city or town, "the ballot shall be so printed as to give to each voter an opportunity to designate by a cross-mark (X) in a square his answer to the question submitted." Such ballots were provided at the polling places upon this election, although in the two instances now being considered such ballots were not delivered to the voter. In regard to the ballots in question, the intention of the voter in either case is not expressed and can only be conjectured, but, if his purpose had been clearly shown by more extended writing upon the ballot, the ballot should not be counted; for it is only in case no ballots printed as required by law are provided at any voting place, or, in case no such ballots are at the polls and ready for use of voters, that voters are permitted to use other ballots. Section 48, c. 11, Gen. Laws 1909; *In re Hammond*, Petitioner, 24 R. I. 289, 52 Atl. 1079. The action of the town council in counting in favor of license the ballot with the word "Yes" written upon its face was erroneous.

[9] Our attention has been called to the action of the town council in counting as against license a ballot on which a number of lines, drawn close together and having the appearance of one broad line, have been marked across the word "Yes" printed after the question submitted, and on which also a cross has been placed in the square to the right of the word "No." Objection to this action of the town council was made before us at the hearing. We think that this action of the council was erroneous. The lines drawn across the word "Yes" amounted to a distinguishing mark. The ballot should have been rejected as defective. We therefore find that three ballots counted in favor of license and one ballot counted as against

license were improperly so counted by the town council. As thus corrected, the vote of the town at said election upon the question, "Will this town grant licenses for the sale of intoxicating liquors?" was 655 votes in the affirmative and 655 votes in the negative. The record of the town council certified to us upon this writ should be quashed.

[10] At the hearing before us, it appeared that immediately following said proceedings in the town council licenses for the sale of intoxicating liquors were granted in the town of Westery. Although admittedly it is not a question before us upon this petition and writ, all parties have urgently requested this court to give its opinion upon the status of the licenses so granted, if we should find said vote to be a tie. In view of the public interests involved, we will pass upon the question. Section 4, c. 123, Gen. Laws 1909, among other things, provides: "Sec. 4. The electors of the several cities and towns who are qualified to vote in the election of all general officers shall, at each election of general officers, cast their ballots for or against the granting of licenses for the sale of intoxicating liquors pursuant to this chapter. If a majority of the ballots so cast at any such election be against the granting of such licenses, no license under the provision of this chapter shall be granted in such city or town during the twelve calendar months next after such election, nor until such city or town shall vote at some subsequent election of general officers to grant such licenses."

* * * But if the majority of the ballots cast at any such election shall be for the granting of such licenses, then licenses under the provision of this chapter shall be granted in such city or town during the twelve calendar months next after such election and until such city or town shall vote at some subsequent election of general officers not to grant such licenses." The intent of this section is that licenses for the sale of intoxicating liquors shall not be granted in any city or town of the state until at some election of general officers a majority of the electors of that city or town, qualified to vote in such election, shall vote in favor of granting such licenses. When in such city or town a majority of said electors have so voted, then licenses shall continue to be granted in that city or town until at some subsequent election of general officers a majority of said electors shall vote against the granting of such licenses.

In November, 1911, at the election for general officers in the town of Westery, a majority of the ballots cast at said election upon the question of granting licenses for the sale of intoxicating liquors in said town were cast in favor of the granting of such licenses. Under the provisions of said section 4, after November, 1911, licenses for the sale of intoxicating liquor shall be granted

in the town of Westery until a majority of the electors of said town shall vote at some subsequent election of general officers not to grant such licenses. As yet a majority of said electors have not so voted.

It therefore appears that the licenses in regard to the validity of which we are asked to give an opinion were properly granted.

DONAHUE v. A. C. TITUS CO.

(Supreme Court of Rhode Island. Jan. 6, 1913.)

Exceptions from Superior Court, Newport County; Charles F. Stearns, Judge.

Action by Catherine A. Donahue against the A. C. Titus Company. A verdict was rendered for plaintiff, and defendant, having been denied a new trial, brings exceptions. Overruled.

Waterman & Greenlaw, of Providence, for plaintiff. Sheffield, Levy & Harvey, of Newport, for defendant.

PER CURIAM. The jury found a verdict for the plaintiff in the sum of \$1,000. In our opinion there was sufficient evidence to support the verdict. While there is some conflict of testimony, there was sufficient evidence from which the jury was warranted in finding that the defendant was guilty of negligence in the keeping of a rug in the place where it was kept, and where the plaintiff slipped and fell, and that the plaintiff was in the exercise of due care at the time of the injury to her. The question of excessive damage is not raised by any exception.

We do not find that any exception urged by the defendant as to admission or exclusion of testimony is of sufficient importance to warrant discussion thereof, or that there was any reversible error pointed out by any of the exceptions set forth in the bill. The verdict was sustained by the trial judge, after hearing a motion for new trial, which was denied; and this court finds no reason to disturb his action in the matter.

The defendant's exceptions are overruled, and the case is remitted to the superior court sitting in the county of Newport, with direction to enter judgment on the verdict for the plaintiff.

LEAVENS v. AMERICAN EXPRESS CO.

(Supreme Court of Vermont. Orleans. Jan. 9, 1913.)

1. CARRIERS (§ 49*)—SHIPMENT OF GOODS—BILL OF LADING—PRESUMPTION FROM ACCEPTANCE.

A shipper's acceptance of a bill of lading is presumptively an assent to its terms, as far as they are reasonable, and not inconsistent with public policy.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 129, 142-147; Dec. Dig. § 49.*]

2. CARRIERS (§ 149½*)—BILL OF LADING—LIMITATION OF LIABILITY—STRIKES.

A stipulation of a bill of lading that the carrier should not be liable for delay by reason of strikes was just, reasonable, and not inconsistent with public policy.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 651-653, 660-662; Dec. Dig. § 149½.*]

Exceptions from Orleans County Court; William H. Taylor, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Merle O. Leavens against the American Express Company. A pro forma judgment sustaining a demurrer to defendant's plea was rendered, and defendant excepts. Reversed, demurrer overruled, plea adjudged sufficient, and cause remanded.

Harry A. Black, of Newport, and Colby Stoddard, of Orleans, for plaintiff. Young & Young, of Newport, for defendant.

ROWELL, C. J. This is case for damage to green skins of small wild animals occasioned by delay in delivering to the consignee in New York City to which they were shipped from Newport, Vt.

The plaintiff declares upon the common-law liability of common carriers. The defendant pleads in bar a certain provision of a special contract contained in the bill of lading, which bill, it is alleged, was delivered to the plaintiff and accepted by him at the time the goods were received for carriage, and constituted the terms and conditions on which they were to be transported, among which terms and conditions is the one relied upon, namely, that the defendant shall not be held liable for any loss, damage, nor delay by reason of strikes, mobs, nor riots. The plea then goes on to allege that, when the goods arrived in New York, a strike was in progress there among employes of various express companies other than the defendant's employes; that the defendant then and there had working for it substantially its full force of men, and at all times during said strike had a sufficient number of employes to operate its business without delay and in the usual manner, and made every possible effort to make prompt delivery, but was prevented therefrom by mobs of strikers and strike sympathizers and by violence, and repeatedly called upon the police force of said city for protection and assistance, but received none; and that its employes were unable to perform their usual duties and make prompt delivery of goods without endangering their lives, but that, immediately upon order being restored, the goods in question were delivered as soon as possible; and that whatever delay there was in their delivery was due entirely to said strike and violence, and not at all to the fault or negligence of the defendant.

The plaintiff demurs to this plea (1) because it does not appear that his attention was called to said agreement at the time of shipment; (2) because the limitation therein relating to strikes is unreasonable in law; (4) because said strike was among employes other than the defendant's; and (6) because, if the police force refused to assist as alleged, it must be presumed as matter of law that the defendant or its employes were the instigators rather than the victims of the alleged disorder. The third and the fifth grounds of demurrer need not be noticed, as they go only to the right of the defendant to stipulate against its own negligence, which stipu-

lation is not involved in the other grounds of demurrer. Nor do we further notice the fourth and the sixth grounds, as they are not briefed.

[1] The objection that it does not appear that said agreement was brought to the attention of the plaintiff at the time of shipment is not tenable, for the plea alleges that the bill of lading was delivered to him at the time the goods were received for shipment and accepted by him; and, as the demurrer admits this, the law presumes that he assented to its terms and conditions, and agreed to be bound by them as far as they are reasonable in the eye of the law, and are not inconsistent with public policy. *Davis & Gay v. Central Vt. R. R. Co.*, 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

[2] The question is, then, whether it was competent to the defendant to limit its liability as stipulated in respect of strikes, mobs, and riots. This depends upon whether the limitation is just and reasonable in the eye of the law, and not inconsistent with public policy. If both, it was competent; otherwise not. *Davis & Gay v. Central Vt. R. R. Co.*, 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852; *Sprigg's Adm'r v. Rutland R. R. Co.*, 77 Vt. 347, 60 Atl. 143. This is settled law as held in *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556, and shown by the cases generally. And that it was competent cannot be doubted, for the stipulation does not materially differ from the law, but is substantially the same as the law, by which as to the mere matter of delay in delivery, the carrier is not an insurer, but only a bailee, with the duty to deliver within a reasonable time in the circumstances, and, though temporary interruptions and obstructions that cannot be overcome with proper care and effort will excuse delay, yet they will not relieve from the duty of delivering as soon as practicable after they are removed. This is too well settled to need the citation of cases. And interruptions and hinderances caused by strikes and mob violence are among those that excuse. This, too, is well settled, but we will, nevertheless, refer to some of the cases that hold it. *Gulf, etc., Railway Co. v. Levi*, 76 Tex. 337, 13 S. W. 181, 8 L. R. A. 323, 18 Am. St. Rep. 45, is a leading case on this subject. There, on reargument, the court reversed its former decision of the case, and held that when, as there, the goods are actually transported and delivered, but the time of delivery is delayed by mobs, strikes, or other causes not under control of the carrier, the delay is excused. So in *Pittsburgh, etc., R. R. Co. v. Hazen*, 84 Ill. 36, 25 Am. Rep. 422, it is held that the plaintiff was not liable for damage to goods in transit resulting from delay caused by the lawless, irresistible violence of men not in its employment, although some of them had then recently been. In *Grismer v. Lake Shore, etc., R. R. Co.*, 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837, it is held that,

in the absence of special contract, there is no absolute duty resting upon a railroad carrier to deliver goods intrusted to it within what in ordinary circumstances would be a reasonable time; that not only storms and floods and other natural causes may excuse delay, but that the conduct of men may also excuse it; that an incendiary may burn a bridge, a mob tear up the tracks, disable the rolling stock, or interpose irresistible force or overpowering intimidation, in which cases the only duty resting upon the carrier not otherwise in fault is to use reasonable efforts and due diligence to overcome the obstacles and forward the goods. There the defendant had employes who were ready and willing to manage its train and forward the goods, but they were prevented therefrom by mob violence that the defendant could not by reasonable efforts overcome, and it was excused. The doctrine of this case is approved and applied in *Haas v. Kansas City, etc., R. R. Co.*, 81 Ga. 792, 7 S. E. 629. So it is held in *Lake Shore, etc., R. R. Co. v. Bennett*, 89 Ind. 457, that where delay in transportation of stock is caused, not by the negligence nor wrongful act of the carrier nor its employes, but solely by the violence and riotous conduct of a lawless mob that the carrier and the civil authority are unable to resist and control, the carrier is not liable for damages resulting from the delay.

The pro forma judgment sustaining the demurrer and holding the plea insufficient is reversed, the demurrer overruled, the plea adjudged sufficient, and the cause remanded.

RICHARDS et al. v. NAUDAIN et al.
(Superior Court of Delaware. New Castle.
Dec. 10, 1912.)

1. MECHANICS' LIENS (§ 272*)—ENFORCEMENT—PLEADING—GENERAL ISSUE.

Under Court Rule No. 9, § 13, providing that in mechanic's lien cases all pleadings must specially set forth the matters of defense, pleas of non assumpsit, "never indebted," "nil debet," "non est factum," or the general issue, cannot be regarded as good and proper pleas; and, independent of the rule, an owner cannot plead non assumpsit, where the labor or materials were furnished by a person employed by the contractor, and not by him, since there could be no promise on the part of the owner.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 514-524; Dec. Dig. § 272.*]

2. MECHANICS' LIENS (§ 272*) — IRRELEVANT PLEAS.

Pleas of "non est factum," and that the contract was made with another party, etc., were irrelevant, in an action to obtain a mechanic's lien by one employed by the contractor, and not the owner.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 514-524; Dec. Dig. § 272.*]

3. MECHANICS' LIENS (§ 280*)—ENFORCEMENT—PLEADING—LIMITATIONS.

In an action to obtain a mechanic's lien, the only limitation that can be pleaded is that

provided in the act itself, that a statement of claim must be filed within 90 days, or within 30 days after the expiration of 90 days.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 456-468; Dec. Dig. § 280.*]

4. MECHANICS' LIENS (§ 272*)—ENFORCEMENT—PLEADING LIMITATIONS—TIME OF FILING OF CLAIM.

In an action to obtain a mechanic's lien, a plea "that the statement was not filed within the time prescribed by the statute in such cases made and provided" will be held to mean the act relating to mechanics' liens.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 514-524; Dec. Dig. § 272.*]

5. MECHANICS' LIENS (§ 61*)—RIGHT TO LIEN—NATURE OF CONTRACT.

Under the statute providing that a person who has "performed or furnished work and labor or materials, * * * to an amount exceeding," etc., "in and for the erection * * * of any house," etc., may obtain a lien, the lien is possible for material furnished under either an express or an implied contract.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 77, 78; Dec. Dig. § 61.*]

Action to obtain a mechanic's lien by Isaac Richards and others against Arnold Naudain and another. On motion to strike pleas. Motion granted.

See, also, 81 Atl. 872.

Argued before PENNEWILL, C. J., and WOOLLEY, J.

William T. Lynam and Frank L. Speakman, both of Wilmington, for plaintiffs. Philip L. Garrett, of Wilmington, for defendants.

PENNEWILL, C. J. (delivering the opinion of the court). The motion to strike out the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, thirteenth, fourteenth, sixteenth, twentieth, twenty-second and twenty-sixth pleas filed in the above stated case, was argued and decided at the September term, with an announcement that the reasons for the decision would be given later.

There were many pleas filed, and all that were objected to but two were ordered stricken out. It is not necessary, or important, to give the reasons which induced the court to strike out many of the pleas. There was but one important question raised by the motion, viz.: Whether the plea of non assumpsit, or the general issue, is a proper plea, under the law of this state, in a mechanic's lien case.

It was that question upon which the opinion of the court was particularly desired because of the uncertainty of the law on the subject.

This court, in the case of *Voigtmann v. Wil. T. B. Co.*, 7 Pennewill, 285, 78 Atl. 920, held that non assumpsit was a "usual and appropriate plea in case of scire facias on a mechanic's lien." The question before the court in that case was, whether "set-off" could be pleaded in an action of scire facias

upon a mechanic's lien, and Judge Spruance, speaking for the court, said: "We see no reason why the same pleas might not be used in this case as in any case of assumpsit. Both reason and the purposes of justice require that the same latitude be allowed."

At an early stage of the present case, on a motion to strike out a plea to the jurisdiction, the court, following the decision in the Voigtmann Case, said: "Whether the said allegation contained in the plaintiff's statement, is, as a matter of fact, true, may be controverted at the trial under the general issue of non assumpsit, which in the case of Voigtmann v. Wilmington Trust Co. [7 Pennewill, 265, 78 Atl. 920] was held to be an appropriate plea in an action to obtain a mechanic's lien." 81 Atl. 872.

[1] There is now, and was at the time of the two decisions referred to, a rule of court, No. 9, section 13 of which provides as follows:

"In causes of mechanic's lien exceptions to the statement and claim must be filed on or before the first Monday of the term to which the scire facias is returnable. And all pleadings in said cases must specially set forth the matters of defense."

This rule was called to the attention of the court for the first time at the argument in this case, and after carefully considering the same we are clearly of the opinion that a plea of non assumpsit, or of the general issue, does not specially set forth the matters of defense as required by the rule. It seems to us to be, in character, the very reverse of the plea contemplated by the rule, and cannot therefore be regarded as a good and proper plea.

This conclusion is based upon the clear and express language of the rule, duly considered in this case, but which was not called to the attention of the court in either of the cases above mentioned. If any regard is to be paid to the said rule the conclusion we have reached seems unavoidable. Independent, however, of the rule, it may be said, that even if the general issue of non assumpsit might be pleaded in a mechanic's lien case where the work and labor, or materials, were furnished by the plaintiff for the owner on a promise of the latter express or implied, there could be no such promise, and, therefore, no such plea, when the work and labor, or materials, were furnished by a person employed by the contractor, and not by the owner, as in the present case. *Kees v. Kerney*, 5 Md. 418.

In the case now before the court there was no promise, express or implied, made by the defendant to the plaintiff, and the plea of non assumpsit was therefore improper. The pleas of "never was indebted" and "nil debet" were also ordered stricken out because they do not set out the nature of the

defense as required by the rule, the manifest meaning of which is, that the defense shall be so pleaded that its nature may be known from the plea.

[2] The plea of "non est factum" was also stricken out, and for the additional reason that there was no averment in the statement filed of any contract made with the defendant. The only contract mentioned was one made with the contractor. The plea was clearly irrelevant.

For the same reason the pleas wherein the defendant owner alleged that the supposed contract was not made with him, that he never entered into any contract with the plaintiff, or that the supposed contract was made with another, were ordered stricken out. Such pleas raised no issue of fact, and were clearly objectionable.

[3] The court held that the plea of the general statute of limitations, as pleaded in this case, was also improper, it being alleged therein that the defendant "did not at any time, within three years before the commencement of this suit, undertake or promise," etc.

It will be observed that the only limitation in this state relating to mechanic's liens, is that which is contained in the act itself, wherein it is provided that a statement of the plaintiff's claim must be filed within 90 days, or within 30 days after the expiration of 90 days, from the completion of the work and labor, or the last delivery of materials. Manifestly this is the only limitation that could be pleaded in a case like the one before the court. The plea of the act of limitations could not be relevant and material unless it showed that the statement was not filed within the time prescribed by the mechanic's lien statute.

[4] The court declined to strike out the twentieth plea which alleged "that the statement was not filed within the time prescribed by the statute in such case made and provided," meaning the act in relation to mechanic's liens.

[5] The plea of the statute of frauds which alleged that the supposed promises were concerning lands, and not in writing, was ordered stricken out because it was deemed inapplicable to the present action. The mechanic's lien statute provides that "it shall and may be lawful for any person or persons having performed or furnished work and labor or materials, or both, to an amount exceeding twenty-five dollars in and for the erection, alteration or repair of any house * * * to obtain a lien," etc. Under the statute the lien exists if the work and labor, or the materials, are furnished in pursuance of a contract either express or implied.

The court declined to strike out the twenty-second plea, the objection to it being that it was not pleaded by and with the consent of the other defendant.

BANCROFT v. BANCROFT et al.

(Superior Court of Delaware. New Castle.
Sept. 20 and Nov. 11, 1911.)

1. INFANTS (§ 77*)—GUARDIAN AD LITEM OF INFANT PARTY—POWER OF COURT.

The court has inherent power to appoint a guardian ad litem for an infant defendant properly served with process.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 192-194; Dec. Dig. § 77.*]

2. DIVORCE (§ 99*)—GROUNDS—ADULTERY—PLEADINGS.

An answer in a suit by a husband for divorce for the adultery of the wife, which alleges that at divers times within a specified period the husband committed adultery with divers persons at divers places not known to the wife, and proof of which she has not fully obtained, and is therefore unable to state with more particularity the facts, is insufficient, and will be stricken out on motion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 316-318; Dec. Dig. § 99.*]

3. DIVORCE (§ 54*)—GROUNDS—ADULTERY—JUSTIFICATION.

A wife, who is sued for divorce for adultery, may not interpose as a defense the husband's extreme cruelty.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 190-196; Dec. Dig. § 54.*]

4. INFANTS (§ 92*)—ACTIONS—GUARDIAN AD LITEM—PLEADINGS.

An answer of an infant defendant, for whom a guardian ad litem has been appointed, may only be interposed by the guardian.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 277-281; Dec. Dig. § 92.*]

5. CONTINUANCE (§ 26*)—ABSENT WITNESS—DILIGENCE.

In divorce cases, the first term after the bringing of the suit is the trial term as well as the appearance term, and a defendant must make reasonable effort to be ready for trial at the first term; but a failure to take out a commission to procure the testimony of non-resident witnesses immediately after the action is docketed, so as to be prepared for trial at the first term, does not show want of diligence, and a continuance to obtain the testimony may be granted.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 74-93; Dec. Dig. § 26.*]

6. CONTINUANCE (§ 26*)—GROUNDS—COMMISSION TO PROCURE TESTIMONY OF NON-RESIDENT WITNESSES—RULES OF COURT.

Rules of court governing the taking of the testimony of nonresident witnesses and relative to continuances must be construed with reference to the circumstances of the particular case and the statutes increasing the number of terms of court.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 74-93; Dec. Dig. § 26.*]

7. CONTINUANCE (§ 26*)—TRIAL—DUE DILIGENCE.

The rules of court governing the taking of testimony of nonresident witnesses and continuances will be liberally construed in divorce cases, so that they may be heard on their merits, though a defendant, desiring a commission to procure the testimony of nonresident witnesses, must exercise due diligence in preparing for trial.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 74-93; Dec. Dig. § 26.*]

8. DIVORCE (§ 99*)—PLEADINGS—ADULTERY.

Where a wife, when sued for divorce on the ground of her adultery, defended on the ground of recrimination, the answer, alleging

the adultery of the husband, must set forth the defense with the same particularity and specification as is required in the libel for divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 316-318; Dec. Dig. § 99.*]

9. DIVORCE (§ 99*)—PLEADINGS—ADULTERY.

An answer in a suit by a husband for divorce for the adultery of the wife, which alleges that at divers times between December 28, 1908, and the commencement of the action in 1911, plaintiff committed adultery with a woman named at a city named, and at divers times during the same period committed adultery with another woman at the same place, is too broad as to time.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 316-318; Dec. Dig. § 99.*]

10. DIVORCE (§ 137*)—TRIAL—COMMISSION TO TAKE TESTIMONY OF NONRESIDENT WITNESSES.

24 Del. Laws, c. 221, § 18, as amended by 25 Del. Laws, c. 213, § 5, providing that all trials for divorce shall be had before the court, and shall be public, except for sufficient reasons, requires hearings and trials in divorce cases before the court, instead of before a commissioner, as was the practice before the statute, and the hearings are subject to the same laws as govern other trials in open court, so far as the taking and introduction of testimony is concerned, and a commission to take the testimony of nonresident witnesses may be issued.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 457-460; Dec. Dig. § 137.*]

11. EQUITY (§ 302*)—ADDITIONAL ANSWER—GROUNDS.

Before granting leave to file an additional answer, it must appear by affidavit that the new matters set forth have come to the knowledge of defendant since the filing of the original answer, and that the delay in presenting the same is not due to any want of diligence before or since the filing of the original answer or to delay the final hearing.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 594-601; Dec. Dig. § 302.*]

12. DIVORCE (§ 125*)—EVIDENCE—ADMISSIONS—ADMISSIBILITY.

24 Del. Laws, c. 221, § 20, prohibiting a decree of divorce unless the cause therefor is shown by affirmative proof, aside from any admissions of defendant, does not exclude confessions; but, where evidence tending to establish the charge has been introduced, it is competent to prove a confession.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 399-402; Dec. Dig. § 125.*]

13. DIVORCE (§ 125*)—ADULTERY—EVIDENCE—ADMISSIBILITY.

In a suit by a husband for a divorce for the adultery of the wife, and for a decree establishing the illegitimacy of a child of the wife, admissions of the wife's adultery cannot be excluded, merely because they tend to prove the illegitimacy of the child.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 399-402; Dec. Dig. § 125.*]

14. DIVORCE (§ 115*)—ADULTERY—EVIDENCE—ADMISSIBILITY.

In a suit by a husband for divorce for the adultery of the wife, and for the establishment of the illegitimacy of a child of the wife, non-access of the husband with the wife during the period of gestation may be proved.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 371-378; Dec. Dig. § 115.*]

Action by John Bancroft, Jr., against Madeline Du Pont Bancroft and another, for a divorce for adultery of the wife, and for the

establishment of the illegitimacy of Max Hiebler. Decree of divorce, and decree establishing illegitimacy rendered.

Argued before PENNEWILL, C. J., and CONRAD and WOOLLEY, JJ.

J. Harvey Whiteman, of Wilmington, for plaintiff. T. Bayard Helsel, of Wilmington, for defendants.

Action of divorce for adultery (No. 20, September Term, 1911).

A motion for the appointment of a guardian ad litem for an infant defendant, duly served with process in an action commenced against his mother and him, was made by plaintiff, based upon two grounds, viz.:

First, the statute of the state of Delaware;

Second, by virtue of the inherent power of the court under the common law.

PENNEWILL, C. J. (delivering the opinion of the court). [1] After reading the many cases cited in the brief you submitted to us, Mr. Whiteman, we have no doubt that the court has the inherent power to appoint a guardian ad litem for an infant defendant, where a suit has been commenced against him, and he has been properly served with process.

All the cases seem to hold that the courts will so far protect the infant as to see that he is properly served with process, and that a guardian ad litem is appointed to manage his defense.

As was said by the court in the case of King v. Collins, 21 Ala. 363, "we know it is the duty of all courts to see that the interest of an infant, who is a party to a suit before it, is properly protected, and this can only be done by appointing some one to supervise and protect his rights; where there is no one else who can or will do it."

It appearing to us from the affidavits filed that the defendant, for whom we are asked to appoint a guardian ad litem, has been properly served with process, and is an infant, we are prepared to make the appointment when a suitable person is suggested.

[2-4] Plaintiff's counsel further moved to strike out those parts of the answer which appear below, on the grounds, first, that the alleged acts of adultery by the plaintiff were not averred with sufficient particularity; second, that the defendant could not recriminate by charging cruelty as a defense in an action of divorce for adultery, it being urged that the recrimination must be of a like offense as that complained of in the action for divorce. He also moved to strike out the whole answer in so far as it related to Max Hiebler, Jr., because it is not competent for any one other than guardian to file an answer for an infant defendant.

After hearing argument, the court made the following order:

"And now, to wit, this 25th day of September, A. D. 1911, upon motion of J. Harvey Whiteman, attorney for the plaintiff, and

after hearing argument by counsel for the plaintiff and for Madeleine Du Pont Bancroft, one of the defendants,

"It is adjudged, ordered and decreed that subsection C of paragraph second of the answer filed in the above stated cause, reading as follows, to wit:

"At divers times within the period aforesaid the plaintiff has committed adultery with divers other persons and at divers places not as yet fully known to this defendant and proof of which she has not yet fully obtained and is therefore unable to state with more particularity at the present time, but which she expects to be able to obtain and submit and prove to the court at the trial of this cause,"

—and that that part of paragraph third reading as follows, to wit:

"On the contrary, the defendant avers that the plaintiff has been guilty of extreme cruelty, such as to endanger the life and health of the defendant and to render cohabitation unsafe, because of which extreme cruelty the defendant has filed simultaneously with this answer, her petition or libel in this court for a divorce a vinculo matrimonii, entered into with this plaintiff,"

—be and the same are hereby stricken out of the said answer, as far as the same relates to the defense of the said Madeleine Du Pont Bancroft; and that the whole of the answer be stricken out so far as it relates to the infant defendant."

The court appointed a guardian ad litem for the infant defendant by the following order:

"Whereas, it appears by the return of the sheriff to the summons issued in the above stated case that service of the said summons was made personally upon Max Hiebler, Jr., one of the defendants in the above stated case, on the 5th day of June, A. D. 1911, by the sheriff of New Castle county, aforesaid;

"And whereas, it appears by the affidavits in the above stated case that the said Max Hiebler, Jr., is an infant of tender years;

"And whereas, counsel representing the plaintiff in the above stated case move the court for the appointment of a guardian ad litem to represent the said Max Hiebler, Jr., in the above stated cause;

"And whereas, argument was heard upon said motion for the said guardian ad litem:

"Now, therefore, on this 25th day of September, A. D. 1911, upon consideration of the foregoing petition and proof of personal service of the summons upon the said Max Hiebler, Jr., the court hereby appoints Thomas B. Helsel as guardian ad litem for the said Max Hiebler, Jr., with authority to appear for him and make defense for the said Max Hiebler, Jr., in the above stated case."

After said appointment the answer of the infant defendant was filed by his guardian.

A commission to take testimony orally in a foreign country on behalf of the defendant without interrogatories was issued under the rules of court, on the 18th day of October, 1911, returnable to the November term, 1911.

The court then consisted of PENNEWILL, C. J., and RICE, J.

The commissioner made return of the commission at the November term of said court, stating that he had not sufficient time to take testimony and return it to the present term of court. November 10th counsel for the defendants applied to the court to have the commissions continued to the January term of the court.

Counsel for plaintiff opposed the continuance because, he contended, due diligence had not been exercised, and also because the defendant had not complied with the rules of court respecting continuances at the second trial term.

PENNEWILL, C. J. (delivering the opinion of the court). [5] In the matter of the application for a continuance of the commission to take testimony in the case of John Bancroft, Jr., v. Madeleine Du Pont Bancroft and Max Hiebler, Jr., and also for a continuance of said case, to the January term, we have carefully considered the arguments of counsel, and are now prepared to render a decision. It is true, as contended by plaintiff's counsel, that in divorce cases the first term after the suit is brought is the trial term; but, it is also the appearance term. While it is necessary that the defendant should make every reasonable effort to be ready for trial at the first term, we are not prepared to hold that he is guilty of laches, and has not used due diligence, if he fails to take out his commission to procure the testimony of nonresident witnesses immediately after the action is docketed so as to be prepared for trial at the first term.

[6] Because of the frequent terms of court under the present law it would be practically impossible in many cases for the defendant to be ready for trial at the first term if the witnesses were residents in a foreign country and their testimony had to be taken by commission under the rules of court now in force, which were published before the passage of the act which increased the number of the terms of court in this county.

We think the rules of court governing the taking of the testimony of nonresident witnesses, as well as the rules and practice relative to the continuance of cases to be taken in connection therewith, should be construed with due regard to present conditions and the facts and circumstances of the particular case. So construed, we are of the opinion that under all the facts and circumstances of the present case the defendant has not been guilty of such laches, or so

failed to exercise due diligence, in procuring the testimony of the nonresident witnesses resident in Germany, as to be precluded from having the commission, as well as the case, continued to the January term.

[7] We will say, generally, that especially in divorce cases, if there is a defense to the action, the court desire, and public policy requires, that it shall be heard if it can be consistently with the law and the rules and practice of the court.

We do not mean by this, of course, that a defendant is not required to exercise due diligence in preparing for trial. He must not sleep upon his rights, take advantage of his own laches or disregard any rule or practice of court. But we do mean that the rules of court governing the taking of testimony of nonresident witnesses will be liberally construed in divorce cases so that they may be heard and determined upon their merits.

It is ordered by the court that the commission issued since the last term of court, and returned to the present term unexecuted for lack of time, be continued to the next term, and that the case be likewise continued.

Counsel for defendant thereupon asked to file the following answer alleging recrimination, viz.:

"Madeleine Du Pont Bancroft, the defendant, saving and reserving unto herself all and all manner of objections and exceptions to the manifold errors and imperfections of the petition or libel of which she may avail herself by plea or demurrer, for further answer to the said libel, by leave of the court first had, saith:

"That John Bancroft, Jr., the said plaintiff, being at the time sojourning in Munich, Bavaria, empire of Germany, in violation of his marriage vow for a period of two years and upwards last past has given himself up to adulterous practices, that is to say:

"(a) At divers times between the twenty-eighth day of December, 1908, and the commencement of this action, the said plaintiff committed adultery with one Ella Mahl, at Munich, Bavaria, empire of Germany, the particular locality or localities in the said city of Munich being to the defendant at present unknown.

"(b) At divers times between the twenty-eighth day of December, 1908, and the commencement of this action, the said plaintiff committed adultery with one Hilda Metzkopp Kirchseeon, at Munich, Bavaria, empire of Germany, the particular locality or localities in the said city of Munich being to the defendant at present unknown."

Mr. Whiteman, for plaintiff, objected, on the ground of insufficiency of particularity as to the times of the alleged acts of adultery. Mr. Helsel, for defendant, contended that in the answer it was not necessary to al-

lege time and place, with the same particularity as in the libel.

PENNEWILL, C. J. [8, 9] In 2 Woolley on Delaware Practice, at section 1636, we find the following:

"When the respondent's defense amounts in substance to a traverse of the allegations contained in the libel, and does not embrace matters of condonation, recrimination or other special defenses, a formal answer to the libel is unusual and unnecessary. As the libelant must prove the averments of the libel in support of his case, so the respondent, without formal answer, may introduce any evidence that is in contradiction of the libelant's proof.

"When divorce is sought on the ground of adultery, the statute provides, that 'if the defendant shall recriminate and prove that the complainant had been guilty of the like crime; or has admitted the defendant into conjugal society or embraces after knowledge of the adultery; or that the complainant, if a husband, allowed of his wife's prostitution, the petition shall be dismissed.' Such defenses, as it appears, partake of the nature of confession and avoidance, or if the allegations of the petition are denied, as they may be, and recrimination, condonation or the allowing of the wife's prostitution is at the same time relied on, the defense amounts to a plea of an exception to the statute allowing divorce for the cause of adultery. In either case, or in any case, where the respondent relies upon an exception to the statute, and defends upon the ground of recrimination, condonation or the husband's assent to his wife's prostitution, the defense is not a traverse, but sets up new matter, and must be specially pleaded. Defenses of the characters embraced within these exceptions of the statute should be pleaded and shown by an answer. The answer should set forth the matters of defense with the same particularity and specification as are required in the libel, for if by the answer the adultery is admitted, but recrimination or condonation is relied upon to constitute an exception to the libelant's right to a divorce, the burden of proof is shifted, and the respondent is required to prove that she is within the exception of the statute. The libelant is entitled to this particularity, because such a defense, in substance, constitutes a charge against him, concerning which he has a right to be fully informed, so that he may either contradict it or prove acts of adultery subsequent to the acts relied upon as a defense."

That seems to be the law in this state, and, we think therefore, the averment in the answer, as to time, is too broad.

Counsel for the plaintiff moved that the orders heretofore made for the issuance of commissions to take the testimony of non-resident witnesses on behalf of one of the defendants be annulled, on the ground that

under the law of this state testimony so taken cannot be used in divorce cases.

PENNEWILL, C. J. (delivering the opinion of the court). [10] A determination of the question raised by the motion involves a construction of section 18, chapter 221, volume 24, Laws of Delaware, entitled "An act regulating annulment of marriage and divorce."

The said section as amended by section 5, chapter 213, volume 25, Laws of Delaware, reads as follows: "All hearings and trials shall be had before the court, and not before a master, referee or any other delegated representative, and shall be public, provided that, for reasons appearing sufficient to the court, the hearings and trials may be had before the court privately in chambers."

We think all that was intended to be accomplished by the section mentioned was to change the method or procedure of hearings and trials in divorce cases, so that they should be had before the court instead of before a commissioner, as was the case prior to the enactment of the statute referred to; and further, that all such hearings and trials should be public, except such as the court believed, for sufficient reasons, should be had privately.

The court are clearly of the opinion that hearings or trials of divorce cases under the present law, are subject to, and are to be governed by, the same laws and rules as govern other trials in open court, so far as the taking and introduction of testimony is concerned, and the motion of the plaintiff is, therefore, refused.

Before BOYCE and RICE, JJ.

Mr. Helsel, for defendant, asked further leave to file an additional answer. Mr. Whiteman, for plaintiff, objected, as on the former occasion, that the alleged answer was not sufficiently particular. The paper was handed to the court.

BOYCE, J. Mr. Whiteman, we have read the proposed answer. We will hear you.

Mr. Whiteman: My objection is that the answer gives me no notice, and is a subterfuge for one that was attempted to be filed here last week. In matters of this kind, the courts have required great particularity, and the rule of court is that the answer is required to be of the same particularity as the petition. While it is addressed to the discretion of the court, yet it is a judicial discretion, which the court will exercise according to well established rules.

In cases of adultery the name of the person is always required. We, however, have a few isolated cases going to this extent: that if the name of the person and the specific residence are given, you may allow some latitude as to time; and the reverse of that is true—that with the name of the person, and being specific as to time, some latitude as to place will be allowed.

The place is laid in Munich, a foreign city containing from 250,000 to 300,000 inhabitants; the name of some person, and the month and year are mentioned. We have no means of finding out whether a fictitious person is named or not. I have no means of directing the defendant's attention to where he was or to any particular house or any particular street.

Mr. Helsel: All charges in connection with this case are laid in Germany. Last week I offered as a further answer in this cause an affidavit covering an answer similar to the one presented to the court to-day. The court refused to allow me to file that answer on the ground that it was not sufficiently specific as to time. Just as soon as it was possible for me to fix the time more definitely from information which I had to obtain from Germany, I prepared this further answer which I have presented to the court.

There are many cases holding that the month and the year which are alleged is definite enough. In *Addicks v. Addicks*, 1 Marv. 338, 41 Atl. 78, the court held that if the year was named that it was sufficiently definite. *Black v. Black*, 26 N. J. Eq. 431; *Bishop on Marriage, Divorce and Separation*, § 1340.

RICE, J. Mr. Helsel, in filing the further answer, you do not mean that that answer supplements so much of the other answer as it stands now?

Mr. Helsel: Yes, sir.

RICE, J. There is an answer filed. Does this take the place of the old answer?

Mr. Helsel: No, sir; this supplements the old answer. It is an additional, further answer. I am not filing it as a substitute for, or an amendment to the old answer, but as an additional answer.

BOYCE, J. Your purpose is that this proposed additional answer shall supplement the original answer?

Mr. Helsel: Yes, sir.

BOYCE, J. (delivering the opinion of the court). This is a second application by Madeleine Du Pont Bancroft, one of the defendants, made within a week, to file an additional answer to plaintiff's petition for divorce, alleging misconduct of the plaintiff by way of recrimination. The first application was refused by the court because of insufficiency of particularity. The present application is opposed for like reason.

We have had very little time to consider the questions raised because the commissioner appointed to take testimony in Germany has made all arrangements to sail in a few hours.

Before reaching our conclusion, the court inquires of you, Mr. Helsel, whether the new matters averred by your client have only to come to her and your knowledge very recently, and since you sought to file the first additional answer, which was refused by the court.

Mr. Helsel: They came to my knowledge for the first time on Friday of last week, the 10th instant.

BOYCE, J. Have the averments been made as fully and with all the particularity you are able to do at this time?

Mr. Helsel: They have.

BOYCE, J. [11] The court is clear that good practice in matters of this character requires that before leave should be granted to file an additional answer it should be averred, being duly verified, that the new matters set forth have come to the knowledge of the party alleging them very recently and since the filing of the original answer, and that the delay in presenting the same to the court was not due to any want of diligence before or since the filing of the original answer or for the purpose of hindering or delaying the final hearing and determination of the case.

In view of the fact that the commissioner is about to sail for Germany, and the answers made by Mr. Helsel to our inquiries, and in the absence of any settled practice, the question whether we should entertain the present application, belated, as it is, is one which appeals to our discretion. Under all the circumstances we think it should be entertained. And after a hurried consideration of the sufficiency of the averments, other matters in court engaging our attention at the same time, we think the averments are sufficient.

Leave is granted to file the additional answer.

Before PENNEWILL, C. J., and CONRAD and WOOLLEY, JJ.

Upon the application of defendant's counsel, and without objection, the court made an order that 15 days' notice be given to counsel for defendant of the time of taking testimony by the plaintiff in Germany, or any foreign country, and that 10 days' notice be given of the taking of such testimony in the United States.

Mr. Kurtz, the commissioner, made return, reporting that under the law of Germany he was not permitted to take the testimony of German witnesses, as that prerogative belonged exclusively to the German courts. The only testimony obtained by the commissioner was taken outside of his commission, in the form of an affidavit of one witness submitted by counsel for Madeleine Du Pont Bancroft, regarding which the said attorney had the witness voluntarily submit herself to cross-examination by the attorney for the plaintiff, in reference to the statements in said affidavit. That examination took place in the office of the United States consul in Munich, Germany.

The commissioner's report showed that said affidavit was not filed in court, but was delivered to counsel for the defendants, which was subsequently used in the trial for the purpose of laying ground for contradic-

tion of said witness when called to the stand to testify.

The case came on for trial at the November term, 1911, before PENNEWILL, C. J., and CONRAD and WOOLLEY, JJ. Charles T. Terry, of the New York bar, and Paxson Deeter, of the Philadelphia bar, were admitted pro hac vice as additional counsel for the plaintiff and the defendants, respectively.

Counsel for plaintiff offered in evidence, as tending to prove a confession of adultery, a letter written by the defendant Madeleine Du Pont Bancroft to her sister-in-law. This was objected to by counsel for defendants, who contended that any admission of the defendants of adultery was inadmissible under the divorce statute of 1907.

PENNEWILL, C. J. We understand the offer of this letter is to support the charge of adultery.

Mr. Terry: Precisely. That is all that it is offered for at this time.

PENNEWILL, C. J. [12] That is the question that is now before the court. The court think that section 20 of chapter 221, volume 24, Laws of Delaware, entitled "An act relating to annulment of marriage and divorce," means, when reasonably construed, not that confessions shall be excluded in the trial of a case, but rather that the decree shall not be made unless there is other evidence establishing the cause. In other words, it defines the probative evidence of confessions. The manifest purpose of the act is that divorces should not be granted through collusion of the parties, and it was to prevent that, we take it, that the act was passed, that particular section of the act.

We overrule the objection.

Counsel for defendants further contended that the statute meant that the confession could not be admitted until the case is established by other affirmative proof.

PENNEWILL, C. J. In reply to that suggestion, Mr. Deeter, the court feel that there has been introduced some evidence—we do not undertake to say what its value or effect may be—tending to establish the charge. We do not think it would be competent for us at any particular stage of the case to determine whether there has been sufficient evidence to establish it or not. So that we still think it is admissible.

In the course of the trial letters and other admissions of the wife and her alleged paramour, tending to show the paternity of the child, were admitted against objection, in proof of adultery of the wife, but subject to the further consideration of the court as to whether they may be considered in support of the issue of the illegitimacy of the infant defendant. The opinion of the court was as follows:

PENNEWILL, C. J. [13] We have considered the objections made by counsel for the defendants to the admissibility of the letters offered in evidence by the plaintiff, as

well as the arguments of counsel for respective parties thereon, and have reached the conclusion that inasmuch as the evidence offered tends to prove the issue of adultery as well as the issue of the illegitimacy of the infant defendant, it cannot be excluded.

The court has already decided in this case that, while a decree of divorce cannot be granted upon the admissions or confessions of the wife alone, such testimony is nevertheless admissible, and may be considered by the court, if the cause is shown by affirmative proof aside from such admissions or confessions. Such being the case, and it being admitted by counsel on both sides that the letters offered in evidence tend to prove the issue of adultery, we are clearly of the opinion that they cannot be excluded on the ground that they also tend to prove the issue of the child's illegitimacy, it being impossible to separate that which tends to prove one issue from that which tends to prove the other.

And it occurs to us now that there is another reason why the court may not refuse the admission of said letters, which is this:

[14] We understand this to be admitted by counsel for the defendants, and such is we think the law, that evidence may be admitted to show the fact of nonaccess on the part of the husband with the wife during the period of gestation. It has been testified by medical witnesses in behalf of the plaintiff that there could have been no such access as would make it possible for the plaintiff to be the father of the child whose legitimacy is in dispute. We also have the statement of counsel for the defendant they propose by their testimony to controvert such evidence, and by medical testimony show that there was such access, taking to be true the undisputed date at which access began.

It is true, therefore, that the fact of access is in dispute and contested, and we are not now prepared to hold that the plaintiff may not establish his claim of nonaccess by testimony other than that of expert medical testimony.

We will admit in evidence in support of the issue of adultery the letters offered, and determine later whether they shall be considered by the court in proof of the issue of illegitimacy. Whether they are, or are not, legally admissible in support of the latter issue may be more apparent in the further development of the case; and in the meantime we will be able to examine with more care than is now possible the authorities which have been just cited, and possibly arrive at a more satisfactory determination of the important questions that have now been raised for the first time in this state, and apply the same to the decision of this case.

The objection is overruled.

There was much oral testimony introduced, showing physical facts and circumstances tending to prove both adultery on the part

of the defendant and the illegitimacy of her child. The court reserved its decision until the March term, 1912, when the following opinion was announced:

PENNEWILL, C. J. (delivering the opinion of the court). The court are prepared to announce their decision in the above stated case.

After a very careful, thorough and serious examination and consideration of the arguments, the evidence and the law, we have reached the following conclusions, viz.:

1. That a decree nisi should be entered, divorcing the plaintiff and defendant wife from the bonds of matrimony heretofore existing between them. The court are satisfied that the cause for divorce was shown by affirmative proof aside from any admissions on the part of the defendant.

2. That the exclusive custody and control of the child, John Bancroft, should be awarded to the plaintiff.

3. That a decree should be entered establishing the illegitimacy of Max Hiebler, Jr., the infant defendant.

In reaching this conclusion we have not regarded the letters or other admissions of the defendant wife or Max Hiebler, which were received in evidence to be thereafter considered, or disregarded, by the court in arriving at their judgment.

PIERCE v. COLE

(Supreme Judicial Court of Maine. Dec. 23, 1912.)

1. FRAUD (§ 9*)—ACTIONABLE FRAUD—ELEMENTS.

A plaintiff suing for fraud must show that the false representation was intentionally made by defendant with intent that plaintiff should act on it, or so as to naturally induce him to act on it; that the representation was false, and was known to defendant to be false, or made as a fact of his own knowledge; that the representation was an expression of a past or existing fact and not of opinion; that it was material; and that plaintiff relied on it and was deceived, and thereby induced to act, to his damage.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 3, p. 7666.]

2. APPEAL AND ERROR (§ 1050*)—ERRONEOUS ADMISSION OF EVIDENCE—HARMLESS ERROR.

Where, in an action for deceit in the sale of a farm, based on the vendor's fraudulent representations that the farm had produced 30 tons of hay for several years past, there was evidence that two years before the sale the vendor had listed his farm for sale, and had on a blank prepared for the purpose stated that 30 tons of hay were cut, and that the agent preparing an advertisement used the expression "30 tons of good English hay cut in smooth fields," and that the vendor had had nothing to do with the advertisement, which did not come to the attention of the purchaser until after the purchase, the error in permitting the agent to testify as to his reason for phrasing the advertisement the way he did by stating that it

was necessary to make a little variety in advertising was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

3. FRAUD (§ 52*)—EVIDENCE—ADMISSIBILITY.

In an action for deceit in the sale of a farm, evidence of an admission by defendant that he had set a dishonest trap for a third person with reference to a sale of personal property which plaintiff thereafter bought was inadmissible.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 48; Dec. Dig. § 52.*]

4. EVIDENCE (§ 106*)—CHARACTER OF DEFENDANT—ADMISSIBILITY.

In an action for deceit, evidence of character of defendant is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 177-187; Dec. Dig. § 106.*]

5. EVIDENCE (§ 106*)—CHARACTER OF PARTY—GENERAL REPUTATION.

Where evidence of character is admissible, it must be shown by general reputation, and not by specific acts, though proof thereof may come by way of admissions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 177-187; Dec. Dig. § 106.*]

On Motion and Exceptions from Supreme Judicial Court, Kennebec County, at Law.

Action by George A. Pierce against Charles J. Cole. There was a verdict for plaintiff, and defendant brings exceptions, and moves for a new trial. Exceptions sustained.

Argued before SAVAGE, BIRD, HALEY, and HANSON, JJ.

Williamson, Burleigh & McLean, of Augusta, for plaintiff. George W. Heselton, of Gardiner, for defendant.

SAVAGE, J. Action for deceit in the sale of a farm in 1907. The particular misrepresentation alleged is "that said farm for several years then last past had produced and cut thirty tons of hay in each year," which representation it is alleged was untrue. The plaintiff testified that the defendant said that the farm "was cutting 30 tons of hay," and particularly of that year, 1907. "He showed me the hay in the barn there, and told me there was 30 tons. He said that it was all that year's hay."

The defendant denies making any representation about the quantity of hay cut, except that at the interviews in the barn, being asked by the plaintiff how much hay he thought there was in the barn, he replied: "I don't know. You must judge for yourself. I think there is about 30 tons." He does not deny that he said the hay in the barn was cut that year. In fact, it is his claim that the farm did cut substantially 30 tons of hay that year, and had done so for the preceding years, or, if not, that he had reason to believe, and did believe so, that whatever representations he made he made in good faith, and without an intention to deceive. The verdict being for the plaintiff, the case comes up on the defendant's exceptions and motion for a new trial.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] Several of the exceptions relate to one subject-matter, and may be considered together. To the question, "Were all the representations you made to the plaintiff made in good faith?" the answer was excluded on the ground that it was immaterial. The presiding justice declined to instruct the jury as requested by the defendant that the plaintiff, to prove his case, must show "that the defendant intentionally made false representations of the amount of hay cut on his farm; that the defendant knew that the representations regarding the hay were false, or so recklessly made them as a fact, without regard to their truth or falsity, when he was able to ascertain their truth or falsity; that if the statements which the defendant made regarding the hay were based upon honest beliefs that they were true, and not recklessly made by him as a fact when the truth could have been ascertained, and he did not in making these statements intend to deceive, the action cannot be maintained, so, if the defendant did not know that the statements were false, or did not recklessly state a larger amount when he could readily have ascertained the actual amount, but gave the plaintiff his best judgment without intent to deceive, so, also, unless the plaintiff shows that there was an intent on the part of the defendant to deceive the plaintiff concerning some material fact by representation made with a knowledge of the falsity of this fact, or made recklessly without regard to the truth or falsity of the fact."

The presiding justice, instead of giving the jury the requested instructions, instructed them as follows: "If one person makes a statement of a positive fact, the truth of which can be ascertained, as of his own knowledge, and that statement is untrue, and he has made that statement for the purpose of inducing another party to act upon it, and the other party relying upon the statement, being induced by the statement, and without knowledge of its falsity on his own part, does act upon such statement to his damage, then such statement is such a misrepresentation as will sustain an action of deceit, * * * and it is not necessary that the false statement should be made with a fraudulent purpose and with intention on his part to cheat or defraud." This statement omits to say that the representation must be concerning a material fact, and that it must be the representation of a fact, and not the expression of an opinion, but these are covered elsewhere in the charge.

The defendant urgently contends that the requests do, and that the charge does not, correctly state the fundamental requisites of proof in an action of deceit. We must hold otherwise. The law in this state has been stated, affirmed, and reaffirmed several times of late, and must now be regarded as settled. The full rule of proof, as was said in *Hotchkiss v. Coal & Iron Co.*, 108 Me. 34, 41, 73 Atl. 1108, is that the plaintiff must show

that the representations were intentionally made with the intent that he should act upon them, or in such manner as would naturally induce him to act upon them; that they were false, and were known to the defendant to be false, or, being of matters susceptible of knowledge, were made as of a fact of his own knowledge; that they were expressions of past or existing facts, and not expressions of opinion; that they were material; and that he relied upon them, was deceived, was thereby induced to act, and was thereby damaged. *Braley v. Powers*, 92 Me. 203, 42 Atl. 362; *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245; *Goodwin v. Fall*, 102 Me. 353, 66 Atl. 727; *Eastern Trust & Banking Co. v. Cunningham*, 103 Me. 453, 70 Atl. 17. See, also, *Litchfield v. Hutchinson*, 117 Mass. 195. In the latter case the court said: "If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense that he believed the facts to be true. The falsity and fraud consist in representing that he knows the facts to be true of his own knowledge, when he has no such knowledge." Therein is the deceit.

It is true that the defendant in his requests states conditions which are themselves evidence of deceit, but he omits the more comprehensive condition, correctly given in the charge, of representations of matters susceptible of knowledge, made as of a fact of the defendant's own knowledge, and shown to be untrue. The defendant can take nothing by these exceptions.

[2] In 1905 the defendant had his farm listed for sale in a "Farm Agency," the one by whose means the sale was ultimately effected. At that time, upon a blank prepared for that purpose, to the question, "How many tons of hay are cut?" he answered, "Thirty." The agent prepared an advertisement of the farm, in which he used the expression: "Thirty tons of good English hay cut in smooth fields." It is not shown that the defendant had anything to do with the preparation or phrasing of the advertisement, and it never came to the attention of the plaintiff until after he had bought the farm. The agent who prepared the advertisement was called by the defendant as a witness. On cross-examination he was asked with reference to the advertisement: "Can you tell or recollect why there was any reason for putting it just that way, 'Thirty tons of good English hay cut from smooth fields,' instead of saying 'cuts good English hay?'" Against the objection of the defendant the witness was permitted to answer: "We have to make a little variety in advertising. Can't use the same language in our advertisements."

Inasmuch as it appears that the advertisement had nothing to do with the trade, and

does not appear that the defendant personally had anything to do with the expression in the advertisement, the evidence was immaterial for all purposes except to impeach the witness. And as to that it did not contradict anything that the witness had testified to, nor, so far as we can see, impeach him otherwise. We think the evidence was not admissible, but we also think that it was harmless. And for that reason the exception must be overruled. *Hovey v. Hobson*, 55 Me. 256; *Powers v. Mitchell*, 77 Me. 361.

[3] Besides the farm, the plaintiff purchased of the defendant live stock, farming machinery, implements, and tools, of which a list was attached to the contract of sale of the farm. The price of the farm was \$3,200, of the personal property \$800. The plaintiff testified that after the trade he had some talk with the defendant about a shortage of the small tools. He then testified in answer to questions as follows: "Q. In connection with that talk, did he make any general statement to you about the whole transaction? A. Yes, sir. Q. What did he say to you? A. I asked him what represented the 'twenty' on my list. He says, 'Plows, cultivators, bars, rollers'—(witness interrupted) Q. Did he make any statement to you? A. Yes, sir. Q. About this whole transaction, selling the farm and everything? A. Yes, sir. Q. What was it? A. I asked him, and he said it represented (objection, as not responsive) the roller. I said, 'Mr. Cole, that roller is not on the list.' He said, 'That is your roller,' and I says, 'Very well, that is your idea.' He said, 'The trap was not set for you. It was set for the other fellow.'" The admissibility of this statement being challenged, the presiding justice ruled that it was admissible, allowed it to stand, and allowed an exception. The defendant denies having made the statement.

The previous testimony of the witness, in response to leading questions that the statement related to "the whole transaction, selling the farm and everything," obviously made it impossible to object successfully to the statement until after the witness had stated it. Then the point was made that it did not relate to the farm. Plaintiff's counsel contended that that was for the jury to decide, and the presiding justice so ruled.

[4, 5] But we think that the entire conversation, not only did not show that the statement objected to related to "selling the farm," but it showed clearly that it did not relate to "selling the farm." If true, it did not show that the defendant had a purpose of cheating the plaintiff in regard to the hay. Regarded as an admission, it was an admission only of a trap set for some other "fellow," but not for the defendant. And that, too, as the context shows, concerning something else than the sale of the farm. Giving it the utmost probative force that

can be claimed for it, it showed that in a specific instance the defendant "set a trap" for another person, and, it may be inferred, a dishonest trap. The statement may have been some evidence of character. But evidence of character is not admissible in a civil action of this kind. And, when evidence of character is admissible, it is to be shown by general reputation, and not by specific acts. 1 *Greenleaf on Evidence*, § 55; 2 *Greenleaf on Evidence*, § 269; 1 *Wigmore on Evidence*, § 64; *Potter v. Webb*, 6 Me. (6 Greenl.) 14; *Thayer v. Boyle*, 30 Me. 475. Nor is the evidence any more admissible because it comes in the form of an admission than it would be otherwise. It may be noticed that when, later in the trial, the plaintiff offered to show the same statement by another witness, the presiding justice, having had further opportunity to consider it, said, "I do not think it was quite connected the way it was put in before," and excluded the evidence.

We think the evidence was inadmissible. It should have been excluded, or, if it was let in through a misunderstanding of its scope, it should have been stricken from the record, and the jury instructed to disregard it, which was not done. The evidence was not only inadmissible, but it was calculated to be mischievous, and extremely prejudicial to the defendant. This exception must be sustained. The remaining exceptions and the motion for a new trial need not be considered.

Exceptions sustained.

GAMRAT v. WORUMBO MFG. CO.

(Supreme Judicial Court of Maine. Dec. 26, 1912.)

MASTER AND SERVANT (§ 154*)—INJURY TO SERVANT — NEGLIGENCE — FAILURE TO INSTRUCT.

Where a woolen mill employé when injured by his hand being caught between the rollers of a washing machine was 18 years old, had been in this country three years, and had worked in various mills and become familiar with machinery, and where he had assisted at least twice, at the machine in question, he was chargeable with knowledge of the danger though this was not his regular work, and his employer was not negligent in failing to instruct him thereon.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 308, 309; Dec. Dig. § 154.*]

Exceptions from Supreme Judicial Court, Androscoggin County, at Law.

Action by John Gamrat against the Worumbo Manufacturing Company. Judgment of nonsuit, and plaintiff excepts. Exceptions overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, KING, and HALEY, JJ.

Getchell & Hosmer, of Lewiston, for plaintiff. McGillicuddy & Morey, of Lewiston, for defendant.

HALEY, J. This is an action on the case, in which the plaintiff, a minor, seeks to recover damages of the defendant for an injury that the plaintiff claims he sustained by reason of his hand being caught between two rollers in a washing machine which the plaintiff was assisting another workman in preparing to start up in the defendant's factory. The accident took place on the 18th day of December, 1911; the plaintiff being at that time 18 years of age and having been in this country 3 years.

When the plaintiff first came to this country, he worked one year and eight months in the cardroom of the defendant, putting wool in the carding machine. He then went to Connecticut, and worked eight months in a scissors factory, sharpening scissors on a grindstone. He then worked six months in a plush mill at Bridgeport. He then returned to Lisbon Falls, Me., and went to work for the defendant in the finishing room, and had been so employed about two weeks at the time of the accident.

He had, before the day of the accident, been called by a man operating the machine known as the washer to assist him in what is known as the threading machine; the plaintiff says three times, the workman said four to six times.

The machine upon which the plaintiff was injured consisted, in part, of two sets of rollers. The work the plaintiff was engaged in when injured was in placing a piece of cloth so it would roll through a second set of rollers. The first set of rollers were about half an inch apart when the cloth was put through, which evidently, when the machine was running, dropped together. A few feet from the first rollers was another set of rollers about six or eight inches in diameter; one being of copper and one covered with hard rubber. The cloth run from the first set of rollers to the second set, and in order to thread it, or place the cloth so that it would run through the rollers, it was necessary for the workman to stand back of the second rollers, facing the first rollers, and reach over the second rollers and hold the cloth close to the rollers, when the machinery was started, and allow the cloth to roll through, so that it could be taken up over another roller some few feet higher, and it was while placing the cloth in position to run through the second rollers that the accident happened. The plaintiff testified that the first time he attempted to put the cloth through the second set of rollers he did not succeed, and that another workman finished the job, and the man operating the machine made some talk to him about his being stupid. The day of the accident the plaintiff was called to assist the workman in placing the cloth between the rollers, as above stated, and told to step in and put the cloth through the second set of rollers. He did so by standing facing the rollers and reaching over, holding the cloth some five

or six inches from the end, with the ends close to the rollers. The man operating the machine, in plain sight of the plaintiff, asked him if it was all right, and the plaintiff said all right, whereupon the man operating the machine turned on the power to start the cloth through the rollers. According to the testimony, the rollers turned about one-third round, and the plaintiff's hand was drawn in between the rollers so that his fingers were jammed up to the end of his thumb, and he was obliged to have one of his fingers amputated. The man operating the machine testified that he turned the power on as usual, when the cloth was being put through as it was at this time; that is, he started the machine enough to carry the cloth through, and then stopped it, that he saw the plaintiff's fingers as they started to go between the rollers, and he stopped the machine, and released the plaintiff's hand.

There is no allegation in the declaration or evidence in the case that the washing machine was not a suitable and proper machine for the purpose for which it was used, or that the master did not furnish a reasonably safe place to perform the work that the plaintiff was performing when injured; but the action is sought to be maintained because the plaintiff was a minor, and inexperienced in the handling or working of such machines as the washing machine, and because he was immature and inexperienced, and did not appreciate the danger of operating the machine, and that the defendant did not perform its duty by properly instructing him of the dangers of operating a washing machine, and, in fact, gave him no instructions or warnings of the danger of operating the machine.

Did the plaintiff know and appreciate the danger of the work he was doing? It was not his regular work, but he had seen the work done a few times, and had assisted in threading the machine at least twice. For over thirty-four months he had worked in factories—one year and eight months putting wool in carding machines, where the wool was drawn in as the cloth was, he was threading the washing machine with, was drawn in, between the rolls; eight months in a scissors factory, grinding scissors, where there must have been revolving wheels and moving machinery; six months weaving in a plush mill, where there must also have been revolving wheels and moving machinery. He then worked two weeks in the defendant's factory among moving machinery. It would seem that his experience in the various mills for practically three years must have taught him the danger of coming in contact with revolving wheels or cylinders. He would have learned the danger by observation, without instruction. He would have learned it as the child learns that fire will burn, that a fall will hurt, or that a sharp instrument will cut. He must have known that, if his fingers got against the cylinders, they would be drawn in between them. He was holding

a piece of cloth against the cylinders that it might be drawn in between them. How could he help, knowing that, if his hand came in contact with the cylinders, it would be drawn in as the cloth was drawn in? It is true that he testified he was frightened, but was he? What was there to frighten him? He was used to machinery. He had seen the same work done, and knew that the machine would be started but a few inches to allow the cloth to run through the rolls, and that, when it was caught between the rolls, he could take his hands off the cloth, and, if he did, as he might have done, there was no danger; and if he was afraid that his hand would be drawn in, although he need not have been, he knew the danger, and by the exercise of reasonable care could have avoided it. When his fellow servant asked him if it was all right to start the machinery, and he replied that it was, he knew the danger, and he knew that his fellow servant was about to start the machinery that turned the rollers, and, although he complains that the machine started quicker than it had at other times, his experience with machinery should have told him that the speed of the machine would necessarily be regulated by the amount of power, that sometimes it might start faster than at other times, but in applying power enough to turn the cylinder a third round there could be no appreciable difference in the speed during the different times it was started, and, by the exercise of due care, by allowing the cloth to run through his hands, he could have avoided all danger. No instruction of the master was needed to inform him of what he must have known. It was not a concealed or an unknown danger, but one that was perfectly apparent to him. *Mott v. Packard*, 108 Me. 247, 80 Atl. 279.

Nor do we think the plaintiff's age was such that he could not appreciate the danger of his employment. It seems incredible that a young man, 18 years old, with 3 years' experience among machinery, was not old enough to appreciate the danger of coming in contact with revolving cylinders. It is contrary to human experience to think that he did not appreciate that danger. Reason and experience must have taught him the danger. Intelligence and reason are not developed the instant one becomes of age. From childhood to manhood they are growing and developing. Reason, as well as authority, says he was of sufficient age to appreciate the danger of coming in contact with machinery in operation. *Mott v. Packard*, *supra*, and cases there cited.

As the plaintiff was of sufficient age to appreciate the danger of the labor he was performing at the time of the accident, if it was dangerous, and his knowledge of the working of machinery was such that it was not an unknown or an unseen danger, the conclusion is irresistible that the accident

was caused by the contributory negligence and want of due care on the part of the plaintiff in not avoiding a danger known to him, and the judgment of nonsuit was properly ordered.

Exceptions overruled.

CITY OF AUBURN v. PAUL

(Supreme Judicial Court of Maine. Dec. 30, 1912.)

1. MUNICIPAL CORPORATIONS (§ 408*)—LOCAL IMPROVEMENTS—ASSESSMENT — ASSESSMENT FOR BENEFITS.

An assessment for benefits for a local improvement is made under the taxing power of the Legislature by municipal officers acting as agents of the state, and the validity of the assessment must be determined by the rules governing the validity of other assessments.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1001, 1002; Dec. Dig. § 406.*]

2. MUNICIPAL CORPORATIONS (§ 511*)—LOCAL IMPROVEMENTS—ASSESSMENTS FOR BENEFITS —APPEAL.

An appeal from an assessment for benefits for the construction of a local improvement is not a constitutional right, but a privilege which can be granted by the state alone.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1183, 1184; Dec. Dig. § 511.*]

3. MUNICIPAL CORPORATIONS (§ 453*)—LOCAL IMPROVEMENTS—ASSESSMENTS FOR BENEFITS —REVIEW—STATUTORY PROVISIONS.

Rev. St. c. 21, § 6, authorizing one dissatisfied with his assessment for a local improvement to have the assessment determined by arbitration, and requiring the municipal officers to nominate six residents of the town, two of whom, selected by the applicant, with a third selected by the two, shall fix the amount, provides for a disinterested board of arbitration, though the interest of a general taxpayer does not disqualify, but no other interest is permissible, and the town must name six citizens who are not interested in the benefits or assessments except as general taxpayers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1076-1079; Dec. Dig. § 453.*]

4. MUNICIPAL CORPORATIONS (§ 408*)—LOCAL IMPROVEMENTS — SPECIAL ASSESSMENTS — STATUTES—VALIDITY.

A statute authorizing assessments for local improvements according to the benefits conferred on the property fixes the standard of assessment and designates the property to be assessed, since the burden must be borne by the property benefited according to benefits received.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1005, 1006; Dec. Dig. § 408.*]

5. MUNICIPAL CORPORATIONS (§ 408*)—LOCAL IMPROVEMENTS — SPECIAL ASSESSMENTS — STATUTORY PROVISIONS—CONSTRUCTION.

Rev. St. c. 21, § 5, providing that when any town has completed a sewer the municipal officers shall determine what parcels of land are benefited thereby, and shall assess thereon such sum, not exceeding the benefits, as they may deem just for the cost of the improvement, requires the municipal officers to determine what parcels of land are benefited by the sewer constructed, and to assess thereon, according to the benefits received, such sums as they deem just and proportionate, and the assessments must be according to the benefits received by the

parcels as compared with those received by other parcels, so that the act sufficiently prescribes how the assessment shall be made.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1005, 1006; Dec. Dig. § 408.*]

6. STATUTES (§ 238*)—CONSTRUCTION—STRICT CONSTRUCTION.

The powers given by a statute to subordinate local authorities are strictly construed, and every reasonable doubt as to the existence of a particular power is resolved against its existence, and, where two constructions may be adopted, that construction limiting the powers to such as are necessary to carry out the objects of the act must be adopted.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 319; Dec. Dig. § 238.*]

7. TAXATION (§ 28*)—LEGISLATIVE POWER—DELEGATION.

The Legislature may not delegate its legislative power of taxation except to municipal corporations so far as is necessary for their own purposes, and in such case the power must be expressly and distinctly granted.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 60; Dec. Dig. § 28.*]

8. MUNICIPAL CORPORATIONS (§ 406*)—LOCAL IMPROVEMENTS — ASSESSMENTS — OFFICERS AUTHORIZED TO MAKE.

Priv. & Sp. Laws 1903, c. 137, as amended by Priv. & Sp. Laws 1905, c. 109, creating a board of public works for a city and merely conferring on it the powers and duties relating to the construction, maintenance, and care of the streets and sewers of the city conferred or imposed on the council, does not authorize the board to levy assessments for benefits for the construction of a sewer, but such assessments are governed by Rev. St. c. 21, §§ 5, 6, authorizing municipal officers to levy assessments for benefits for the construction of sewers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1001, 1002; Dec. Dig. § 408.*]

Report from Supreme Judicial Court, Androscoggin County, at Law.

Action by the City of Auburn against Ether S. Paul. Cause reported. Judgment for defendant.

Argued before SPEAR, CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

Seth May, City Sol., of Auburn, for plaintiff. John A. Morrill, of Auburn, for defendant.

HALEY, J. This is an action of debt brought by the city of Auburn under the provisions of chapter 21, § 10, of the Revised Statutes of Maine, to, recover the sum of \$1,680, the amount of an assessment levied upon the defendant's land on Lake and Shepley streets and Gamage avenue, in said city, for the benefits received by said land by the construction of a sewer through said streets. The assessment in question was levied by the board of public works of the city of Auburn, which consisted of the mayor, a member ex officio, and five citizens of Auburn chosen by the city council under the provisions of the Private and Special Laws of 1903, c. 137, as amended by the Private and Special Laws of 1905, c. 109.

October 2, 1909, the board of public works voted to petition the city council to locate and accept a street from Lake street to Gamage avenue to be on the line between the land of the defendant and the Davis estate. The signers of this petition included five of the six members of the board of public works, who later made the assessment in question.

July 11, 1910, the city council authorized and directed the board of public works to construct the sewer in question, and made the necessary appropriation therefor. The board of public works received the order from the city council, and accepted the same, and authorized the mayor to contract for the building of the sewer, and the mayor, in behalf of the city, executed a contract and the sewer was constructed. On December 10, 1910, the board of public works took a view of the streets in which the sewer was located for the purpose of making the assessments upon the property benefited by the said sewer. January 4, 1911, the question of the assessments for the sewer was taken up by the board, and it was voted to make an assessment of \$35 for each 50-foot lot, and the assessments were made and filed in the city clerk's office that day, and on the same day a hearing was ordered by the said board upon the subject-matter of the assessments to be held on February 18th, and due notice thereof was given.

On February 13, 1911, the hearing was had before the board of public works, and it was voted to abate of the defendant's assessment the sum of \$210, leaving the assessment at \$1,680, and the defendant was duly notified of the above action. February 21, 1911, the defendant notified the board that he desired the assessment to be determined by arbitration. On February 25th the board named six citizens of Auburn, from which two members of arbitrators were to be selected by the defendant under the provisions of chapter 21, § 6, R. S. March 3, 1911, the defendant notified the city clerk of his selection of two of the names submitted, and March 10, 1911, the city clerk notified the defendant that one of the parties selected by him refused to serve, and the defendant afterwards declined to make a further choice, although the city clerk offered, in behalf of the board of public works, to furnish another list of names for the defendant to select from.

The defendant questions the validity of the statute governing and regulating assessments for the construction of sewers, as provided by chapter 21.

Section 5 of chapter 21, R. S., provides that the municipal officers, after constructing a sewer, shall determine what lots or parcels of land are benefited by such drain or sewer, and shall estimate and assess upon such lots and parcels of land and against the owners thereof, or the person in possession or against whom the taxes thereon shall be assessed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

such sum not exceeding such benefit as they deem just and equitable toward defraying the expense of constructing and completing such drain or sewer, not to exceed one-half of the cost of such drain or sewer, and also provides for the filing by them with the clerk of the town a location of such drain or sewer with a profile description of the same, and the amount assessed upon each lot or parcel, and that the clerk shall record the same, and within 10 days shall notify each person so assessed, with an order of notice signed by the clerk, stating the time and place for hearing upon the subject-matter of such assessment, and upon such hearing said officers shall have power to revise, increase, or diminish any such assessment.

Section 6 provides:

"Any person not satisfied with the amount for which he is assessed, may, within ten days after such hearing, by request in writing given to such clerk, have the assessment upon his lot or parcel of land determined by arbitration. The municipal officers shall nominate six persons who are residents of said town, two of whom selected by the applicant, with a third resident person selected by said two persons, shall fix the sum to be paid by him, and the report of such referees made to the clerk of said town, and recorded by him, shall be final and binding upon all parties. * * *

It was the evident intent of the Legislature, by section 6, to provide a tribunal, before which a party assessed for the construction of a sewer might have determined, by proceedings in the nature of an appeal, the amount that he should be assessed for the expense of the construction of the sewer, by reason of the benefit received by his land, which tribunal should act judicially in determining the amount of his assessment.

The power of the Legislature to authorize the assessment of a tax upon the owners of land whose property is benefited by a sewer, according to the benefit received, as in this case, is not questioned; the statute authorizing such assessment having been before this court in a suit between the same parties to recover an assessment for the construction of a sewer (*Auburn v. Paul*, 84 Me. 212, 24 Atl. 817), in which that question was raised and decided, and the same principle as applied to the widening of a street was sustained in *Bangor v. Peirce*, 106 Me. 527, 76 Atl. 945, 29 L. R. A. (N. S.) 770, 138 Am. St. Rep. 363, but the position now urged by the defendant against the validity of the assessment was not presented to the court, nor passed upon, in *Auburn v. Paul*, supra.

[1] The assessment having been made, under the taxing power of the Legislature, by the board of public works, who, if they were authorized to make it, were, in the assessment thereof, acting as agents of the state, and having complied with the statute by fixing a time and place for a hearing before

the board of public works, when the parties assessed to pay a part of the cost of the construction of the sewer could be heard upon the assessment made, due notice thereof having been given, that hearing had, and its doings recorded, the proceedings were according to the statute (R. S. c. 21, § 5), and the validity of the assessment must be judged and determined by the same rules of law as those by which other assessments are judged and determined.

[2] It is objected that section 6 of chapter 21, R. S., providing for arbitration to fix the amount of the assessments, is invalid, as, by section 6, the owner of the land is not given the right of appeal that he is entitled to by law, but in *Auburn v. Paul*, supra, the court said: "And when the statute merely imposes a tax for benefits, like the act now considered, involving no question arising under the exercise of eminent domain, no appeal to a jury need be provided,"—citing *Howe v. Cambridge*, 114 Mass. 388; *Chapin v. Worcester*, 124 Mass. 464. In the above cases the parties taxed urged that they were entitled to an appeal to a jury, which explains why the court said, "to a jury." It would have been more accurate to have said, "No appeal need be provided." The assessment in question is the same as any tax assessed by the Legislature within its constitutional limits, the exercise of the sovereign power, from which no appeal lies, except when given by statute. Upon the separation of Maine from Massachusetts, the Legislature of this state enacted a law giving parties aggrieved by the assessment of taxes by the assessors of the cities and towns the right of appeal from the assessment. Public Laws of 1821, c. 116, § 13. The same right existed by statute in Massachusetts before the separation, and has existed in this state ever since the act of separation; but, without a statute giving the right, there could be no appeal from the assessment of taxes by the assessors of the cities and towns. An appeal from the assessment of taxes is a privilege, not a constitutional right, and can only be granted by the sovereign power; that alone has the power to impose the tax.

[3] Section 6, by giving to a party aggrieved the right to have the amount of his assessment determined by arbitration, gave him a right to a hearing before a disinterested court or board, according to the rules of law and the procedure of our courts. It does not mean a hearing before an interested court or board.

It is urged that section 6, giving to a party aggrieved the right to have his assessment determined by arbitration, has not provided a disinterested board to fix the amount of the assessment, but that the board of arbitration that the statute provides to finally fix the amount is an interested board, and therefore incompetent to judicially determine the benefits received by the various lots

of land, and the amount of the assessments therefor, and the objection is urged because the board provided for by section 6 must all be citizens of the town in which the sewer is constructed, and that, as citizens, they would be interested to assess the benefits to the full amount allowed by statute that the burden to their town, by reason of the construction of the sewer, might be lessened. So zealous is the law in protecting its tribunals from even the suspicion that their judgments are influenced by any interest except the merits of the cause that it was held in *Commonwealth v. McLane*, 4 Gray (Mass.) 427, that a recognizance, entered into before a justice of the peace residing in the town in which any forfeiture incurred under the recognizance was given by statute, was void, if there was no statute expressly removing his disqualification by reason of such interests, if there was any other magistrate in the county before whom the recognizance could be taken. Lord Coke declared, while sitting judicially, that even an act of Parliament, made against natural equity, as to make a man a judge in his own case, is void in itself, "for jura naturæ sunt immutabilia, and they are leges legum," cited in *State v. Crane*, 36 N. J. Law, 400. The maxim that no man can be a judge in his own case is said to have had its origin in the fundamental nature of law; but, while a law enacted by the Legislature giving a party power to act as judge in his own case is undoubtedly void, it does not follow that any interest, however small, is a disqualifying interest that cannot be removed. If the Legislature did not have that power, as said in *State v. Intoxicating Liquors*, 54 Me. 564, "this argument, if carried out to its logical results, would prevent the imposition of any fine to and for the use of the state, by any magistrate in it, whether a justice of the peace or a judge of the Supreme Court; for all are citizens of the state and pay taxes, and have an interest in having a treasury supplied by penalties and fines, in the same manner as the judge of the police court of a city has in replenishing the city treasury by like means. It has been contended that when the Legislature has, in express terms, given jurisdiction in cases where the magistrate might have a minute and remote interest, without in terms, or by implication, except as in such case, the fair construction is that jurisdiction is given notwithstanding such interest, and, although there may be other courts of concurrent jurisdiction, * * * the limit and extent of the provision is within legislative discretion and determination." The court then quotes Chief Justice Shaw in *Commonwealth v. Emery*, 11 Cush. (Mass.) 411, as follows: "We may go further and add that, it being quite competent for the Legislature to provide, as they have in many cases, that such a municipal minute interest shall not disqualify a judge, juror, or appraiser or other similar

officer, when jurisdiction is given to a magistrate, who, by force of the same act, may have some remote municipal interest, it was their intention to remove such disqualification."

In the case of *State v. Crane*, supra, the court, in discussing the interest that would disqualify a party from acting judicially, after stating that the interest objected to in that case was that one of the commissioners to assess the damages for the laying out of the way was an owner of land over which the way passed, said: "This interest is different from that of a general taxpayer which, in some cases, from the necessity of things, might be disregarded, or, if not so, could be relieved against by the Legislature. * * * That it may be done when the interest is only as a general taxpayer I think is clear. * * * It may therefore be considered as settled that disqualification for such interests as are common to all taxpayers may be removed by the Legislature." The Legislature has removed the interest of a justice or a judge in suits in which the county or town in which he resides are parties if the adverse party to such town or county enters on the docket a waiver of their interest (R. S. c. 84, § 50), also the interest of trial justices, judges of municipal and police courts, in suits for taxes (R. S. c. 10, § 27), and also interest of juror in prosecutions for the recovery of money, or other forfeitures, when they are liable to pay taxes in the county, town, or plantation which may be benefited by the recovery. R. S. c. 84, § 101.

We think that the Legislature, by providing that the board of arbitration to fix the assessment should be citizens of the town in which the sewer was constructed, considered that the interest of the general taxpayer of the town was too minute or remote to warp or influence their judgment, and that the disqualification by reason of that interest was removed by the act. *State v. Bangor & Brewer*, 98 Me. 114, 56 Atl. 589.

Of course, if the interest of any of the parties named as arbiters was more than the interest of the general taxpayer, that interest would not be removed, and they would not be competent to act. In other words, it is the duty of the town to name six citizens of the town, who are not interested in the benefits or assessments other than as general taxpayers, to act as arbiters, and a board selected as provided by section 6 is a competent and disinterested board to act judicially in determining the amount of the assessment for the construction of sewers.

[4] It is also urged that sections 5 and 6 are invalid because they prescribe no rule or standard of assessment, and it has been held that acts authorizing the assessment for local improvements upon designated property must determine the mode of distributing the burden; that the property out of which the tax is to be made must be desig-

nated, and the standard of assessment established, and cannot be left to the discretion of others, and assessments like the one under discussion, where the officers making them were authorized to assess in such proportions as they deemed just and equitable, have been held invalid. But statutes authorizing assessments according to the benefits conferred upon the property assessed are not subject to the objection, because the property to be assessed is designated, and the standard of assessment is fixed. The burden is to be born by the property benefited according to the benefits received.

[5] So much of section 5 as is material upon this branch of the case is as follows:

"When any town has constructed and completed a public drain or sewer, the municipal officers shall determine what lots or parcels of land are benefited by such drain or sewer, and shall estimate and assess upon such lots and parcels of land * * * such sum not exceeding such benefit as they may deem just and equitable toward defraying the expenses of constructing and completing such drain or sewer, the whole of such assessments not to exceed one-half of the cost of such drain or sewer. * * *

We think that this statute should be construed to mean that the municipal officers shall determine what land, or parcels of land, are benefited by the sewer or drain, and that they shall assess upon such lots or parcels, according to the benefits received by such lots or parcels, such sums as they deem just and equitable—that is, equitable and proportionate—that the fair implication of the language is that the assessments are to be according to the benefits received by the lots or parcels, as compared with the benefits received by the other lots or parcels. It is not claimed that the assessments in question were not made according to the benefits received, but only that the statute does not prescribe how they shall be made, and does not specify that they shall be made according to the benefits received. But, as before stated, the fair implication of the statute is that the assessments are to be made according to the benefits received by the land assessed, and the statute is not invalid for the reason urged.

[6-8] It is also objected that the board of public works had no authority to make the assessment in question; that that duty is placed by statute upon the municipal officers of the city; and that, as the municipal officers did not make the assessment in question, no valid assessment has been made. The act creating the board of public works (chapter 137 of the Private and Special Laws of 1903) provided that said board were to have and exercise "all the powers and be charged with all the duties relating to the construction, maintenance and care of the streets, highways, bridges, sidewalks, drains and sewers in said city, which are now con-

ferred or imposed upon the city council, municipal officers and commissioners of streets by the charter and ordinances of the city and the general law of the state."

This act took from the city certain of its powers and duties, among others some relating to sewers and drains, and imposed those powers and duties upon the board of public works. By section 2, c. 21, R. S., the municipal officers of a town, or a committee duly chosen by the town, may construct public drains or sewers. By the law of 1905 that power was taken from the city of Auburn and imposed upon the board of public works. By section 5, c. 21, R. S., it is provided that: "All drains or sewers shall forever thereafter be maintained and kept in repair by such town." The city of Auburn, by the law of 1905, had that duty taken from it, and it was imposed upon the board of public works. The only powers and duties taken from the city government, as far as drains and sewers are concerned, and imposed upon the board of public works, in express terms, are the construction, maintenance, care, and control. The board of public works could not construct the sewer until authorized by the city council and an appropriation made therefor. Section 5, c. 21, R. S., provides that, whenever any town has constructed and completed a public drain or common sewer, the municipal officers shall determine what lots or parcels of land are benefited by such drain or sewer, and shall estimate and assess such sum, not exceeding such benefits, as they may deem just and equitable toward defraying the cost of constructing and completing such drain or sewer. Was this duty and power taken from the municipal officers by the act creating the board of public works and imposed upon that board? If it was, it was so taken by the law of 1905 creating the board, as no amendment granting that power has since been enacted by the Legislature, and it must be determined by a construction of the act creating the board. The rule of construction as stated in *Endlich on the Interpretation of Statutes*, § 352, is as follows: "The powers that are given to subordinate local authorities are strictly construed, and every reasonable doubt as to the existence of a particular power resolved against the same, and consequently of two possible constructions that has to be adopted, which is based upon the theory that the Legislature intended to delegate only such powers as were necessary to carry out the objects of the enactment, and not any larger powers than were necessary for that purpose. Hence, too, statutes delegating to municipal and other inferior authorities the power of imposing taxation must be in clear and unambiguous terms, and are subject to the rule of strict construction." *Cyc.* vol. 37, p. 725, after stating that the Legislature cannot delegate its power of taxation, states the exception as to municipal corporations

as far as necessary for their own purposes and in respect to property within their jurisdiction, and then states: "But, even in this case, the power must be expressly and distinctly granted." In *Wandworth, Board of Public Works, v. Telephone Co.*, L. R. 13 Q. D. 904, Bowen, L. J., in discussing what powers were conferred upon the board, said: "The board of works have what the Metropolis Management Act, 1855, has given to them; they have no more and no less. * * * It is wise to adopt such a construction as is based upon the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the act, and not give any unnecessary power."

In *Paine v. Spratley*, 5 Kan. 526, in discussing the powers of the city to assess taxes, the court said: "Such corporations possess and may exercise those powers which are granted in express terms; also those necessarily implied or necessarily incident to the powers expressly granted; and lastly those which are absolutely indispensable to the declared objects and purposes of the corporation. In this connection it may also be stated that it is regarded as a settled principle of law that, wherever there is a fair and reasonable doubt as to the existence of a power in such corporations, the courts will not uphold or enforce its execution."

As shown above, there was no express authority given to the board of public works to estimate the benefits and make the assessments. Their powers and duties were to have and exercise all the powers, and be charged with all the duties relating to the construction, maintenance, care, and control, of drains and sewers. Is the grant of the power of taxation necessarily implied or necessarily incident to the power expressly granted said board? We do not think it is. The board of public works do not need the power of taxation to construct, maintain, and keep in repair sewers. By the law of the state sewers can only be constructed after an appropriation for that purpose has been made by the town, which in this case was done by the city council, who alone had the power to appropriate the money for that purpose. Under the act creating them they could only expend for drains and sewers the money appropriated for that purpose. Therefore they did not need the power to assess the owners of the land benefited to enable them to perform the duties imposed by the act creating the board. Section 7, c. 109, of the Private and Special Laws of 1905, provides that all of the bills of said board shall be paid from the city treasury. The power of taxation is not indispensable to the declared object and purpose for which said board was created, and as the Legislature has not granted to the board of public works the power of taxation—i. e., the power to assess land and the owners for

the benefits received by the sewer—there has been no valid assessment; therefore this action cannot be maintained.

Judgment for defendant.

HEALD v. PAYSON et al.

BENNER v. SAME.

(Supreme Judicial Court of Maine. Jan. 6, 1913.)

1. ELECTIONS (§ 237*)—CONTEST—PLURALITY.

A candidate who did not receive a plurality of all the votes cast is not elected, though his opponent was not properly nominated, and, his opponent not being ineligible to the office, the votes cast for him are effectual so as to prevent the election of a candidate receiving a less number of votes.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 210-215; Dec. Dig. § 237.*]

2. ELECTIONS (§ 273*)—CONTEST—PERSONS ENTITLED TO BRING.

Under Rev. St. c. 6, §§ 70, 73, providing that any person claiming to be elected may proceed in equity against the person holding or claiming such office, and that the court may order the party unlawfully claiming or holding such office to yield up to the officer who has been adjudged lawfully entitled thereto, one not himself elected cannot demand the ouster of one in possession of the office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 249; Dec. Dig. § 273.*]

3. APPEAL AND ERROR (§ 781*)—QUESTIONS REVIEWABLE—MOOT QUESTIONS.

Questions in the determination of which neither party has any interest are moot, and will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. § 781.*]

Report from Supreme Judicial Court, Knox County.

Petition by Edwin O. Heald for a writ of mandamus against Clarence D. Payson and others to correct the record of the votes cast in the primary election. The peremptory writ was awarded, and respondent excepted. Petition by Edward M. Benner to oust Clarence D. Payson from the office of register of probate. On report. Exceptions dismissed, and petition dismissed.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, KING, and BIRD, JJ.

R. I. Thompson, of Rockland, for petitioner Heald. M. A. Johnson, of Rockland, for petitioner Benner. Williamson, Burleigh & McLean, of Augusta, for respondents.

SAVAGE, J. The first of these cases is a petition for mandamus to compel the ward clerk of Ward 3 in Rockland to correct the record of the votes cast for the Democratic candidates for register of probate at the primary election held June 17, 1912. The peremptory writ was awarded, and the respondent excepted.

The second case is a petition, as in equity, under R. S. c. 6, § 70, wherein the petitioner claims that he was legally elected to the of-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fice of register of probate for Knox county, at the September election, 1912. The case comes up on report. The two cases relate, in effect, to the same subject-matter.

The history of the case, and the contentions of the parties, briefly stated, are these: Heald and Payson were both candidates for the nomination of register of probate in Knox county at the primary election in June, 1912. The names of both were on the Democratic official ballot. On the face of the returns throughout the county it appeared that Payson had been nominated. Heald claimed that there was an error in the record of the votes cast in Ward 3, Rockland, and in the returns thereof, which, if corrected according to the fact would show that he had received a majority of the votes cast, and was therefore legally nominated. Heald brought a petition for mandamus to compel the ward clerk to correct the record and return. The peremptory writ was granted, and the corrections were made. After the writ was granted, as it seems, the exceptions in this case were allowed. It is unnecessary to inquire into the merits of the controversy as presented to the Governor and council. In the end that body decided to place the name of Payson upon the official ballot to be used at the September election. Benner was the Republican candidate for the office of register of probate, whose name appeared upon the same ballot. At the election in September, Payson received a large plurality of the votes over Benner.

[1] Benner's contention is that Heald was lawfully nominated as a candidate for the office of register, and should have been so declared by the Governor and council; that Heald's name, instead of Payson's, should have been placed upon the official ballot for the September election; that the placing of Payson's name upon the ballot was unlawful; and that, therefore, all ballots cast for Payson are to be deemed null, and to be entirely disregarded, and not to be counted for any purpose. Upon that view of the case, the petitioner, Benner, claims that he received a plurality of all the votes that can legally be regarded and counted, and that he is entitled to judgment for the office.

We do not agree with the conclusion. Whatever may be said in regard to Payson's nomination, it is patent that Benner was not elected. It is fundamental that minorities cannot elect or rule. By the overwhelming weight of authority in this country, a candidate receiving less than a plurality of the votes cast is not elected, even if the opposing candidate receiving a plurality of the votes is ineligible. The votes cast for an ineligible candidate are at least so far effectual as to prevent the election of a candidate who received a less number of votes. Of the many authorities sustaining this proposition, we cite the following: Crawford v. Dunbar, 52 Cal. 36; State v. Swearingen,

12 Ga. 23; People v. Molitor, 23 Mich. 341; Barnum v. Gilman, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304; State v. Vail, 53 Mo. 97; State v. Anderson, 1 N. J. Law, 318, 1 Am. Dec. 207; People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508; Com. v. Cluley, 56 Pa. 270, 94 Am. Dec. 75; In re Corliss, 11 R. I. 638, 23 Am. Rep. 538; State v. McGeary, 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446; State v. Smith, 14 Wis. 497. In some of these cases, following the English authorities, it is held that the rule does not apply where the electors have full knowledge of the ineligibility of the candidate. In some cases it is held that the rule does apply even when the candidate for whom the greater number of votes were cast dies before the election is completed, or, indeed, if there be no such person as the one named on the greater number of the ballots.

In this case the general rule must be applied. Payson was not dead. He was not ineligible. There was no reason why at the election any voter who chose to do so should not vote for him. A plurality did vote for him. There is nothing to show that the electors had knowledge of any irregularity or imperfection in the ballot within the English rule, even if we assume that such an irregularity or imperfection existed. On the contrary, each elector was given, for marking, an official ballot prepared by authority of the state on which Payson's name appeared.

[2] There is no escape from the conclusion that Benner was not elected. That being so, we have no occasion to examine the other numerous questions raised in argument. If Benner was not elected, he cannot maintain this petition under R. S. c. 6, § 70. If he was not elected, he cannot have Payson ousted in this proceeding. It is only when a petitioner shows himself entitled to an office that "the court may issue an order to the party unlawfully claiming or holding said office, commanding him to yield up to the officer who has been adjudged to be lawfully entitled thereto, said office." R. S. c. 6, § 73. Unless Benner shows himself elected, he cannot demand an ouster of Payson. It results that Benner's petition must be dismissed.

[3] The foregoing conclusion in the case of Benner v. Payson virtually disposes of the case of Heald v. Payson. Nothing is left in it but moot questions. Neither party has any further interest in their determination. To overrule or to sustain the exceptions will not now affect either party's right. Therefore the exceptions should be dismissed.

Accordingly the certificate will be in Heald, Pet'r, v. Payson et al.:

Exceptions dismissed.

In Benner v. Payson et al.:

Petition dismissed, with single bill of costs.

FLOSTROY v. WM. B. CORBY COAL CO.
et al.(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)**1. ATTACHMENT (§ 180*)—TRANSFER OF CORPORATE STOCK—PRIORITY.**

A transfer of corporate stock in satisfaction of a debt due from the stockholder has priority over a subsequent attaching creditor of the stockholder, though notice of the transfer was not given until after execution sale under the attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 550-575; Dec. Dig. § 180.*]

2. CORPORATIONS (§ 197*)—RIGHT TO VOTE CORPORATE STOCK—RELIEF.

Where the president of a corporation acquired, on execution sale, the stock of a stockholder who had previously transferred the stock to a third person who acquired title, the president could not vote the stock, but the court would restrain him from so doing and permit the third person to vote the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 747, 749-763; Dec. Dig. § 197.*]

Appeal from Court of Chancery.

Suit by Thomas E. Flostroy against the William B. Corby Coal Company and another. From a decree of the Court of Chancery advised by Vice Chancellor Stevens, for complainant, defendants appeal. Affirmed.

The following is the opinion of Vice Chancellor Stevens:

"This is in effect a contest between the complainant, Flostroy, who holds certain stock of the William B. Corby Coal Company by assignment from one Girvan, and a judgment creditor of Girvan, who claims title to the stock by sale under execution. Four hundred and thirty shares of this stock were transferred by Girvan to Flostroy on March 21, 1911; but the assignee did not give notice and did not request a transfer on the company's books until July 6, 1911. In the meanwhile, on May 3, 1911, Johnson, the execution creditor, who is also president of the coal company, obtained a judgment in the district court against Girvan for \$520.50, and sold Girvan's interest in the stock, under docketed judgment and execution on May 16, 1911. On May 17th there was issued to him on the company's books a certificate for 431 shares, the entire amount that had been held by Girvan.

[1] "The weight of the evidence is that Flostroy was a creditor of Girvan, and that on March 21, 1911, the stock certificate was actually transferred to him, in blank, in satisfaction of his debt. There is no doubt but that Johnson was also a creditor. Neither parted with anything of value at the time of obtaining title. Flostroy's transfer was prior in time but he gave no notice until after Johnson had, under the execution sale, obtained from the company a transfer on its books. The question, which under these circumstances has the better title, has been directly adjudicated by Vice Chancellor

lor Pitney in *Board of Education v. Duparquet*, 50 N. J. Eq. 234, 24 Atl. 922. He there held that notice was not necessary in order to give priority to the prior assignee over a subsequent attaching creditor, and that, as between the former and the latter, the former had the better title. There is a manifest distinction between such a creditor and one who, without notice, parts with value, on the strength of an assignment based on the apparent ownership of the assignor, in cases where he has notified the debtor, and the first assignee has not. *Cogan v. Conover Manufac. Co.*, 69 N. J. Eq. 814, 64 Atl. 973, 115 Am. St. Rep. 629; *Jenkinson's Ex'r v. N. Y. Finance Co.*, 79 N. J. Eq. 247, 82 Atl. 36, Emery, V. C.

[2] "Mr. Johnson, after acquiring title, took steps to dissolve the corporation. A meeting of the stockholders was called, and it was, by more than a two-thirds majority, resolved to dissolve. If Johnson had not voted the stock he obtained on the execution sale, the requisite majority would not have been secured. A temporary injunction restrained the filing with the Secretary of State of the certificate of consent to dissolve. This injunction must be made permanent, so that Flostroy may have an opportunity of voting on the question of dissolution."

Wolber & Blake, of Newark, for complainant. Edwin A. Rayner, of Newark, for defendants.

PER CURIAM. The decree appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Stevens.

MAYOR AND COMMON COUNCIL OF CITY OF HOBOKEN v. STATE BOARD OF EQUALIZATION.(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)**Error to Supreme Court.**

Action between the Mayor and Common Council of the City of Hoboken and the State Board of Equalization. From a judgment in favor of the latter, the former brings error. Affirmed.

Horace L. Allen, of Hoboken (John J. Fallon, of Hoboken, on the brief), for plaintiffs in error. William D. Edwards, of Jersey City (Edwards & Smith, of Jersey City, on the brief), for defendants in error.

PER CURIAM. This case was decided by the Supreme Court prior to the decision in *Lehigh Valley Railroad Co. v. Jersey City*, 80 N. J. Law, 298, 78 Atl. 215. Our decision in that case justifies the result reached by the Supreme Court in the present case. It is unnecessary to decide whether that result

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

does justice to the railroad company, since they do not appeal.

The judgment is affirmed, with costs.

MINTURN, J. (dissenting). The commissioners of assessment of the city of Hoboken imposed an assessment on what is called the lower ferry property in that city, containing a frontage of approximately 350 feet on the Hudson river, upon which is erected the ferry building and alaps, from which the ferry-boats of the Delaware, Lackawanna & Western Railroad Company ply between Hoboken and the city of New York. This ferry was operated by Col. John Stevens for the use of the general public before the advent of steam as a motive power, and thereafter under contract arrangement between its owners and the Morris & Essex Railroad ferried the passengers of the railroad in conjunction with the general public of the state at large between the two cities. Through mesne conveyances the Delaware, Lackawanna & Western Railroad took the property over in 1903. Some time thereafter the railroad returned the property with its other buildings to the state board of assessors, by which board it was assessed as railroad property. The city board of assessors continuing to assess it locally, the question of jurisdiction thus raised was presented to the county board of taxation, and thereafter to the state board of equalization of taxes, which latter board found as to the buildings that "it clearly appeared that this use is three-fourths local and one-fourth railroad use," and canceled the local assessment of \$440,000, and substituted upon the ratio aforesaid an assessment of \$85,000. Upon review that adjudication was sustained by the Supreme Court. This judgment of affirmation is upon writ of error before us. It is unnecessary for the purpose of this review to consider the question raised by the city as to the right of the Morris & Essex Railroad Company, the lessor of the present owner, to operate a ferry under the provisions of its charter. If it be conceded that it possesses no such power, the argument still remains that the Delaware, Lackawanna & Western Railroad Company possesses the power under the nineteenth section of the General Railroad Act (L. 1903, p. 656). And, since the latter railroad company is undeniably the owner and operator of the ferries, the question of the charter powers of the former company is entirely beside the question at issue. We are relegated, therefore, to the question of the logical soundness, and legal correctness of the view of the state board of assessors in formulating this assessment, and that of the Supreme Court in affirming it. Railroad and canal property was segregated as a class from the general ratables of the state for taxation purposes solely upon the theory that there was a differentiation in use which warranted the segregation as a legislative state policy. *State Board of Assessors v. C. R. R.*,

48 N. J. Law, 147, 4 Atl. 578. The federal Supreme Court also held under similar circumstances that such a differentiation does not militate against the constitutional requirement that property be assessed at true value under general laws and by uniform rules. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Kentucky R. R. Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; *Pittsburg R. R. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031. The ratio decidendi in these adjudications was the peculiar use to which the property was put, for upon that theory alone could the segregation and differentiation in method of assessment be justified under the constitutional inhibition. The Supreme Court in determining the locus of an assessment in controversies such as that sub judice has frequently emphasized this distinction.

In the case of *Camden & Atlantic R. R. Co. v. Atlantic City*, 58 N. J. Law, 316, 33 Atl. 198, where the Supreme Court had under consideration the character of two distinct properties owned by the railroad company, one admittedly property impressed with a railroad use, and as such assessable by the state board, and the other a street trolley railroad assessable by the local authority, Mr. Justice Garrison said: "The electric system * * * has no such history (i. e., steam railroad use) and must be judged in the light of its admitted character, irrespective of its ownership. The application of any practical test discloses the independent character of this class of property. Thus, supposing the steam railroad company should sell the disputed property to a street railway company, what railroad purpose would thereupon cease to be subserved?" It was determined that the electric plant, although owned and operated by the steam railroad, was locally assessable. The case of *Lehigh Valley R. R. Co. v. Jersey City*, 80 N. J. Law, 298, 78 Atl. 215, is clearly distinguishable from the case at bar, and serves to emphasize the rationale which should govern in the determination of these cases. The learned Chief Justice who had previously in his opinion recognized the distinction of use as the determining factor in *Re United R. R. & Canal Co.*, 75 N. J. Law, 334, 68 Atl. 167, again emphasizes it, in the *Lehigh Valley Case* by stating: "The test is use for railroad purposes." Keeping in mind the distinction drawn by the Supreme Court in the *Camden & Atlantic Railroad Case* and the *United N. J. R. R. & Canal Case*, in applying this test of railroad use, can it be rationally claimed that mere ownership, regardless of the extent or percentage of use shall determine the question? Is ownership in the construction of the railroad taxation act to be deemed the equivalent of use regardless of the extent of the use? If so, the adjudications of the Supreme Court recognizing an equality of use in the locality as

a basis for local assessment are not in conformity with this principle of construction.

It is entirely conceivable that the actual railroad use may be but nominal, and the local use the substantial factor of value in the operation of a ferry plant, as in the case at bar, still under this test of mere ownership the right to assess and tax is denied to the locality, and transferred to a board organized by statute for dealing with the assessment of property assumed to be impressed with a distinct railroad use, and for that reason segregated from the other ratables of the state. Such a construction of the railroad tax act in my judgment militates against the legislative intent and the underlying philosophy of the theory upon which such legislation is based. In the United N. J. R. R. & Canal Co. Case, 75 N. J. Law, 334, 68 Atl. 167, the question presented was essentially similar to that involved in the case at bar, and the assessment was ordered to be divided between the assessors of Jersey City and the state board according to what that court found from the facts to be the percentage of use as between the patrons of the railroad and the general public using the ferry buildings by way of the city streets.

In the case at bar the state board presumably followed that adjudication, and made the division based upon use at the ratio of three-fourths to local use and one-fourth to railroad use, but limited the application of the principle to the ferry buildings. The Supreme Court in affirming this division and assessment declared that, under the phraseology of the act for the taxation of railroad and canal property, "the principles enunciated should not be extended any further." This limitation in the application of the principle presents the obstacle which calls for my dissent. I am unable to perceive upon principle any reason for conceding the right of assessment of the superstructure to the extent of three-fourths its value to the locality, and denying the right to the local board to assess the land upon which the structure stands upon the same basis of value. The concession in this case by the state board that the local use of the buildings is the major use is essentially a concession that it is the main use. If that be the conceded fact as to the superstructure, I am unable to perceive upon what principle the use thus defined stops with the buildings, and is held not to extend to the land upon which they stand. The method assessment thus adopted is in the inverse order of assessment, contrary to the usual practice, and opposed to legal principles, in that it begins with the structures and excludes the land upon which they stand, although vested in the same ownership, and devoted to the same use. The land being the principal element in the use, the assess-

ment should be levied upon it as the fundamental factor, and carry with it as a necessary result the structures upon it to the extent of the assessment, upon the familiar principle inherent in the maxim, "Quicquid plantatur solo, solo cedit." In my opinion, therefore, the city is legally entitled upon the principle of use by the locality as determined by the state board to assess the land upon which the buildings and other superstructures stand to the extent of three-fourths in value of its area.

I am requested by Judges BOGERT, TREACY, and WHITE to say that they concur in this view.

Appeal of BRIDGEPORT MALLEABLE IRON CO.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1912.)

1. INTOXICATING LIQUORS (§ 45*)—LICENSES—REMOVAL—TAXPAYER'S APPEAL.

Gen. St. 1902, § 2669, which allows a taxpayer to appeal where a liquor licensee is permitted to move his business to another location, was not repealed or affected by Acts 1909, c. 267, amending Gen. St. 1902, § 2660, which gave a taxpayer an appeal to the superior court from the decision of county commissioners granting a license, or refusing to revoke a license, by adding the words "or in refusing to grant the transfer of any such license."

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 47; Dec. Dig. § 45.*]

2. INTOXICATING LIQUORS (§ 104*)—LICENSE—PERMISSION TO REMOVE—"APPEAL"—SCOPE.

The county commissioners, when permitting a liquor licensee to remove his business to a different location, sits as an administrative board and not as a court, and an appeal from their decision does not and cannot transfer to the superior court their jurisdiction to hear purely administrative questions, but transfers only judicial questions involving the legality of the commissioner's conduct, so that the term "appeal" applied to such transfer is a misnomer.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 109; Dec. Dig. § 104.*]

For other definitions, see Words and Phrases, vol. 1, pp. 442-447; vol. 8, pp. 7577, 7578.]

3. INTOXICATING LIQUORS (§ 104*)—LICENSES—PERMISSION TO REMOVE—NOTICE OF APPEAL.

Where the statutes relating to a taxpayer's appeal from the county commissioners' permit for a liquor licensee's removal of his place of business do not require notice to be given to the licensee, who is a party to the proceeding before the commissioners, he must take notice of the proceedings, and a notice of appeal filed with the commissioners and the filing of a bond completes the appeal without formal notice to him.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 109; Dec. Dig. § 104.*]

Appeal from Superior Court, Fairfield County; Lucien F. Burpee, Judge.

Appeal to the superior court by the Bridgeport Malleable Iron Company from the action of the county commissioners of Fairfield county in granting a removal permit to one McQuire, a liquor licensee. From a judg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment of dismissal, the Bridgeport Malleable Iron Company appeals. Error, and cause remanded.

Appeal by a taxpayer from the action of the county commissioners of Fairfield county in granting a removal permit to a liquor licensee, taken to the superior court in said county where the licensee entered a special appearance, and filed a plea in abatement upon the ground that no notice of the appeal had been given him. A demurrer to this plea having been overruled by the court (Case, J.), the appellant filed an answer to the plea, which upon demurrer the court (Burpee, J.) held to be insufficient. Thereupon the appellant filed a motion that the licensee be cited in as a party defendant, which was denied, and a judgment sustaining the plea in abatement and dismissing the appeal was entered. The appellant below appeals to this court assigning for error the rulings of the trial court upon the demurrers and motion and in dismissing the appeal. Error and cause remanded to be proceeded with according to law.

Stiles Judson, of Bridgeport, for appellant. Robert E. De Forest, of Bridgeport, for appellee.

THAYER, J. (after stating the facts as above). [1] It was suggested upon the argument by counsel for the appellee that no appeal is allowed by statute from a decision of the county commissioners granting the transfer of a licensed business from one place to another; that this appeal was therefore wholly unwarranted in law; that the superior court had no jurisdiction of it, and should have dismissed it for that reason; and that as a consequence the appellants were not harmed by the court's dismissal of the appeal, even if its rulings which are complained of in the reasons of appeal were erroneous. It will be well to consider this claim at the outset, for, if the appellant had no right of appeal, the case should have been dismissed by the superior court for want of jurisdiction, whether the plea in abatement was sustainable or not, and the appellant was not harmed by the rulings of which complaint is made.

General Statutes, § 2658, provides for an appeal by the applicant for a license from the action of the county commissioners in refusing to grant a license, or in revoking a license to sell intoxicating liquors. Section 2660 provides that a taxpayer "may appeal to the superior court from the decision of the county commissioners in granting a license to sell spirituous or intoxicating liquors or in refusing to revoke any such license already granted." Section 2669, after providing that every license shall specify the town and the particular building or place in which liquors may be sold under the license, and that the county commissioners may after due notice and hearing, indorse upon the

license permission to the licensee to remove from one building to another, concludes with the provision that "the law concerning appeals from county commissioners shall apply to such cases." We have held that this provision allowed a taxpayer to appeal where a licensee was given permission to remove his business from one building to another. Wakeman's Appeal, 74 Conn. 313, 315, 50 Atl. 733; Bornmann's Appeal, 81 Conn. 458, 462, 71 Atl. 502. The provision relating to an appeal doubtless refers to the right of appeal given in sections 2658 and 2660, and thus gives to the licensee as well as the taxpayer, in cases where permission to remove has been granted or refused, an appeal, which until the passage of section 2669 in 1897 had not been allowed. Wakeman's Appeal, 74 Conn. 313, 315, 50 Atl. 733. Chapter 267 of the Public Acts of 1909, upon which the appellee bases his claim that no appeal is allowed to a taxpayer where permission of removal is granted to a licensee, amends section 2660 by adding, after the words "may appeal to the superior court from the decision of the county commissioners granting a license * * * or in refusing to revoke any such license already granted," the words "or in refusing to grant the transfer of any such license." It is claimed that under section 2660, as thus amended, a taxpayer has a right to appeal from a refusal to grant a transfer, but that neither by this statute nor by any other has he now the right of appeal from an order granting a transfer. We are not called upon to now construe this statute, nor to inquire what the Legislature intended by the amendment. The transfer of a license is an entirely different thing than permission to remove the licensed business from one building to another; the former permitting a person other than the one originally licensed to carry on the business at the place originally licensed, and the latter permitting the original licensee to carry on the business at a place other than that originally licensed. It is clear that the statute (chapter 267 of the Public Acts of 1909) gives the taxpayer no right to appeal from a decision of the county commissioners granting permission to remove a licensed liquor business from one place to another. But it is a strange result if this act by giving a taxpayer an appeal which he would not desire from a decision refusing the transfer of a license against which he had remonstrated (for the statute requires that he must have remonstrated to entitle him to an appeal) takes from him the right, which he had under section 2660, to appeal from a decision granting the permission of a removal which he sought to prevent. There is in chapter 267 no express repeal of section 2669 or any portion of it. There is no inconsistency between the two statutes. They can therefore stand together. We think that section 2669 was not affected by chapter 267 of the Public Acts of 1909, that taxpayers retain the right

of appeal given them by that section in cases where permission is given to remove the licensed business from one building to another, and that the appellant's appeal was properly allowed.

[2, 3] The rulings complained of in the assignments of error all relate to the question of notice. The appellee McGuire, as appears by the record, held a license to sell spirituous and intoxicating liquors in the city of Bridgeport at No. 1311 Main street. He applied to the county commissioners for permission to remove his business under the license to No. 447 Gregory street. The appellant and numerous other citizens and taxpayers remonstrated against the granting of such permission, but it was granted. The appellant thereupon filed with the county commissioners a written notice that it appealed from such decision to the superior court in Fairfield county on the second return day thereafter after the decision, and filed with them a bond to the county to pay all costs, should the appeal not be sustained. The county commissioners accepted and approved the bond and allowed the appeal, but made no order of notice of the taking of the appeal to be given to the appellee. No notice of the appeal was in fact served upon him, but that he had notice of it is apparent from the fact that he appeared specially to plead in abatement the want of notice. The question is, Was he entitled to a formal notice?

The appellant in taking its appeal complied in every respect with the statute relating to appeals in these cases as provided in General Statutes (section 2660), as amended by chapter 150 of the Public Acts of 1905 and chapter 267 of the Public Acts of 1909. There is nothing in the statutes requiring that any notice shall be given or ordered to be given to the appellee in such cases. In appeals from justice and other inferior courts to the superior court and court of common pleas, and in appeals from the superior court and other trial courts to this court no notice to the appellee is provided for. He is a party to the proceeding in the lower court, and must take notice of what takes place there relating to the proceeding. The notice of the appeal filed with the trial court and the filing of the bond is all that is required of the appellant, unless, in cases of appeal to this court, a finding is necessary to properly present the questions of law sought to be raised.

It is said that the county commissioners when granting and revoking licenses and permitting transfers and removals sit as an administrative board, and not as a court. We have so held, and held that an appeal from their decision does not and cannot transfer to the superior court the jurisdiction of the county commissioners to hear purely administrative questions, and that the word "appeal" is thus a misnomer when applied to these appeals from the county com-

missioners, because the proceeding by appeal does not transfer the entire matter to the superior court for a rehearing, but takes there only judicial questions involving the legality of their conduct. *Moynihan's Appeal*, 75 Conn. 358, 360, 53 Atl. 903. In this respect these appeals are like those from the superior court and other trial courts to this court which transfer only questions of law. In *Moynihan's Appeal* the question of the superior court's jurisdiction of the appeal was raised, it being claimed that the statute allowing the appeal was void as permitting the transfer to that court for trial the purely administrative questions which it was the duty of the county commissioners to determine. The appeal in that case was taken in the same manner as the one now before us, by giving written notice of the appeal to the county commissioners, the giving of a bond, and the allowance of the appeal by the county commissioners. In that case the county commissioners made an order that notice of the appeal should be given to the appellees. But, as there was no statutory requirement that such order should be made or notice given, it was without efficacy, except so far as it may have resulted in actual notice being given to the appellees. Such notice the appellee had in the present case. The claim made in that appeal, as already mentioned, was not sustained, and we held that, under the name of "appeal," the license law had provided appropriate process for controlling the unlawful conduct of the county commissioners. It is true that we also said that this "amorphous appeal" (as such appeals are called in *Norwalk Street Ry. Co.'s Appeal*, 69 Conn. 576, 600, 37 Atl. 1080, 1088, 39 L. R. A. 794), as thus used, "has been construed as providing for an original application to the superior court to exercise its appropriate judicial power," etc. And again we spoke of one of these appeals as an application to the superior court under section 2660 of the General Statutes. This was in *Burns' Appeal*, 76 Conn. 395, 398, 56 Atl. 611, which was taken in the same manner as *Moynihan's Appeal*. This is the form which has been used during the 20 years since the statutes allowing these appeals has existed. In some of them notice to the appellee has been ordered by the county commissioners, and in others it has not been. The fact that these appeals, taken as the statute prescribes that they shall be, have been construed by this court as original applications to the superior court, is urged as supporting the claim that notice must be given to the appellee as in other cases of original applications to courts. The appellee contends that, being an "original application," it is distinct from the proceeding before the commissioners, and that as a matter of natural justice the appellee was entitled to notice of it. We think that the matter of notice is not affected by the construction which has been placed upon the process by

appeal in these cases. We were there speaking of their effect, of the questions which were presented by them, as we might have said that they were in effect writs of certiorari or writs of error. There had been no direct application to the court in either of the cases referred to. Appeals as the statute provided had been taken in each, and we said that, in effect, they were like original applications calling into action the judicial power of the superior court in determining the legality of the commissioners' conduct. That is not saying that the appellant shall make a direct application to the superior court, nor that an appeal in the way fixed by statute shall be followed by an order of notice and service of the same upon the appellee.

The Legislature had power to provide a process by which the illegal conduct of the county commissioners in granting or refusing licenses and in permitting or refusing transfers or removals can be corrected. It exercised that power in section 2660 of the General Statutes, as amended, by providing the appeal thereby allowed. *Moynihan's Appeal*, 75 Conn. 358, 360, 53 Atl. 903. The appellee was a party to the proceeding before the county commissioners, is held to know the law, and is chargeable with knowledge of the appeal. He was not entitled to be served with a notice of the appeal.

Error is assigned upon the court's action in refusing to order that notice be given to the appellee after the demurrers had been decided against the appellants and a motion for final judgment on the plea in abatement was pending. As the appellee had to the knowledge of the court actual notice of the pendency of the appeal, such notice was unnecessary. In a case where it is made to appear to the court that an appellee has no knowledge of the pendency of the appeal, it would be proper to order that notice be given to him. It was not error in the present case to refuse the order of notice requested. The demurrer to the plea in abatement should have been sustained.

There is error, and the cause is remanded to be proceeded with according to law. The other Judges concurred.

AMERICAN WOOLEN CO. v. MAAGET.

(Supreme Court of Errors of Connecticut. Dec. 19, 1912.)

1. BANKRUPTCY (§§ 363, 391*) — ACTION AGAINST BANKRUPT—SURVIVAL.

An action brought before defendant was adjudged a bankrupt survives where he fails to obtain a discharge, and dividends declared in the bankruptcy court and received by plaintiff merely reduce the cause of action pro tanto.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554, 637-655; Dec. Dig. §§ 363, 391.*]

2. BANKRUPTCY (§ 363*) — ACTION BEFORE BANKRUPTCY—PRESENTATION OF PROOF OF CLAIMS—EFFECT.

Where a plaintiff, instituting a suit before defendant was adjudged a bankrupt, filed his proof of claim in the bankruptcy court and procured its allowance, but at the time of the filing he gave notice of the action, and stated that he filed the claim without prejudice to his right to pursue the action, he did not waive his right to thereafter pursue action.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554; Dec. Dig. § 363.*]

3. BANKRUPTCY (§ 391*)—ATTACHMENT—LIABILITY OF SURETIES.

Where a defendant in attachment obtained a discharge of the attachment by giving bond, and he was thereafter adjudged a bankrupt and obtained his discharge, plaintiff was entitled to a special judgment securing the benefit of the attachment or the substituted bond.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637-655; Dec. Dig. § 391.*]

4. BANKRUPTCY (§ 391*) — ACTION AGAINST BANKRUPT—SPECIAL JUDGMENT.

The court has jurisdiction to render a special judgment against a defendant in an action aided by attachment who is subsequently adjudged a bankrupt, and who obtained his discharge, to enable plaintiff to enforce the bond given by defendant for the release of the attachment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637-655; Dec. Dig. § 391.*]

5. BANKRUPTCY (§ 334*) — DISCHARGE — SPECIAL JUDGMENT.

A plaintiff in attachment who obtains a special judgment to secure the benefit of the attachment made, or of the substituted bond given prior to the adjudication in bankruptcy of defendant, may prove his claim in the bankruptcy court, and in the distribution of dividends the amount of the judgment may be deducted from the face of the claim allowed, and the dividends paid on the balance.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501-507; Dec. Dig. § 334.*]

6. PAYMENT (§ 38*) — APPLICATION — WHAT LAW GOVERNS.

The application of payments by a buyer is governed by the law of the state where the payment is made.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 99-103; Dec. Dig. § 38.*]

7. EVIDENCE (§ 80*)—LAWS OF OTHER STATES — JUDICIAL NOTICE—PRESUMPTIONS.

Where the law of a sister state is not proved, the court must follow it as far as it can ascertain it from the decisions of the sister state, and, where that cannot be done, it must presume that the law of the sister state is like the law of the forum, and, when the law of the forum is not settled, it must presume that it is the same as the common law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

8. PAYMENT (§ 43*) — MUTUAL ACCOUNTS — TRANSACTIONS CONSTITUTING.

Where an account on the debit side consisted of continuous charges for goods sold on different dates with entries of the several dates when the same became due, and on the credit side appeared credit entries for goods returned, and the cash payments were entered as cash on account, the account was not a mutual account, but an ordinary mercantile open running account made up of debits on one side, and cash credits and goods returned on the other.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 122; Dec. Dig. § 43.*]

9. PAYMENT (§ 36*)—APPLICATION.

The law governing the application of payments is the same whether the payments are made on an ordinary running mercantile account, or on an account made up of as many independent causes of action as there are bills of goods sold.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 857, 858; Dec. Dig. § 36.*]

10. PAYMENT (§ 39*) — APPLICATION — RIGHT OF DEBTOR.

Ordinarily a debtor may direct at the time of payment to which one of two or more debts or items of account the payment shall be applied, and, where he fails to do so, the creditor may make the application, and this rule will be enforced in action of book debts for goods sold, with credits; the account being an entire one without any rest or balance struck.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

11. PAYMENT (§ 36*) — APPLICATION — EVIDENCE.

The application of payment to one of two or more debts or items of account may be by express designation, or the intention to apply may be inferred from the circumstances of the payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 857, 858; Dec. Dig. § 36.*]

12. PAYMENT (§ 39*)—APPLICATION BY CREDITOR—TIME OF APPLICATION.

A creditor who has the right to apply payments to one of two or more debts or items of an account must make the application before suit.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

13. PAYMENT (§ 39*)—APPLICATION—RIGHT OF CREDITOR.

Where the right of a creditor to apply a payment to one of two or more debts or items of account is lost before he sues, the commencement of the suit does not evidence an intention to apply the payment to the debts or items of the account other than those sued on.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

14. PAYMENT (§ 43*)—APPLICATION BY COURT.

In the absence of application by debtor or creditor of a payment to one of two or more debts or items of account, the court will make it according to the justice of the case best promoted by carrying out the intention of the parties, whether express or implied.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 122; Dec. Dig. § 43.*]

15. PAYMENT (§ 43*) — APPLICATION — OPEN RUNNING MERCHANT'S ACCOUNT.

In the absence of evidence of a contrary intention, or other controlling circumstances, the law presumes that the entry of payments generally as credits on an open running merchant's account indicates an intention of the creditor to apply the payment to the earliest items of the account, and, where the creditor credits payments generally on the account, without showing any application to the later items of the account, and he thereafter brings action on the earlier items, and on the debtor becoming a bankrupt files proof of the entire account, the payments must be applied to the earliest items.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 122; Dec. Dig. § 43.*]

16. TRIAL (§ 404*)—FINDINGS—LEGAL CONCLUSION.

A statement in the memorandum of decision made a part of the finding that a creditor never intended to apply payments to the earliest items of the account is but an expression of a

legal conclusion rather than a finding of fact, where it conflicts with a carefully prepared finding of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.*]

17. PAYMENT (§ 43*)—APPLICATION.

Payment made after the commencement of an action aided by attachment will not be credited on the items of the account sued on, though they are the earliest items of the account, since such application would prejudice the rights of the creditor secured in the suit by the debtor obtaining a dissolution of the attachment by giving bond prior to his being adjudged a bankrupt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 122; Dec. Dig. § 43.*]

Appeal from Superior Court, Fairfield County; William H. Williams and Howard J. Curtis, Judges.

Action by the American Woolen Company against Israel H. Maaget. From a judgment for plaintiff, defendant appeals. Reversed in part and remanded, with directions.

The plaintiff, a manufacturer of woolen cloths, had for several years prior to this action sold goods to the defendant, a manufacturer of clothing.

The plaintiff kept an open account of said sales on its books, and entered the same when made but not in the order of delivery. The said account comprised, under different columns, the date of each sale, the identifying number of the goods, the terms of the sale, the dating of the bill in case a date other than the sale was given, the amount of the charge, and the amount of any credit for goods returned and payments made.

The plaintiff at the time of this action had sold goods to the defendant as follows:

Group 1: June 8 to August 16, 1907, items dated day of sale and due October 8 to December 16, 1907.....	\$11,566 39
Group 2: May 17 to August 16, 1907, items dated day of sale and due April 1, 1908.....	18,902 82
Group 3: December 18, 1907, to February 23, 1908, items dated day of sale and due April 18 to June 28, 1908.....	5,366 03

Making a total due, exclusive of payments, at date of suit.....

Group 4: February 4 to May, 1908, items dated June 1, 1908, and due October 1, 1908.....	2,710 15
Group 5: June 1 to 20, 1908, items dated day of sale and due October 1, 1908.....	88 03

Total sales.....\$38,633 42

Payments had been made on said account as follows:

Before this action:

March 10, 1908.....	\$ 873 53
April 11, 1908.....	1,351 83
May 6, 1908.....	1,192 14
June 4, 1908.....	1,564 78
June 5, 1908.....	1,431 00
	<u>\$6,413 33</u>

After this action:

Sept. 4, 1908.....	\$1,587 91
March 9, 1909.....	1,731 83
	<u>\$3,319 74</u>

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Said payments of \$6,413.33 were credited by the plaintiff generally on its said ledger account with the defendant, but had not, prior to the bringing of this action, been applied, either by the plaintiff or the defendant, to any particular items of said account, and the defendant had made no request for any such application. In the course of dealing with the plaintiff, sometimes the defendant designated the particular items of the account to which he desired the payments applied, in which case they were so applied on said ledger account, and at other times the defendant made no application of the payments, and in such cases the payments were entered as a general credit on said account. This action was begun by attachment on August 31, 1908, to recover for the items in group 1. Shortly thereafter the attachment was dissolved by the giving of a bond with surety. On November 7, 1908, after said bond had been substituted for said attachment, the defendant was duly adjudged a bankrupt in the United States District Court. When the defendant was so adjudged, the balance due the plaintiff on the debit side of said ledger account was \$31,591.04, which was transferred on the books of the plaintiff to an account called the "suspense account." On October 9, 1909, the plaintiff duly filed its proof of claim with the referee in bankruptcy in the sum of \$29,890.40, in which proof of claim the fact that this action had been instituted was referred to, and the claim presented without prejudice to the plaintiff's right to proceed in said action. Said claim included all of the items due the plaintiff at the date of suit and subsequent thereto, and was proved and allowed in the sum of \$23,187.03. After this action was begun, and before the same came to trial, the defendant applied for his discharge under the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 8418], and said discharge was denied, and the time limited for an appeal from the order denying said discharge had expired. A preliminary dividend of 5 per cent. was duly declared on all claims proved and allowed by the bankruptcy court against the estate of said defendant, but said dividend has not yet been paid by the trustee in bankruptcy. Before issue was joined in this action, the defendant moved for a stay of proceedings until 12 months after the date of adjudication in bankruptcy, or until the question of defendant's discharge in bankruptcy was determined. The plaintiff made answer to said motion that it desired to prosecute said action to judgment for the purpose of proceeding against the surety in case the condition of said bond was not performed. The court denied the motion for said stay upon the ground that the plaintiff was entitled to a modified judgment to enforce whatever rights it might be entitled to upon the bond. And the plaintiff in its reply set up "that the plaintiff desires to pro-

secute this action to judgment for the purpose of proceeding against the said surety, in case the condition of the aforesaid bond is not performed."

The court found the issues for the plaintiff both upon the complaint and counterclaim, and rendered judgment that the plaintiff recover of the defendant \$14,436.78.

William A. Redden and William B. Boardman, both of Bridgeport, for appellant. John K. Beach and Frederick H. Wiggin, both of New Haven, for appellee.

WHEELER, J. The appeal raises three questions, the decision of which are necessary to the determination of this cause: (1) Did the proof and allowance in the bankruptcy court of the plaintiff's entire claim merge the cause of action involved in the claim sued on? (2) Ought the payments made prior to this action to have been credited upon the items of the account in suit? (3) Ought the payments made subsequent to this action to have been credited upon the items of the account in suit? We will take up, in order, these questions.

[1] 1. The plaintiff brought its action against the defendant upon the items of group 1 before he was adjudged a bankrupt. In order to share in the bankrupt's estate, the plaintiff was compelled to prove its entire claim against the bankrupt. If the bankrupt procured his discharge, the plaintiff's right of action thereafter upon its claim, in the absence of fraud, would be gone, since it had due notice of the proceeding. If the bankrupt failed to secure his discharge, and that is this case, the plaintiff's cause of action survived, and dividends declared in the bankrupt court and received by the plaintiff merely reduced its cause of action pro tanto. It has been held that "a creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences." *Wiswall et al. v. Campbell*, 93 U. S. 347, 351 (23 L. Ed. 923). And that a disallowance of a claim is a bar to an action upon the subject-matter of the claim. *Hargadine-McKitterick Co. v. Hudson*, 122 Fed. 232, 235, 58 C. C. A. 596; *In re Kenyon* (D. C.) 156 Fed. 863, 864. Assuming that this be the ordinary rule of the federal court, it has no application to the situation presented in this case for two reasons:

First. The cause of action underlying the claim is never held merged in the judgment of allowance, unless the bankrupt secures his discharge. When, as in this case, the bankrupt is denied a discharge, the cause of action survives. This was the construction placed upon the bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), and decisions upon this point are equally applicable to the present act. Both acts permit the creditor proving his claim to object to the discharge. If the allowance of the

claim ends the cause of action arising from the existence of the claim, contesting the discharge could not affect the rights of the creditor and such a course would be futile. If the allowance merged the cause of action and the discharge was denied because of fraud, the creditor could not avail himself of the fraud. The true rule is that the denial of the discharge remits the creditor to all the rights and remedies which may have been suspended by the proceedings in bankruptcy. *Dingee v. Becker*, 7 Fed. Cas. 724, No. 3,919, 9 N. B. R. 508; *Smith v. Soldiers B. M. D. Co.*, 35 N. J. Law 60-62; *Hill v. Phillips*, 14 R. I. 93, 94; *Rogers v. Wentworth*, 58 N. H. 318.

[2] Second. The presentation of the proof of claim and its allowance did not constitute a waiver of the plaintiff's right to thereafter pursue the cause of action involved in the claim. The federal cases seem to hold that an unreserved presentation of a claim may constitute such waiver, but that the creditor may in his presentation reserve his right to preserve his cause of action. When Hall, a creditor, filed against the bankrupt estate of his brokers a claim, which included the value of certain stocks he had deposited with the bankrupt, and expressly reserved the right to recover his stocks, the court held: "We are of the opinion that the reservation of Hall evidenced his intention to hold on to whatever rights he had in his shares of stock, and there is nothing in his conduct which should preclude him, after he had discovered that the shares had been returned to the assignees in bankruptcy, from claiming them as his own property." In *re Jacob Berry & Co.*, 174 Fed. 409, 410, 98 C. C. A. 360, 361. Filing a claim without asserting a lien is held a waiver of the creditor's security. In *re Flisk & Robinson* (D. C.) 185 Fed. 974, 976; In *re Strickland* (D. C.) 167 Fed. 867. So, too, it was held that a creditor who had a right to rescind a contract and recover his certificate of deposit, and with full knowledge filed his claim, irrevocably elected to pursue this remedy alone. In *re Kenyon* (D. C.) 156 Fed. 863. In the case before us, the plaintiff began suit against the defendant before he was adjudged a bankrupt, and, when it filed its proof of claim in the bankrupt court, gave notice of the institution of the action, and stated that it filed its claim without prejudice to its right to pursue its action. The plaintiff's reservation disclosed its purpose to preserve its rights in the action already brought.

[3] Third. Had the discharge been granted, it would have afforded no obstacle to the rendition of a special judgment securing the benefit of the attachment made or of the substituted bond given prior to the adjudication of bankruptcy.

[4] A qualified judgment of this character is within the power of our courts to render. *Schunack v. Art Metal N. Co.*, 84 Conn. 331, 338, 80 Atl. 290; In *re Loden* (D. C.) 184

Fed. 966; *Standard M. Co. v. Kattell*, 132 App. Div. 539, 117 N. Y. Supp. 32.

[5] The plaintiff expressly asserted in its interlocutory motion its purpose to secure such a judgment. The pursuit of such a judgment will not prevent proof of a claim which includes the claim in suit. In the distribution of dividends the amount of the judgment may be deducted from the face of the claim allowed and the dividend paid upon the balance. "Moreover," says the court, "in this case" (In *re Buchan's Soap Corporation* [D. C.] 169 Fed. 1017), "the action was brought in the court before the defendant went into bankruptcy, so that, if this doctrine had any application, the state court suit would bar the proceeding to re-liquidate in bankruptcy; but the entire doctrine has no application to such cases." The trial court rightly held that the claim in suit was not merged by the allowance of the entire claim in the bankruptcy court.

2. The defendant contends that the cash payments credited generally upon the plaintiff's account, both those made prior to this action and those made subsequent, should have been applied to the items of the account sued upon, since these are the earliest items of the entire account.

[6, 7] The sales of goods making up the account in suit were made in New York and the application of payments is governed by the law of New York. We have no proof as to what the law of New York is. It is our duty to follow it so far as we can ascertain it from the decisions. G. S. § 896; *Lockwood v. Crawford*, 18 Conn. 370, 371. When this cannot be done with certainty, it is our duty to presume it to be like our own, and, when our law is not settled, to presume it to be the same as the common law. *Adams v. Way*, 33 Conn. 482; *Lockwood v. Crawford*, 18 Conn. 370.

[8] The ledger account of the plaintiff with the defendant on the debit side consisted of continuous charges of various bills of goods sold on different dates, with entries of the several differing dates when the same became due. Upon the credit side opposite the charge for goods sold appeared credit entries for goods returned and cash payments were entered generally as "cash on account." This was not a mutual account, nor was it an account composed of as many distinct causes of action as there were bills of goods sold. It cannot properly be treated as such for the parties did not consider these as distinct debts, but as one entire account. *Pierce v. Knight*, 81 Vt. 702. That the different bills of goods which made up the debit side were due at different times did not change the character of the account. This is the everyday incident of the ordinary mercantile account, of the open running account made up of debits on one side and cash credits and goods returned on the other.

[9] But whether this be regarded as an ordinary running mercantile account, or as an

account made up of as many independent causes of action as there are bills of goods sold, the rule of law as to the appropriation of payments does not differ. 30 Cyc. of Law, 1233, 1235.

[10] Ordinarily the debtor may direct at the time of payment to which one of two or more debts or items of an account a payment shall be applied. On his failure to so direct the creditor may make the application.

[11] This may appear by express designation, or the intention so to do may be inferred from the circumstances surrounding the payment. *Cavanaugh v. Marble*, 80 Conn. 389, 391, 68 Atl. 853, 15 L. R. A. (N. S.) 127; *Chapman v. Commonwealth*, 66 Va. 721, 750, 751. We enforce the same rule in the correlative action of book debt for goods sold, with certain credits; the account being an entire one without any rest or balance struck. *Fairchild v. Holly et al.*, 10 Conn. 175, 179.

[12] The courts of the different jurisdictions are not in accord upon the time when the creditor may make application of payment. Some courts hold that the creditor may make application at any time prior to judgment or verdict. *Brice v. Hamilton*, 12 S. C. 32, 38; *Pearce v. Walker*, 103 Ala. 250, 253, 15 South. 568; *Starrett v. Barber*, 20 Me. 457; *Haynes v. Waite et al.*, 14 Cal. 446, 450; *Mayor, etc., Alexandria v. Patten et al.*, 4 Cranch, 318, 2 L. Ed. 633. Courts hold as a necessary corollary of this rule that the institution of the suit evidences the creditor's application of payments to items of the account other than those sued on. *Haynes v. Waite et al.* and *Starrett v. Barber*, *supra*. Other courts hold that the creditor must make his application of payments within a reasonable time. *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485, 492; *Harker et al. v. Conrad et al.*, 12 Serg. & R. (Pa.) 301, 304, 14 Am. Dec. 691; *Allen v. Culver*, 3 Denio (N. Y.) 284. Other courts hold that it must be made before suit (*People v. Grant*, 139 Mich. 26-28, 102 N. W. 226; *Boynton v. Salinger*, 147 Iowa, 537, 547, 126 N. W. 869, 372; *Harker et al. v. Conrad et al.*, *supra*; *Frazer v. Miller*, 7 Wash. 521, 527, 35 Pac. 427; *Plummer v. Erskine*, 58 Me. 59, 62); while others hold that it must be made before the controversy upon which suit is brought (*United States v. Kirkpatrick*, 9 Wheat. 720, 738, 6 L. Ed. 199; *National Bank v. Mechanics' N. Bank*, 94 U. S. 437, 439, 24 L. Ed. 176; *Chapman et al. v. Commonwealth*, 66 Va. 721, 750, 751; *Benson v. Reinshagen et ux.*, 75 N. J. Eq. 358, 362, 72 Atl. 954, 955; *Terhune v. Colton*, 12 N. J. Eq. 812, 320; *Applegate v. Koons*, 74 Ind. 247, 248; *Lazarus v. Freidheim*, 51 Ark. 371, 378, 11 S. W. 518; *Johnson v. Thomas*, 77 Ala. 367, 369; *Milliken v. Tufts*, 31 Me. 497, 501). We have not heretofore expressly passed upon the point. If we accord the creditor the right to apply payments, made without designation by the debtor, up to the period of controversy we give him a reasonable time to exercise his

privilege and fully protect his rights. To extend his period of election beyond this point might wrong the debtor, and fairly prejudice the rights of third parties. We think the better reason and authority support the rule that the election of the creditor must be made before the controversy arose. The rule requiring the election by the creditor prior to suit rests upon identical reasoning, and leads to the conclusion that the election in the present case was not made within a reasonable time. The plaintiff did not make its election prior to this suit. The finding is explicit that "said payments had not prior to the bringing of this action been applied, either by the plaintiff or by the defendant, to any particular items of said account." Hence their right to apply these payments ceased whether we regard the true rule as that within a "reasonable time," or prior to the controversy, or prior to suit.

[13] If the law of New York be that of the "reasonable time" rule, as we judge it is from *Shipsey v. Bank*, 59 N. Y. 485, 492, the conclusion must result that the plaintiff has lost its right of application. The right of application was lost before suit, and therefore the institution of the suit could not evidence, as the plaintiff claims, an intention to apply the payments to the items of the account other than those sued upon.

[14] In the absence of application by debtor or creditor, the court will make it "according to the justice of the case." *Stamford Bank v. Benedict*, 15 Conn. 437, 442; *Chester v. Wheelwright*, 15 Conn. 562, 567; *Selleck v. Sugar H. T. Co.*, 13 Conn. 460. New York has adopted the same rule: "The court will make such application of the payments as equity and justice require, according to its own motion of the intrinsic equity and justice of the case." *Camp v. Smith et al.*, 136 N. Y. 187, 200, 32 N. E. 640; *Seymour v. Van Slyck*, 8 Wend. (N. Y.) 403, 416; *Stone v. Seymour*, 15 Wend. (N. Y.) 19, 83. The weight of authority supports this rule. *National Bank, etc., v. Mechanics' Nat. Bank*, 94 U. S. 437, 439, 24 L. Ed. 176; *United States v. Wardwell et al.*, 5 Mason, 82, 85, Fed. Cas. No. 16,640; *Terhune v. Colton*, 12 N. J. Eq. 320, 321; *Drake v. Sherman*, 179 Ill. 362, 368, 53 N. E. 628; *Lingle et al. v. Cook's Adm'rs*, 73 Va. 262, 271. The justice of each case will best be promoted by carrying out the intention of the parties. In case an expressed intention cannot be found, one may be implied from the circumstances of the case. Every presumption and rule which the courts have adopted in furtherance of their purpose to discover the "justice of each case" are subordinate to this rule of intention. *Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 263, 272; *Dulles v. De Forest et al.*, 19 Conn. 190, 204; *Barrett v. Sipp* (Ind. App. April, 1912) 98 N. E. 310, 313.

[15] The finding in this case makes no finding of the intention of the parties. It

excludes an express declaration of intention. It recites facts which would make a finding of the intent of the parties to apply these payments to items of the account other than those in suit difficult if not impossible. The plaintiff credited these payments generally on the account, and nothing on the books of account nor any communication made by it to the defendant showed an application to the later items of the account. It brought suit upon the earlier items. The defendant went into bankruptcy. At no time has the plaintiff indicated its purpose to apply these payments to the later items. After bankruptcy, the plaintiff transferred on its books to a "suspense account" the balance due on plaintiff's ledger account. The plaintiff filed its proof of claim in the bankruptcy proceeding showing the entire debits on one side of the account—the items in suit not separated from the rest of the items in any way—and the entire payments on the other side, the balance representing its claim. No distinction is shown between the several items of the account. It might well have been found from these circumstances that the plaintiff had no intention of applying these payments to other than the earlier items. It could not upon these facts be held as matter of law that there was such an intention.

[10] We have not overlooked the statement in the memorandum of decision, made a part of the finding, that "the plaintiff never intended to apply these payments to these items." We think the trial judge intended this as an expression of a legal conclusion rather than as a finding of fact, in view of the fact that it conflicts with the carefully prepared finding, and that it is indispensable to the rights of the parties that a fact of such controlling consequence should appear in the finding. In the absence of evidence of a contrary intention and of no other controlling circumstances, the law presumes that the entry of payments generally as credits upon an open running merchant's account indicates the intention of the creditor to apply the payments to the earliest items of the account. "The rule, although general, is, by no means, universal. It is not an artificial or arbitrary principle, but one founded merely on the presumed intention of the parties; and is applicable only where there is no evidence sufficient to show a contrary intention." *Dulles et al. v. De Forest et al.*, 19 Conn. 190, 204; *Shellabarger v. Binns*, 18 Kan. 345, 352; *U. S. Rubber Co. v. Peterman*, 119 Ill. App. 610, 623. As a general rule the law, when it makes the application, "will apply the payments to the extinguishment of the oldest debt." *Fairchild et al. v. Holly et al.*, supra. "It may also be observed that it is a general rule that, where a payment is made upon general account with no direction as to its application, the law applies it

to the oldest items." *Perry v. Booth*, 67 App. Div. 235, 239, 73 N. Y. Supp. 216; *Hurd v. Wing*, 93 App. Div. 62, 65, 86 N. Y. Supp. 907; *Kloepfer v. Maher* (Sup.) 84 N. Y. Supp. 138; *Frazer v. Miller*, supra; *Hughes & Co. v. Flint et al.*, 61 Wash. 460, 462, 112 Pac. 633 (Jan. 1911); *Crompton v. Pratt*, 105 Mass. 255, 257; *Peale v. Grossman*, 70 W. Va. 1, 73 S. E. 46, 47, 48 (Nov. 1911); *Chapman et al. v. Commonwealth*, 68 Va. 721, 750, 751; *Polk Printing Co. v. Smedley*, 155 Mich. 249, 253, 118 N. W. 984; *Grasser & B. B. Co. v. Rogers*, 112 Mich. 112, 114, 70 N. W. 445, 67 Am. St. Rep. 389; *Hersey v. Bennett*, 28 Minn. 89, 92, 9 N. W. 590, 41 Am. Rep. 271; 30 Cyc. of Law, 1243; Note, 96 Am. St. Rep. 55. We are of opinion that, under this rule, the trial court should have applied the payments made prior to suit to the earliest items of the account which were in part the items in suit.

[17] 3. We are further of opinion that the payments made after suit begun and attachment made ought not to be credited upon the items of the account sued on, since this would unfairly prejudice the rights of the plaintiff already secured in its suit; and, moreover, the law should not enforce a rule which rests upon a presumption of the appearance of an intent to so credit which manifestly does not in fact exist.

There is error in part, the judgment is set aside, and the cause remanded, with direction to the superior court to render judgment in favor of the plaintiff for the amount of \$5,153.06 damages, and its costs, with interest thereon from December 16, 1907. The other Judges concurred.

KOSKOFF v. GOLDMAN.

(Supreme Court of Errors of Connecticut. Dec. 19, 1912.)

1. LANDLORD AND TENANT (§ 169*)—INJURIES FROM DEFECTIVE CONDITION—RIGHT OF ACTION.

Where the evidence in a tenant's action for the death of his wife was such that the jury might have reasonably found that an outside stair railing had been dangerous for a considerable time, that some six weeks before the accident such condition had been made known to the defendant on behalf of plaintiff's intestate, that he had then promised to repair it, that his attempted repairing was negligently done and wholly inadequate, that such dangerous condition might have been discovered upon a reasonable inspection, and that it was the proximate cause of the death of intestate, a verdict for plaintiff was justified.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 644-646, 663-667, 681-684; Dec. Dig. § 169.*]

2. LANDLORD AND TENANT (§ 162*)—INJURIES FROM DEFECTIVE CONDITION — NEGLIGENCE IN MAKING REPAIRS.

A landlord having the duty of keeping premises in repair cannot escape liability on the ground that he employed a competent carpenter to do what was necessary, since if the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

carpenter was negligent either in not discovering a defective condition of which defendant had been warned, or, having discovered it, in not making such repairs as were reasonably required, his negligence was the negligence of the defendant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 629; Dec. Dig. § 162.*]

3. LANDLORD AND TENANT (§ 168*)—INJURIES FROM DEFECTIVE CONDITION—CONTRIBUTORY NEGLIGENCE OF TENANT.

In an action by a tenant for the death of his wife from the defective condition of an outside stairway, it appeared that deceased came out on the stairs, and that on a sudden noise she started forward and fell, throwing her weight against the rail, which gave way. *Held* that, as the act of deceased in coming in contact with the rail was involuntary, and the result of a sudden fright, she was not guilty of contributory negligence.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 642, 643, 661, 662, 680; Dec. Dig. § 168.*]

4. LANDLORD AND TENANT (§ 169*)—INJURIES FROM DEFECTIVE CONDITION—ADMISSIBILITY OF EVIDENCE.

In a tenant's action for the death of his wife from defective condition of the premises, where the issue on which certain evidence was admitted over objection was the credibility of a witness which depended on the time when a broken stair railing was replaced and repaired by defendant after the accident, evidence to establish such time is admissible, and is not in violation of the rule that evidence of subsequent repairs cannot be received for the purpose of showing prior negligence.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 644-646, 663-667, 681-684; Dec. Dig. § 169.*]

5. WITNESSES (§ 405*)—CONTRADICTION—IRRELEVANT FACTS.

In a tenant's action for the death of his wife resulting from a defective stair railing, where the plaintiff's witness testified to an examination of the construction of the railing on a certain day and before its repair, and defendant testified that it was repaired before that time, the admission of plaintiff's evidence to establish such time, did not conflict with the rule forbidding the contradiction of a witness as to an answer given in respect to an irrelevant fact.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1273, 1275; Dec. Dig. § 405.*]

6. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for the death of plaintiff's wife resulting from a defective stair railing, the admission of evidence that she had left two sons and three daughters was harmless as an attempt to arouse the sympathies of the jury, in view of the fact that all of the children save one were witnesses in the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

7. EVIDENCE (§ 236*)—DECLARATIONS—ACTION BY REPRESENTATIVE OF DECEDENT.

Under Gen. St. 1902, § 705, relating to the declarations of decedents in actions by their representatives, the declarations of a deceased tenant, made to her son-in-law, as to the repairs, were admissible in her husband's action against the landlord for her death from a defective stair railing.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1061, 1062, 1064-1066, 1068-1069; Dec. Dig. § 236.*]

8. TRIAL (§ 267*)—INSTRUCTIONS—FORM AND SUFFICIENCY.

The court is not bound to charge in the language of the requests, but performs its full duty where it gives instructions correct in law, adapted to the issues and sufficient for the jury's guidance in the determination of them upon the evidence, and the ultimate facts as they might reasonably be found to be established by the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.*]

9. TRIAL (§ 260*)—REQUESTS FOR INSTRUCTIONS—INSTRUCTIONS ALREADY GIVEN.

Requested instructions, covered so far as applicable by adequate and appropriate instructions, are properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

10. LANDLORD AND TENANT (§ 150*) — REPAIRS—DUTY OF LANDLORD.

The duty of maintenance and repair rests upon a landlord in respect to common passageways and approaches in or to a building occupied by several tenants and which are retained under his control for the use of the tenants.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 536-557; Dec. Dig. § 150.*]

11. LANDLORD AND TENANT (§ 164*)—INJURIES FROM DEFECTIVE CONDITION—LIABILITY OF LANDLORD.

A landlord is liable for injuries received by a tenant resulting from his neglect of his duty to keep passageways and approaches in repair.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

12. TRIAL (§ 133*)—ARGUMENT OF COUNSEL—REFERENCE TO DEFENDANT.

In a tenant's action for the death of his wife resulting from a defective stair rail, his attorney's use of the following language, "On the other side, this man, who has amassed his money, slick and smooth, got his tenement houses together," in referring to defendant, while improper, was not reversible error, where the court cautioned the jury to disregard it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 316; Dec. Dig. § 133.*]

Appeal from Superior Court, New Haven County; William L. Bennett, Judge.

Action by Isaac Koskoff, administrator, against Albert Goldman. Judgment for plaintiff, and defendant appeals. No error.

Action to recover damages for personal injuries resulting in the death of the plaintiff's intestate and alleged to have been caused by the defendant's negligence, brought to the superior court in New Haven county and tried to the jury before Bennett, J. Verdict and judgment for the plaintiff for \$3,500, and appeal by the defendant.

July 4, 1910, the defendant was, and for a considerable period of time had been, the owner of premises known as No. 448 Congress street in the city of New Haven. In the rear of these premises was a three-story building. The lower floor was occupied by the defendant as a place of business; the two upper floors as tenements by different tenants. Entrance to the tenements was by a stairway on the outside of the build-

ing leading from the ground to a landing place which was substantially on a level with the second floor of the building. This stairway ran parallel to the wall, and was built close to it. The steps extended straight out from the building, except that the four upper ones were carried in a curve, so that a person ascending the stairs was, when he reached the top step, brought face to face with a door leading into the building, and stood upon a landing which was of the size and shape of one of the curved steps. This door was close to the southwest corner of the building, and furnished the only means of access to the tenements in the building. The occupants of the upper floor tenement in reaching their apartments, having passed through the door, ascended a flight of interior stairs. All persons entering or leaving either of the tenements were compelled to pass up or down this outside stairway, over the landing which the upper step provided, and through this door, and the stairway, landing, and door were used in common by all the occupants of the two tenements.

The stairway and landing were covered by a roof supported by wooden columns extending practically the entire length of the building, thus giving the external appearance of a second-story porch. Surrounding it on the three sides not against the building was a railing with upright spindles. This railing ran from post to post on the side, and from end post to a pilaster fastened to the wall at the two ends. These end railings were about $3\frac{1}{2}$ feet in length. The upper step or landing, like the three below it, was, on the inner side of the curve of the stairs, somewhat narrower than the other steps, and on the outside somewhat wider. The outer or wider end was next to the south end railing, which joined the house a few inches from the doorway. This railing was held in place by being attached to the pilaster and corner post. The landing step was about 12 feet above the ground, which, directly under this end of the railing, was covered with solid pavement.

On said date the plaintiff's intestate, Shendall Koskoff, her husband, and children occupied the second floor tenement, and for some six months had been its tenants. Prior to that time they had lived in the tenement above. About 3 o'clock in the afternoon of that day Mrs. Koskoff took the tablecloth from the table where the family had been eating, and, with it in her hand, stepped out of the entrance door onto the landing step. A moment or two later she fell through the end railing described, carrying it away with her in her fall, and struck the pavement below, with the result that she received injuries from which she died that night.

The above facts were uncontroverted. The plaintiff offered evidence to prove, in addition, that the railing which gave way was at the time, and for a considerable time

had been, in an unfit and dangerous condition by reason of its insecure and improper construction, want of repair, and rotten condition; that the stairway and landing were thereby rendered unsafe for their intended use in connection with the tenement which the intestate occupied; that this unfit and unsafe condition of the railing, stairway, and landing was and for some time had been known, or ought to have been known, to the defendant; that this condition was occasioned by the defendant's negligence; and that Mrs. Koskoff's injuries and death were due directly to it. Evidence of two witnesses was presented to the effect that complaint of the defective condition of the railing had been made to the defendant on Mrs. Koskoff's behalf about six weeks before the accident.

The defendant offered testimony to disprove these charges. Included in it was testimony tending to show that any weakness which may have existed in the railing on July 4th was caused by hard and improper usage to which the Koskoff family and its guests had subjected it during the two or three days immediately preceding, and of which the defendant had no knowledge. He denied the receipt of complaints about the condition of it, and all knowledge or suspicion that it was not in proper condition at any time. He also testified and offered a witness to corroborate him that only a few weeks before Mrs. Koskoff's fall he had employed a carpenter of long experience to look over the building generally and the approaches in particular to see what repairs ought to be made, and to make them. He also contended that he was under no obligation to keep the stairway and railing in repair, and not liable for its nonrepair. The only testimony as to Mrs. Koskoff's movements and conduct between the time she passed out of the door with the tablecloth and the time when she was on her way to the ground was that recited in the opinion.

Spotswood D. Bowers, of Bridgeport, and Benjamin Slade, of New Haven, for appellant. Robert C. Stoddard, of New Haven, for appellee.

PRENTICE, J. (after stating the facts as above). [1] The defendant says that the court erred in refusing to set aside the verdict. An examination of the evidence leads us to the contrary conclusion.

The jury might reasonably have found the defendant guilty of negligence. Evidence was before it upon which it reasonably might have found that the railing in question had for a considerable time been in an unfit and dangerous condition; that some six weeks prior to the accident complaint of that condition had been made to the defendant on behalf of the plaintiff's intestate; that the defendant had then promised to repair it;

that thereafter nothing was done in that direction beyond possibly the driving of a nail or two; that, whatever was done, the attempted reparation was negligently and improperly done and wholly inadequate; that the unfit and dangerous condition remained; that this continuing condition was readily discoverable and would have been discovered at any time by a reasonable inspection; and that the intestate received her fatal injuries as the proximate result of such condition.

[2] The defendant cannot escape liability upon the ground that he had employed a competent carpenter to do what the conditions appeared to him to demand, if such was the case. If the carpenter was negligent either in not making a reasonable inspection to discover the defective condition of which the defendant had been warned, or, having discovered it, in failing to make such reparation as was reasonably required, or in making a carelessly inadequate one, that negligence of the servant was the negligence of the defendant upon whom, under the conditions which, in view of the verdict, the jury must have found existed, the duty of reparation rested. *Wilson v. Willimantic Linen Co.*, 50 Conn. 433, 465, 47 Am. Rep. 653; *McElligott v. Randolph*, 61 Conn. 157, 162, 22 Atl. 1094, 29 Am. St. Rep. 181; *Wood on Master & Servant*, § 438.

[3] It could not reasonably have been found that the intestate was guilty of contributory negligence. The testimony of the only eyewitness of the immediate fall, who was a sister of the defendant and a witness on his behalf, was that she sat in her window of an adjoining house which looked out upon Mrs. Koskoff's entrance only a short distance away, and that she saw the whole occurrence, which she described in the following language: "The woman came out of the house carrying a tablecloth. She stopped a moment, and this loud shot, cannon shot, whatever it was, and I know I remember I started from the chair I was seated in, and she started forward and fell throwing her weight against this rail, dead weight, and then the balustrade gave way, and the next I saw the woman on the ground." This testimony, to the effect that the intestate's contact with the railing which gave way was involuntary and the result of a sudden fright, relieves her of all responsibility for her injury through a negligent act; and there was no other evidence tending to show a different situation.

[4, 5] Several rulings upon the admission of testimony are challenged as erroneous. A number of these are of a precisely similar character, and admitted evidence to establish the time when the railing was replaced and repaired by the defendant after the accident. The circumstances attending these rulings were the following: The plaintiff had introduced an experienced builder, who testified that he visited the premises in company with one of the plaintiff's counsel on the morning

of the day following the accident, and examined the conditions as they were then disclosed before the railing had been replaced or repair made. The plaintiff relied upon this witness to establish that the method of construction thus laid bare was not safe or proper for ordinary use, and that the means employed for holding the rail in place indicated a failure to exercise proper care. The defendant, as a witness in his own behalf, subsequently testified that on the afternoon of the day of the accident he caused the railing, which had been carried away, to be replaced and necessary repairs made. If the testimony thus given was true, that of the plaintiff's builder could not have been. A question of veracity was thus presented, and it was one which had an important bearing upon the ultimate questions at issue. The evidence admitted bore directly upon this question of veracity. It was admitted as bearing upon that question only, and the jury were cautioned to give it no other significance. In fact, it could not well have had other significance attached to it for the double reason that a replacement of the railing carried away by Mrs. Koskoff in her fall could hardly have furnished a reasonable basis for an inference of prior improper construction, and that the defendant had himself already testified to the replacement. The only matter in issue was the time when the conceded act was done, and upon that issue the evidence was clearly admissible. The rulings were not in violation of either the rule that evidence of subsequent repairs may not be received for the purpose of showing prior negligence, as laid down in *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47, or that forbidding the contradiction of a witness as to an answer he may have made in respect to an irrelevant fact as stated in *Barlow Bros. v. Parsons*, 73 Conn. 698, 49 Atl. 205.

[6] A son-in-law of Mrs. Koskoff having been called as a witness by plaintiff's counsel, he was, among the preliminary questions, asked to describe the building, its tenants, Mrs. Koskoff's tenement, and the number and ages of the members of her family. The answer to the last inquiry was objected to as irrelevant and immaterial. Having been admitted, it elicited the information that she had two sons and three daughters, aged, respectively, 24, 20, 18, 13, and 10 or 11 years. The admission of this testimony is complained of (1) as countenancing an attempt to arouse the sympathies of the jury, and (2) as laying the foundation for a recovery upon the basis of the loss to the family. It is a sufficient answer to the first suggestion that it is difficult to discover what harm the answer given could have worked, since all of the children save only the 18 year old daughter were witnesses in the case, and their existence thus came to the knowledge of the jury. As to the second, the answer is to be found in the fact that there was no claim to recover upon the basis indicated, and that

the rule which the court gave to the jury for the assessment of damages was one which is not subjected to criticism.

[7] Evidence of Mrs. Koskoff's declarations to her son-in-law respecting the repairs were admissible under the statute. General Statutes, § 705. Those of the son-in-law to Mrs. Koskoff which are now complained of came in without objection or ruling.

Other rulings assigned as errors call for no discussion. They are either manifestly correct, or relate to inconsequential matters.

The appeal contains 35 reasons of appeal based upon the court's failure to charge as requested and portions of the charge as given. It would be profitless to discuss all of these assignments, or even the minor part of them which have seemed to defendant's counsel of sufficient merit or importance to call for consideration in their brief.

[8] The court, as we have repeatedly held, was under no duty to instruct the jury in the language of the requests. It performed its full duty if it gave instructions correct in law, adapted to the issues and sufficient for the jury's guidance in the determination of them upon the evidence and the ultimate facts as they might reasonably be found to be established by the evidence. *Water Commissioners v. Robbins*, 82 Conn. 623, 636, 74 Atl. 938. Our examination of the charge has disclosed no failure on the part of the court in the performance of the duty resting upon it.

[9] The subject-matter of the requests in so far as it was pertinent was all dealt with and adequately and appropriately dealt with, and the criticisms of the few passages from the charge which are made in the brief are not well founded when the entire charge is considered.

The passage in which the jury were told that the duty of maintaining the stairway and landing in a reasonably safe condition and repair was upon the defendant, if it should be found that they were retained by him as landlord as a common passway for all tenants of the building, forms no exception to this statement. The court had just concluded a carefully stated and correct exposition of the law governing the subject, and in the passage complained of turned to

make application of it in brief terms to the case in hand. Read together, the instructions were not only not erroneous, but also not easily susceptible of misconstruction or misunderstanding.

[10, 11] It is a rule of sound reason and one generally accepted that the duty of maintenance and repair rests upon a landlord in respect to common passageways and approaches in or to a building occupied by several tenants, which passageways or approaches are retained under his control for the use of the several tenants as a means of access to the portions of the premises leased to them, and that the landlord is liable for injuries received by a tenant by reason of the landlord's negligence in the performance of this duty. *Looney v. McLean*, 129 Mass. 33, 35, 37 Am. Rep. 295; *Sawyer v. McGillicuddy*, 81 Me. 318, 322, 17 Atl. 124, 3 L. R. A. 458, 10 Am. St. Rep. 260; *Pell v. Reinhart*, 127 N. Y. 381, 384, 27 N. E. 1077, 12 L. R. A. 843; *Gillvon v. Reilly*, 50 N. J. Law, 26, 27, 11 Atl. 481. This was the court's instruction.

[12] One of the plaintiff's counsel in the course of his argument, speaking of the defendant, used the following language: "On the other side, this man who has amassed his money, slick and smooth, got his tenement houses together." In its charge the court called attention to this remark as improper, and cautioned the jury that it was to be disregarded and the suggestion it contained wholly dismissed from consideration, and emphasized the fact that the richness or poverty of the defendant was not a matter to be taken into account in reaching their conclusion. The remark was one which should not have been made; but, in view of the action of the court, we should not feel justified in granting a new trial on account of it. *State v. Laudano*, 74 Conn. 638, 645, 51 Atl. 860; *State v. Washelesky*, 81 Conn. 23, 29, 70 Atl. 62.

The defendant complains of the attitude of the court toward his counsel during the trial, and urges that it was necessarily harmful to him. We fail to discover just cause for this complaint.

There is no error. The other Judges concurred.

In re LEWIS.

(Superior Court of Delaware. New Castle.
Jan. 16, 1913.)

JUSTICES OF THE PEACE (§ 30*)—CONTROL BY JUDGES OF SUPERIOR COURT—OFFENSES.

The object of Rev. Code 1852, amended to 1893, p. 697, c. 92, § 2, authorizing the judges of the Superior Court to examine and punish omissions, favors, and corruptions of justices of the peace, is to give the judges supervisory powers by summary process over justices of the peace, though not so as to conflict with Const. art. 1, § 8, article 4, § 30, and article 5, §§ 7, 8, providing that no person shall for any indictable offense be proceeded against criminally by information, etc., and a justice of the peace, guilty of oppression and favoritism, is guilty of an offense indictable at common law and under chapter 127, § 18, and he cannot be proceeded against under chapter 92.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 66-70; Dec. Dig. § 30.*]

Rule to show cause why Thomas S. Lewis, a justice of the peace, should not be punished for favors and corruption. Rule discharged.

Argued before BOYCE and RICE, JJ.

Hugh M. Morris, of Saulsbury & Morris, of Wilmington, for the rule. Robert H. Richards, of Wilmington, opposed.

Rule to show cause (No. 166, September term, 1912) why Thomas S. Lewis should not be punished for the favors and corruptions alleged in the petition.

The facts and the questions of law presented appear in the opinion of the court.

RICE, J. This is a rule issued by the judges of the Superior Court in and for New Castle county, directed to Thomas S. Lewis, a justice of the peace, to show cause, if any he has, why he should not be punished for the favors and corruptions in the case of the Goodyear Tire & Rubber Company against the Bradford Company.

The petition upon which the rule issued sets forth that the Goodyear Tire & Rubber Company commenced an action before Thomas S. Lewis, a justice of the peace, to recover from the Bradford Company, the petitioner, the sum of \$57.57 with interest from March 6, 1911; that the plaintiff in the action was represented by counsel who uniformly instituted such suits before the justice; that the judgment was in favor of the plaintiff for the full amount of its claim; that the evidence did not warrant judgment being entered against the defendant in that action (the petitioner in this proceeding); that counsel for the plaintiff improperly read to the justice a letter from the Goodyear Tire & Rubber Company; that the justice as a favor to said counsel considered said letter in reaching his determination in the case; that the judgment was not based on the evidence, but was corruptly rendered by the justice as a favor to counsel as aforesaid.

The petition further sets forth that the

major portion of the civil actions instituted before the said justice are instituted by the counsel as aforesaid, and that the fees of the justice so derived form a considerable portion of his fees from civil cases; that the justice uniformly and without exception renders judgment in favor of plaintiff represented by the counsel as aforesaid, or his law partner.

Thomas S. Lewis, the respondent, made answer under oath in which he admitted that he is a justice of the peace, that the Goodyear Tire & Rubber Company commenced an action before him against the Bradford Company, and that judgment was given in favor of plaintiff, also that at the hearing a letter from the plaintiff company was read by counsel for the plaintiff, but states it was read without objection on the part of defendant, and in his answer denies that the letter was considered by him in reaching his determination in said case, and he also denies all and every act of fraud, corruption or favoritism alleged in the petition, and his counsel asks that the rule be discharged.

This action is brought under the provisions of section 2, chapter 92, Revised Code, p. 697, which section is as follows:

"The said judges, or any two of them, shall have full power and authority to examine, correct and punish the contempt, omissions, neglects, favors, corruptions and defaults of all justices of the peace, sheriffs, coroners, clerks and other officers within this state; and also shall award process for levying all such fines, forfeitures and amercements as shall be imposed, or recovered, in said court; and generally shall minister justice to all persons, and exercise the jurisdictions and powers hereby granted them, concerning the premises, according to law and equity, as fully and amply, to all intents and purposes whatsoever, as the justices of the King's Bench and Common Pleas at Westminster, or the Chancellor of England, may or can do."

Counsel for the respondent claims that the rule should be discharged for the reasons (1) that the respondent has made answer under oath fully denying all the averments of fraud, corruptions and favors contained in the petition, and it comes within the decision of this court in the case of *King v. Reading*, 5 Har. 399; (2) that the offense charged is an indictable one and that said section 2 must be considered in connection with article 1, section 8, of the Constitution of this state and cannot be determined by this summary proceeding.

In the case of *King v. Reading*, supra, a rule was laid on the defendant, a justice of the peace, to show cause why an attachment should not issue against him for official neglect and default. The petitioner stated in his petition that the justice had refused an appeal to which he was entitled and in which

he had offered sufficient security, and had also refused to give a transcript of his record.

On return of the rule, the justice appeared, and by affidavit fully denied the facts set forth in the petition, the court thereupon ordered the proceeding to be dismissed.

The decision of the court in the King Case seems to be based on the idea that it was a contempt on the part of the justice to refuse an appeal to the higher court, and the justice in his answer under oath having fully denied the contempt, and the facts constituting it he was thereupon purged of the same, and dismissed following the practice in attachment cases at common law. Bacon's Abridgment, vol. 1, page 471; Rapalje on Contempts, § 119.

In a similar proceeding in the case of *In re Tull*, 78 Atl. 299, it was averred in the petition that the respondent, an alderman, fined a boy without a lawful hearing and made no record of the proceeding upon which an appeal or certiorari could be taken, and that the alderman was thereby prevented from giving a transcript of his record to the petitioner when requested. At the return of the rule the respondent appeared and made no answer. It appeared at the hearing, by the testimony of witnesses and by admissions of the respondent, that the charges in the petition were true. The court fined the alderman, holding that such an officer is included in the phrase "other officers" contained in said statute.

Judge Woolley, delivering the opinion of the court, said: "We think that when an officer, be he justice of the peace or an alderman, is clothed by the law with original jurisdiction, he must keep a record of his judicial proceedings in order that a person brought before him may avail himself of the rights which may be guaranteed by the law, without which the law's guaranty is of no avail. The Constitution guarantees the right of certiorari. We think that in this case not through bad motives, but through the omissions, neglects and defaults, the respondent was in the wrong in not trying the case in an orderly way upon a charge properly laid, and in convicting the boy without such an orderly hearing or without a plea of guilty, and that he was in error in not keeping a record of his proceedings so that the wrong in his proceedings could be corrected by another tribunal, and therefore we are constrained to make the rule absolute."

It thus appears in the King Case, where the justice made answer under oath denying the charges of neglects and defaults, the rule was discharged, and in the Tull Case, where the justice or magistrate did not make answer under oath denying the omissions, defaults and neglects, a hearing was had before the judges.

The purpose of section 2, chapter 92, undoubtedly is to give the judges of the Superi-

or Court general supervisory powers by summary process over justices of the peace and inferior officers to the extent therein expressed, but not in conflict with the Constitution of this state. If the charges made against the justice in this case were similar to those made either in the King Case or in the Tull Case, we should be constrained to regard the decision as decisive of the matter. While this case may be so similar to the King Case in principle that we should follow the decision of the court in that case, to the extent of discharging the rule on the answer filed, yet it being manifest that the favors and corruptions charged in this petition are different from the contempts, omissions, defaults and neglects charged in that case, we do not think that the mere dismissal of the rule on the first ground would be proper without considering the second. In the King Case and the Tull Case it appears that the justice had failed to perform some act which in itself was denying this court the right of supervision over the acts of the justice, while in the present case the defendant in the case below was not denied, by any act of the justice, to either his right of appeal or certiorari allowed by law, nor was the justice in conflict with any rule of the Superior Court which would make him in contempt of that court, but on the other hand the justice is charged in the petition with acts of oppression which the respondent claims to be indictable under the laws of this state.

In *Rex v. Barren*, 3 B. & A. 432, it is said: "On motions for information against magistrates the question is, not whether the act done might on free investigation be found to be strictly right, but whether it proceeded from oppression, dishonest, or corrupt motives (under which fear and favor may generally be included), or from mistake or error; in either of the latter cases the court will not grant a rule."

In *King v. Okey*, 45 Modern, 45, a rule was granted to show cause why an information should not be filed against the defendant, who was a justice of the peace, for sending the prosecutor to the house of corrections without a sufficient cause. Leave was given by the court to file an information against the justice of the peace.

In the case of *Rex v. Harris and Price*, Justices of the Peace, 3 Burrows, decided in 1765, Lord Mansfield said: "The court should never interpose against magistrates unless they have acted from bad motives and mala fide; especially in such a case as this where they are entrusted with an absolute discretion. And for that very reason, this is the strongest case for the interposition of the court if it appears that they have acted upon corrupt motives."

"The court thought it a proper case for an information and made the rule absolute."

By an examination of the above authorities and many others it is determined that the

procedure in the court of King's Bench in like cases was in the form of a motion for a rule to show cause why an information should not be filed against the respondent. But in this state article 1, section 8, of the Constitution of 1897 provides that "no person shall for any indictable offense be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. * * *

It is not claimed by the petitioner that this case comes within the exceptions mentioned in the above section, or exceptions set forth in section 80, article 4, and section 7 and 8, article 5, of the Constitution.

In this state a procedure by way of information in like cases as at common law would be in conflict with the provisions of the Constitution of this state, and such a proceeding is not within the contemplation of said section 2, chapter 92, of the Code.

Under the provisions of section 18, chapter 127, Revised Code, 926: "Assaults, batteries, nuisances and all other offenses indictable at common law and not specially provided for by statutes, shall be deemed misdemeanors, and shall be punishable by fines or imprisonment, or either, according to the discretion of the court."

Counsel for the petitioner makes no claim that the favors and corruptions stated in the petition are specially provided for by statute in this state, other than by section 2, although he submits "that the common-law punishment of oppression and partiality of justices of the peace was by information rather than by indictment." We think the question at this point to be whether the acts of oppression charged against the respondent were indictable offenses at the common law and not whether proceeding might be had at common law by way of information; for if the corruptions and favors with which the respondent is charged were indictable at common law, then under section 18, chapter 127, they would be indictable offenses under the laws of this state and it would be against the provisions of article 1, section 8, to proceed except by indictment.

In Hawkins' Pleas of the Crown, volume 2, page 289, we find this statement: "There can be no doubt, but that all capital crimes whatsoever, and also all kinds of inferior crimes of a public nature, as misprisions, and all other contempts, all disturbances of the peace, all oppressions, and all other misdemeanors whatsoever of a public evil example against the common law, may be indicted, but no injuries of a private nature, unless they some way concern the king."

In Russell on Crimes (8th Amer. Ed.) vol. 1, page 45, is the following: "It is clear that all felonies, and all kinds of inferior crimes of a public nature, as misprisions and all other contempts, all disturbances of the

peace, oppressions, misbehavior by public officers and all other misdemeanors whatsoever of a public evil example against the common law, may be indicted."

The same authority at page 135 of the same volume states: "The oppression and tyrannical partiality of judges, justices and other magistrates in the administration, and under color of their offices, may be punished by impeachment in Parliament, or by information or indictment, according to the rank of the offenders, and the circumstances of the offense. Thus, if a justice of the peace abuses the authority reposed in him by law, in order to gratify his malice, or promote his private interests or ambition, he may be punished by indictment or information."

From the authorities it is clear that offenses of oppression and favoritism were indictable at common law, and if they are indictable at common law then under the provisions of section 18, chapter 127, they are indictable offenses in this state.

Therefore, the respondent being charged in the petition with offenses which are indictable under the laws of this state, we are of the opinion that the petitioner cannot proceed further in this summary proceeding. We order that the rule be discharged.

WOOLSEY v. WOOLSEY et al.

(Court of Chancery of New Jersey. Jan. 8, 1913.)

1. WILLS (§ 545*)—CONSTRUCTION—INTESTACY—GIFT.

Where a testator leaves his estate in trust for a grandson and provides that, in case such grandson dies before majority and without issue, the estate should be divided as though testator died intestate on the date of the will, on the death of such grandson before majority the trustees should divide the estate as though the testator had died intestate on the date of the will, and, if no other descendants existed at the date of the will, the next of kin of the deceased grandson should get the estate, taking not by intestacy, but by gift.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171-1176; Dec. Dig. § 545.*]

2. WILLS (§ 19*)—RULES FOR FINDING LEGATEES—DISCRETION OF TESTATOR.

Testators have wide power and discretion in laying down rules to be followed to find out who are to be the takers of their bounty upon the happening at a remote time of various more or less remote contingencies.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 43, 44; Dec. Dig. § 19.*]

Bill by Eugene Woolsey against Virginia M. Woolsey and others. Decree for defendants.

See, also, 78 N. J. Eq. 579, 81 Atl. 1135.

Bill by legatee for an accounting of executors and trustees and the recovery for the estate of moneys paid by executors to defendant Virginia M. Woolsey, the establishment in favor of complainant of an "executory devise" of property under the will, etc.,

and cross-bill by executors asking for instructions in regard to the payment of moneys in their hands. Heard on pleadings and testimony stipulated into the cause from prior case between the parties in the court of errors and appeals.

M. T. Rosenberg, of Jersey City, for complainant. Charles L. Carrick, of Jersey City, for Woolsey & Northrop, executors. Randolph Perkins, of Jersey City, for defendant Virginia M. Woolsey.

STEVENSON, V. C. It is agreed by counsel that all the questions raised by the pleadings in this cause have been disposed of with the exception of the one herein to be considered. The solicitors of all parties interested have also by an ample stipulation submitted the said question to the determination of this court, without regard to the technical form of the pleadings. The subject-matter of this controversy is presented by the pleadings, and the sharp question argued by counsel, and submitted as aforesaid, is distinctly put to the court in the cross-bill filed by the executors, to which cross-bill the defendant Virginia M. Woolsey alone was called upon to answer. The stipulation signed by the solicitors of all the parties in this cause makes the decision of the issue presented by the cross-bill and answer thereto of the defendant Virginia M. Woolsey binding upon all the parties.

The testator, Charles A. Woolsey, resident in Hudson county, N. J., made his will June 14, 1894, and made a codicil, which throws some light upon this controversy, on November 20, 1894. The testator died July 4, 1895, leaving him surviving as his next of kin his daughter Alice Woolsey, now deceased, his infant grandson Herbert W. Woolsey, now deceased, and also leaving a sister of the whole blood, Sarah A. Newell, and two brothers of the half blood, Frank Woolsey and Eugene Woolsey, and also leaving a daughter-in-law, the defendant Virginia M. Woolsey, widow of the testator's deceased son Herbert, and mother of the said infant grandson Herbert W. Woolsey. The family relations of the testator were the same at the time of the making of the will and at the time of his decease. There seem to be no other facts or circumstances existing at the time of the making of this will which throw any light upon the question of construction to be decided in this cause, excepting that the testator was a man of substantial fortune, a large part of which was invested in a paint and oil business which subsequently failed. The will after making certain comparatively small bequests, which have a bearing upon the controversy in this cause to be hereinafter noticed, gives, devises, and bequeaths all the residue of the testator's estate of every kind to his executors and trustees and the survivors and survivor of them, their heirs and assigns, in trust nevertheless

for certain specified uses and purposes. It may well be noted here that the entire residue of this estate, after taking out legacies which constituted a small proportion of it, is vested in these executors and trustees, and thereupon the further provisions of the will are occupied with directions as to the parties to whom the estate shall be paid by these trustees. The executors hold the residue of the estate under the terms of this will, and they are to pay it out as the will directs. The takers of the fund do not take by intestacy. The residue constituting the trust fund was disposed of for the support and benefit of the testator's daughter Alice Woolsey and his grandson Herbert W. Woolsey. Provision was made for the death of this daughter and grandson before the grandson should arrive at the age of 21 years, which provision shows that the testator contemplated the probability of a considerable period of years during which his estate would be held in trust, and for the distribution of it at the termination of the trust among his descendants, if any should then be surviving. The latest possible time for distribution was fixed at the time when the grandson Herbert should become of full age, which, in case the grandson reached that age, would be many years after the testator made his will and framed this trust.

[1] Subparagraph 8 of the third paragraph of the will is as follows: "(8) In case of the death of said Herbert W. Woolsey and Alice M. Woolsey, before the division herein provided for, and without one or each of them leaving lawful issue, and no directions for such contingencies being herein specifically set forth, then such share or shares shall be divided in the same manner as though I had died intestate, and a resident of the state of New Jersey, upon the day of the date of this instrument." It is claimed on behalf of the next of kin of the testator, the complainant Eugene Woolsey, the defendants Frank Woolsey and Kitty May Wadsworth, succeeding by will to any title or interest of her deceased mother Sarah A. Newell, that this clause of the testator's will should be read as if after the words "I had died intestate" the words "Herbert and Alice being then dead" had been interpolated. It is claimed on the other hand, on behalf of the defendant Virginia M. Woolsey, that no such proposed interpolation is proper or necessary in order to reach the plain meaning of the testator and the exact force of the language which he employed, and that the true construction of this provision gives to the defendant Virginia M. Woolsey, as the next of kin of her deceased infant son Herbert, one-half of the fund in dispute concerning the payment of which the trustees ask for instructions from this court.

In my judgment the construction contended for on behalf of Mrs. Virginia M. Woolsey is the correct construction, while the con-

struction contended for on behalf of the next of kin of the testator can only be established by a violent and unjustifiable wrenching of the testator's words, resulting in the establishing, not of the testator's will, but of some will which this court may think the testator might have made if he had given due thought to the business which he had in hand.

1. The vice, it seems to me, which inheres in the whole argument on behalf of the next of kin lies in the fact that the construction for which they contend ignores the force and significance of the provision which makes it necessary, in determining who are the takers, to consider the date of the execution of the will, and not the date of the decease of the testator. The will does not say that at the probably remote period which the testator contemplated as the time for distribution, if all the trusts had been performed and the trust provisions had become inoperative, the estate should go as if he had died intestate. What the testator does is to lay down a rule, whether a wise or a reasonable rule we have no right to inquire, but a perfectly clear rule according to which the takers of this trust estate are to be ascertained in the event of the decease of the principal beneficiaries without leaving issue. The testator might have made no provision for such a contingency, in which case his next of kin would take by intestacy—take something undisposed of by the will. But the testator disposes of his entire estate. He vests it in his executors in trust and provides for the contingencies under which the estate is to be paid out to different beneficiaries, and contemplating perhaps, as a remote possibility, that both his daughter and his grandson would die before the grandson had reached the age of 21 years, and without leaving any issue, he then lays down a rule by which the trustees are to find the person or persons to whom they are to pay over the "share or shares" which otherwise would have gone under this will to the testator's descendants or descendant.

A direction in a will made by a testator who could not know whether he would live one year or ten years, providing in the event of certain contingencies occurring for the distribution of a trust fund by the payment thereof "in the same manner as though" such testator had died intestate and a resident of the state of New Jersey upon the day of the date of the will, makes a direction for the payment of money which involves no case of intestacy, and in my judgment gives rise to little, if any, difficulty in its application. The takers under this rule are found by inquiring where the fund would have gone if the testator had died intestate on the arbitrary day fixed as the test. The ultimate question, however, is not where, in the case stated, the fund would have gone; the practical question is, Where does the fund now go from these trustees who hold it? The two questions, however, follow each other. Having ascertained in answer to the first ques-

tion where the fund would have gone in case the testator had died intestate on the day of the execution of his will, it becomes necessary to trace any other devolutions to which the fund or any part thereof would have been subjected, owing to events which occurred subsequent to the test date. If the testator had died intestate at the date of the execution of his will, the estate which he put in trust would have gone in equal shares to his daughter Alice and to his grandson Herbert. The testator, when he made his will, certainly knew that both his daughter and his grandson were then alive, and presumably knew that they would take his entire estate if he then immediately died intestate. I am unable to adopt the view of counsel for the next of kin that we must suppose that the mind of the testator was so occupied with the possible distribution of his estate years after he made his will, and after both his daughter and his grandson were dead without leaving issue, that, when he laid down this test by which the takers of the fund were to be ascertained, he misspoke himself and did not make his next of kin, who were alive before him, the hypothetical stirpes through whom the takers were to be ascertained, but that he made his two brothers and his sister such stirpes.

[2] It must at all times be kept in mind that this estate is in the hands of trustees by whom distribution is to be made, and we are to find from this will directions as to whom these trustees are to make the payment. They make the payment by following the rule for the ascertainment of the payees laid down by the testator. Now, then, if the testator had died when he made his will intestate, which is not the case, the fund in question would have gone to Alice and Herbert, which is not the case, and which manifestly the testator could not have contemplated as a possibility, because he was providing for a condition of affairs after the death of both these persons. But if these two persons had received equal shares by intestacy, then when Herbert died his mother, the defendant Virginia M. Woolsey, would have taken his one-half share by intestacy as his next of kin, while, if Alice had received her one-half, then upon her death unmarried and intestate, which followed the death of her nephew Herbert by a few years, her one-half would have passed to her next of kin, to wit, the defendants Frank Woolsey and Eugene Woolsey, and Sarah A. Newell, whose interest is represented in this case by her general legatee, the defendant Kitty May Wadsworth. It may be urged that the recognition of such an artificial and peculiar rule for the ascertainment of the takers of this trust fund might lead to most extraordinary results which the testator never could have contemplated. This same vicious argument has perhaps sometimes prevailed so as to cause courts to make and enforce wills which they think testators ought to have made and would have been lia-

ble to make if they had known this, that, or the other thing, or thought of this, that, or the other contingency.

Where language is employed in a will like that which is now under consideration, the question arises, or may arise, whether all possible forms of the devolution of property may not sometimes have to be examined and considered, not in order to trace title to the fund which is to be paid under the will, but to ascertain the person to whom such payment is to be made. A general assignment for the benefit of creditors might perhaps have to be given force and effect not as having actually passed title to the fund in question, which is held by trustees, let us suppose, as in this case, and is paid out in execution of the will, but to lead up to and indicate with certainty the beneficiary for whom the trustees are making search. Whether in this sort of a case theoretical devolutions of property other than by will or by intestacy are to be dealt with differently in their relation to the testator's intention, and the testator's rule for finding the beneficiary, it is unnecessary in this case to discuss or determine. It may be conceded that if, under language like that employed in subparagraph 8 of this will, the beneficiary is always to be found by assuming a fictitious vesting by intestacy and subsequent transfers by any and all forms in which the hypothetical vested interest, if it had been a real interest, would in fact have passed perhaps through a series of owners by virtue of wills, deeds, escheats, etc., oftentimes results would be reached which in fact the testator never contemplated. In such cases a good deal can be said about enforcing the intention of the testator, and also about making a will for him which he did not make, but which a court may conclude he would have made if he had thought about the matter.

Testators undoubtedly have wide power and discretion in laying down rules for executors and trustees and courts to find out who are to be the takers of their bounty upon the happening at a remote time of various more or less remote contingencies. In this present case, in my opinion there is no temptation to think out a will for the testator which the court may suppose he would have made, but which in fact he did not make, because in the hypothetical or fictitious transfers which must be taken into consideration in determining who shall take under the terms of this will, or, in other words, to what persons these trustees are to make payment, we have the very simple cases of a mother taking the personal estate of her deceased son by intestacy, and a daughter taking the personal estate of her deceased mother under a will making her her mother's universal legatee, and, it may be added, that for all that appears, if no will had been made, this daughter would have taken the mother's estate by intestacy.

2. At this point we may observe that, if

the contention on behalf of the next of kin is correct, we still have precisely the same artificial rule assuming hypothetical devolutions of property in order to ascertain the actual devolution to be recognized and effectuated under this peculiar subparagraph 8. We still have not certain named, ascertained beneficiaries whom the testator says shall take, but a mere arbitrary rule for ascertaining in the light of subsequent events how the takers are to be found. Adopting arguendo the proposed interpolation, we reach the result that, in the hypothetical case put by the testator, the estate in question would have devolved not upon Alice and Herbert, but upon the testator's brothers and sister. Now, suppose that Mrs. Newell, who died in fact after both Herbert and Alice, had died at some time after the death of the testator, but before the death of either Alice or Herbert. In such case the defendant Mrs. Wadsworth, it seems to me, would take one-third of the estate under the terms of this will, and not under the terms of her mother's will, although the mother's will constitutes a necessary part of the hypothetical devolution of this third share which is to be taken as a guide in ascertaining the actual devolution of that third share under this testator's will.

3. The whole scheme of this will strongly supports the view that the testator practically adopted his daughter-in-law as a daughter, and contemplated that she might through her son, the testator's grandson, receive a substantial share of his estate. The will exhibits plainly how much larger a place in the testamentary plans and purposes of this testator was occupied by his daughter-in-law Virginia than by any of his collateral relatives. This daughter-in-law was an absolute participant to a very large extent in the benefactions of this will, while these collateral relatives were practically ignored.

The testator's only sister, Mrs. Newell, receives a legacy of \$5,000, while the daughter-in-law, Mrs. Virginia M. Woolsey, receives a legacy of \$10,000; and after disposing of certain household goods and personal articles, evidently of little value, the great bulk of the testator's estate is put in trust, and the provisions of the trust are for the benefit of the testator's daughter, grandson, and this daughter-in-law, Mrs. Virginia M. Woolsey, to the exclusion of his brothers and sister. Mrs. Woolsey is provided with an annuity of \$2,000 a year, which seems to be substantially the same as the sum of the annuities left for the daughter Alice. The testator apparently contemplated that, if his grandson Herbert became of age so as to receive his share of the corpus of the estate, his daughter-in-law, the mother of Herbert, would naturally be thereby provided for. In the codicil the testator expressly provides that the annuity to Virginia shall cease in case of her marriage or the coming of full age of her son Herbert, and then proceeds to direct that, if Herbert

shall die before reaching the full age of 21 years, then Virginia's annuity is to be continued until her death or marriage. These provisions for Virginia's support terminating when her son Herbert should arrive at 21 years of age and receive a substantial fortune from his grandfather, which would enable him to properly care for his own mother, strongly suggest the view that the testator knew precisely what he was doing when he established his daughter Alice and his grandson Herbert as what I have called hypothetical stirpes through whom, as the supposed equal owners of his estate at the time of the execution of his will, the devolution of that estate would be ascertained in after years in case both Alice and Herbert should die without leaving issue before Herbert reached the age of 21 years. That the testator actually contemplated situations and conditions in which his daughter-in-law might receive through her son a large portion of the testator's estate is indicated by another important provision. In the event of the death of Alice without issue, the entire estate became vested in Herbert, and the testator recognized that this might occur while Herbert was an infant and incapable of making a will, and therefore he expressly directs that in such case the estate should be managed by his executors until Herbert became of full age. How can we escape the conclusion that the testator, aided as he no doubt was by counsel in drawing this portion of his will, recognized the possibility, by no means remote, that his entire residuary estate, comprising the bulk of his fortune, might pass by intestacy from his grandson Herbert to Herbert's mother, the defendant Mrs. Woolsey. There seems to be little force in the argument that the testator did not consider the possible devolution of one-half of the residuary estate upon this favored daughter-in-law under the provisions of this will, and also was strangely blind to the obvious contingency that under the will the entire estate might become vested in an infant from whom the favored daughter-in-law might receive the whole by intestacy.

4. The whole argument on behalf of the next of kin seems to me to lose force if we consider this very probable situation which might have occurred, and which the testator presumably contemplated, viz., that, before the death of Alice and Herbert, the two brothers and the sister had all died. Is there any semblance of reason or common sense in the claim that these dead collaterals should be taken as the hypothetical stirpes, displacing the daughter and grandson, who were alive and in the contemplation of the testator when he made his will? In case such a substitution were made, the favored daughter-in-law would be excluded from the distribution under consideration, while a husband of the testator's sister and a large number of strangers to the testator,

including charitable institutions, might stand as claimants.

5. The case of *White v. Springett*, 4 Ch. App. 298 (1869), while I think strongly supporting the views herein expressed, is particularly valuable on account of the opening statement in the opinion of Lord Justice Selwin, which is as follows (page 302): "I accede to the argument on behalf of the appellants to this extent: That the current of modern decisions, and especially those in the House of Lords, has set strongly in favor of adhering strictly to the literal meaning of the words used by the testator in each case, without alteration or addition, and, as far as possible, without reference to other cases or other wills." Lord Chancellor Halsbury in a series of recent cases in the House of Lords has protested against the tendency to follow the construction of phrases in one will as a precedent for the construction of other wills, and of working out a will which courts or lawyers may think the testator would have made "if he had had the whole circumstances present to his mind." *Higgins v. Dawson* (1902) A. C. 1, 6. *Kingsbury v. Walter* (1901) A. C. 187, 188. See, also, the remarks of Lord Herschel in *Hickling v. Farr* (1899) A. C. 15, 25.

So far as authorities and precedents may be resorted to for help in this case, perhaps the most useful decision is that of the House of Lords rendered in 1860 in the case of *Bullock v. Downes*, 9 H. L. C. 1, 11 English Reprint, 627. See, also, 1 Jarm on Wills, Ed. of R. & T. p. 682. In *White v. Springett*, supra, the supposititious intestacy which was to be assumed in order to find the takers of the estate was placed, not at the time of the death of the testator nor at the date of the will, but at the death of certain persons named, who, in fact, died after the testator. To make the rule for finding the beneficiaries more artificial, the will required that, in ascertaining the supposed next of kin of the testator at the supposed time of his death, one grandchild should be excluded from consideration, and, in fact, at the supposed date this excluded grandchild was the testator's sole next of kin. The court followed the suppositions and fictions of the will pointing out that the takers were not the testator's next of kin at the time of his death, but that "he creates for himself an arbitrary class to be ascertained in a particular manner, and the question of the persons who are to constitute that class is what we have to look to."

6. Where, under the words of a will, the vesting of an estate upon a remote contingency is in the next of kin of the testator, or is to be ascertained by supposing that he died intestate, there may be good grounds for holding in some cases that the testamentary language effects no gift, but constitutes merely a declaration that in case his main purposes are defeated, for instance, by the death

of all his direct descendants, he has no further testamentary purpose to accomplish and is content to die intestate as to the estate or the residue of the estate of which his attempted disposition has been thwarted by time and death. No such view, however, seems tenable when the testator disposes of his estate upon the happening of a more or less remote contingency as if he had died intestate upon some arbitrary date, such as the date of his will or the date of an event which may happen before or after his own decease, on which assumed date he did not in fact die. In every such case a gift must be found to have been made by the will to a donee who remains unknown until the contingency happens, and then must be ascertained by applying an artificial rule as was done in *White v. Springett*, supra. Of course if the assumed date for the hypothetical intestacy is the date of the will, or any date prior thereto, the testator's next of kin on such assumed date are known to him, as was true in this case. But in such case there seems to be no reason why, if the gift of the contingent interest is made to these next of kin, they should not be named instead of indicating them by a clumsy circumlocution. The purpose of the suppositions and the fiction of intestacy seems to be to keep the takers of the estate upon the happening of the contingency unknown and indeterminate until such contingency shall happen.

7. It may be deemed by some minds that the effect of what the testator in this case did was to vest the contingent interest in question in his daughter-in-law and grandson, notwithstanding the circumlocution which he employed. This would not be, as was I think erroneously suggested in the argument, a gift to deceased persons, but a gift to living persons of a contingent estate which, from the nature of the contingency, they could never have in possession. It is unnecessary in this case to discuss this theory of construction, because it leads to the same result which is reached if we hold that the will makes no gift of the contingent interest to the daughter and grandson, but merely lays down an artificial and arbitrary rule by which the donee, theretofore being undetermined, is to be ascertained upon the happening of the contingency.

8. It is understood that in accordance with the arguments of counsel, and in harmony with the stipulation signed by the solicitors of all the parties, this decision is confined to the force and effect of the paragraph of the will above set forth. The defendant Virginia M. Woolsey in her answer to the cross-bill claims a balance of \$8,000 due on her legacy of \$10,000, but whether such a claim could be substantiated in this case has not been the subject of any argument, and in accordance with the stipulation I have given no consideration to it. If I have been misled in regard to this matter by the state-

ments and stipulation of counsel, the matter may be disposed of after further argument upon settlement of the decree.

9. A decree will be advised instructing the trustees to pay one half of the fund in dispute to the next of kin of the testator's daughter Alice, and the other half to the next of kin of the testator's grandson Herbert.

COTTON v. CRESSE et al.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

INJUNCTION (§ 62*)—COVENANTS AS TO USE OF PROPERTY—ENFORCEMENT IN EQUITY.

A written agreement between adjoining lot owners that each should not build nearer than three feet to the common line in certain places, though not enforceable at law, will be enforced in equity against a purchaser with notice.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124-127; Dec. Dig. § 62.*]

Appeal from Court of Chancery.

Bill by Alonzo Cotton to enjoin Lewis M. Cresse and others from constructing a building so as to interfere with plaintiff's light and air. From a decree of the Court of Chancery granting the application for an injunction, the defendants appeal. Affirmed.

The following is the opinion of the vice chancellor:

"In February, 1901, the complainant entered into a written agreement with Gainer P. Moore as follows: 'This agreement made this 14th day of February, A. D. 1901, between Alonzo Cotton of Ocean City, county of Cape May, state of New Jersey, of the first part, and Gainer P. Moore, of the same city, county and state, of the second part, is as follows, to wit: That we, the parties of the first part and second part, owning properties adjoining each other on the east side of Asbury avenue below Eighth street, being lots Nos. 438 and 440, enter into a mutual agreement that the said party of the first part may build up to the party line fifty feet of the distance from the property line on Asbury avenue, and that the said party of the second part may build up to the party line fifty feet from the property line of the street back, that is to say, that each party can use the line one-half the distance from street to street which is one hundred feet, provided he let no part of the building hang over the line; and it is further agreed that if either party desires to erect a building extending more than fifty feet from the property line on either street, he shall not build it nearer the party line than three feet. For the true and faithful performance of all which, we set our hands and seals the day and year aforementioned.' The defendant subsequently acquired title to lot No. 438 with actual notice of the agreement. The complainant long ago built upon his lot and conformed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to the lines specified in the covenant. The defendants have commenced to build on their lot in disregard of the agreement and propose to build on the division line where the complainant's building runs to that line, and thus shut off the light and air which the complainant enjoys through appertures in his building.

"On behalf of the defendants it is insisted that the covenant in question does not run with the land nor create an easement, but is purely personal, and therefore is not enforceable. Reliance is largely based upon the case of *People v. Railroad*, 57 Ill. 436. That was a case in which the defendant agreed with the owner of an elevator to run a track into it for the delivery of grain. The track subsequently was disused and a portion of it removed. Later, lessees of the premises sought by mandamus to compel the restoration and use of the track. Relief was denied on the ground that the agreement was entirely personal between the original parties to it. *Costigan v. Pennsylvania R. R. Co.*, 54 N. J. Law (25 Vroom) 233, 23 Atl. 810, is also relied on by the defendants' counsel. In that case the Supreme Court refused to give effect to a covenant which was not a grant of an easement nor of a right in the nature of an easement and was one that did not run with the land. These two cases of *People v. Railroad* and *Costigan v. P. R. R. Co.* are cases at law, and admittedly courts of law will not enforce covenants of the kind there under review. However, a different rule prevails in equity, and it will be enforced in appropriate cases. *Brewer v. Marshall*, 19 N. J. Eq. (4 C. E. Green) 537, at page 544 (97 Am. Dec. 679). In this case Chief Justice Beasley, speaking for the Court of Errors and Appeals, said: 'Nor is this doctrine without illustration in our own courts. It was enforced in the case of *Van Doren v. Robinson*, 16 N. J. Eq. 256. This was a suit founded on a covenant in a conveyance, whereby the grantee agreed to reconvey to the grantor whenever he (the grantee) should quit the actual possession of the premises. The grantee conveyed to a stranger, who took the title with constructive notice of the covenant. Chancellor Green maintained that this was a mere personal covenant; that it neither ran with the lands nor bound the alienee in equity; but that it would be enforced against such alienee in equity, when he was chargeable with notice of the original contract. And in *Holsman v. Boiling Spring Bleach Co.*, 14 N. J. Eq. 347, the same accurate jurist maintained the right of equity to exert its authority in proper cases to prevent injustice, without any dependency on the merely legal rights of the parties. And I think it is also manifest from the case of

Rogers v. Danforth, 9 N. J. Eq. 294, that Chancellor Williamson was of the same mind on this subject, for he remarked, with reference to a covenant touching lands, that he does not think that it follows that, because a suit at law cannot be maintained, a Court of Chancery may not protect the rights of the parties under it. From this review of the authorities, I am entirely satisfied that a court of equity will sometimes impose the burden of a covenant relating to lands on the alienee of such lands on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the title. So far I think the law is not in doubt, and the only question in this case, which I have regarded as possessed of any material difficulty, is whether the covenant now in controversy is embraced within the proper limits of this branch of equitable jurisdiction.'

"The covenant under consideration in the case at bar was intended by the parties to it, as I read it, to be effectual and binding by way of building restriction upon their adjoining premises, and upon their successors in title. For years it was so acted upon. True, it could not bind the alienees of either party without actual notice of its existence; but, as actual notice is present in this case, I think the agreement enforceable under the doctrine of *Brewer v. Marshall*, supra.

"Quite apposite is the case of *Whatman v. Gibson*, 9 Sim. 196, observed upon by Chief Justice Beasley in *Brewer v. Marshall*, 19 N. J. Eq. at page 543, 97 Am. Dec. 679. There, as here, the restrictions did not exist in a deed which formed a link in the chain of title, but resided in a deed made between one-time owners of different lots, and the restrictive covenant was enforced against a purchaser with notice who had not executed the covenant but derived title under a purchaser who had; and, as said by Chief Justice Beasley at the same page: 'These decisions proceed upon the principle of preventing a party having knowledge of the just rights of another, from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land.'

"This view leads to the making absolute of the order to show cause, and a preliminary injunction will be issued. Let the costs abide the event."

Bourgeois & Coulomb, of Atlantic City, for appellants. Bleakly & Stockwell, of Camden, for respondent.

PER CURIAM. The decree appealed from is affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Walker.

REALTY TITLE & MORTGAGE CO. v. SCHAAF et al.

(Court of Chancery of New Jersey. Dec. 28, 1912.)

HUSBAND AND WIFE (§ 169*)—MARRIED WOMEN—SEPARATE ESTATE—LIEN—EQUITY.

When the husband did not join in a mortgage of the separate estate of the wife, it was not valid as a mortgage or a specific lien, but was effective to show that the debt was contracted on the credit of the married woman's separate estate, and equity will declare and enforce a lien against it.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 600-670, 949, 951; Dec. Dig. § 169.*]

Bill by the Realty Title & Mortgage Company against Mattie Schaaf and others. Decree for plaintiff.

G. Dore Cogswell, of Camden, for complainant. Frederick A. Rex, of Camden, for defendants.

LEAMING, V. C. The bill is filed to foreclose a mortgage made by Annie Horner to George H. Briggs. The mortgage is now owned by complainant, and defendants are the heirs at law of the mortgagor.

Annie Horner, the mortgagor, was a married woman at the time the mortgage was made by her. Her husband (now deceased) did not join in the mortgage. The mortgage does not disclose that the mortgagor was a married woman, and the acknowledgment to the mortgage does not certify that she was examined by the acknowledging officer separately and apart from her husband.

The evidence discloses that the real estate described in the mortgage was the separate estate of the mortgagor, and that the mortgage was executed by the mortgagor for money loaned to her by the mortgagee on the credit of her separate estate; the loan having been made at the time the mortgage was executed.

It is well settled in this state that, under the circumstances stated, the instrument intended as a mortgage is not valid as a mortgage or specific lien; the failure to comply with the statutory requirements is fatal to the mortgage as such. It is, however, equally well settled that, under the circumstances stated, a court of equity will declare and enforce a lien against the separate estate for the debt intended to be secured by the mortgage. While the mortgage is not effective as a lien, it is effective to show that the debt was contracted on the credit of the married woman's separate estate, and that she intended it to be chargeable thereon. *Wilson v. Brown*, 13 N. J. Eq. (2 Beas.) 277; *Harrison v. Stewart*, 18 N. J. Eq. (3 C. E. Green) 451; *Armstrong v. Ross*, 20 N. J. Eq. (5 C. E. Green) 109; *Homœopathic Mut. Life Ins. Co. v. Marshall*, 32 N. J. Eq. (5 Stew.) 103, 112. No equitable principle can

find more perfect justification than this in its inherent quality of justice and fairness; it is merely operative to restore that which is due in conscience. An exemplification of the principle is to be found in those cases in which a married woman has contracted to sell separate estate under an agreement which cannot be specifically enforced against her, and has received a portion of the purchase price; in such cases courts of equity have declared liens for the amounts paid and thus enforced restitution. *Pentz v. Simonson*, 13 N. J. Eq. (2 Beas.) 232, 235; *Pierson v. Lum*, 25 N. J. Eq. (10 C. E. Green) 390.

It also appeared at the hearing that at the time the mortgage was executed the mortgagor and her husband were living separate and apart from each other. In view of the power and duty of this court to declare and enforce a lien under the circumstances first above stated, I think it unnecessary to here inquire whether the separation was of a nature to render the mortgage here in question valid as such.

The bill is silent touching the nature of the indebtedness for which the mortgage was given. While the prayer is probably adequate for appropriate relief, I think the bill should be amended to conform to the proofs before a decree is signed. Upon such amendment being made, I will advise a decree declaring a lien for the amount of the debt and directing its enforcement by a sale of the premises described in the bill.

LEONARD v. LEONIA HEIGHTS LAND CO.

(Court of Chancery of New Jersey. Dec. 27, 1912.)

1. MORTGAGES (§ 244*)—BONA FIDE PURCHASERS—UNRECORDED ASSIGNMENT OF MORTGAGE.

The act respecting conveyances, by section 54 (2 Comp. St. 1910, p. 1553), provides that every unrecorded instrument mentioned in section 21 of the act, which includes assignments of mortgages, shall be void as against subsequent bona fide purchasers, for value and without notice, whose deed is first recorded. *Held*, that where a mortgagee assigned the mortgage and the assignment was not recorded, and subsequently acquired the equity of redemption and sold it for the full value of the land to a bona fide purchaser, representing that the mortgage was lost, the purchaser on recording his deed got title discharged of the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 633-655; Dec. Dig. § 244.*]

2. MORTGAGES (§ 244*)—ASSIGNMENTS—RECORDING—PAYMENTS OR RELEASE—VENDOR AND PURCHASER.

An act concerning mortgages (3 Comp. St. 1910, p. 3419) § 34, providing that, when an assignment of a mortgage is not recorded, a release by the assignor to a person not having actual notice of the assignment shall be as valid as if the mortgage had not been assigned, is meant to afford protection to the purchaser of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the land itself who believes the mortgage to be lost, as well as purchasers of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 633-655; Dec. Dig. § 244.*]

3. MORTGAGES (§ 244*)—BONA FIDE PURCHASER—EVIDENCE.

Evidence held to show that the purchaser of land acted in good faith and after all inquiry possible, in taking title relying on the vendor's assurance that a mortgage standing of record in the vendor's name had been lost, though in fact he had assigned it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 633-655; Dec. Dig. § 244.*]

Bill by Adelia A. Leonard against the Leonia Heights Land Company. Heard on pleadings and proofs taken in open court. Decree dismissing the bill.

Louis A. Cowley and William W. Watson, both of Passaic, for complainant. Frederick P. Schenck, of Leonia, for defendant Leonia Heights Land Company.

STEVENSON, V. C. (orally). [1] My conclusion is that the defendant, the Leonia Heights Land Company, is entitled to a decree dismissing the foreclosure bill, on the ground that the company is a bona fide purchaser for a valuable consideration without notice of the interest of the complainant which she acquired under her assignment; the assignment having been left unrecorded.

In another aspect of the case I think the conclusion is warranted that the defendant, the land company, is protected against the mortgage of the complainant under the thirty-fourth section of the act in relation to mortgages (3 Comp. St. 1910, p. 3419), which provides, in effect, that, when an assignment of a mortgage is not recorded in accordance with the system provided for in the act, any payments made to the assignor in good faith and without actual notice of such assignment, and any release by the assignor of said mortgaged premises or any part thereof to a person not having actual notice of such assignment, shall be as valid as if the mortgage had not been assigned. The defense which I first referred to is founded upon the fifty-fourth section of the act in relation to conveyances (2 Comp. St. 1910, p. 1553), which must be read in connection with section 21 of the same act.

We have here a purchaser of mortgaged premises who pays full value and takes a warranty deed from the owner. The owner had recently acquired the property. Before he had acquired the property he had taken the mortgage in question now held by the complainant. The owner then assigned the mortgage to the complainant for value, and afterwards, a considerable time after he had thus parted with all interest in the mortgage, he acquired the equity of redemption. Thus, at the time of the transaction with which we have to deal, the Leonia Heights Land Company acquired, by warranty deed, the property in question from a person, one Ryan, who appeared on the record as the

owner of the equity of redemption, and the owner of the bond and mortgage in case no merger had occurred. In case a merger had occurred, this man Ryan appeared on the record as the owner of the entire fee, free and clear. In fact, as between Ryan and the assignee of the mortgage, the complainant, Mrs. Leonard, there was no merger. Ryan sold the bond and mortgage to Mrs. Leonard before he acquired the equity of redemption, and when he acquired the equity of redemption as between himself and Mrs. Leonard he acquired it subject to the mortgage which she held.

As between these two parties no question of intention arises. There is no ground upon which any merger can be found to have been effected, but the question is: Under the fifty-fourth section of the act respecting conveyances, does the defendant, the Leonia Heights Land Company, occupy the position of a subsequent bona fide purchaser for a valuable consideration, not having notice of Mrs. Leonard's assignment so as to get the protection provided by that section, which consists in making the assignment to Mrs. Leonard void as to it, the Leonia Heights Land Company?

[2] The argument has been urged that the language of section 54 must be construed in some way distributively, and that the protection against an unrecorded assignment of a mortgage duly recorded, provided by that section, for a purchaser in the position of the Leonia Heights Land Company, is confined to a purchaser of the mortgage. In other words, according to this argument, if a man had dealt with Mr. Ryan supposing him to be what he appeared to be on the record, the owner of this bond and mortgage, and had bought the bond and mortgage for a valuable consideration in good faith, without notice of the assignment made by Ryan to Mrs. Leonard, then that assignment would be void as against such purchaser of the mortgage. But it is insisted that no such protection is afforded to a purchaser of the land itself.

I am unable to adopt this view. Some cases have been cited from other states which are based on statutes which I think are somewhat different from ours but containing dicta which favor this view; but, in my judgment, the construction of section 54 and the policy of the enactment contained in that section are beyond doubt. Section 21 of our act respecting conveyances provides a means whereby all persons who acquire interests of a great many different kinds in real and personal property may have their instruments under which they acquire their interests acknowledged and recorded, and then they are safe, and all parties who deal with respect to the res, the subject-matter—the real estate in this case—are charged with notice of this outstanding interest. If a party acquires such an in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

terest and ignores the provisions of the statute for his protection, then it is the intention of the act that his title shall be void as against all parties who subsequently acquire an interest in the subject-matter—in the res—which would be injuriously affected if the outstanding unrecorded title could be asserted and enforced. The only proviso is that the party subsequently acquiring his interest must pay a valuable consideration, act in good faith, and not have notice of the outstanding title. Any other construction, it seems to me, would defeat the perfectly plain purpose and policy of our statute.

According to this view the defendant, the Leonia Heights Land Company—if they acted in good faith and paid a valuable consideration and had no notice, about which matters I shall say something further on—had a right to deal with Mr. Ryan precisely as if the assignment to Mrs. Leonard was void. The statute makes that assignment void. It would perhaps be more accurate to say that the defendant, the Leonia Heights Land Company, according to this view of the construction of the statute, did deal with Mr. Ryan with the advantage to them that this assignment was void, provided, of course, this company was a bona fide purchaser of the interest affected by the assignment of the mortgage for a valuable consideration and without notice.

I think, also, that there is another view of this case which gives the Leonia Heights Land Company the full benefit of section 34 of the act in relation to mortgages which provides, in substance, that any payment made in good faith to the assignor without actual notice of the assignment and any release of the mortgaged premises, or any part thereof to a party not having actual notice of the assignment, shall be as valid as if said mortgage had not been assigned.

Now, in fact, there was no merger, as we have seen, and for present purposes I am considering that the complainant's view is correct, and that the defendant, the Leonia Heights Land Company, under section 54 of the conveyancing act, cannot be deemed to have purchased from Ryan the entire fee upon the theory of a merger. If in transacting their business with Mr. Ryan when they acquired this property the assignment to Mrs. Leonard must be deemed void under this section 54, then there was a merger as between the Leonia Heights Land Company and Mrs. Leonard.

But now I am supposing that we lay aside that view and for a time adopt the other view, that there was no merger as between the Leonia Heights Land Company and Mrs. Leonard, the holder of the outstanding unrecorded assignment. We have, then, this case: The Leonia Heights Land Company is making a deal plainly for Mr. Ryan's entire interest, whatever that was. It may be that the president of the company thought that

there was a merger, and thought that when he paid the full value and took a warranty deed from Mr. Ryan he was acquiring the land free and clear of all incumbrances from a party who held the land in that way, from a party who held the entire fee; the mortgage having merged in the equity of redemption. I say the president may have thought he was doing that; but if, in fact, there was no merger as between his company and Mrs. Leonard, then the mortgage was outstanding against the property, and what the Leonia Heights Land Company in fact did was to pay full value for both interests, the value of the equity of redemption and the value of the outstanding mortgage unmerged.

Now, then, in my judgment Mr. Ryan accepted the full value of the whole fee, the mortgages and stock or whatever the Leonia Heights Land Company turned over to him in payment of his entire apparent interest, including this mortgage interest. He knew that he had no right to undertake to transfer the whole interest, the equity of redemption and mortgage interest, to the Leonia Heights Land Company. He knew that they were paying a part, if not the whole, of what they paid to him as the price, not of the equity of redemption, but of the mortgage interest which, in fact, was held by Mrs. Leonard.

This transaction, therefore, on the theory that there was no merger, on the theory that the mortgage interest was outstanding in Mrs. Leonard, effected, in substance, in equity a payment made by the company to Mr. Ryan, who the company supposed held the entire interest in the property as I have said, including the mortgage interest which, in fact, was held by Mrs. Leonard.

Now, then, the last question is whether, within the meaning of these two statutes, section 34 of the mortgage act, and particularly section 54 of the act respecting conveyances, the Leonia Heights Land Company is to be deemed to be, or to have been, a subsequent bona fide purchaser for a valuable consideration without notice of Mrs. Leonard's assignment? It is conceded, or perhaps I should say it is not denied, that the Leonia Heights Land Company had no actual notice of the assignment from Ryan to Mrs. Leonard. Mrs. Leonard was a friend or a sort of family connection of Mr. Ryan, and she lived in a distant place, another state—I think she lived in Buffalo, N. Y.—and she transacted her business with Mr. Ryan by correspondence. She trusted him implicitly. There was no way suggested by which the Leonia Heights Land Company could have received notice of the assignment of this bond and mortgage from Mr. Ryan to Mrs. Leonard except from Ryan himself. It is also beyond all question that the Leonia Heights Land Company paid a full, fair, valuable consideration for the transfer to it of the entire interest which they thought Mr. Ryan held; that is to say, a title to the property free and

clear of all incumbrances. The particulars of the consideration have not been very minutely exhibited in the evidence, but there is no question on this point.

[3] The sole question in determining whether the Leonia Heights Land Company was a bona fide purchaser or not relates to the question of good faith—I incline to think that is the correct way to put it—on the part of the company. Perhaps the question might be made a little broader and put in this form: Whether the company acted in good faith and after discharging every duty in respect of inquiry in regard to the existence of Mrs. Leonard's assignment.

Now, then, it appears that the transaction between Mr. Ryan and the company was negotiated on the part of the company by the president, Mr. Paulin. We may disregard, as I have heretofore disregarded, the conveyances to and from Mrs. Cornell, who, as plainly appears, had no interest which can affect the transactions which we have to deal with between the Leonia Heights Land Company, Mr. Ryan, and Mrs. Leonard. As I have said, the company paid Mr. Ryan in stock and mortgages full value for the land. I think it appears that Ryan had paid about \$750 an acre for the land in question. There is no dispute that the mortgage which Mr. Ryan had received originally upon this property for \$6,000 which he subsequently assigned to Mrs. Leonard was what was called a "dummy mortgage"; Ryan holding the land at the time in the name of the mortgagor, one Flood. For purposes of his own he took on these six lots a mortgage for \$6,000, the mortgage being proved to have been for at least twice the value of the property. It was not a mortgage which could have been readily assigned excepting in the way in which Mr. Ryan assigned it to Mrs. Leonard, namely, through a gross fraud practiced by him upon her.

When Mr. Paulin was negotiating with Mr. Ryan for the purchase of this property by the land company in which they both were interested very largely, a search was made, and the mortgages which were upon the property were all disclosed, and this particular parcel containing, I think, six lots, covered by Mrs. Leonard's mortgage, was found to be unincumbered by that mortgage because of the apparent merger.

These facts being disclosed to the company and its president, Mr. Paulin, it became the duty of the company to inquire. This is a very important point. In one or two cases which were cited the purchaser failed to get protection from a statute somewhat similar to ours because he made no inquiry whatever. It certainly is a very significant fact if a party who, on the record, holds both the equity of redemption and also a bond and mortgage, when offering the whole property—the whole fee—for sale, does not exhibit and offer to deliver the bond and mortgage which, according to the record, he holds. No

doubt such a situation calls for investigation. But in this instance in my judgment the Leonia Heights Land Company fully discharged the duty which was cast upon them to make inquiry.

I have pointed out, and it must be borne in mind in connection with this point, that that mortgage was not one which, from the nature of the case, a purchaser would suppose Mr. Ryan could readily transfer. But if the company could, or should, have surmised that Mr. Ryan may have had this dummy mortgage made for twice the value of the land in order to assign it to somebody and perpetrate a fraud, how could they discover who that party—that possible assignee—might be, except through Mr. Ryan?

It appears from the evidence, which is not contradicted, that Mr. Paulin persisted for two weeks before the title was taken on behalf of the company in endeavoring to get this bond and mortgage from Ryan. Mr. Ryan said first that he presumed he had the mortgage papers at the hotel where he was then stopping and he would endeavor to find them and produce them. This was a scandalous falsehood. Mr. Ryan certainly knew he could not produce those papers. He had been paying the interest on this mortgage to his client and practically his beneficiary who trusted him. Mr. Paulin says that, after they had persisted for some time in endeavoring to procure the bond and mortgage from Mr. Ryan, he (Ryan) said they must be misplaced, but he would find them. In other words, Ryan put off the complainant and finally represents that the papers had been lost. Mr. Ryan, at the time of this transaction, it seems, was a man of financial responsibility, and the indications are that those who were associated with him would not have suspected that he could have been guilty of the gross fraud that he practiced upon Mrs. Leonard. Mr. Paulin also says that they knew that Mr. Ryan was careless about his papers. The fact that no assignment appeared of record, of course, added to the force of Ryan's representations.

What more could the Leonia Heights Land Company have done in the way of prosecuting inquiries to discover whether this bond and mortgage had been assigned in any way by Mr. Ryan? In my judgment, they did all that they could do, and they therefore must stand before the court within the purview of section 54 of the conveyancing act as a bona fide purchaser for a valuable consideration without notice, actual or constructive, of the outstanding mortgage held by the complainant under an unrecorded assignment, and must also occupy the corresponding favorable position under section 34 of the act concerning mortgages.

Of course, the transaction between Ryan and the Leonia Heights Land Company effected a merger and gave the company a title free from the mortgage, unless Mrs. Leonard can assert her unrecorded assign-

ment against this company, which I find, under the provisions of section 54 of the act in relation to conveyances, and in the light of the evidence in this case, she cannot do.

Of course, equity disregards mere forms in a transaction like this. It is evident, as counsel for complainant seemed to concede, that if the Leonia Heights Land Company had divided the warranty deed into two instruments, making one a conveyance of the equity of redemption and the other a release from the mortgage, or had split the consideration which it paid into two portions, and one of these portions had been accepted as the price of the equity, and the other as the payment of the mortgage, Mrs. Leonard's assignment would be void, or, to speak more accurately, her mortgage would be deemed paid, as against the title of the Leonia Heights Land Company, under section 34 of the act concerning mortgages.

The same result would seem to follow in case, after exhausting all inquiries for a possible assignee and being satisfied with the truthfulness of Mr. Ryan's representation that he still owned the mortgage but had mislaid it, the Leonia Heights Land Company had taken an assignment of the bond and mortgage from Mr. Ryan. The essential and controlling fact in this affair was the payment by the Leonia Heights Land Company to Mr. Ryan of the full value of the two estates, which both parties knew Mr. Ryan at some time had held, after this company by its agents had exhausted every reasonable means to procure the bond and mortgage and having the firm conviction—in my judgment entirely justifiable under the circumstances—that Ryan had never transferred the mortgage to any one.

What erroneous theories of the exact nature of the transaction the president of the Leonia Heights Land Company had does not in the slightest degree concern Mrs. Leonard, or affect any interest which she had under her assignment, provided he paid Ryan in good faith full value for both interests in the land which, according to the record, Ryan held. Whether the Leonia Heights Land Company, in fact, paid for this mortgage interest merged in the land, or unmerged and apparently held by Mr. Ryan, is entirely immaterial for all purposes relating to fixing the status of Mrs. Leonard's unrecorded assignment under section 34 of the act concerning mortgages.

This is not a case of hardship under our statutes such as might found or suggest some argumentum ab inconvenienti against the construction which I have made. Mrs. Leonard's loss is not attributable to our laws which she in her ignorance disregarded, but to her blind confidence in a man who betrayed her trust and defrauded her. She never saw these vacant lots or knew their value, but accepted a mortgage upon them from

Ryan accompanied by his personal guaranty for double the value of the lots without, as she testified, making any inquiry of anybody, either as to value or title. She says she knew nothing about the affair, but "depended upon Mr. Ryan's honesty."

The evidence seems to show that Mrs. Leonard made Mr. Ryan her agent or trustee for the purpose of giving her a safe mortgage upon property of adequate value and then protecting such investment by observance of all legal requirements, including the recording of the assignment. There is no evidence that her mind was ever directed toward the question of recording her assignment, but she appears to have allowed this most important part of her business to be left absolutely within the control of her plenary agent, Mr. Ryan.

Under these circumstances, as between Mrs. Leonard and the Leonia Heights Land Company, it seems to me that our recording acts would be quite imperfect if we were obliged to construe them so as to place the loss which falls upon Mrs. Leonard because her trustee left her assignment unrecorded, upon this innocent purchaser, the Leonia Heights Land Company, rather than upon herself. I should be sorry to be obliged to construe the sections of our statutes which I have referred to so as to bring about such a result. No system of laws could protect this unfortunate lady against the injurious results of her misplaced confidence.

The following are the citations of the statutes hereinbefore referred to and construed: An act respecting conveyances (Revision of 1898) L. of 1898, p. 677, § 21, and page 690, § 54 (2 Comp. St. of N. J. p. 1541, § 21, and page 1553, § 54). An act concerning mortgages (Rev. St. 1874, p. 484) 3 Comp. St. of N. J. p. 3419, § 34.

The following are a few of the cases which have been cited by counsel and through which access can be had to the most important expressions of judicial opinion having a bearing more or less direct upon the questions raised in this case: *Harrison v. N. J. R. & T. Co.*, 19 N. J. Eq. 488; *Weinberger v. Brumberg*, 69 N. J. Eq. 669, 61 Atl. 732; *Purdy v. Huntingdon*, 42 N. Y. 334, 1 Am. Rep. 532; *Curtis v. Noyes*, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506.

DOREMUS et al. v. CITY OF PATERSON. (Court of Chancery of New Jersey. Jan. 4, 1913.)

1. JUDGMENT (§ 713*)—CONCLUSIVENESS—RES JUDICATA.

An award fixing the damages to a landowner during a stated time from pollution of a stream by a city is not an adjudication of the amount of damages suffered subsequently.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. WATERS AND WATER COURSES (§ 76*)—POLLUTION—DAMAGES—COMPUTATION.

In an action for damages to suburban real property caused by the pollution of a stream, the damages must be assessed on the value of farming property, even though complainants' experts testified as to its problematic value for city purposes.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 64; Dec. Dig. § 76.*]

3. WATERS AND WATER COURSES (§ 76*)—POLLUTION—DAMAGES.

In a suit for damages to real property caused by the pollution of a stream, where a depreciation of \$800 in the sale price was admitted, but the defendant insisted that at the end of five years such pollution would be removed, the measure of damages for that depreciation is not the interest on the difference in price, but the interest on the difference between the present price as if the pollution would be removed at the end of several years, and the price as if there were none.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 64; Dec. Dig. § 76.*]

4. WATERS AND WATER COURSES (§ 76*)—POLLUTION—DAMAGES.

In a suit for damages to real property caused by the pollution of a stream through the introduction of sewerage, the owners are entitled to adequate compensation; and so, where the bed and banks of the stream have been permanently polluted, they are entitled to damages therefor, even though the emptying of the sewage has been stopped.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 64; Dec. Dig. § 76.*]

5. WATERS AND WATER COURSES (§ 76*)—POLLUTION—DAMAGES.

Where a right depends upon the happening in future, of some contingent event, the court will not pass upon it until the contingency occurs; hence the amount of damages to which landowners may be entitled for the pollution of a stream at the end of a given period will not be computed, where defendant claims that after that time it will no longer pollute the stream, and it does not appear in what condition the stream will be left.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 64; Dec. Dig. § 76.*]

Bill by Henry W. Doremus and others against the City of Paterson asking award of damages. Decree for complainants.

See, also, 79 N. J. Eq. 63, 84 Atl. 571.

J. Edward Ashmead and Chauncey G. Parker, both of Newark, for complainants. Edward F. Merrey, of Paterson, for defendant.

STEVENS, V. C. This case has been before me on several previous occasions. 63 N. J. Eq. 606, 52 Atl. 1107; 65 N. J. Eq. 711, 55 Atl. 304; 69 N. J. Eq. 775, 61 Atl. 396; 70 N. J. Eq. 298, 62 Atl. 3; 73 N. J. Eq. 476, 69 Atl. 225. I shall not repeat what has been said; nor shall I attempt any further discussion of the merits than is necessitated by the new evidence. The question is: What award shall be made to the complainants for the injury done and to be done to their respective properties because of the contin-

uance, for four years, of the pollution of the Passaic river by the defendant's sewage?

The prayer of the bill was originally for an injunction only, but, in accordance with the decision of the Court of Errors (60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642), it was so modified that it prayed for an injunction, unless and until the defendant made such compensation to complainants respectively, for the diminution in value of their said lands and property rights, as should be ascertained to be just. The city elected to make compensation, and an award was made accordingly. The final decree, made June 26, 1908, awarded compensation on the basis of a continuance of the nuisance until March 26, 1911, and then provided that an injunction should issue on that date, with, however, the following proviso: "If, notwithstanding the exercise of due diligence, the mayor and aldermen of the city of Paterson is unable to cease polluting the river by the time aforesaid, leave is reserved to apply to this court, upon such terms as this court may deem equitable, to postpone the time of issuing said injunction to a day to be fixed by this court." The city at first applied for a further term of *five* years, but subsequently changed it to *four*.

On the former hearing, as a convenient means of reaching a definite result, I prepared a table of the annual or rental values of the various properties. It will be found in 73 N. J. Eq. on page 506, 69 Atl. 237. I then, arbitrarily, for reasons there explained, estimated the diminution in annual value caused by the pollution of the river, attributable to Paterson alone (for I found pollution from other sources), as follows: For the year 1892, 5 per cent. of the sums named in the table, and for each succeeding year 1 per cent. in addition. The amounts computed on this basis were promptly paid. The gradually increasing percentage was given because of the admitted fact that as the city increased in population and built new sewers the pollution also increased. From this table it would have been possible to have computed the probable injury for the four-year period now under consideration; but the complainants, with a view of showing that the compensation thus ascertained would be inadequate, introduced new evidence.

At the former hearing, although the complainants put in a great deal of evidence on other points, they did not introduce testimony as to annual or rental values. I necessarily took as my guide on that subject evidence of the defendant's experts. On this hearing the complainants have themselves called experts, and, as their testimony differs widely from that of the city's, I am obliged to subject the above-mentioned table to revision.

[1] Counsel for defendant argues that the matter is *res judicata*, but it is evident that it is not. The injury to be inflicted on the

complainants by the wrongful acts of the defendant for the four years beginning March 26, 1911, will be, no doubt on the whole, greater year by year than that inflicted upon them in the five years immediately preceding that date. The adoption of an arbitrary standard for the ascertainment of the probable amount of injury that would be suffered in the earlier period could not operate to prevent the court from making a new finding as to the later period, if the evidence justified it; the injuries, both in point of time and of quantity, being distinct.

[2] On the former hearing I gave compensation only for loss in annual values. It is now very earnestly argued that the evidence demands an additional award that will compensate the complainants for the injury to be suffered in not being able to sell their respective properties except at greatly depreciated prices.

Mr. Harrison Van Duyne, and the other experts called by complainants, thus estimate this loss: They say (taking the property of Mr. Cadmus, on the Bergen county side of the river, as an illustration) that 30 acres of his land, excluding the frontage, which they estimate on a different basis, "is materially damaged in its selling value by the present condition of the river. If the river was clean, it would be worth \$800 per acre, or \$24,000. Under present conditions it would not sell for over \$400 per acre, or \$12,000, making a loss of \$12,000 in value." They then calculate interest on \$12,000 at 6 per cent., or \$720 per year. This multiplied by 4 amounts to \$2,880, and is, they say, the compensation Mr. Cadmus should receive for the four-year period. They make a similar estimate in the case of other complainants.

The defendant's estimate is altogether different. Mr. Lee and other witnesses for the city say that the Cadmus property is nothing but a "farming proposition," worth \$200 per acre, and that it has, at present, little, if any, speculative value.

Two of the complainants' five witnesses on this point, Mr. Mercer and Mr. Coe, come from Bergen county. Mr. Allen comes from Passaic, Mr. Van Duyne from Newark, and Mr. Karl from Garfield. Newark is growing more rapidly than Paterson, and the increase in population in Garfield, Passaic, and Bergen county is phenomenal. Mr. Coe testifies that there are very few farms left in Bergen county, except along the Passaic; that "they are most all cut up" and either developed or awaiting development, except in the northern part, which is rocky and mountainous. The optimistic testimony given by these witnesses is very naturally ascribable to the rapid rise in values in the localities with which they are most familiar. On the other hand, the witnesses for the city come either from Paterson itself, where it would seem rents are very low, or from the farming dis-

tricts of Passaic county, west of Paterson, where good farm lands may still be had for \$100 per acre. It is not unlikely that the judgment of the various witnesses on both sides has been colored by the development, or lack of development, of the districts from which they come. Now such of the complainants' lands as lie in Bergen county east of the Passaic river, and which, with the exception of the Gelderman property, are still farmed, and apparently with success, seem, from their situation at its western extremity, to be quite as much affected by conditions in Paterson, which they immediately adjoin, as by those resulting from the New York overflow. It would, however, seem that even these lands are not altogether exempt from the immense rise in values which are taking place in that county. It would seem, too, as I have pointed out in my former opinion, that at no very distant day they, or a considerable part of them, are destined to be used for factory purposes. There is a steady advance of this character up the river from Passaic, and, perhaps, not so marked an advance down the river from Paterson. This might, in the estimation of buyers, give them some added value, although the witnesses for the city will hardly admit it.

In view of the conflicting evidence, it is hard enough to assign a value to the lands, even under present conditions. It is harder to say what they would be worth if conditions were such as prevailed 30 years ago, and still harder to guess their additional value (over present values) if the factory pollution, for which Paterson is not responsible, and which I have heretofore found to amount to from one-quarter to one-third of the total pollution, should be admitted as a factor in making an estimate; that is, an estimate based upon the assumption that the river would be free from the Paterson pollution, but fouled by the factory pollution.

The properties which lie on the east bank of the Passaic have been for 200 years or more utilized as farms. They were so utilized 30 years ago, when conditions were perfect, and they are now so utilized. The witnesses for complainants, notwithstanding, divide each tract into two separate parts. They convert the front parts, which include the farmhouses and six or seven acres adjoining the river, into suburban residences, assigning a rental value to them as such, and they give to the rear parts, embracing much the larger acreage, a price such as it would have if ready for speculative development. Basing their valuations, as they do, upon assumptions which are so problematical and incapable of verification, I do not feel justified in making them the basis of an assessment. The principle of *Hatfield v. Central R. R. Co.*, 33 N. J. Law, 252, referred to in my former opinion, would seem to apply.

There is another fallacy, at least from a legal standpoint, in complainants' estimates. They are all evidently based upon the assumption that the injury will continue *after* the lapse of four years. Defendant, in its amended answer, says: "(2) That defendant has not taken the respective lands and property rights of the complainants, except so far as the injury to them, if any such injury there may be through or by means of its sewerage system in the complainants' bill mentioned, may be considered as such taking; and that such injury or taking is to be temporary, and is to continue no longer than five (now four) years from the date of the filing hereof," etc. It is apparent that the assumptions made by the witnesses and those which must be made by the court are different. If I am to assume that the pollution is to cease on March 26, 1915, as the answer says it will, an estimate that the property will be worth in the market, at any time prior to that date, \$400 per acre, and thereafter \$800, is altogether unreasonable. I shall revert to this subject hereafter in another connection.

My conclusion as to these farm properties is that they must be dealt with as such. They are farm properties now, and they are likely to remain so for an indeterminate time longer.

Notwithstanding all this, I would not be justified in disregarding the testimony of complainants' witnesses, altogether. It is given by gentlemen of intelligence and large experience. At the former hearing I had only the defendant's witnesses to guide me; now I have experts on both sides. It is unquestionable that the value of a property is one of the factors which goes to fix the amount of rent to be asked; and it is, on the other hand, equally unquestionable that a farmer cannot afford to pay a rent that will prevent him from making a profit. In view of all the facts and of those considerations which will be found in my former opinion, I have come to the conclusion that the rental values in the table should be somewhat increased for the purpose of estimating the injury, and that the sliding percentage heretofore adopted should be applied to these values thus corrected.

There are some exceptional cases:

(1) The Gelderman property. This is the only suburban residence property on the east side of the river. It has been considerably improved since the last hearing, and its rental value has been increased. Mr. Lee, testifying for the city, says that it is now \$500, and with the river free from pollution not more than \$600. Mr. Van Duyne and some of the other witnesses for complainants say that, on an 8 per cent. basis, the rent should be, if the river were pure, \$1,080. Considering the value they place upon the building, this would seem high. For the purposes of estimating the injury, I will

assign to it and to the land appurtenant to it a rental value of \$650—more than double my former estimate.

[3] (2) The Nash property. This is on the west side of the river. My previous estimate of its annual or rental value was \$850. In view of the new evidence, this is manifestly too low. \$1,200 for the three houses is not, I think, excessive. In addition to the three houses, Mr. Nash has a separate tract of 12 acres, fronting on the lake and unimproved. Since the last hearing and in consequence of the rapid growth of the city of Passaic northward, it would seem that this lot has become ripe for development. Its advantageous disposition is unquestionably affected by the pollution. Mr. Lee, a witness for Paterson, and Mr. Van Duyne, a witness for the complainants, agree that, with the pollution, it is worth \$1,200 per acre; without \$2,000. But \$1,200 represents the value, not on the basis of a pollution to cease on March 26, 1915, but on an indefinite continuance of it. This is what Mr. Van Duyne says: "Q. Suppose that assurances were given that within three years that nuisance would be removed, what effect would that have on the purchaser? A. It would depend somewhat upon how the purchaser looked at that matter. My own judgment is against all possibility of removing the nuisance in three years, even if the sewage is taken out. Q. Answer the question as it is put now. I am asking you how, if there was assurance given that the nuisance would be removed in three years, what effect would that have upon a possible purchaser? Would he give more with that assurance than he would under the theory on which you testify? A. If he had positive assurance that within three years the river would be clean, why, I think that the difference then would not be one-half—the way we have concluded that it would be in a number of these cases. * * * Q. With the effects removed now, a person knowing it would be done within a certain time, he would give a great deal more than the one-half you mention? A. Then I think he would give more. Q. A great deal more, too? A. Well, considerably more."

Mr. Lee, giving evidence from the city's standpoint, after saying that \$1,200 would represent the value in the polluted condition of the river, and \$2,000 in the unpolluted, says: "Q. Suppose assurance were given to you that within three years the sewage would cease to flow into the river, what would you consider the present value per acre? A. Well, then, I would get down to figures. I would try to establish what it was going to cost me to hold that property for three years. I would take into consideration the interest and the taxes. I would arrive at it in that way, I think."

Mr. Van Duyne's way of arriving at the amount of injury, on the basis of pollution to

continue indefinitely, I state in his own words: "In my judgment, if the river were clear, it [12 acres] would be worth \$2,000 per acre, or \$24,000. With the present condition of the river, I don't think it is worth over \$1,200 per acre, or \$14,400. Loss in value, \$9,600; interest on same at 6 per cent., \$576." Multiplying \$576 by 4, we have \$2,304 as Mr. Van Duyne's estimate of Mr. Nash's injury during the four-year period. But it is perfectly apparent that if the nuisance were to cease at the end of the period, the loss would be less. A purchaser who pays \$1,200 for what in four years he will be able to sell for \$2,000 not only gets back his interest, which, at 6 per cent., would amount to \$288, but gains, in addition, over \$500. From this, however, should be deducted taxes, which would amount, perhaps, to from \$50 to \$75. A purchaser paying \$1,550 for the property at the beginning of the four-year period would be fully reimbursed for his outlay at the end of it, if he could realize \$2,000. Taking \$1,550 and applying Van Duyne's method of computing the injury, we would have the following: Subtract \$18,600 (i. e., \$1,550x12) from \$24,000 and there is left \$5,400, which multiplied by 6 gives \$324 as the annual loss. This multiplied by 4 (\$1,296) would represent Mr. Nash's compensation for his injury thus estimated. If we take into account the fact that he not only loses interest on his investment, but also pays taxes, that sum would not appear to be excessive. I doubt whether the factory pollution alone would materially affect values at this point. Mr. Van Duyne very properly estimates the loss of annual interest, not on \$2,000, but on that sum diminished by what he regards as the present selling price.

(3) The Mercells property. This property is on the west bank of the Passaic not far from the Nash property. It is a single tract extending from the river to Lake View avenue. For the rental value of the house and land, about 26 acres, I gave at the former hearing \$350. I am inclined to think that this is a fair rental for the house, considering its character, and for the ground immediately adjoining it. It falls, as the evidence now stands, to represent the injury to the remaining property, which is, according to the testimony, ripe for development. The tract is somewhat injured by the nuisance, though not to the same extent as the Nash property just considered; for it is back from the river. The sum to be given for the injury is necessarily an arbitrary one. One hundred and fifty dollars per annum on this account would not, I think, be too much.

(4) The Outwater property. The evidence will not justify an addition to the sum heretofore allowed. It is argued that the amount is excessive. Taking into account the effect of the nuisance—less here, however, than on the lake—it does not seem to be so, as applied to the property remaining unsold.

The table of values will then be as follows:

Nash	\$1,200
Mercells	350
Terhune	900
Cadmus	500
R. Van Riper	550
H. Doremus	550
Alea	450
G. Van Riper	1,150
Edo Van Riper	700
Mary Van Saun	425
P. Doremus	550
Gelderman	650
Outwater	450

To which must be added the sums allowed to Mr. Nash and Mr. Mercells for arrested development.

[4] I now come to the consideration of a subject that is not without difficulty. The Court of Errors, in the *Simmons Case*, 80 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642, uses, in reference to these property owners, the following language: "The relators are here asking equity [i. e., an injunction], and they must do equity. A substituted remedy by giving them *adequate* compensation for their injury would be a just disposition of the controversy." According to this decision, on which all the subsequent proceedings have turned, the compensation must be full. In the paragraph of the city's amended answer, heretofore quoted, it is said, not that Paterson will *cease emptying* its sewage into the river at the date mentioned, but that "such injury or taking [through or by means of its sewerage system] is to be temporary, and is to continue no longer than five (now four) years from the date of the filing hereof." The city, therefore, in substance, avers that the *injury* will cease at that time. The decree was that if, notwithstanding the exercise of diligence, the city was "unable to *cease polluting* the river by the time aforesaid" (March 28, 1911) leave was reserved to apply to the court, upon such terms as it deemed equitable, to postpone the issuing of the injunction.

To cease emptying sewage into the stream and to cease polluting it are two different things. The evidence makes it probable that the injury will continue after Paterson ceases to empty its sewage into the river. When it first began to do this, in the decade beginning with 1870, Jersey City and Newark obtained their drinking water from the lower Passaic at Belleville. In the beginning so little did the sewage affect its purity that Passaic took its drinking water from a point not far below Paterson until 1882, and Jersey City took its lower down until 1898. Now more than 100,000,000 gallons of water are taken daily from the river and its tributaries above Paterson, and the amount is constantly increasing. The result is that the volume of the flow of the stream past Paterson is much less than it formerly was. There is more sewage and less water to carry it off. Then we have the fact that Dundee Lake is formed by damming the river just above

Passaic. With these conditions it is no wonder that the diminished flow of water, retarded by the dam, is insufficient to carry off the polluted matter which, in large quantities, is being deposited, not only on the shores of the river and lake, but throughout its bed. It is these deposits which are now largely responsible for the nuisance. Even if the sewers cease to discharge their contents into the stream at the time named, these deposits will remain; but how long no one can undertake even to guess. As I have shown in my former opinion (73 N. J. Eq. on page 478, 69 Atl. 226), the flow of water through Paterson varies enormously, not only at different seasons of the year, but in different years. If a freshet should occur, such as inundated Paterson several years ago, a great deal of this accumulated matter would, I suppose, be swept out in a few days. On the other hand, if there should be several years of comparatively even flow, the nuisance might last for a long time. I do not feel qualified to express an opinion as to how far it would be possible to abate the nuisance by opening the gates of the Dundee Canal, or resorting to other artificial methods. This much is certain: That the property owners would not get "the adequate compensation for their injury" to which, in the Simmons' Case, they were declared to be entitled, if, after the four-year period, the polluted matter thus accumulating should continue to create a nuisance.

[5] Where the right depends upon the happening, *in future*, of some contingent event, it is a common practice for this court not to pass upon it until the contingency occurs. This principle would here seem applicable, first, because Paterson says it will *not* pollute after the date named, and it must here be assumed that it will make its averment good; second, because of the impossibility of estimating the injury, even approximately, at this time. If it be competent for the court to assess damages at all, it is competent for it to determine *when* it will assess them; and if there be an obvious propriety in deferring the assessment, in part, until at least some idea can be formed as to what it is likely to be, I see no legal difficulty in the way. The city, by its submission, has given this court power to make an award, and therefore a complete award.

This course will avoid a real difficulty and be just to both sides. As a matter of law, I have been obliged to assume the existence of a condition which, as a matter of fact, may not be present in March, 1915, and which the witnesses say they cannot assume because of its extreme improbability. I think, therefore, that leave should be reserved to apply to this court for further compensation when the city shall cease to empty its sewage into the stream, if the pollution shall then continue, but without prejudice to

the raising by the city of such legal or other objections to any further award as it may see fit. This will safeguard the right of the city, if it desire to contend that no further award should or can be made.

WILLIAMS v. WILLIAMS.

(Court of Chancery of New Jersey. Dec. 10, 1912.)

(Syllabus by the Court.)

1. DIVORCE (§ 127*)—EVIDENCE—CORROBORATION.

It is an inflexible rule in this state that a divorce will not be granted upon the uncorroborated testimony of a party to the suit; and this applies not only to the cause for divorce but to every necessary element in the proofs.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 403-407; Dec. Dig. § 127.*]

2. DIVORCE (§ 127*)—DESERTION—WILLFULNESS—EVIDENCE—CORROBORATION.

Under the above rule, petitioner's testimony that a certain letter of the defendant to her solicitor was written by him is insufficient to establish the letter as an element in the proofs, unless the fact that the letter is in the handwriting of the defendant be corroborated.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 403-407; Dec. Dig. § 127.*]

Suit for divorce by Annie T. Williams against Harry L. Williams. On exceptions to master's report advising the dismissal of the bill. Exceptions overruled and report confirmed.

James H. Bolitho, of Rockaway, for petitioner and exceptant.

WALKER, Ch. This is a cause for divorce for desertion. The special master, to whom the case was referred, in his report says "that the charge of desertion is supported by the evidence of the petitioner alone, and that there is no corroboration thereof. The parties had not lived together amicably for some time prior to the alleged desertion, and that, there being no children to make each more tolerant of the other's feeling, and while against the consent of the petitioner, the desertion was not disagreeable to her; after the desertion, the continuation thereof was, to some extent, by her acquiescence. And * * * in my opinion the petitioner has not substantiated the truth of the allegation of the said petition as to the cause for divorce, nor has she substantiated the alleged desertion by the proof required by law, and is not entitled to the relief prayed. I do recommend that the petition be dismissed."

Beside the petitioner only two witnesses were sworn, Emma V. Randall, a friend, and Walburga Shaumeyer, the mother of the petitioner. These latter witnesses gave no testimony of value, except that it is to be inferred from the mother's testimony that the parties have not lived together since the alleged desertion.

[1] It is an inflexible rule in our state

that a divorce will not be granted upon the uncorroborated testimony of a party to the suit; and this applies not only to the cause for divorce but to every necessary element in the proofs. Biddle's N. J. Div. Prac. (2d Ed.) p. 21, and cases cited.

[2] Assuming the desertion proved, there must still necessarily be proof of its willfulness. In this connection counsel argues that a letter written by the defendant to the petitioner's solicitor November 24, 1911, in which he said, "Will you very kindly suggest to Miss Shaumeyer (his wife) that the writer is very desirous of writing her a last letter," proves that the defendant is alive and well and able to return to the petitioner, and that it is to be inferred from the letter that he has not and never had any intention of returning, and that his desertion has been willful. This letter is attached to the brief submitted on the argument of the exceptions, but nowhere in the testimony returned with the master's report do I see any mention of its having been offered in evidence. The only reference to it in the evidence is a question put to the petitioner wherein she was asked, "Did you recognize his (defendant's) signature on a letter which he wrote Mr. Bolitho?" and she answered, "Yes, sir." It did not appear that the letter was then and there exhibited to her, and, as already stated, it appears not to have been offered in evidence. Assuming that it was offered, and that the writing (or signature) was thus shown to be that of the husband, and assuming further that that letter, if proved, would afford sufficient corroboration to make out the petitioner's case, it nevertheless fails of that purpose because the proof of the letter comes from the petitioner alone, and she is not in that respect corroborated.

In *Sterling v. Sterling*, 71 N. J. Eq. (1 Buch.) 59, 63 Atl. 548, it was held that in a suit for divorce the uncorroborated testimony of one of the parties is insufficient to establish any of the essential facts. One of the essential facts alleged in that case was the possession by the complainant of a key which he found would open the door of a house in which he says a man lived whom he suspected of being intimate with his wife. Chancellor Magie remarked (71 N. J. Eq. at page 61, 63 Atl. at page 549): "There is corroboration that the key which complainant had would open the front door of a certain house, but there is no corroboration of complainant's testimony that the key came from the possession of the defendant, nor that the house was one in which the man in question lived, nor that there had ever been any undue familiarity between the defendant and that man." Now what was said in that case (*Sterling v. Sterling*) about the key may be said as well in this case about the letter. Assuming that the proof is that the petitioner's solicitor received a letter from

the defendant making what amounts to damaging admissions, there is no corroboration of petitioner's testimony that the letter (or signature) is in the handwriting of the defendant. This alone is fatal to the petitioner's case on the question of the authorship of that letter.

The exceptions must be overruled, and the master's report confirmed.

CONDUCT et al. v. ERIE R. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1912.)

EJECTMENT (§ 6*)—EQUITY (§ 47*)—REMEDY BY EJECTMENT.

The title and right to possession of a tunnel, under the surface of land which a party other than the owner of the surface claims to have acquired by adverse possession should be determined by an action of ejectment, and not by a suit in equity.

[Ed. Note.—For other cases, see *Ejectment*. Cent. Dig. §§ 7-11; Dec. Dig. § 6; **Equity*. Cent. Dig. §§ 153-155; Dec. Dig. § 47.*]

Appeal from Court of Chancery.

Action by Walter H. Conduct and others against the Erie Railroad Company. Judgment for defendant, and complainants appeal. Affirmed.

The opinion of Vice Chancellor Stevens below, mentioned by the court, was as follows:

"It seems to me plain that complainant's proper remedy is ejectment. He claims to have the legal title to, and to be in possession of, a lot of land in Montclair, through which, 40 years ago, the predecessor of the defendant company constructed a tunnel. The possession which he proves is possession of the surface. The company does not deny possession of the surface, but by its amended answer to complainant's amended bill says that since 1871 it and its predecessors have been the owners of the tunnel (40 feet below the surface), and in the open, notorious, and exclusive possession thereof to the extent that it was capable of being owned and possessed. It does not pretend that it has a paper title.

"It appears that the tunnel was constructed through the land now owned by complainant, apparently without objection, in 1871, but, because of the then company's pecuniary embarrassments, not through the whole of the Orange Mountain. It further appears that the tunnel has to some extent, though not entirely, fallen in. The evidence does not show that complainant or his grantor ever entered upon the tunnel, or that either complainant or defendant ever made any actual use of it. If defendant now has possession, it is because its predecessor once had possession, and because the possession thus had has never been taken away. It is obvious that these are questions within the exclusive jurisdiction of a court of law. There is nothing to prevent complainant from

trying them in a legal action. It is true that defendant in addition to its defense that the action is legal sets up certain equities. Those alleged equities may have to be passed upon hereafter in this court at defendant's instance, but the legal question, which is the only one raised by complainant, must first be determined by the law court. There is no cross-bill. The bill may be retained till the action at law is decided."

Condict, Condict & Boardman, of Jersey City, for appellants. Cortlandt & Wayne Parker, of Newark, for appellee.

PER CURIAM. The decree appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Stevens.

PENNSYLVANIA R. CO. v. CLARK.

(Court of Appeals of Maryland. Nov. 13, 1912.)

1. CARRIERS (§ 97*)—CARRIAGE OF PERISHABLE FREIGHT—LIABILITY.

A carrier of perishable freight owes only the duty of exercising reasonable care and diligence to protect the freight from injury, in the absence of any special contract as to time of delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 409; Dec. Dig. § 97.*]

2. CARRIERS (§ 104*)—CARRIAGE OF PERISHABLE FREIGHT—NEGLIGENCE—EVIDENCE.

Delay in the transportation of perishable freight raises a prima facie presumption of negligence of the carrier, and to escape liability it must show that it exercised reasonable diligence in forwarding the freight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 439-447, 459-461; Dec. Dig. § 104.*]

3. CARRIERS (§ 106*)—CARRIAGE OF PERISHABLE FREIGHT—NEGLIGENCE—EVIDENCE.

Where a prima facie presumption of negligence of a carrier in transporting perishable freight is raised by undisputed proof of delay, whether the carrier's evidence to excuse delay shows reasonable diligence is for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 448-450; Dec. Dig. § 106.*]

4. CARRIERS (§ 106*)—PERISHABLE FREIGHT—EVIDENCE—INSTRUCTIONS.

Where, in an action against a connecting carrier for delay in transporting perishable freight, the evidence showed that the freight reached its destination in a damaged condition from 6 to 36 hours late, that a track was cleared for traffic 17 minutes after a wreck on the connecting carrier's line occurring on the day of shipment, a second track, 14 hours later, a third track 16 hours later, and a fourth track, 50 hours later, and that as the tracks were successively cleared they were utilized for the resumption of traffic, passenger trains first, then trains carrying perishable freight and live stock, and then other freight, an instruction submitting the case on the theory that, if the carrier received the freight with knowledge of a wreck, it assumed the risk, was not justified by the evidence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 448-450; Dec. Dig. § 106.*]

Appeal from Circuit Court, Kent County; Philemon B. Hopper and Wm. H. Adkins, Judges.

Action by William Foster Clark against the Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

William W. Beck, of Chestertown, for appellant. L. Wethered Barroll, of Baltimore, for appellee.

STOCKBRIDGE, J. The questions presented by this appeal are all raised by one bill of exceptions, reserved to the rulings of the trial court upon the prayers. They involve the duty and liability of a common carrier for injury to perishable freight, resulting from alleged delay in its transportation. Inasmuch as the first prayer of the defendant sought to withdraw the case from the consideration of the jury upon the ground of a failure of evidence to support a verdict for the plaintiff under the pleadings, a succinct statement of the case presented by the proof will tend to clarify the questions of law involved.

On the 16th of August, 1910, the plaintiff, who was a buyer and shipper of fruit, delivered to the Philadelphia, Baltimore & Washington Railroad Company, at Henderson, Md., some peaches, pears, cantaloupes, and apples for transportation over the line of that road and a connecting line, the Pennsylvania Railroad, to Jersey City. On the day following, the plaintiff made a like shipment of peaches, apples, and plums. According to the evidence these shipments should have reached their destination soon after midnight on the days on which they were made. The evidence tends to show that prompt delivery was made in each case by the initial to the connecting carrier, but that the consignments did not reach their destination until some time on the 18th of August, or from 6 to 30 hours late, and that when they did arrive decay had to some extent set in, so as to greatly impair their market value. It is to recover for this lessened value that the present suit was brought.

The defendant company does not attempt in any manner to controvert these facts, but seeks to excuse the delay and avoid any liability by showing that on the 16th of August, the date of the first shipment, there was an exceptionally serious wreck on its line, in which some 15 or more large, steel, coal cars of the Berwin & White Coal Mining Company were demolished, the railroad tracks torn up for some distance, approximately 800 tons of coal dumped on the tracks, or where the tracks had been, and that all traffic at that point was stopped for a longer or shorter

time until the wreckage could be cleared away, and a portion of the tracks relaid. The railroad company further gave evidence to show that it had used all possible expedition in clearing its tracks for traffic and forwarding the accumulation of freight. Evidence was also given for the purpose of showing that the wreck was caused by the breaking of an arch bar on one of the cars of the Berwin & White Coal Mining Company, and that this breakage was due to a latent defect in the metal composing the arch bar, which was not and could not have been detected by any of the customary examinations or inspections made of the cars by those employed for that purpose.

The declaration filed by the plaintiff in instituting the action did not undertake to specify any particular act on the part of the defendant company as a reason for liability, but simply averred that the defendant neglected its duty, and did not safely carry the said fruit, nor deliver the same to the consignees as it had agreed to do, "but by default of the defendant in the premises the value of the said goods was lost to the plaintiff."

The defendant pleaded non cul., and the case then proceeded to trial before a jury. At the conclusion of the testimony the plaintiff offered three prayers, of which the third related to the measure of damages, and the defendant presented five, the first of which has already been referred to. The trial court granted all of the plaintiff's prayers and refused all of those offered by the defendant. The first and second prayers of the plaintiff were as follows: "Plaintiff's First Prayer. The plaintiff prays the court to instruct the jury that if it shall find from the evidence that the plaintiff shipped in good condition certain perishable fruit at Henderson, Md., on the line of the Philadelphia, Baltimore & Washington Railroad Company, a common carrier on August 16 and 17, 1910, consigned to Jersey City, and that the Philadelphia, Baltimore & Washington Railroad Company delivered said fruit to the defendant as the delivering common carrier in order that the defendant might deliver said fruit at defendant's terminal in Jersey City, the place of its destination, then if the jury find that either or both shipments of said fruit when delivered by the defendant at its destination was in a rotten and decayed condition, then the jury is instructed that the defendant is responsible for the inferior condition of the fruit so injured at the time of its delivery, if the jury find that such condition was caused by delay in transportation by the defendant. Plaintiff's Second Prayer. The plaintiff prays the court to instruct the jury that if it shall find the plaintiff delivered the fruit in the manner mentioned in the plaintiff's first prayer, and if the jury shall further find that it was necessary for the re-

ceiving common carrier to forward said fruit over the line of the defendant in order that it might reach its destination, and if the jury shall find that the defendant, because of a serious wreck on its road, knew that it would be impossible for it to deliver said fruit in good marketable condition at its destination, yet defendant received said fruit to carry it forward on its road to its place of destination, it assumed the risk which might follow if said fruit deteriorated and rotted while in its care and custody as such common carrier by reason of delay in transportation by the defendant."

[1] The first question to be disposed of is the nature of the carrier's duty, and the extent of its responsibility. No special contract is proven as to the time when the deliveries of the shipments of fruit in question were to have been made, and the liability was therefore the common-law liability of the carrier.

There are three cases in this state in which the questions now raised were fully and carefully considered, and it will be sufficient to refer to them without again repeating the analysis of the various adjudicated cases cited in them. These are *P. W. & B. R. R. Co. v. Lehman*, 58 Md. 209, 40 Am. Rep. 415; *Shockley v. Penna. R. R. Co.*, 109 Md. 123, 71 Atl. 437; and *P. B. & W. R. Co. v. Diffendal*, 109 Md. 495, 72 Atl. 193, 458. A careful examination of these adjudications and many others leads to the following conclusion: Whereas, formerly and to some extent even yet a carrier was treated as an insurer of the property of a shipper, at the present day this rule has been relaxed when a delivery is made, especially as affecting perishable freight, and there is imposed on the carrier, in the absence of special contract as to time of delivery, only the duty of exercising ordinary or reasonable care and diligence, under all the circumstances of the case, to protect the freight from injury. See, also, *Brennisen v. Penna. R. R.*, 100 Minn. 105, 110 N. W. 362, 10 Ann. Cas. 169; *Wibert v. N. Y. & Erie R. R. Co.*, 12 N. Y. 251; *Hutchinson on Carriers*, § 496; 6 Cyc. 442; *Blackstock v. N. Y. & E. R. R. Co.*, 20 N. Y. 48, 75 Am. Dec. 372; *Geismer v. L. S. & M. So.*, 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.

[2, 3] The defendant's first prayer was properly refused because it asked the court to rule as matter of law that the evidence was insufficient to afford a basis for recovery by the plaintiff. The delay in the transportation was not denied. This raised a prima facie presumption of negligence, and whether the excuse set up by the defendant was sufficient to show that it had fulfilled its duty of exercising reasonable diligence in the forwarding of the fruit was a question of fact properly to be passed on by the jury. While this case presents many points of similarity to that of the *St. Louis S. W. R. Co. v. Wal-*

lace, 90 Ark. 138, 118 S. W. 412, 22 L. R. A. (N. S.) 379, in which an instruction similar to that asked for in this case was given, it differs from it in one very essential particular, namely, that there a special contract as to time of delivery had been made, thus changing the entire legal aspect of the instruction asked for.

The first prayer of the plaintiff which was granted by the trial court in effect made the carrier an insurer of the property and its delivery, under all conditions, not even excepting a failure to deliver by reason of an act of God or the public enemy. This operated therefore to hold the railroad company to a different and higher degree of responsibility than the law exacts, and the prayer should have been refused. When delay in delivery of freight has been shown, and the defendant has presented evidence tending to excuse that delay, it then becomes a question for the jury whether the facts as given in evidence on behalf of the defendant show such reasonable diligence as should excuse the delay.

[4] The second prayer of the plaintiff proceeded upon this theory, and assigned, as the default of the defendant upon which to base his recovery, the acceptance by the second or connecting carrier of the freight, with knowledge of the impossibility of its delivery at the point of destination in good marketable condition. Yet from beginning to end of the testimony there is nothing to show such knowledge, or any facts upon which such knowledge could have been imputed to the company. What the evidence does show is that one track was cleared for traffic 17 minutes after the wreck occurred, the second 14 hours, the third 16 hours, and the fourth 50 hours, following the wreck. As the tracks were successively cleared, they were utilized for the resumption of traffic in the following order, passenger trains, trains carrying perishable freight, and live stock, other freight.

Under such evidence the question might very properly have been submitted to the jury to say whether the defendant company had used due and reasonable diligence in the dispatching and forwarding of the plaintiff's fruit; but that is an entirely different matter from submitting to the jury to find upon such evidence that the defendant had knowledge that it would be impossible to deliver the freight at its destination in good marketable condition. This prayer should therefore also have been refused.

No error is perceived in the rejection by the court of the other prayers of the defendant in the form in which they were presented; but, for the errors already indicated, the judgment of the circuit court for Kent county in this case must be reversed.

Judgment reversed, and cause remanded for a new trial; costs to be paid by the appellee.

STATE, to Use of CULLEN v. CRISFIELD ICE MFG. CO.

(Court of Appeals of Maryland. Nov. 13, 1912.)

1. ELECTRICITY (§ 16*)—INJURIES INCIDENT TO PRODUCTION AND USE—NEGLECT.

One permitting its electric light wire heavily charged, to remain detached from the arm designed to support it and hanging so as to touch a gutter along the side of a street, from Saturday until Wednesday following, is guilty of actionable negligence, and liable for death by electric shock on Wednesday.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 16.*]

2. ELECTRICITY (§ 16*)—INJURIES INCIDENT TO PRODUCTION AND USE—CONTRIBUTORY NEGLIGENCE.

Where a boy 11½ years old picked up an electric light wire before the lights were turned on, and he was warned by two passers-by that it was dangerous to hold the wire and that he would be killed if he did so, as the lights would soon be turned on, and he continued to hold the wire until the lights were turned on, when he received a fatal shock, he was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 16.*]

3. ELECTRICITY (§ 19*)—INJURIES INCIDENT TO PRODUCTION AND USE—CONTRIBUTORY NEGLIGENCE.

Whether a boy 11½ years old, killed by electric shock by coming in contact with a broken electric light wire, was guilty of contributory negligence, *held* for the jury in view of the conflicting evidence.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

4. TRIAL (§ 143*)—CONFLICTING EVIDENCE.

Where evidence is contradicted, the case must be submitted to the jury, however slight the contradictory evidence may be.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

Appeal from Circuit Court, Dorchester County; Robley D. Jones, Judge.

"Not to be officially reported."

Action by the state of Maryland, to the use of Amanda Cullen, against the Crisfield Ice Manufacturing Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

William Colton, of Baltimore, for appellant. Joshua W. Miles, of Princess Anne, for appellee.

STOCKBRIDGE, J. There is but a single question presented for consideration by the record in this case: Did the trial court err in directing a verdict for the defendant by granting the second prayer of the defendant corporation, to the effect "that by the uncontradicted evidence in the case the negligence of Gordon Cullen, plaintiff's son, directly contributed to the accident which caused his death?"

[1] Gordon Cullen was a boy 11½ years of age at the time of his death on Wednesday, November 3, 1910. About 6 o'clock in the

evening of that day he was playing with a hoop on one of the streets of the town of Crisfield. An electric light wire of the defendant, which had become detached on the previous Saturday from the arm designed to support it, was hanging so as to touch, or nearly touch, the ground by a gutter which ran along the side of the street. This wire, when in use, carried a current of 2,200 volts, a deadly current to persons who might come in contact with it. The child Gordon did so come in contact with it, and with a scream fell dead, and when he was finally picked up his right and left hands were both badly burned. Such, in substance, is the undisputed evidence in the case. On the other points there is more or less contradiction. But from the evidence thus far recited it will be clear that the defendant company was guilty of such negligence as would render it liable, in leaving a deadly wire for such length of time where passers-by might come in contact with it.

[2] The defense relied on is that of contributory negligence. Three witnesses, Walter Braxton, Marion Pruitt, and Vernon Webb, were called, who testified substantially to the effect that on the evening in question Gordon, who had been playing with a hoop, as he came to where the wire was hanging down or lying on the side of the gutter, picked up the wire and tried to get two colored girls who were passing to take hold of it, and also Pruitt; that Braxton, who was passing, told the girls not to touch it, and said to Gordon to put it down, that it was dangerous, that the lights would soon be turned on, and that then he (Gordon) would be killed; and Pruitt further testified that a similar caution was given by a colored woman who was also passing. It is further testified that the lights had not been turned on when this took place, and that very soon thereafter the lights were turned on, and Gordon fell, lifeless. If there was nothing else in the evidence contradicting this testimony, the prayer of the defendant with regard to contributory negligence would have been perfectly proper, and a verdict should have been directed for the defendant as was done. *Lewis v. B. & O. R. R.*, 38 Md. 588, 17 Am. Rep. 521; *B. & O. R. R. v. Miller*, 29 Md. 252, 96 Am. Dec. 528.

[3] There was some testimony given by the plaintiff tending to show that the lights were burning when the accident happened, and some on the part of the defendant to the effect that the wire had been cut before the time of the accident. If it be a fact that the lights were burning before Gordon came in contact with the wire, it would have been impossible for him to have handled the wire as testified to by the three witnesses named; but he would have met his death at the first instant of contact. The testimony upon the

lights being lighted or not, while not a contradiction in terms of the evidence given by Braxton, Pruitt, and Webb, is such in effect, and therefore, there being some evidence contradictory of that adduced by the defendant to show contributory negligence, the question was one proper to have been submitted to a jury, rather than ruled upon by the court as a matter of law.

[4] It is not the present purpose to express any opinion as to the relative weight of the evidence on this point, or which is entitled to the greater amount of credence, but merely to point out that the evidence of contributory negligence cannot properly be said to be uncontradicted, and if there be any contradiction, however slight in the view of the court, it is bound to be submitted to the jury.

So, too, with regard to the cutting of the wire. The testimony is undisputed that if the wire had been cut the wire would have become a "dead" wire, and the lights supplied with current from it would not have burned; but all of the witnesses, whether plaintiff's or defendant's, who speak of the lights at all, speak of them as burning on that evening immediately after the accident.

Some reliance apparently was placed by the defendant on the case of *Cowan et al. v. Dietrick*, 101 Md. 48, 60 Atl. 282, 4 Ann. Cas. 292; but one fact completely distinguishes that case from this, namely, that there was no evidence whatever of any negligence on the part of the defendant.

For error in the granting of the defendant's second prayer, the judgment in this case must be reversed.

Judgment reversed, and the case remanded for a new trial; costs to be paid by the appellee.

BOSTON & M. R. R. v. STATE. (Supreme Court of New Hampshire. Dec. 3, 1912.)

1. TAXATION (§ 493*)—ASSESSMENT BY STATE BOARD OF EQUALIZATION—REVIEW OF PROCEEDINGS—EXTENT.

While the Supreme Court has power to revise the findings of the State Board of Equalization in assessing railroad property, it cannot revise the rulings made by it in a proceeding before it, since the only issue in the Supreme Court is whether the company is aggrieved by the tax; *Pub. St. 1901, c. 64, § 10*, providing that a railroad company, aggrieved by a tax, may appeal to the Supreme Court, which shall make such orders as "justice may require."

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 876-883; Dec. Dig. § 493.*]

2. TAXATION (§ 390*)—REAL PROPERTY—ABATEMENT.

In view of *Pub. St. 1901, c. 64, § 1*, as amended by *Laws 1909, c. 66*, requiring railroad property to be taxed at a rate as nearly equal as may be to the average rate upon other property, if railroad property is not assessed for a greater percentage of its value than the average of all other property in the state, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

company is not entitled to an abatement, though the Tax Commission acted illegally in making the assessment.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 652-655, 658, 659; Dec. Dig. § 390.*]

8. TAXATION (§ 493*)—ABATEMENT OF TAX—APPELLATE PROCEEDINGS—QUESTIONS CONSIDERED.

While in the absence of an agreement for judgment on a direct appeal to the Supreme Court after exceptions to the admission of evidence, as on a petition for an abatement of a tax on real property, it does not usually consider questions of law, it may do so at any stage of the proceedings if it will hasten the disposition of the controversy.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 876-883; Dec. Dig. § 493.*]

4. TAXATION (§ 390*)—RAILROAD PROPERTY—RATE OF ASSESSMENT—"OTHER PROPERTY"—"PROPERTY."

Pub. St. 1901, cc. 55-66, covers the subject of taxation, and all of its chapters indicate that the word "property," when used therein without qualification, refers to "taxable property." Chapter 64, § 1, as amended by Laws 1909, c. 66, provides that railroad property shall be taxed "at a rate as nearly equal as may be to the average rate of taxation * * * upon other property throughout the state, except property specially taxed." Chapter 64, § 10, permits any railroad corporation aggrieved by a tax to apply to the Supreme Court for relief, and chapter 69, § 11, makes the taxpayer's compliance with the provision as to furnishing the assessors with a list of all his "taxable" intangible property a condition precedent to abatement. *Held*, that the words "other property" in section 1 included all "taxable" property, and not merely other property "taxed."

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 652-655, 658, 659; Dec. Dig. § 390.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5095-5097, 5693-5728; vol. 8, pp. 7768-7770.]

5. TAXATION (§ 452*)—RAILROADS—APPEAL—PURPOSE OF STATUTE.

Pub. St. 1901, c. 64, § 10, permitting any railroad corporation aggrieved by a tax assessed against it to appeal to the Supreme Court for relief, which shall make such orders as justice may require, was enacted to put railroad companies on the same basis as to taxation as other taxpayers.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 806, 807; Dec. Dig. § 452.*]

6. TAXATION (§ 485*)—EQUALIZATION—EVIDENCE.

In view of Laws 1878, c. 61, § 7, providing that the Board of Equalization "shall determine whether the personal estate of the several towns has been uniformly estimated according to the best information which can be derived from the statistics of the state or from any other source," and Pub. St. 1901, c. 63, § 4, requiring the board itself to investigate the valuation of property every fourth year and correct the assessor's returns if any personalty has been undervalued or escaped taxation, the board of equalization, in determining the value of other property throughout the state for the purpose of assessing railroad property at a rate as nearly equal as may be to the average rate of taxation of all other property, as required by chapter 64, § 1, as amended by Laws 1909, c. 66, is not confined to the returns of the local assessors.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 861-864; Dec. Dig. § 485.*]

7. TAXATION (§ 493*)—ASSESSMENT—APPEAL FOR ABATEMENT—EVIDENCE.

An appeal to the Supreme Court for the abatement of a tax on railroad property pursuant to Pub. St. 1901, c. 64, § 10, is a judicial proceeding to which the usual rules of evidence apply, so that the company may only show facts going to a reduction of its tax by legal evidence, though the same latitude is not allowable in producing evidence as in ordinary judicial proceedings.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 876-883; Dec. Dig. § 493.*]

Petition by the Boston & Maine Railroad against the State for an abatement of taxes. Rulings against petitioner, and defendant excepted and appealed directly to the Supreme Court, and the State moved to dismiss the appeal. Motion denied.

Petition for an abatement of the tax assessed against the plaintiffs for the year 1911. At the hearing before the Tax Commission, the plaintiffs offered to show (1) that of the taxable intangibles belonging to persons who died between January 1, 1909, and April 1, 1910, only 6 per cent. were taxed at the assessment next preceding the death of the owners; (2) that of the undischarged mortgages recorded in the state between April 1, 1904, and April 1, 1909, only 7 per cent. were taxed to the mortgagees on the latter date; (3) that the individual deposits in New Hampshire national banks on April 1, 1911, were more than double the whole amount of intangibles returned for taxation. The Commission excluded the evidence, subject to the plaintiffs' exception.

Branch & Branch, of Manchester, and Streeter, Demond & Woodworth, of Concord, for plaintiffs. James P. Tuttle, Atty. Gen., for the State.

YOUNG, J. The tax from which the plaintiffs appeal was assessed by the Tax Commission, but it was acting under the provisions of chapters 63 and 64, Public Statutes, when it made the assessment, and not under chapter 169, Laws of 1911.

[1] This appeal therefore stands just as it would if the tax had been assessed by the State Board of Equalization; and, while this court has power to revise the findings of that board on appeal, it has no power to revise the rulings it makes in a proceeding before it. The issue on the trial of the appeal is whether the plaintiffs are aggrieved by the tax. The validity of the steps the board took in assessing it are not in issue. In other words, the plaintiffs' right to relief does not depend upon the validity of their exceptions, but upon section 10, c. 64, Public Statutes, which provides that, if a railroad is aggrieved by a tax assessed against it, it may appeal to the Supreme Court which shall make such orders "as justice may require."

[2] The tax was assessed under section 1, c. 64, Public Statutes, as amended by chapter

66, Laws of 1909, which provides that the property of railroads shall be taxed "at a rate as nearly equal as may be to the average rate of taxation * * * upon other property throughout the state, excepting property specially taxed." Consequently the test to determine whether the plaintiffs are entitled to relief is not to inquire in respect to how the assessment was made, but whether their property is assessed for a greater per cent. of its true value than the average of all the other property in the state, excepting property specially taxed; for, if it is not so assessed, they are not entitled to an abatement, even if the Commission acted illegally in making the assessment. Page v. Portsmouth, 76 N. H. 372, 83 Atl. 97. Both parties concede that this is the rule, but disagree as to what is intended by "other property." The plaintiffs say other *taxable* property; the state, other *taxed* property. The parties also agree that the test to decide which of these contentions is sound is to inquire what the Legislature intended when it enacted section 1, but they disagree as to the court's duty in the matter. The state says the question is not properly before the court at this time, and should not be considered for that reason.

[3] It is true that, when there is no agreement for judgment, the court does not usually consider a question of law, but that is not an invariable rule. In fact, the court is accustomed to consider such questions at any stage of the proceedings, when it finds, as in this case, that that will probably hasten the final disposition of the controversy.

[4] Title 9 of the Public Statutes, of which chapter 64 forms a part, covers the subject of taxation. It defines the property that is taxable (chapter 55) and the places where and the persons to whom it shall be taxed (chapter 56). It provides that the owners shall list (chapter 57), and that the assessors shall value (chapter 58) and tax it (chapter 59). It also provides for collecting the tax (chapters 60, 61) and for the taxing of railroads (chapter 64) and savings banks (chapter 65). In short, this title relates to taxation and taxable property; and an examination of its provisions will show that, in every other instance in which "property" is used without qualifying words, *taxable* property is intended. Consequently it is probable that that is the sense in which it is used in this section.

[5] The fact that section 10, c. 64, Public Statutes, was enacted to put railroads on the same footing in respect to taxation as other taxpayers (Boston, etc., R. R. v. State, 60 N. H. 87, 94) tends to the conclusion that the test to determine whether a railroad is entitled to an abatement is to inquire whether the true value of its property is to the tax assessed against it as the true value of all the other *taxable* property in the state is to the tax assessed against it, for that is

the test which is applied in the case of other taxpayers. Amoskeag Mfg. Co. v. Manchester, 70 N. H. 200, 205, 46 Atl. 470.

The provisions of section 11, c. 59, Public Statutes, tend to the same conclusion, for that section makes the taxpayer's compliance with the provisions in respect to furnishing the assessors with an accurate list of all his *taxable* intangibles (chapter 57) a condition precedent to an abatement. As has already appeared, the purpose the Legislature had in view when it enacted section 10, c. 64, Public Statutes, was to put railroads on an equality with the average taxpayer. Boston, etc., R. R. v. State, supra. The fact that that was its purpose tends to the conclusion that the property it had in mind when it enacted section 1 was *taxable* property, for, in so far as the question of equality of taxation is concerned, it can make no difference to a railroad whose property is valued for the purposes of taxation at more than 50 per cent. of its true value whether all the other *taxable* property in the state is assessed at 50 per cent. of its true value, or whether 50 per cent. of it escapes taxation. In either case the railroad is compelled to bear more than its fair share of the public burden, for in either case its property is taxed at a higher rate than the average taxpayer's. In short, the context and the purpose of the statute tend to the conclusion that by "other property" other *taxable* property is intended, and that is the way section 1 was construed in Boston & Maine R. R. v. State, 75 N. H. 513, 517, 77 Atl. 996, 31 L. R. A. (N. S.) 539, Ann. Cas. 1912A, 382.

What evidence is there to rebut this conclusion? The state contends that that was not the sense in which "other property" was used, because giving the plaintiffs an abatement for that reason increases unjustly the taxes of other innocent taxpayers. Although it is true that giving the plaintiffs an abatement because taxable intangibles escaped taxation will increase unjustly the taxes of a large number of innocent taxpayers, that fact is not sufficient to rebut the presumption that *taxable*, not *taxed*, property was intended, for, notwithstanding the effect of the abatement on innocent taxpayers is relevant to the issue of the intention of the Legislature when it enacted section 1, its tendency to prove that *taxed* rather than *taxable* property was intended is slight.

In so far as the distribution of an abatement is concerned, the effect on innocent taxpayers is the same whether the abatement is given because *taxed* property was undervalued, or because *taxable* property escaped taxation. The necessary effect of an abatement for either cause is to increase unjustly the burden of every taxpayer in the state whose property is assessed for a greater per cent. of its true value than the average of other property; that is, the injustice to other taxpayers of which the state complains is not pe-

collar to abatements which are given because taxable property escaped taxation, but to the failure of the scheme devised by the Legislature for equalizing taxation to provide for imposing the abatement on those whose property either was undervalued or escaped taxation. Consequently, the effect of the abatement on innocent taxpayers has no particular tendency to prove that, when the Legislature said "other property" it intended *taxed* rather than *taxable* property. In short, the Legislature undertook to equalize taxation by giving an abatement to a taxpayer whose property is valued at a higher per cent. of its true value than all the other property in the taxing district. This scheme makes all the other taxpayers in the district defendants, and divides the amount of the abatement among them; that is, it does not impose the abatement on those whose property is undervalued or escapes taxation, but divides it among all the taxpayers, the innocent as well as the guilty. It may be conceded that this is not a very exact way of doing justice; but the fact that the Legislature failed to devise a more exact scheme has no tendency to prove that an abatement is to be given when the inequality is caused by undervaluing taxed property and not given when it is caused by taxable property escaping taxation. The only logical conclusion that can be drawn from the Legislature's failure to impose the abatement on those who ought to bear it is that it thought its scheme was accurate enough for practical purposes, for, if it had not thought that the trouble and expense incident to the reassessment (which would be necessary to impose the abatement on those who ought to bear it) would more than counterbalance the injustice to other taxpayers, it is probable that it would have conferred the same power on the court that chapter 169, Laws of 1911, confers on the Tax Commission. In other words, it would have made it the duty of the court to do whatever is necessary to equalize not only the plaintiffs' tax, but that of all the other taxpayers in the state.

[6] Although the state's contention that the Board of Equalization should consider only the returns of the local assessors in determining the value of "other property" would be entitled to great weight if it were addressed to a legislative body, it has no merit as a legal proposition, for the act which created the board and prescribed its duties provides that it "shall determine * * * whether the personal estate of the several towns has been uniformly estimated, according to the best information which can be derived from the statistics of the state or from any other source." Laws 1878, c. 61, § 7. In other words, the act which prescribes the board's duties provides in terms that it shall not accept the returns of the assessors as conclusive of the value of tangible or in-

tangible taxable property, but shall investigate the matter for itself every fourth year and correct these returns if it finds that tangible or intangible taxable property has been undervalued or has escaped taxation. P. S. c. 63, § 4.

[7] It is competent, therefore, for the plaintiffs to show that taxable intangibles escaped taxation, but they must show it by legal evidence. By this is not intended that they will not be given the same latitude in the production of evidence that they would be given in the ordinary judicial proceeding. What is intended is to emphasize the fact that a tax appeal is a judicial proceeding (Boston & Maine R. R. v. State, 76 N. H. 86, 79 Atl. 701) and that the same rules apply in the trial of an appeal, in so far as the production of evidence is concerned, as in other judicial proceedings. To illustrate: If, on the trial of their appeal, the plaintiffs offer the evidence the Tax Commission excluded, the test to determine the issue of admissibility will be to inquire whether it is too remote, or whether it is likely to elucidate or to confuse the main issue, and not, as they contend in their brief, whether it is relevant to any of the various issues that may arise in the course of the trial.

State's motion to dismiss denied. All concurred.

SMITH v. MOONEY.

(Supreme Court of New Hampshire. Hillsborough. Dec. 8, 1912.)

INFANTS (§ 98*)—MEDICAL SERVICES—RATIFICATION.

Evidence, in assumpsit for medical services rendered to defendant while she was a minor, living with her father and supported by him, held sufficient to sustain a verdict for plaintiff on the ground of ratification.

[Ed. Note.—For other cases, see Infants. Cent. Dig. § 293; Dec. Dig. § 98.*]

Exceptions from Superior Court, Hillsborough County; Chamberlin, Judge.

Action by Herbert L. Smith against Helen Mooney. Judgment for plaintiff. From a ruling that the evidence was insufficient to support it, plaintiff excepted. Exception sustained.

Assumpsit for medical services rendered to the defendant while she was a minor, living with her father and supported by him. Trial by jury and verdict for the plaintiff. At the close of the evidence the defendant's motion that a verdict be directed in her favor was denied, subject to exception. After the verdict the court, upon the defendant's motion, ruled as a matter of law that the evidence was insufficient to support it, and the plaintiff excepted.

George F. Jackson, of Nashua, and Branch & Branch, of Manchester, for plaintiff. Doyle & Lucier, of Nashua, for defendant.

WALKER, J. The plaintiff's position is that it was competent for the jury to find that at the time the services were rendered there was a voidable contract by the defendant to pay the plaintiff for them, which the defendant, after becoming of age, ratified. There is no evidence in the record that when the services were rendered the defendant had been emancipated, that she was supporting herself, or that she had any means of support aside from her dependence upon her father, with whom she lived as a member of his family. All the evidence shows that her father was performing his parental duty of furnishing her with a home and such necessities as her condition in life required. Nor is there any direct evidence that she expressly agreed to pay for the services at the time they were rendered. As there was no express promise by any one to pay him for his services, which were beneficial to the defendant, it could be found, from the circumstances connected with his attendance upon her, that her father was the promisor.

Although these facts alone might be insufficient to sustain a finding of her liability, there was evidence that after the rendition of the services by the plaintiff, and during her minority, she told the plaintiff that she wanted him paid therefor, and recognized the bill as a proper charge against her. This evidence authorizes the inference that she understood, when the services were rendered, that she employed the plaintiff, who had the same understanding. It follows that the jury would be warranted in finding that, so far as she had the capacity to do so, she personally contracted with the plaintiff. Whether, in the absence of other evidence, she would be liable upon the contract thus made, in view of her infancy and her situation in her father's family, it is unnecessary to decide, since there was other evidence authorizing the further inference that after becoming of age she ratified her voidable contract with the plaintiff. The ruling of the court that the evidence did not, as a matter of law, support the verdict was erroneous. Plaintiff's exception sustained. All concurred.

MILLER v. PEARCE.

(Supreme Court of Vermont. Rutland. Jan. 9, 1913.)

1. HUSBAND AND WIFE (§ 333*)—ALIENATION OF AFFECTIONS—EVIDENCE—ADMISSIBILITY.

A wife suing for the alienation of the affections of her husband, and demanding exemplary damages, may prove the value of defendant's property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124; Dec. Dig. § 333.*]

2. WITNESSES (§ 251*)—EXAMINATION—CORROBORATION.

A witness who testifies to an occurrence may testify that the occurrence was at the time the subject of a conversation between him-

self and a third person to strengthen his recollection.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 865; Dec. Dig. § 251.*]

3. WITNESSES (§ 267*)—CROSS-EXAMINATION—DISCRETION OF TRIAL COURT.

The extent of cross-examination is largely within the discretion of the trial court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 923-930; Dec. Dig. § 267.*]

4. WITNESSES (§ 267*)—CROSS-EXAMINATION—DISCRETION OF TRIAL COURT.

Where, in a suit by a wife for the alienation of the affections of her husband, the husband as a witness for defendant testified that his relations with defendant were merely friendly and proper, and that he took a lease of defendant's barn and kept his horses there, the action of the court in requiring him to testify on cross-examination as to whether he knew when he took the lease that there had been and was public discussion about his associations with defendant, and that the publicity had decreased his business, was within the discretion of the court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 923-930; Dec. Dig. § 267.*]

5. WITNESSES (§ 388*)—IMPEACHMENT—ORDER OF PROOF.

Where the foundation for the impeachment of a witness by contradictory statement had not been made, the action of the court in permitting the impeaching witness to testify, and in thereafter permitting the parties to call the witness sought to be impeached for examination as to what was said, was within the court's discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242; Dec. Dig. § 388.*]

6. EVIDENCE (§ 220*)—CONDUCT OF PARTIES—ADMISSIBILITY.

The exclusion of a statement made by a witness to a party who made no reply was not erroneous, where it did not appear what the witness said or that any unfavorable inference could be drawn against the party because of his silence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-785; Dec. Dig. § 220.*]

7. HUSBAND AND WIFE (§ 326*)—ALIENATION OF AFFECTIONS—JUSTIFICATION.

An action by a wife for the alienation of the affections of her husband is not defeated by the fact that the wife was entirely estranged from her husband before his acquaintance with defendant, but that fact was admissible only in mitigation of damages.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1120; Dec. Dig. § 326.*]

8. HUSBAND AND WIFE (§ 333*)—ALIENATION OF AFFECTIONS—LIABILITY.

An action by a wife for the alienation of her husband's affections is sustained by proof that defendant enticed, induced, and persuaded the husband without reference to whether she induced the husband into unlawful relations with her, or he induced her into such relations with him.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124; Dec. Dig. § 333.*]

9. HUSBAND AND WIFE (§ 325*)—ALIENATION OF AFFECTIONS—LIABILITY.

A wife suing for the alienation of the affections of her husband must to recover compensatory damages show an intentional alienation, but need not show that defendant's acts were malicious; maliciousness only bearing on the question of exemplary damages.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1119; Dec. Dig. § 325.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

10. DAMAGES (§ 87*)—COMPENSATORY DAMAGES—EXEMPLARY DAMAGES.

Exemplary damages do not go to the right of recovery, but only to the amount of recovery in the discretion of the jury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 188–192; Dec. Dig. § 87.*]

11. HUSBAND AND WIFE (§ 332*)—ALIENATION OF AFFECTIONS—LOSS OF CONSORTIUM.

An action for alienation of affections and an action for criminal conversation are for the same cause of action based on loss of consortium, and, where the declaration in an action by a wife for the alienation of the affections of her husband alleges adultery as one means of alienation, and she proves the misconduct, she is entitled to recover, because the law will presume alienation.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1123; Dec. Dig. § 332.*]

12. HUSBAND AND WIFE (§ 325*)—ALIENATION OF AFFECTIONS—GROUNDS OF RECOVERY.

A defendant in an action by a wife for the alienation of the affections of her husband based on her adultery with him as a means of alienation is liable, whether she was the seducer or the seduced.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1119; Dec. Dig. § 325.*]

Exceptions from Rutland County Court; E. L. Waterman, Judge.

Action by Jennie E. Miller against Emma O. Pearce. There was a judgment for plaintiff, and defendant brings exceptions. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

T. W. Moloney, of Rutland, for plaintiff. William W. Stickney, John G. Sargent, and Homer L. Skeels, all of Ludlow, for defendant.

ROWELL, C. J. [1] This is case for alienating the affections of plaintiff's husband. It was proper to allow Cahee to testify to the value of the defendant's house, for exemplary damages were claimed. *Rea v. Harrington*, 58 Vt. 181, 188, 2 Atl. 475, 56 Am. Rep. 561.

[2] It was also proper to allow the witness Bresee to say that the occurrence to which he testified about the defendant motioning plaintiff's husband into Baker's drug store and there drinking soda with him was the subject of remark between him and Baker, for it specified a ground for his recollection and tended to strengthen it. 1 Wig. Ev. § 730. This rule is illustrated and its limitations stated in *Detroit*, etc., R. R. Co. v. Van Steinburg, 17 Mich. 99. The same may be said of Howland's testimony that the presence of the defendant on a street in Brandon at a certain time was the subject of remark in a certain office there.

[3, 4] The plaintiff's husband was a witness for the defendant, and testified that his relations and associations with her were merely the friendly relations and associations of a gentleman and a lady, and entire-

ly proper in all respects, and always with due regard to propriety. He also testified that he took a lease of defendant's barn at one time, and kept his horses there. On cross-examination he said that this suit was pending when he took the lease and moved in his horses, which, it appeared, he took care of himself mornings and nights. The cross-examiner was then allowed to elicit from him that he knew when he took the lease that there had been and was public discussion and sentiment about his associations with the defendant, and that he testified about a year after he brought a petition for divorce against his wife, which was while this suit was pending, that said publicity had decreased his business more than threefold. Large scope is allowed to cross-examination; the extent of it in a given case being left largely to the discretion of the trial court. 2 Wig. Ev. § 944; *Stevens v. Beach*, 12 Vt. 587, 36 Am. Dec. 359; *Hathaway v. Crocker*, 7 Metc. (Mass.) 266. Here the cross-examination was well within the discretion of the trial court if not within the right of the defendant, and so no error.

[5] The defendant called the officer who served the petition for divorce on the plaintiff, and showed by him a conversation he had with her at the time in the house and the presence of Miss Griswold. The plaintiff called Miss Griswold in rebuttal to testify to that conversation. The defendant objected that the officer could not be impeached without first inquiring of him about it. The officer not being present at the time, the court said that the witness might be examined and the officer called later if necessary, and thereupon the witness was examined. Later, the officer was called by the plaintiff, and examined by both sides as to what was said. The course taken by the court was entirely discretionary, and so no error here.

[6] Nor was it error to exclude talk to the plaintiff by Miss Griswold in which the officer did not participate and to which the plaintiff made no reply, especially as it does not appear what Miss Griswold said, nor that any unfavorable inference could be drawn against the plaintiff because of her silence.

[7] The defendant seasonably moved for a verdict, because there was no evidence tending to support the declaration; none tending to show that defendant interfered, or in any way undertook or tried, to alienate the affections of plaintiff's husband, and because the entire evidence showed that the plaintiff was entirely estranged from her husband before the commencement of his acquaintance with the defendant. This motion was rightly overruled. We take no time with the last ground of it, for, if true, it would not defeat recovery, but go only in mitigation of damages. *Fratini v. Caslini*, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843;

Lewis v. Roby, 79 Vt. 487, 65 Atl. 524, 118 Am. St. Rep. 984.

The other ground of the motion is not well founded, for the testimony on the part of the plaintiff clearly tends to show what the motion says it does not, namely, that the defendant did interfere, and did undertake and try to alienate the affections of plaintiff's husband.

[8] The defendant requested a charge that, in order to recover, it must affirmatively appear that she was the seducer and enticer, and that the plaintiff could not recover if it appeared that her husband enticed her into unlawful relations with him. The defendant excepted for noncompliance with this request, and now says that the court applied it only to "enticing, inducing, and persuading," whereas she had a right to have it cover "seducing" also, claiming that, unless she was the acting and seducing party, there could be no recovery. But "enticing, inducing, and persuading" by the defendant were certainly sufficient as to all the elements of recovery except the "unlawful relations" mentioned in the request, which we take to mean criminal conversation, and whether as to those relations seduction by the defendant was necessary to recover will be considered later.

[9, 10] The defendant also excepted to the failure to charge as requested that intentional alienation must be shown. But the charge shows a substantial compliance with this request. She also excepted to the failure to charge as requested that her acts that caused the alleged injury must have been malicious. This was not charged, which is claimed error because both compensatory and exemplary damages were claimed. But that makes no difference, for exemplary damages do not go to the right of recovery, as the request assumes, but only to the amount of recovery in the discretion of the jury.

[11] The declaration alleges adultery as one means of alienation. The court charged without qualification that, if adultery was found, the plaintiff should recover, as the law would presume alienation. To this the defendant excepted generally, and claims that, notwithstanding the allegation of adultery, the action is purely for alienation, and not at all for crim. con., but that the court "mixed" the law of these two actions, whereas it should have applied only the law relative to actions for alienation, and therefore should have told the jury that the plaintiff could not recover on the ground of adultery unless the defendant was the seducer, which the court did not do, but left it in a way that the plaintiff might recover on that ground though her husband was the seducer and the defendant the seduced, which might have been proper, it is said, had the action been for criminal conversation, if such an action can be maintained against a woman, which is denied arguendo, for there the seduction, the act itself, is the gist, while

here the loss of consortium is the gist and therefore the defendant must be the seducer, otherwise no protection is afforded to a woman who is likely to have been overcome by persistency or force and without intent on her part.

It is to be noticed that the defendant is not claiming that this action cannot be maintained against her at all on the ground of criminal conversation, but only that it cannot be without showing that she was the seducer as to that, any more than it can be on the other ground alleged without showing that she was the enticer, inducer, and persuader as to that. So the question is on this point, and the only question, whether it was necessary to recover on this ground that it should be found that she was in fact the seducer. It is claimed in support of the affirmative of this proposition that an action for alienation of affections is absolutely different and distinct from an action for criminal conversation, and that all text-books and authorities treat them as entirely different in nature, and some cases are cited to that effect. But however this may be elsewhere, it is not so here. Thus in Daley v. Gates, 65 Vt. 591, 27 Atl. 193. the original declaration charged that the defendant enticed away plaintiff's husband per quod consortium amisit. A new count was filed charging criminal conversation with the same per quod. The question being whether the new count was for the same or a different cause of action, this court said that the injury complained of in the original declaration and the injury complained of in the new count were one and the same injury, namely, the loss of consortium, and that the new count was but the statement of another way in which the injury was committed, of another ground of demanding the same thing, namely, damages for said loss; the identity of the cause of action being preserved. This doctrine is recognized in Frattini v. Caslini, 66 Vt. 275, 29 Atl. 252, 44 Am. St. Rep. 843, and Knapp v. Wing, 72 Vt. 337, 47 Atl. 1075.

[12] It remains to consider whether it makes any difference in law whether the defendant was the seducer or the seduced. We think it does not, for seduction, unlike rape, does not preclude consent, but gains it by persuasion, procurement, and enticement, leaving the seduced a willing participant in the wrong; and the act of adultery itself, subject to all the consequences that the law attaches to it, one of which is, in actions like this, that the loss of consortium necessarily results from it, regardless of which party is the seducer, and thus is the cause of action perfected, and the right of recovery established. Lellis v. Lambert, 24 Ont. App. 653, 663. In Houghton v. Rice, 174 Mass. 368, 54 N. E. 843, 47 L. R. A. 310, 75 Am. St. Rep. 351, one woman sued another woman for alienating the affections of her husband. On demurrer the court held that

the declaration was bad in substance at common law if the action was by the husband against another man, and that no statute gave the wife any greater right than the husband had in actions of that nature, which means, of course, that the substantive law of the case is the same whichever sues. In speaking of the absence of an allegation of adultery as a cause, the court said that, when the husband sues, the allegation is debauchment and carnal knowledge of the wife; that alienation of her affections is mere matter of aggregation, and the loss of consortium the actionable consequence of the injury; that the adultery is the essential fact to be proved, without which the action cannot be maintained. In *Lellis v. Lambert*, above cited, to which the court refers, it is said on this subject at page 663 that it is essential and sufficient to prove the mere fact of adultery, and, if it is not proved presumptively or directly, the plaintiff fails. It is manifest, therefore, that the only difference between alienation by persuasion and alienation by adultery is that in the former you must *prove* resultant loss of consortium, while in the latter the law conclusively *presumes* it.

In *Hart v. Knapp*, 76 Conn. 135, 55 Atl. 1021, 100 Am. St. Rep. 989, one woman sued another woman for alienating the affections of her husband by committing adultery with him. The defendant claimed in bar of recovery that she did not seduce plaintiff's husband, but that he seduced her; but the court held that that made no difference, and the plaintiff had judgment, and on a ground from which it may be deduced that carnal knowledge of the husband is as much a civil injury to the wife, as carnal knowledge of the wife is a civil injury to the husband. In *Scott v. O'Brien*, 129 Ky. 1, 110 S. W. 260, 16 L. R. A. (N. S.) 742, 130 Am. St. Rep. 419, the court criticised *Hart v. Knapp* as being contrary to the weight of authority. But it had no occasion to say anything about that case, for adultery was not involved in the case before it, nor did the court take note of the difference above pointed out between alienation by persuasion and alienation by adultery.

Judgment affirmed.

BOVILLE v. DALTON PAPER MILLS.

(Supreme Court of Vermont. Essex. Dec. 12, 1912.)

1. PLEADING (§§ 199, 324*)—BILL OF PARTICULARS—TIME FOR DEMURRER.

Specifications are not a nullity because the items thereof exceed the amount of the ad damnum in the writ; so no motion for further specifications being made they cannot be ignored as regards the rule requiring demurrer to be filed within 10 days after the filing of specifications.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 464-469, 980-983, 985; Dec. Dig. §§ 199, 324.*]

2. WORK AND LABOR (§ 14*)—WORK DONE UNDER SPECIAL CONTRACT.

One may recover under the common counts for work done under a special contract which he has been compelled to abandon by defendant's nonperformance.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 31-33; Dec. Dig. § 14.*]

3. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admission of a declaration that papers were to be sent to a certain place was harmless; it appearing they were in fact sent there.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

4. EVIDENCE (§ 258*)—EVIDENCE OF AGENCY—FOUNDATION FOR AGENT'S DECLARATIONS.

Evidence, in an action involving the question whether a copy of the agreement for performance of work by plaintiff for defendant was signed by defendant, that B., employed by defendant for oversight of plaintiff's work, had possession of the copies of the agreement between the time when they were completed by defendant's attorney for execution and the time when, after he had brought them to plaintiff and obtained his signature thereto, they were returned to defendant for its signature, and that thereafter one of them was returned to plaintiff by B. with an additional signature, tends to show that B. was acting for defendant regarding the execution of the papers and in the delivery of an executed contract, so as to authorize admission against defendant of B.'s statement, at the time of returning the copy to plaintiff, that the additional signature was that of defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

5. EVIDENCE (§ 184*)—SECONDARY—PRELIMINARY—LOSS OF PRIMARY.

To account for his failure to have the copy of his agreement with defendant, claimed by him to have been signed by defendant, and delivered to him by its agent, and to sustain his claim as to the number of copies made, plaintiff may testify to such agent having borrowed it, with promise to return it soon, and that he never saw it afterwards.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 638-641; Dec. Dig. § 184.*]

6. EVIDENCE (§ 258*)—DECLARATIONS OF AGENT—IMPLIED PRELIMINARY FINDING.

Reception of evidence of what B. said, after a discussion in which its admissibility was treated as depending on the fact of B.'s agency, involved an implied preliminary finding of such agency.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

7. CONTRACTS (§ 322*)—REBUTTAL EVIDENCE—PERFORMANCE OF CONTRACT.

In view of defendant's evidence that plaintiff's failure to get wood through, under his contract with defendant, in high waters, was not because of insufficiency of the dams, which defendant was to keep in condition, but because plaintiff neglected such contract to work for another, plaintiff, to explain his conduct, could testify that he had to wait till the drive of V. went by the mouth of a stream, and that his work for another was in helping V. to get out of his way.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1306, 1307, 1339, 1347, 1348, 1466, 1492, 1534-1542, 1754, 1768, 1772, 1801; Dec. Dig. § 322.*]

8. WITNESSES (§ 321*)—CONTRADICTING ONE'S OWN WITNESS.

One is not concluded by the testimony of his witness, but may show by other witnesses that the fact is not as stated by his first witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1094, 1099-1100; Dec. Dig. § 321.*]

9. WORK AND LABOR (§ 28*)—ABANDONMENT OF CONTRACT—EVIDENCE.

Though plaintiff, in an action for work, did not in terms testify he was compelled by defendant's failure to pay as agreed to abandon his contract, *held* the evidence was sufficient to show it.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 55; Dec. Dig. § 28.*]

10. LOGS AND LOGGING (§ 8*)—CONTRACTS—CONSTRUCTION—PERFORMANCE.

Under the contract of employment of plaintiff to log for defendant, defendant must repair the dams as now existing, defendant must repair them in a reasonably careful and prudent manner, having in view existing conditions and the use to be made of the dams, notwithstanding the provision, "all of which is to be done as directed by the agent of" defendant.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 15-17; Dec. Dig. § 8.*]

11. TRIAL (§ 250*)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS AND EVIDENCE.

Plaintiff's declaration, in an action for work, authorizing a recovery on the ground of an express contract, which he had been prevented from fully performing by defendant's failure of performance, or on the ground of labor for and at the request of defendant without an express contract, and he not having confined his evidence to one only of the grounds, and the court having stated without contradiction that it was conceded the writing must have been signed by the parties in order to constitute an express contract, and that otherwise plaintiff must rely on an implied contract, defendant's requested charge that plaintiff could not recover unless he established that there was a written contract signed by defendant was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

12. ESTOPPEL (§ 90*)—CONTRACTS—ACQUISITION.

Where defendant engaged plaintiff for certain work, and prepared a written contract which plaintiff signed, and, though defendant did not sign it, it did not inform plaintiff thereof, and plaintiff went on with the work in accordance with the terms of the prepared contract, and every act of defendant in connection with it was calculated to lead plaintiff to suppose he was proceeding under that contract, defendant cannot claim the benefit of the rule which measures the value of plaintiff's services by the benefit which defendant receives.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 242-256; Dec. Dig. § 90.*]

13. DAMAGES (§ 124*)—ELEMENTS OF DAMAGE—BREACH OF CONTRACT.

Plaintiff having been prevented from having the wood at defendant's mill when needed by nonperformance of a contract obligation resting on defendant, the loss sustained by defendant therefrom is not an element of damages it is entitled to have applied in reduction of the claim of plaintiff, suing for services performed under the contract before he was compelled by defendant's default to abandon it.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

14. DAMAGES (§ 124*)—ELEMENTS OF DAMAGE—BREACH OF CONTRACT.

Where plaintiff was doing work under an entire contract by which he was to deliver wood at defendant's mill, he had a right to proceed with the work in any manner which did not injure the stock, assuming that his performance of the contract would not be prevented by any act or default of defendant, so that the increased difficulty of getting the wood to the mill from where plaintiff had left it, because of the manner in which he had delivered it at a stream, is not an element of damages which defendant is entitled to have applied in reduction of plaintiff's claim for work performed under the contract before he was compelled by defendant's default to abandon it.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

15. CONTRACTS (§ 322*)—ABANDONMENT—REASON—EVIDENCE.

Plaintiff's testimony that the difficulty in driving the wood was that the dam was no good, and that if the dam had been good all the wood would have been down to defendant's mill in 15 or 16 days, is not subject to the construction that his only reason for abandoning his contract for the driving was that the dam was no good, but is no more than saying that good dams might have prevented the conditions which made defendant's delays in making payments under the contract fatal.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1306, 1307, 1339, 1347, 1348, 1465, 1492; Dec. Dig. § 322.*]

16. TRIAL (§ 105*)—EVIDENCE—NECESSITY OF OBJECTIONS.

It is not error for the court to make use of evidence which comes into the case without objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.*]

17. JUDGMENT (§ 266*)—MOTION IN ARREST.

A motion in arrest of judgment reaches only defects apparent of record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 467; Dec. Dig. § 266.*]

18. JUDGMENT (§ 266*)—MOTION IN ARREST.

Specifications are not a part of the record for purposes of pleading, and so may not be considered on a motion in arrest.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 467; Dec. Dig. § 266.*]

19. ACTION (§ 41*)—JOINDER OF CAUSES.

A special count in assumpsit may be joined with the common counts.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 328-359; Dec. Dig. § 41.*]

20. JUDGMENT (§ 266*)—MOTION IN ARREST.

A motion in arrest of judgment cannot be sustained by matters which appeared on the trial, as shown by the transcript.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 467; Dec. Dig. § 266.*]

Motion for Rehearing.**21. APPEAL AND ERROR (§ 274*)—EXCEPTIONS.**

An exception to the dismissal of a demurrer, stating that defendant claimed that a paper filed was not a specification within the rule as to time of demurrer, and therefore that the demurrer was not filed out of time, implies that no other objection was made to the dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1631-1645; Dec. Dig. § 274.*]

22. APPEAL AND ERROR (§ 232*)—REVIEW—OBJECTION NOT MADE BELOW.

Dismissal of a demurrer as not seasonably filed cannot be held error on a ground not covered by the objection to the dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1430, 1431; Dec. Dig. § 232.*]

23. APPEAL AND ERROR (§ 274*)—SCOPE OF EXCEPTIONS.

Complaint may not be made that there was no preliminary finding by the trial court of one's agency, where the only question presented by the exceptions is whether there was any evidence tending to show such an agency as justified the admission of the person's declarations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1631-1645; Dec. Dig. § 274.*]

24. EVIDENCE (§ 208*)—JUDICIAL ADMISSIONS—MOTION TO FILE PAPER.

Plaintiff's paper moving for the filing of the contract "whereon his cause of action is based," not having been submitted during or for the purposes of the trial but to secure possession and inspection of the contract in preparation for the trial, is not a judicial admission that his cause of action was based solely on an express contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. § 208.*]

25. PLEADING (§ 406*)—OBJECTIONS—WAIVER BY FAILURE TO DEMUR.

Defendant cannot go to trial, without having demurred to the declaration, and defeat the result of the trial for a defect of the declaration insufficient to sustain a motion in arrest.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374; Dec. Dig. § 406.*]

Watson and Powers, JJ., dissenting.

Exceptions from Essex County Court; Fred M. Butler, Judge.

Action by Joseph Boville against the Dalton Paper Mills. Verdict and judgment for plaintiff, and defendant brings exceptions. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Harland B. Howe, of St. Johnsbury, Samuel E. Richardson, of New York City, and Harry W. Witters, of St. Johnsbury, Vt., for plaintiff. Theriault & Hunt, of Montpelier, for defendant.

MUNSON, J. [1] The declaration is in assumpsit and consists of the common counts and one special count. The plaintiff's specifications were filed June 21, 1911. The defendant filed a demurrer to the declaration on the first day of the October term. The rules require that a demurrer be filed within 10 days after the filing of specifications, and the court dismissed the demurrer as filed out of time. Defendant contends that the paper filed June 21st was not a specification, and that it was not required to file its demurrer any earlier than it did. The ad damnum in the writ was \$3,000, but the items of the specification amounted to nearly \$5,000; and

it is argued from this that the specifications are outside the scope of the pleading and constitute a variance. It cannot be said that the discrepancy between the ad damnum and the total of the items specified made the specifications a nullity. The larger total of the specifications did not require the conclusion that the plaintiff's claim was anything different from what it was specifically stated to be, or anything inconsistent with the amount of the ad damnum.

It is not essential to the sufficiency of a bill of particulars that it contain matters which afford a defense or offset for the adverse party. 31 Cyc. 566, and cases cited. Moreover, no motion for a further specification was filed, and it has been held that, if the adverse party does not apply for a further or more specific bill of particulars, he cannot ignore the bill furnished and proceed as if none had been filed, unless bad faith is shown, in respect to the original bill. 31 Cyc. 581, citing *McCarthy v. Moonney*, 41 Ill. 300; *Davis v. Johnson*, 96 Minn. 130, 104 N. W. 766; *Purdy v. Warden*, 18 Wend. (N. Y.) 671; *Bates v. Wotkyns*, 2 How. Prac. (N. Y.) 18.

[2] The special count alleged an express contract, partial performance by the plaintiff, and a breach by the defendant which prevented plaintiff's further performance. Before any evidence was introduced, defendant moved that the plaintiff be required to elect whether he would stand on the common counts or the special count, and the plaintiff thereupon elected to proceed under the common counts. The plaintiff introduced evidence tending to show that he had a contract for doing the work covered by his specification at agreed prices, by which he was to receive payment on the 15th day of each month for the work done the previous month; evidence tending to show that the defendant failed to make these payments in accordance with the agreement; and evidence which it is claimed tended to show that this made it impossible for the plaintiff to complete his undertaking. The evidence regarding the defendant's failure to pay was excepted to as immaterial in view of the plaintiff's election to stand on the common counts. In connection with this exception, the defendant cites *Myrick v. Slason*, 19 Vt. 121; *Camp v. Barker*, 21 Vt. 469. Neither case presents the question arising here. It is the uniform holding of our cases that one may recover under the common counts for work done under a special contract which he has been compelled to abandon by the nonperformance of the other party. Of these cases reference may be had to *Chamberlain v. Scott*, 33 Vt. 80; *Davis v. Streeter*, 75 Vt. 214, 54 Atl. 185.

The inquiries of defendant's counsel and the replies of his witnesses both recognized the fact that there was an agreement between the parties as to the work to be done

and the terms of payment. But the defendant claimed that there was no written contract, and excepted to evidence introduced by the plaintiff to show that one was prepared and signed. In its charge to the jury the court said, "I understand it to be conceded that the writing must have been signed by the parties in order to constitute an express contract," and that, "Otherwise the plaintiff must rely upon an implied contract"; and it does not appear that any suggestion to the contrary was made by counsel. In line with this understanding, the court instructed the jury that the plaintiff could recover either on the ground of an express contract or on the ground of an implied contract; that to establish the first ground the plaintiff must show that there was an express contract between him and the defendant; that such contract was signed by the defendant; that plaintiff did not voluntarily abandon the contract; that defendant by its acts or default prevented him from completing it; and that, if the plaintiff failed to establish any of these things, he could not recover on the ground of an express contract. One ground of the defendant's motion for a verdict, as orally developed in a discussion between court and counsel, was that there was no evidence in the case tending to show that the defendant ever signed a contract with the plaintiff. The question whether there was such evidence involves an inquiry as to the relation sustained to the defendant by J. H. Beattie, a deceased employé, and the consequent admissibility or inadmissibility of his declarations.

The plaintiff claimed that the defendant had or had had in its possession a typewritten agreement signed by both parties, and he procured an order in advance of the trial under which the defendant filed in court a typewritten paper signed by the plaintiff alone. The plaintiff introduced this and two other identical papers, one of which bore the signature of the plaintiff, but neither of which was signed by the defendant. These were received in connection with evidence which it was claimed tended to show that there was a fourth impression which had been signed by the defendant and delivered to the plaintiff and afterwards obtained from the plaintiff by Beattie. The defendant claimed, and there was evidence tending to show, that only three impressions were made. The ones produced were received in evidence against the objection that no contract had been executed by the defendant, and that, in any event, the contract was immaterial. This outline of the positions taken regarding the contract will serve to indicate the bearing and importance of the various features of the testimony; and the case which the testimony tends to establish must now be stated with sufficient fullness to afford a basis for the disposition of the several exceptions relied upon.

The defendant is a corporation located at

Portland, Me., and owning timber lands in Lemington and Averill in this state. Its president and treasurer, and most if not all its directors, resided in Portland. It operated a pulp mill at Fitzdale in this state, and had a general manager who resided there. The arrangement with the plaintiff was made by E. J. Parsons, an agent of the defendant, and the writing was prepared by Porter H. Dale, the defendant's attorney. Parsons lived at Island Pond and had general charge of the defendant's operations in the woods, reporting to and receiving his instructions directly from the company. He had authority to engage some one for the immediate oversight of the plaintiff's work, and employed J. H. Beattie for this service. The contract as prepared names Beattie as the defendant's agent, and provides that the plaintiff shall conduct all his operations as Beattie may direct. Beattie was engaged for this service before the writing was prepared, and he acted for the defendant in connection with plaintiff's operations until his death. The plaintiff lived at Bloomfield in this state. Parsons had an impression that he signed the papers at Island Pond, but was very doubtful about it. Plaintiff's signature was witnessed by J. H. Beattie and plaintiff's daughter. Plaintiff testified that Beattie brought the papers to him at Bloomfield, and that the number of papers signed was three; that after he had signed them Beattie took them away, saying he was going to send them to Portland to be signed; that Beattie brought one back soon after and handed it to plaintiff, saying, "There is your contract"; that plaintiff cannot read written English, but that he looked at the paper and saw that it was signed by two names, and that Beattie said it was the signature of the defendant; that Beattie afterwards came and asked for the paper, saying he would return it soon; and that he gave it to Beattie and had not seen it since. Parsons testified that there were but three copies, and that the two signed by the plaintiff (Exhibits 1 and 3) were sent to Portland for the signature of the defendant, and were never returned to him; that he learned soon after that the defendant had refused to sign the paper, but never informed the plaintiff of this fact; and testified further that he retained the copy that was not signed (Exhibit 2) and kept it in his possession until Beattie asked for it as a memorandum to guide him in looking after the work, and that, when Beattie's papers relating to the job were sent to him after his death, he found this copy among them, and had had it in his possession since. The defendant produced C. G. Allen, who was a director of the company but not an officer of it, and he testified that one of these copies was submitted and considered at a directors' meeting, and that the result of the discussion was that the contract was not signed—

that there was no authorization for the signing. The records of the company were not produced, and no officer of the company was called, and it did not appear what the powers of its officers were, nor what authorization was necessary. The agreement, as drawn, called for a cutting expected to extend over two or three years, and contained particular requirements and restrictions regarding the manner of cutting, with provisions for a compensation payable in monthly installments, depending on the progress of the work, and for the building and repair of certain dams by the defendant. The conduct, claims, and waivers of the parties as the work proceeded had constant reference to the provisions of an existing agreement. The court said in its charge, without any suggestion of objection, that it had not heard in argument any question but that the writing expressed the understanding existing between the parties. The only reason given by the defendant for not signing the contract was that the directors did not wish to assume an uncertain expense in the building and repair of dams. It did in fact build and repair the dams specified in the writing, but the repairs of the existing dams were claimed to be insufficient.

[3-5] Defendant excepted to the plaintiff's testimony regarding the declarations made by Beattie as immaterial and incompetent. The plaintiff's testimony and the names of the witnesses to his signature tend to show that the papers were brought to him for signature by Beattie. The statement that they were to be sent to Portland must be regarded as harmless, for they were in fact sent to Portland after being signed by the plaintiff. The possession of the papers between the time when they were completed for signature and the time when they were sent to Portland was in itself evidence tending to show that Beattie was acting regarding the execution of the papers in conjunction with Parsons. The testimony of the plaintiff, irrespective of the declarations of Beattie, tends to show that one of the copies was returned to him by Beattie with an additional signature. Upon the theory of the case presented by plaintiff's testimony, the copies sent to Portland must have been returned directly to Beattie, for Parsons testified that he never saw the copies that were sent to Portland after they went there. So Beattie's possession of the paper at this time would be evidence tending to show that he was acting for the company in the delivery of an executed contract. In these circumstances the accompanying statement that the additional signature was that of the company cannot be held to have been unauthorized. The further statement of the plaintiff that Beattie afterwards borrowed the contract, saying he would return it soon, was legitimate evidence to account for his fail-

ure to have the copy and to sustain his claim as to the number made.

[6] The defendant argues that this evidence was admitted without any preliminary finding as to Beattie's agency, and that this was error. It is held that this is not a question for the jury, but one to be determined by the court. *Cairns v. Mooney*, 62 Vt. 172, 19 Atl. 225; *Dickerman v. Quincy, etc., Ins. Co.*, 67 Vt. 609, 32 Atl. 489. The court did not submit this question to the jury, and it did not expressly find the fact of agency. But the evidence of what Beattie said when he brought back the contract was received after a discussion in which the admissibility of Beattie's statements was treated as depending upon the fact of agency, and its allowance thereafter was an implied finding of authority.

[7] It was not error to permit the plaintiff to testify regarding certain work done elsewhere that he had to wait until the Van Dyke drive went by the mouth of the Brouillard brook, and that he was there helping Van Dyke to get out of his way. An affidavit which the defendant was to use by agreement tended to show that the plaintiff's failure to get the pulpwood through in high water was not because of the insufficiency of the dams, but because he neglected this contract to work for another party. The plaintiff's evidence tended, to explain a course which might otherwise have operated to the prejudice of his claim.

[8] The defendant moved for a verdict on the ground that Parsons, the plaintiff's first witness, testified on direct examination that the papers marked Exhibits 1 and 3 were the only contract signed by the plaintiff, and that the plaintiff was bound by such evidence, and that consequently there was no available evidence tending to show that defendant ever signed a contract with the plaintiff. The point is not well taken. A party is not concluded by the testimony of his own witness, but may show by other witnesses that the fact is not as stated by the one first called. *Jennett v. Patten*, 78 Vt. 69, 62 Atl. 33. And, if we give this branch of the motion the broader scope given it by the court below, it is apparent from the statement previously made that there was evidence tending to establish the existence of a contract signed by the defendant.

[9] Another ground of the motion for a verdict was that the plaintiff testified that his only reason for abandoning the contract was that defendant failed to perform its agreement respecting the repair of the dams, and that there was no evidence tending to show that defendant failed to perform in that respect. We have noticed no place, and none has been brought to our attention, where the plaintiff testified as stated in the motion. There may not be any place where the plaintiff testified in terms that he was compelled to abandon the job by the defendant's

failure to pay as agreed. But he testified to telling Parsons that he must have his money every 15th, and that if he did not have it on the 15th he should have to quit; that he had no money to do business with. There was doubtless evidence of the plaintiff which tended to show a waiver of strict performance in this respect, but none which sanctioned such delays as the evidence tended to establish. It appeared that one Kugelman advanced \$1,400 to pay plaintiff's men, and that the suit was brought partly for his benefit. Among the exhibits was a letter of the defendant dated April 29, 1910, which reads as follows: "Can't you wait ten days? We have some money coming in then and will clean it up."

[16] We do not consider it necessary to set forth in detail the testimony regarding the dams. There was ample evidence tending to show that the dams, as repaired by defendant, were not sufficient; that they broke repeatedly while being filled; and that this seriously delayed and made more expensive the work of the plaintiff. There was nothing in the motion for a verdict, or in the oral discussion upon it, that fairly directed the attention of the court to anything further. But the defendant argues that by the terms of the contract it was to "repair the dams as now existing," and that the work was "to be done as directed by" its agent; that the defendant did repair the dams as they existed in accordance with the judgment of its agent; and that this relieves it from responsibility. This question was first distinctly raised by two exceptions to the charge, in which the court said, in substance, that the contract meant that the defendant should repair the dams then in existence in a reasonably careful and prudent manner, having in view existing conditions and the use to be made of the dams. We think the court's view of the matter, as embodied in its charge, was sufficiently favorable to the defendant, and that the motion for a verdict, even if treated as raising this question, was properly overruled.

[11] The defendant excepted to the court's refusal to charge that the plaintiff could not recover unless he established the fact that there was a written contract signed by the defendant. The plaintiff must be taken to have conceded that he could not recover on the ground that the parties had entered into an express contract unless a written contract signed by the defendant was shown; but he nowhere confined his claim of recovery to that ground. He could recover under the common counts on the ground that there was an express contract between the parties which he had been prevented from fully performing by a failure of performance on the part of the defendant, or on the ground that he had performed labor at the request and for the benefit of the defendant where no express contract existed.

[12] The defendant excepted to the court's

failure to charge as follows: "The law does not imply any promise on the part of the defendant to pay for services that were of no value to it, and a promise to pay is implied only so far as the services were of benefit or value to defendant. If such services were worth nothing to defendant, then plaintiff can recover nothing." The court instructed the jury that, if the plaintiff was entitled to recover, he was entitled to recover what his services were reasonably worth, and proceeded as follows: "It is said on the part of the defendant that in view of the manner in which the plaintiff performed the work, and the way he left the pulp in the stream, his services were of no practical value. This is a matter wholly for you to consider." The question raised by this exception must be considered with reference to the case presented by the evidence and the instructions previously given. Early in its charge the court said, in substance, that if a person performs valuable service for another at his request or by his permission or consent so given as to amount to a request, and the parties to it so treat it, the law implies a promise to pay for that service what it was fairly and reasonably worth. This instruction was applicable to the case as it would stand with the written contract not established. The defendant engaged the plaintiff for this work, and prepared a written contract which the plaintiff signed. The defendant failed to sign it, but did not inform the plaintiff of that fact. The plaintiff went on with the work in accordance with the terms of the contract as prepared, and every act of the defendant in connection with it was calculated to lead the plaintiff to suppose that he was proceeding under that contract. In those circumstances the defendant cannot claim the benefit of the rule which measures the value of the plaintiff's services by the benefit which the defendant receives.

[13, 14] The defendant requested a further instruction that, if the defendant had suffered any damage by reason of the manner in which the plaintiff performed his work, it must be applied to reduce, or, if sufficient, entirely extinguish, any damages that might otherwise be found for the plaintiff. The defendant cites in support of this request *Patrick v. Putnam*, 27 Vt. 759. There the plaintiff was prevented from completing a contract by sickness, and in sustaining a judgment for the defendant the court said that generally one who is allowed to recover for part performance of an entire contract is liable to have the amount of his recovery reduced by the amount of the damages sustained by the other party, "unless hindered in the performance of his contract by the other party, or excused by such party." In taking their exception, counsel indicated the grounds of their claim, one of which was the failure to have the wood at the mill when needed. But, if the plaintiff was prevented from delivering the wood at the mill by the

nonperformance of a contract obligation resting on the defendant, the loss which the defendant sustained in this respect was not an element of damage which it was entitled to have applied in reduction of the plaintiff's claim. The further ground indicated was the increased difficulty of getting the wood because of the manner in which it was delivered at the stream. If the written agreement was established, this work was being done under an entire contract by which the plaintiff was to deliver the wood at the mill in Fitzdale, and he had a right to proceed with the work in any manner which did not injure the stock, assuming that his performance of the contract would not be prevented by any act or default of the defendant. The court so charged in effect, and no exception was taken to the instruction.

The defendant excepted to what the court said about the plaintiff's right to recover for materials furnished and delivered, saying there was no evidence which warranted the submission of such a claim. The statement complained of was contained in a recital of the common counts which the court made in opening its charge, evidently by way of indicating the nature of the action, and there was nothing in the body of the charge which could have given it any further effect in the minds of the jury. Defendant excepted to the court's reference to a farm contract by way of illustration. The basis of its objection is that the plaintiff was insisting upon the existence of a written contract, and that no ground of recovery other than that should have been recognized. Our conclusion to the contrary has already been stated. It is objected, further, in support of this exception that there was no evidence tending to show that the failure to pay the monthly installments seasonably was a cause of the abandonment of the contract. Evidence which we consider to have that tendency has been pointed out.

[15] Connected with the point just disposed of is the further exception to an instruction which permitted a recovery on the ground of a failure to comply with the terms of payment in disregard of the plaintiff's own testimony that his only reason for leaving the work was that the dam was "no good." We think the testimony referred to is not fairly subject to defendant's construction. The plaintiff said the difficulty in driving the pulpwood was that the dam was "no good," and that if the dam had been good all the wood would have been down to Fitzdale in 15 or 16 days. This was no more than saying that good dams might have prevented the conditions which made the delays in payment fatal.

[16] Defendant excepted to the court's reference to a conversation between Parsons and the plaintiff regarding prices as evidence tending to show that the hauling was worth \$2 a cord, when the price assigned to that part of the work in the contract was 25 cents less, on the ground that the conver-

sation occurred before the contract was written out. The evidence came into the case without objection, and it was not error for the court to make use of it. *State v. Jackson*, 79 Vt. 504, 511, 65 Atl. 657, 8 L. R. A. (N. S.) 1245.

[17-26] The remaining exceptions are to the overruling of a motion in arrest of judgment. The substance of the motion is that the declaration contains inconsistent and repugnant causes of action. A motion in arrest reaches only defects apparent of record. *Trow v. Thomas*, 70 Vt. 580, 41 Atl. 652. The specifications are not a part of the record for the purposes of pleading. *Alexander v. School District*, 62 Vt. 273, 19 Atl. 905. The face of the declaration discloses no misjoinder of actions. A special count in assumpsit may be joined with the common counts. 4 Cyc. 345; *Carland v. Western Union Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 43 L. R. A. 280, 74 Am. St. Rep. 394. The defendant relies upon matters which appeared on the trial as shown by the transcript, but a motion in arrest cannot be thus sustained. *Walker v. Sargeant*, 11 Vt. 327; *Morgan v. Hendrick*, 80 Vt. 284, 67 Atl. 702.

Judgment affirmed.

Motion for rehearing.

After the delivery of the above opinion, but at the same term, the defendant moved for a rehearing, and entry of judgment was thereupon stayed and the case entered with the court, and now in vacation counsel submit a brief in support of the motion.

[21, 22] In disposing of the defendant's claim that the court below erred in dismissing its demurrer, two points were covered. Defendant's brief contained the following additional point: "Aside from the matter of specifications, the docket entries and files * * * show that on no other ground could it be held that defendant's demurrer was filed out of time." The defendant now suggests that the court failed to apprehend and consider its claim orally made under this point; that its demurrer was seasonably filed because filed immediately after the court had allowed an amendment to the declaration which, upon the filing of the demurrer, it permitted to be withdrawn. The exceptions state that the defendant claimed that the paper filed was not a specification within the rule, and that consequently its demurrer was not filed out of time. This implies that no other objection to the dismissal of the demurrer was made, and it will not be necessary to consider the point now urged, for we could not properly hold that the dismissal was error on a ground not covered by the objection made.

The defendant insists that the court erred in its conclusion that there was evidence tending to show an authority in Beattie which gave admissibility to his declaration made in connection with the delivery of the

writing as testified to by Boville. But, after giving careful consideration to counsel's analysis of the argument and the authorities cited, we think our conclusion was justified by the evidence, and leave the matter as presented in the original opinion.

[23] The point is made that there is no basis for assuming an implied finding of Beattie's agency by the trial court, because that court has expressly referred the scope and extent of Beattie's authority to the decision of this court. But the only question presented by the exceptions, upon a fair construction of its language, is whether there was any evidence tending to show such an agency as justified the admission of the declarations. It is claimed, further, that the discussion regarding the admissibility of this evidence was limited to the claim of plaintiff's counsel that the contract itself made Beattie the defendant's agent. It is true that plaintiff's counsel repeatedly assumed that Beattie's agency was shown by the insertion of his name in the contract prepared, but a remark made by the court during the discussion indicates plainly enough that it did not accept this view. Evidence was offered and admitted which legitimately tended to establish the required agency, and there is nothing to show that the court based its admission of the declaration upon anything else.

It is claimed that the court erred in its holding regarding the duty which the contract imposed upon the defendant respecting the dams. The defendant relies upon *Vanderwerker v. Vermont Central R. R. Co.*, 27 Vt. 130, which was a suit to recover for work done in the construction of defendant's road under a contract which provided that the defendant's engineer should be the sole judge of the quality and quantity of the work, and that from his decision there should be no appeal. The defendant also relies upon a line of our cases in which the agreement was to furnish articles to the satisfaction of the purchaser. A provision that the thing contracted for shall be to the satisfaction of the purchaser or other recipient is but an enlargement of the obligation assumed. A provision that the performance of a stipulation shall be to the satisfaction of the party who is to perform it, or of his servant who is to do the work, is destructive of, or at least a limitation upon, the obligation otherwise assumed. If this doctrine of satisfactory performance is to be extended to cases of the latter class, it certainly is not too much to say that its application should be confined to cases where the intention of the parties is evidenced by a plain and definite provision. Here the defendant engages the plaintiff to do certain work, and agrees to provide certain facilities essential to the work. The clause in question reads: "All of which is to be done as directed by

the agent of the party of the second part." We considered, and still think, that this language is not sufficiently explicit to subject the contractual rights of the plaintiff to any curtailment by the action of defendant's agent.

[24] The defendant suggests that the court overlooked its claim that the plaintiff's motion for the filing of the contract "whereon his cause of action is based" was a judicial admission that his cause of action was based on an express contract. This claim was not specifically mentioned because it seemed to be adequately met by the view taken regarding the bases of recovery. But an independent answer can be given. The paper containing this expression was not submitted during or for the purposes of the trial, but to secure the possession and inspection of the writing in preparation for the trial.

[25] No separate treatment was given to the point in which counsel barely suggested the comprehensive effect of an exception to the judgment. The defendant now contends that an exception to the judgment raises every question necessary to be decided in order to render a valid judgment; that the specifications, if not a part of the record for the purposes of a motion in arrest, may be looked into in considering an exception to the judgment; and that it thus appears that this declaration sets up two distinct and repugnant causes of action, on which no valid single judgment can be rendered. The defendant seeks by this argument to place itself in the position it would have occupied if there had been an overruled demurrer to the declaration. But a defendant cannot be permitted to go to trial, without having demurred to the declaration, and defeat the result of the trial for any defect of the declaration not sufficient to sustain a motion in arrest. *Hoskinson v. Central Vt. R. R. Co.*, 66 Vt. 618, 30 Atl. 24.

Motion for rehearing denied, and judgment entered for the plaintiff.

WATSON and POWERS, JJ., dissent.

HAYES v. WELLING et al.

(Supreme Court of Rhode Island. Jan. 6, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 471*)—NECESSITY OF INVENTORY AND APPRAISEMENT—STATUTES.

Gen. Laws 1909, c. 813, § 1, provides that, with certain exceptions, an executor shall within 30 days after appointment, or within the time allowed by the probate court, return under oath an inventory of the effects of deceased which have come to his knowledge, with an appraisal thereof, and section 2 provides for a sworn appraisal by three disinterested persons, chapter 319, § 2, provides that such accounts shall charge the executor with the amount of the inventory, or the amount of the balance of the last account rendered, and with income, etc., chapter 320, § 1, requires an executor to give bond with sureties conditioned to return an inventory of all the testator's personal property.

and chapter 311, § 8, provides that no probate decree shall be held invalid for want of proper form, or want of jurisdiction appearing upon the record, if the court had jurisdiction of the subject-matter. *Held*, that the filing of an inventory as preliminary to an accounting was not a mere matter of form which could be dispensed with in the discretion of the court, upon information which the inventory would give, but that the filing of an inventory and appraisal was necessary for the accounting required in the probate court.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2018-2024; Dec. Dig. § 471.*]

2. EXECUTORS AND ADMINISTRATORS (§ 513*)—INVENTORY—EFFECT.

The acceptance and recording of an inventory is not a judgment, so as to conclude the correction of a mistake therein, and the effect of Gen. Laws 1909, c. 319, § 8, providing that an executor's account shall charge him with all property received by him although not inventoried, is simply that the parties to a probate accounting are not so concluded by the inventory and appraisal as to prevent a full and fair accounting ultimately.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2267-2291; Dec. Dig. § 513.*]

3. EXECUTORS AND ADMINISTRATORS (§ 510*)—ACTION AGAINST—APPEALS—SCOPE OF REVIEW.

Where the court on appeal from a decree allowing an executor's account has sustained the first exception thereto, and determined that its allowance was error requiring a remission to the superior court with direction to reverse, it cannot proceed to decide questions raised by the other exceptions, since that would be an attempt to decide by way of anticipation questions which might or might not arise on a proper accounting.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2235-2256; Dec. Dig. § 510.*]

Exceptions from Superior Court, Washington County; Willard B. Tanner, Presiding Justice.

Probate proceeding by Emily Welling Hayes against W. Brenton Welling and others, executors. Judgment for defendants allowing their account, and complainant excepts. Exception sustained and case remitted to superior court, with direction to reverse the decree allowing the account to the end that proper proceedings as to an accounting might be had.

Mumford, Huddy & Emerson, of Providence (Charles C. Mumford, of Providence, and J. Noble Hayes, of New York City, of counsel), for appellant. Green, Hinckley & Allen, of Providence (Theodore Francis Green and Frederick W. Tillinghast, both of Providence, of counsel), for appellees.

PARKHURST, J. This proceeding is a probate appeal from the decree of the town council of the town of North Kingstown, sitting as a court of probate, said decree dated March 14, 1910, allowing a so-called "amended preliminary account" of the appellees as executors under the will of Katharine C. Welling, late of said North Kingstown, deceased.

These executors, having been duly appointed and qualified pursuant to the terms of said will, without having returned the inventory and appraisal of personal estate as required by Gen. Laws R. I. (1909) c. 313, §§ 1 and 2, on the 12th day of February, 1910, filed an account, in which they charged themselves with various items of personal estate at valuations estimated by themselves, and some of them necessarily involving numerous articles in lump and without any attempt at any inventory or statement showing how such valuations are made out. The total amount with which these executors thus charge themselves is \$645,540.28. At the hearing before the court of probate counsel for the appellant formally reserved the point as to the requirement of an inventory. The account as presented by the executors, without inventory or appraisal, was, after hearing, allowed by the town council sitting as a court of probate, by decree dated March 14, 1910; and from this decree the appellant in due time took and perfected her appeal, and the same was heard before a justice of the superior court sitting without a jury, and said justice on December 20, 1911, announced his decision allowing the account as presented, and the appellant duly noted her exception to said decision, and has duly prosecuted her bill of exceptions to this court, and the case is now before this court upon said bill of exceptions. Among the reasons of appeal, filed by the appellant upon her appeal from said decree of the probate court is the following: "(b) That said order and decree is erroneous, in this: that said account is not a proper account to be allowed by said probate court because said executors have not charged themselves either with the amount of the inventory of said estate, or with the amount of the balance of the last account rendered by them." Upon motion of the appellees in the superior court, and after hearing thereon by a justice of said court, this reason of appeal was stricken out on the ground, substantially as set forth in his rescript by the justice, that the provisions of the statute (Gen. Laws 1909, c. 319, § 2) to be hereafter quoted, requiring executors to charge themselves with the amount of the inventory, etc., is directory, rather than mandatory; and holding, in substance, that as the executors, in lieu of an inventory, filed a statement or schedule of the assets of the estate, supported by oath of the executors, although it lacks the appraisal and oath of the appraisers, it served the same purpose as a technical appraisal. The appellant duly excepted to this ruling of the justice, and this exception appears as the first exception set forth in the bill.

[1] In considering the question thus raised as to the necessity of returning an inventory and appraisal as a preliminary to the settlement of an account, the court below and

counsel for the appellees seem to have ignored certain plain provisions of the statutes. Gen. Laws 1909 provide as follows:

Chapter 313: "Inventory and Appraisal."

"Section 1. Every administrator except the husband as administrator of the personal estate of his wife, and every executor, unless he has given bond to pay the funeral charges, debts, and legacies of the testator, shall, within thirty days after his appointment or such longer period as may be allowed by the probate court, return to the probate court, under oath, a true inventory of all the goods, chattels, rights, and credits of the deceased which have come to the knowledge of such administrator or executor, with an appraisement thereof.

"Sec. 2. The property comprised in the inventory shall be appraised by three suitable disinterested persons appointed by the court. The appraisers shall be sworn to the faithful discharge of their trust."

Chapter 319:

"Sec. 2. Accounts rendered by an executor or administrator to the probate court shall be for a period stated therein, and shall charge the executor or administrator with the amount of the inventory, or instead thereof, the amount of the balance of the last account rendered, as the case may be, and all income, and all gains from the sale of the personal property and all other property received by him, although not inventoried, and all rents and proceeds of sale of real estate received by the executor or administrator; said account shall credit all charges, losses, and payments, including legacies and distributions and specific personal property delivered, and shall also show the investments of the balance of such account, if any, and changes of investment."

By chapter 320, § 1, an executor is required to give a bond with sureties conditioned: "First. To make and return to the probate court as by law required a true inventory of all the testator's personal property which, at the time of making such inventory, shall have come to his possession or knowledge."

Counsel for the appellees appear to claim, and to have argued to the justice of the superior court who struck out the above reason of appeal, that, inasmuch as the probate court had undoubted jurisdiction of the subject-matter of the settlement of executors' accounts, it could, if it saw fit, accept the executors' statement of the assets of the estate as set forth in this account without any inventory or appraisal, and that, having done so and allowed the account as presented, it appears to have considered that the schedule of assets filed as a part of the account "contained all of the information which an inventory could furnish." And the justice of the superior court cites in his consideration of this matter, as do also the appellees' counsel, Gen. Laws 1909, c. 311, § 8, which provides as follows: "Sec. 8. No order or decree of a probate court which

may be appealed from, or in any collateral proceeding when the same shall not have been appealed from, shall be deemed to be invalid, or be quashed, for want of proper form, or for want of jurisdiction appearing upon the record, if the probate court had jurisdiction of the subject-matter of such order or decree. * * *" It would appear from this that the justice of the superior court, as well as counsel for the appellees, contend that the filing of an inventory and appraisement, as a preliminary to the accounting by administrators and executors, is a mere matter of form, and may be dispensed with by the probate court and by the appellate court of probate if in their discretion they see fit. This court is unable to agree with this contention. In view of the plain provisions of the statutes above quoted, we think it is the duty of the executor or administrator to obey the law, and of the probate court to enforce it, particularly in view of the provision that the very first condition of the probate bond is "to make and return as by law required a true inventory," etc. It is futile to say that the executor may in some other way "give all the information which an inventory could furnish," or that the court can find out in some other way all that it requires to know. The statutes have pointed out the way in which the necessary information shall be furnished as the basis of the accounting; and no court in the state has the power or authority to dispense with this way and accept some other way, acting on its own belief, or on the suggestion of counsel or parties, that "it is just as good."

In the case of *Potter v. McAlpine*, 3 Dem. Sur. (N. Y.) 108, at pages 127, 128, in speaking of the illegality of a provision of a will exonerating the executors from filing any inventory, the surrogate well says: "An executor is required by law within a reasonable time after qualifying, with the aid of appraisers, to make a true and perfect inventory of all the goods, chattels and credits of his testator (2 R. S. 82, § 2). This inventory shall be filed with the surrogate within three months after the issue of letters. If this is not done, he may be compelled, on the application of a creditor, or person interested in the estate, to perform such duty; and in case of default, he may be committed to jail. Code Civ. Proc. §§ 2715, 2716. In actions and special proceedings, the inventory is presumptive evidence of the amount and value of the estate both for and against the executor. It would often be extremely difficult, if not impossible, to prove what property came into the possession of an executor if he were excused from making and returning an inventory thereof. If the executor converts to his own use, makes away with or fraudulently withholds any of the money or property of the estate, he is guilty of embezzlement. L. 1877, c. 208. If a testator can dispense with the making of an inventory by will, many of the safeguards

thus thrown around the estate which comes to the hands of the executor would be thrown down, and fraud and misappropriation of the trust property would be rendered much easier and less liable to detection than at present. It is against public policy to permit such interference with the forms of procedure established by law, or to remove the barriers designed to protect estates from misappropriation. The safety, preservation, and honest distribution of decedent's estate require that provisions like the one in question should be declared invalid and of no effect."

In the case of *In re Jones*, 1 Redf. Sur. (N. Y.) 263, at page 265, the surrogate says: "The inventory is the basis of the accounting. How can the surrogate make allowances for property lost and for decrease, as he is authorized to do by sections 56 and 57 of said article, except on reference to the inventory which the executor is required to file?" See, also, as to the necessity of filing the inventory and appraisal as provided by law, *Est. of Selna* (Cal. Prob.) Myr. Prob. 233; *Hutchinson's Appeal*, 34 Conn. 300; *Est. of Squire*, 11 Phila. (Pa.) 110, 111. See, also, *Stillman v. Moore*, 28 R. I. 548, 554, 68 Atl. 726, 728, where this court said of a probate account allowed by decree of a probate court from which an appeal was taken: "The original account was not a proper account, in that it did not charge the administrator with the amount of the inventory and the gain thereon, did not credit him with the loss on the same, and did not show the investment of the balance of the account as required by law." In that case it was directed, owing to the informalities and irregularities of the proceedings both in the probate court and in the superior court, that the decree of the superior court be vacated, that the superior court reverse the decree of the probate court appealed from to the end that an account in proper form might be newly filed in the probate court and proceedings be taken thereupon according to law. We think this latter case is a plain recognition of the essential requirements of the laws above cited as to the filing of inventory and appraisal as a foundation for the accounting required to be had in probate courts.

[2] None of the cases cited by the appellees in support of their contentions upon this point in any way disturb our conclusion. It is true that the acceptance and recording of an inventory by a probate court is held not to be a judgment so as to conclude the administrator from correcting a mistake therein, as was held in *McGinty v. McGinty*, 19 R. I. 510, 34 Atl. 1114, but that is not to say that it is a mere matter of form which may be dispensed with at the discretion of the probate court, or of the superior court. Nor does the provision of the statute above quoted that the executor or administrator shall be charged with "all the property received by him although not inventoried" in any way modify the plain and explicit require-

ment of the statute. The effect of the *McGinty* Case, as well as of the last-cited provision of the statute, is simply to show that the parties to a probate accounting are not to be so concluded by the inventory and appraisal as to prevent a full and fair accounting ultimately of all property for which the executor or administrator ought to be properly accountable. And this is the purport of the other authorities cited on behalf of the appellees upon this point.

Several other points of interest to the parties are raised by the other exceptions in this proceeding; but as this court is of the opinion that the account should not have been allowed by the probate court by reason of the failure of the accountants to obey the law with regard to an inventory and appraisal, and that the justice of the superior court was in error in striking out that one of the reasons of appeal which raised this question, and that the superior court should on the contrary have permitted that reason to stand and should have reversed the decree of the probate court upon that ground, and inasmuch as the whole accounting must fall for the reasons above stated, it becomes futile for this court to consider the other exceptions. We do not know of any way in which, if we should proceed to consider these other questions, we could so frame a decree as to make a decision of them effectual, in view of the decision that, under our view of the law, there is no legal accounting by the accountant appellees. Nor is it certain that the questions or all of them involved in these other exceptions will necessarily arise again upon an account properly taken hereafter. The principal question raised as to whether the appellant is indebted to the estate for various sums of money loaned to her by her mother, or whether these sums of money were given to her by way of advancement and whether the subsequent execution of her mother's will without mention of such advancement released the appellant from any liability to have them taken out of her share of the estate, may conceivably be raised and settled in other proceedings between the parties, or may be eliminated by action of the parties themselves.

[3] At any rate, we are convinced that we cannot now proceed to decide the other questions involved in the other exceptions, if for no other reasons, because it would be to attempt to decide by way of anticipation questions which may or may not arise upon a proper and lawful accounting by the executors.

The appellant's first exception is sustained. The case is remitted to the superior court for the county of Washington, with direction to enter its decree reversing the decree of the probate court of the town of North Kingstown entered on the 14th day of March, 1910, allowing the so-called "amended preliminary account" of William Brenton Welling and Richard Ward Greene Welling, executors un-

der the will of Katharine C. Welling, to the end that proper proceedings may be taken in the probate court of North Kingstown by said executors, with regard to their accounting in said court, according to law.

SWAYNE v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut.
Jan. 15, 1913.)

1. TRIAL (§ 139*)—DIRECTED VERDICT—POWER OF COURT.

The court may direct a verdict, where the jury, as reasonable men, informed as to the law governing the facts in issue, could not reach any other conclusion than that embodied in the verdict directed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 338, 338-341, 365; Dec. Dig. § 139.*]

2. STREET RAILROADS (§ 99*)—COLLISIONS—CONTRIBUTORY NEGLIGENCE.

Where a driver aware of the approach of a car several hundred feet away did not turn away from the track until the car was about 60 feet away, when he attempted to turn, and in so doing his wagon alued, which brought it on the track, and the rear of it was struck by the car, the driver was guilty of contributory negligence as a matter of law; the street being straight with nothing to obstruct the view.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 112-115; Dec. Dig. § 99.*]

3. STREET RAILROADS (§ 112*)—COLLISIONS—BURDEN OF PROOF.

A traveler suing for injuries in a collision with a street car has the burden of proving the negligence of the street railroad company and his own freedom from contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 140½; Dec. Dig. § 112.*]

4. STREET RAILROADS (§ 112*)—COLLISIONS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

The burden of proving freedom from contributory negligence on the part of a traveler injured in a collision with a street car may be sustained only by proving that he made such use of his faculties as an ordinarily prudent man would have done under similar circumstances.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 140½; Dec. Dig. § 112.*]

5. STREET RAILROADS (§ 114*)—COLLISIONS—NEGLIGENCE—EVIDENCE.

The testimony of a traveler struck by a street car that the car approached like a chain of lightning is entitled to but little weight in determining the speed of the car, where he did not see the car, but only the searchlight coming directly toward him.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 145-149; Dec. Dig. § 114.*]

6. STREET RAILROADS (§ 114*)—COLLISIONS—NEGLIGENCE.

Evidence held not to support a finding of negligence in operating a street car at too high a speed.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 145-149; Dec. Dig. § 114.*]

7. STREET RAILROADS (§ 114*)—COLLISIONS—"PROXIMATE CAUSE."

Where a traveler struck by a street car testified that before he saw the car he drove along the right side of the road 12 or 14 inches

from the track, and that in trying to get farther away, when he saw the car approaching 60 feet away, he turned so quickly to the right that the wagon alued around toward the track so that the corner of it was struck by the car, the high speed of the car was not the proximate cause of the collision, since the proximate cause of an event is only that which in a natural sequence, unbroken by any new and intervening cause, produces that event and without which the event would not have occurred.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 145-149; Dec. Dig. § 114.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

Wheeler, J., dissenting.

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Action by Walter S. Swayne against the Connecticut Company. From a judgment for defendant, plaintiff appeals. Affirmed.

At the close of the plaintiff's evidence the defendant moved for a nonsuit, which the court denied. At the close of the whole evidence defendant's counsel moved for the direction of a verdict for the defendant, which the court at first denied. After the arguments in the case had been made, an adjournment was taken until the following week, when the court granted the motion to direct a verdict for the defendant. The plaintiff thereupon moved the court to set aside such verdict. The court denied this motion, and entered judgment for the defendant upon the verdict. From the judgment the plaintiff appeals.

Ward Church and Harrison Hewitt, both of New Haven, for appellant. Harrison T. Sheldon, of New Haven, for appellee.

RORABACK, J. (after stating the facts as above). This action was brought to recover damages to the person of the plaintiff and to his horse and wagon. The horse was being driven by the plaintiff, and the damages are alleged to have been received as the result of a collision between the wagon of the plaintiff and a car of the defendant company. The allegations of negligence are that the defendant's servants were operating the car at a too rapid rate of speed and failed to stop the car so as to avoid running into the wagon of the plaintiff. The question raised on the appeal is confined to the action of the trial court in directing the jury to render a verdict for the defendant, and in denying the plaintiff's motion to set it aside.

From the uncontradicted facts it appears that the defendant operated a double-track street railway through Main street from New Haven to East Haven. On the night of January 8, 1912, at about 9 o'clock in the evening, the plaintiff was driving a horse attached to a covered milk wagon on Main street, in an easterly direction, and when at a point east of Huntington avenue he was struck by a car moving in an easterly direction along the defendant company's southerly

track. Main street is substantially 41 feet in width, and in the middle are laid the defendant's tracks, which are about 14 feet in width, leaving about $13\frac{1}{2}$ feet of traveled roadway on each side of the tracks. The tracks are substantially straight for some distance, and a car can be seen all the way to the curve of Beacon avenue, which is over 600 feet west of the point of the collision. No streets cross Main street from Beacon avenue for a distance of 2,000 feet or more to the east, and only two open into it, one of which is Huntington avenue. Within this distance there are only two or three houses on Main street. Huntington avenue is about 500 feet east from Beacon avenue. Beacon avenue is at the top of Beacon Hill, and Main street descends easterly from Beacon avenue at a grade of from $3\frac{1}{4}$ to $3\frac{1}{2}$ per cent. to the point where the plaintiff sustained his injuries. The night in question was dark and sleeting. The highway was icy, and there were ruts. The defendant's car was equipped with a big searchlight, which was lighted. The car stopped at Huntington avenue to let off a passenger. The car was running in a country district with but a few houses, upon a straight road with no intersecting roads.

The plaintiff's servant, John Shute, testified that he was driving another wagon about a wagon length in front of the plaintiff; that he saw the headlight of the car when it turned the corner at Beacon avenue; and that he immediately called to the plaintiff warning him of its approach, and the plaintiff waved back that he understood.

The plaintiff testified that when Shute called to him he was driving rapidly along the road in the wheel tracks in the snow about 12 to 14 inches south of the southerly rail; that when the car was about 60 feet away from him he started to turn to the right; but that his wagon unexpectedly slued and brought his wheels nearer to the track; and that before he could get out of the way the car struck his wagon.

The defendant offered testimony tending to prove that after the stop at Huntington avenue was made, and when the car had proceeded two or three car lengths, the motor-man discovered the plaintiff's team ahead on the west-bound track, and rang the gong and did everything possible to prevent an accident, and that the plaintiff turned south across the east-bound track, and was struck by the car. There was conflicting evidence as to whether the plaintiff in fact crossed the track in front of the car, and if the case turned upon this claim of the defendant there was evidence to have gone to the jury.

[1] There is no doubt of the power of the trial court to direct a verdict upon the evidence presented in a case when the jury as reasonable men, informed as to the law governing the facts in issue, could not have reached any other conclusion than that embodied in the verdict directed. Farrington

v. Cheponis, 84 Conn. 1, 4, 78 Atl. 652. Applying that rule to the present case, it is clear that the decision of the superior court was correct.

[2] If the testimony of the plaintiff's witness Shute were true, it appears that the plaintiff was notified of the approach of the car when it was several hundred feet away. He did not turn away from the track at once, but, as appears by his own testimony, proceeded along until the car was about 60 feet away, when he attempted to turn; but in so doing his wagon slued, which brought it upon the track, and the rear end of it was struck by the car. The plaintiff took his chances and remained upon the track, or in close proximity to it, when he had ample time and opportunity to get out of the way of the car, which he knew was approaching. He made a mistake in his calculations because his wagon slued onto the track when the car collided with it. From the corner of Beacon avenue down to the place of the accident the street was practically straight, with nothing to obstruct the view. The plaintiff, from the information received, must have known of the approaching car, but did not make any reasonable effort to avert the danger until it was too late.

[3] The burden of proving the alleged negligence of the defendant, and his own exercise of due care, rested upon the plaintiff. *Brockett v. Fair Haven & W. R. Co.*, 73 Conn. 428, 433, 47 Atl. 763; *Morris v. Winchester Repeating Arms Co.*, 73 Conn. 680, 49 Atl. 180; *Fay v. Hartford & Springfield Street Ry. Co.*, 81 Conn. 330, 335, 71 Atl. 364.

[4] Upon the question of contributory negligence that burden may be sustained only by showing that the plaintiff made such use of his faculties and his senses as an ordinarily prudent man would under such or similar circumstances. It is manifest that no injury would have been sustained if the plaintiff had been in the exercise of proper care. *Morse v. Consolidated Ry. Co.*, 81 Conn. 395, 71 Atl. 553.

[5] If, on the other hand, the testimony of Shute were not credible, and we take the testimony of the plaintiff that the car was within 60 feet of him when he was notified by Shute and saw it and attempted to turn out, there is no evidence upon which the jury could find that the defendant was negligent as alleged. It was alleged in the complaint that the collision was caused by the negligence of the employees of the defendant who operated the car "at a too rapid rate of speed." The only testimony offered by the plaintiff which referred directly to this allegation was that of the plaintiff himself, who stated that the car was "coming like a chain of lightning down that hill which they always do." This evidence was not of any importance in determining the speed of the car when the collision actually took place.

The plaintiff did not see the car, but only the searchlight coming directly toward him. He had therefore no manner of judging of this speed. "On that hill," referred to in the statement, was Beacon Hill, several hundred feet away from the point where the collision actually occurred. The expression "like a chain of lightning" was entitled to but little weight as a definite statement of the speed of the car. *Foley v. Boston & M. R. Co.*, 193 Mass. 332, 335, 79 N. E. 765, 7 L. R. A. (N. S.) 1076.

[6] Four witnesses testifying upon the speed of the car concurred in saying that the car was stopped at Huntington avenue to discharge a passenger; that it had just started and was running at a speed of 8 or 10 miles an hour when it struck the wagon. There was conflicting testimony as to the distance the car ran after the accident. The estimates as to the distance ranged from one to two car lengths to one estimate of 500 to 600 feet. The evidence shows that the plaintiff and his wagon were not upon the defendant's track upon which the collision occurred until after the car stopped at Huntington avenue. There was no evidence that the car could have been stopped in a shorter distance than in fact it was stopped, nor that it could have been stopped before it struck the wagon, after the motorman saw, or should have seen, the obstruction upon the track. The motorman and three disinterested witnesses testified that the car stopped at Huntington avenue, which is only two or three car lengths from the point where the collision occurred, and were not contradicted as to this fact. Had the jury upon the evidence found the defendant negligent in operating its car at too high a rate of speed at this place, the verdict would properly have been set aside.

[7] But from the plaintiff's own testimony it appears that, even if the car were going at too high a rate of speed, that fact was not the proximate cause of the accident. He testified that before he saw the car he was driving along upon the right side of the road 12 or 14 inches from the track, and that in trying to get farther away from the track, when he saw the car approaching and 60 feet away, he turned so quickly to the right that the wagon alued around toward the track, so that the corner of it was struck by the car. The speed of the car was not the proximate cause of the collision. It would have occurred however slowly the car was moving. "Negligence is only deemed contributory when it is a proximate cause of the injury. That only is a proximate cause of an event, juridically considered, which, in a natural sequence, unbroken by any new and intervening cause, produces that event, and without which the event would not have occurred. It must be an efficient act of causation separated from its effect by no

other act of causation." *Smith v. Connecticut Ry. & Ltg. Co.*, 80 Conn. 268, 270, 67 Atl. 888, 889 (17 L. R. A. [N. S.] 707). At the place where the accident occurred there was ample room to drive along the roadway.

Upon any view of the evidence the plaintiff failed to make out a case, and a verdict for the defendant was properly directed.

There is no error.

WHEELER, J., dissents. See 85 Atl. 737.

In re NEW HAVEN WATER CO.
(Supreme Court of Errors of Connecticut. Dec. 19, 1912.)

1. EMINENT DOMAIN (§ 182*)—CONDEMNATION PROCEEDINGS—ASSESSMENT OF DAMAGES—NOTICE.

Where a water company applies for the appointment of a committee to assess damages for water rights to be taken by condemnation, and the application is brought under the provisions of the company's charter, providing for damages to be assessed upon the superior court or judge "causing ordinary legal notice or such notice as any judge of such court may prescribe to be given to the adverse party," a notice served pursuant to the court's order by depositing a copy in the post office, duly addressed, was sufficient.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 493-496; Dec. Dig. § 182.*]

2. APPEAL AND ERROR (§ 171*)—REVIEW—CHANGE OF CONTENTION.

Where an application for the appointment of a committee to assess damages for water rights in condemnation proceedings was heard below on the applicant's theory that a finding of necessity was a prerequisite to the appointment of the committee, the applicant could not be heard to claim on appeal that no finding of necessity was required.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

3. EMINENT DOMAIN (§ 180*)—CONDEMNATION PROCEEDINGS—NOTICE.

The necessity of giving reasonable notice of condemnation proceedings will be implied where the statute makes no provision for notice.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 489; Dec. Dig. § 180.*]

4. EMINENT DOMAIN (§ 181*)—CONDEMNATION PROCEEDINGS—NOTICE.

The reasonableness of the notice in condemnation proceedings is not governed by the period for service of civil process, though such period is a circumstance which the judge may consider.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 488, 490-492; Dec. Dig. § 181.*]

5. EMINENT DOMAIN (§ 166*)—"CONDEMNATION PROCEEDING."

A "condemnation proceeding" is a special proceeding at law to determine in a single action the damages done by the taking, but it is not a civil action, or a civil process within the meaning of the statutes relating to civil process.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 448-450, 456; Dec. Dig. § 166.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1394-1400; vol. 8, p. 7610.]

6. EMINENT DOMAIN (§ 182*)—CONDEMNATION PROCEEDINGS—NOTICE.

The notice by mail of an application for the appointment of a committee to assess dam-

ages for water rights in condemnation proceedings was given in sufficient time, where a copy of the application reached each person from 8 to 10 days prior to the date of hearing.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 493-496; Dec. Dig. § 182.*]

7. EMINENT DOMAIN (§ 191*)—CONDEMNATION PROCEEDINGS—APPLICATION—SUFFICIENCY.

A water company's application for the appointment of a committee to assess damages for water rights condemned is not demurrable because it alleged under the terms of its charter that the taking is both "necessary and expedient," though the charter be modified by Gen. St. 1902, § 2600, as amended by Pub. Acts 1903, c. 192, so that, to authorize the taking of water, it need only appear that it is "necessary"; the sufficiency of the application not being affected by the addition of an unnecessary allegation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 509-518; Dec. Dig. § 191.*]

8. EMINENT DOMAIN (§ 241*)—CONDEMNATION PROCEEDINGS—JUDGMENT—WATER RIGHTS.

While the amount of water which may be taken by condemnation by a water company engaged in supplying the public must be reasonably definite, the quantity of water embraced in a judgment that the petitioner take all the water in certain streams in excess of a certain amount, though varying in quantity, was not indefinite.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 621-625; Dec. Dig. § 241.*]

9. EMINENT DOMAIN (§ 196*)—CONDEMNATION PROCEEDINGS—WATER RIGHTS—EVIDENCE.

In proceedings to condemn water rights for the use of a water company serving the public, evidence that the company had for over 30 years been preparing to take the water sought to be condemned, and had recently at great expense constructed a tunnel to divert such water, was admissible on the issues of necessity and the applicant's good faith.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529-534; Dec. Dig. § 196.*]

10. EMINENT DOMAIN (§ 122*)—RIGHT TO CONDEMN—UNCERTAINTY OF DAMAGES.

The fact that the damages from the contemplated condemnation of water rights by a water company serving the public are such that they cannot be fully compensated will not prevent the condemnation; all property being subject to condemnation for public use, and the damages awarded being such as will compensate as near as the nature of the property will permit.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 325, 325½; Dec. Dig. § 122.*]

11. EMINENT DOMAIN (§ 56*)—RIGHT TO CONDEMN—NECESSITY.

The necessity of the taking of private property for a public use must be a reasonable one, and the property taken must reasonably serve the purposes of the incorporation, and not be taken for speculative purposes, to secure a monopoly, to forestall rivalry, or in bad faith.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 56.*]

12. EMINENT DOMAIN (§ 56*)—CONDEMNATION PROCEEDINGS—"NECESSARY."

"Necessary," under the legislative acts according the right of eminent domain, does not mean an absolute or indispensable necessity, but only that the taking provided for is reasonably necessary.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 5. pp. 4708-4710.]

13. WATERS AND WATER COURSES (§ 201*)—PUBLIC WATER SUPPLY—DUTY OF WATER COMPANY.

A private corporation engaged in furnishing water to a community owes it the duty of providing such ample supply of wholesome water at all times that a scarcity cannot be reasonably apprehended, taking into consideration the changeable seasons, liability of accidents, prospective growth in population and industrial activities, the preservation of health, and the safeguarding of property from fire.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 275; Dec. Dig. § 201.*]

14. EMINENT DOMAIN (§ 58*)—CONDEMNATION PROCEEDINGS—AMOUNT OF PROPERTY TAKEN.

The property taken in condemnation proceedings must be restricted to that which will reasonably serve the public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 58.*]

15. EMINENT DOMAIN (§ 262*)—APPEAL AND ERROR—DETERMINATION OF NECESSITY.

The determination of the necessity for water to be taken through condemnation proceedings by a water company engaged in supplying the public, being within the discretion of the trial judge, under the circumstances of the case, will not be disturbed where it appears that such discretion has been reasonably exercised.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.*]

16. EMINENT DOMAIN (§ 262*)—CONDEMNATION PROCEEDINGS—REVIEW.

A trial court's conclusion, in proceedings to condemn certain waters for the use of a water company serving the public, that there was a reasonable necessity for the taking, could not be disturbed on the ground that the company by requiring the use of meters could so lessen consumption of water that the condemnation would be unnecessary, where there was nothing before the reviewing court to show facts concerning the use of meters, their cost, their effect upon the community served, and the attitude of such community towards their use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.*]

17. EMINENT DOMAIN (§ 262*)—CONDEMNATION PROCEEDINGS—REVIEW.

Nor could such conclusion be disturbed on the ground that the use of storage reservoirs would render the present supply sufficient, where the court's findings showed that such storage reservoirs would entail enormous cost and add little to the supply.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.*]

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Application by the New Haven Water Company for the appointment of a committee to assess damages for water rights to be taken. From a judgment appointing the committee, Charles S. Russell and others appeal. No error.

Application for the appointment of committee to assess damages for water rights to be taken for a water supply brought before the Honorable Edwin B. Gager, a judge of the superior court. Facts found, and judgment rendered appointing said committee to make said assessment, and appeal by

the respondents for alleged errors in sustaining demurrer to plea in abatement, in overruling demurrer to application, in rulings on evidence, and for correction of finding.

Carl Foster, of Bridgeport, for appellants.
George D. Watrous and Harrison T. Sheldon, both of New Haven, for appellee.

WHEELER, J. [1] The respondents pleaded in abatement because the application was not accompanied by a summons to the parties in interest and no service was made on the respondents other than by depositing a copy in the post office duly addressed; whereas, either personal service or service by copy at their usual places of abode was required. The applicant demurred to the plea upon the ground that the application was a special proceeding under its charter which provides for service within the discretion of the judge whose order was followed, and further that the application was not a civil action within the meaning of the statutes relating to service of process.

Section 9 of the charter of the applicant (Sp. Acts, vol. 5, p. 454) grants it power to take and use the water of any stream to such extent as may be necessary and expedient in carrying into effect the object of the act which was to furnish to certain communities a supply of water. And in section 10 the charter provides a method of assessment of damages by application to the superior court or a judge thereof for the appointment of a committee upon such tribunal "causing ordinary legal notice or such notice as any judge of said court may prescribe, to be given to the adverse party, of such application." If this application be held to have been brought under its said charter, as the applicant claims, the service must be held reasonable and adequate, and within the discretion of the judge ordering it unless a service by mail be held an unreasonable mode of service. The contrary has been held. *Crane v. Camp*, 12 Conn. 464, 468; *Ives v. East Haven*, 48 Conn. 272, 291.

Section 2600 of G. S., as amended by section 2, of chapter 192, P. A. 1903, provides: "Any city, town, borough, or corporation authorized by law to supply the inhabitants of any city, town, or borough with pure water for public or domestic use may take and use such lands, springs, streams, or ponds, or such rights or interests therein, as the superior court, or any judge thereof in vacation, may, on application, deem necessary for the purposes of such supply. For the purpose of preserving the purity of such water and preventing any contamination thereof, such city, town, borough, or corporation may take such lands or rights as the superior court, or any judge thereof in vacation, may, on application, deem necessary therefor." If it be held that section 2600,

as amended, modified the applicant's charter to the extent of requiring a finding of necessity by the superior court or a judge thereof before appointment of a committee of appraisal, the order of service made is within the charter thus modified, since the notice is discretionary.

[2] The applicant alleged in its application that the taking sought was necessary and expedient. The respondents joined issue on this allegation, and the case has, so far, been tried upon the theory that a finding of such necessity by the judge was a prerequisite to the appointment of the committee. The applicant now claims that no finding of necessity by the judge was required, since under its charter it was made the judge of the necessity and empowered to take whatever stream it deemed necessary. We have no occasion to change the character of the case at its present stage from that which the applicant gave to it, by accepting this contention, and shall treat it as the parties have heretofore done.

[3] When the condemnation statute makes no provision for notice, the law will imply the giving of notice, and action under the statute can be had only upon giving reasonable notice. *Lewis on Eminent Domain* (3d Ed.) § 571; *Baltimore Belt R. Co. v. Baltzell*, 75 Md. 94, 23 Atl. 74.

[4] The reasonableness of the notice is not governed by the period for service of civil process.

[5] A condemnation proceeding is a suit at law. *New Milford Water Co. v. Watson et al.*, 75 Conn. 237, 243, 52 Atl. 947, 53 Atl. 57; *N. Y., N. H. & H. R. Co. v. Long et al.*, 69 Conn. 424, 37 Atl. 1070. And the respondents urge that the form of summons or notice must have been in accordance with that prescribed for civil actions and civil process generally. But a "condemnation proceeding" is not a civil action, nor a civil process within the meaning of the statutes relating to civil process. It is a special proceeding to determine in a single action the damages done by the taking. *Lewis on Eminent Domain*, p. 930, § 512; *Water District v. Waterville*, 98 Me. 234, 52 Atl. 774; *Hayford v. Bangor*, 103 Me. 434, 69 Atl. 688. The period prescribed by statute for service in civil process was a circumstance, no doubt considered by the judge in determining the notice to be given in this case, but it was not a controlling circumstance.

[6] The notice ordered and given was by mail. The return of the officer shows that a copy of the application reached each of the respondents from 8 to 10 days prior to the date of hearing, when they duly appeared by counsel and filed the plea in abatement we are considering. To dismiss this application under these circumstances would compel another action when no claim even is made that the respondents did not have sufficient time in which to prepare their case, and when the method of service ordered

has been approved by our law, and the period of notice held more than ample in other special proceedings. In re Premier Cycle M. Co., 70 Conn. 473, 39 Atl. 800. The demurrer to the plea in abatement was properly sustained.

[7] The applicant's charter grants it power to take the water of any stream "to such extent and in such manner as may be necessary and expedient." The General Statutes, § 2600, as amended, provide that a corporation such as the applicant may take such rights in any stream as the superior court, or a judge thereof, may deem "necessary" for the purposes of a water supply. The application alleges that it is "necessary and expedient" to take a certain water supply. The respondents demurred to the application upon the ground that the charter of the applicant had been repealed so far as it may be authorized to take the water of any stream to such extent and in such manner as may be expedient; that is to say, that the charter authorized such taking as may be necessary and expedient. But the General Statutes, § 2600, has modified this by authorizing such taking as may be necessary only. The argument is: Under the charter it must appear that the taking was necessary and expedient, while under G. S. § 2600, of the charter as modified by this section, it need only appear that it was necessary. The allegation of the application includes not only the allegation of necessity, but also that of expediency. It is in so far broader than the mere allegation of necessity, and hence broader than the applicant claims is required. The sufficiency of an application may be affected by the omission of a necessary allegation; it cannot be affected by the addition of an unnecessary allegation. The demurrer to the application was properly overruled.

[8] The respondents insist that the amount of water to be taken by the applicant must be reasonably definite in allegation and proof. This we understand to be the law. The application alleges, and by the judgment the petitioner takes, all the water of the named streams in excess of a certain amount. The amount which can be taken will be measured by the excess above this minimum; it is a variable quantity, but it is never indefinite, since it is all above a certain quantity. *Ingraham v. Water Co.*, 82 Me. 335, 340, 19 Atl. 861.

[9] The rulings upon evidence require very brief discussion. The trial court, against the objection of the respondents that the evidence was irrelevant and did not tend to prove the necessity, permitted the applicant to offer evidence that it had, since 1876, been preparing by plans and purchases to take the waters of these streams and had recently constructed a tunnel having a capacity of 30,000,000 gallons a day, at an expense of over \$300,000, for the purpose of diverting the waters of these streams into its system of water supply. The evidence was admis-

sible to put the judge in possession of all the facts connected with the proposed water supply, and to show the good faith of the applicant. It was so held in a similar proceeding. *Olmsted v. Proprietors of Morris Aqueduct*, 46 N. J. Law, 495, 502. It was also admissible as claimed, tending to prove the necessity. No claim was made that the applicant had not expended these funds and made and executed these plans in carrying on its corporate business. That a private corporation has for over 30 years steadily pursued a definite plan looking to the ultimate acquisition of a source of water supply, and to that end, through a period of years, has made land and mill site purchases, and finally built at great expense a tunnel with a daily capacity in excess of the present daily consumption of the company, proves its own fixed belief that this source of water supply is necessary. And we think such a course of conduct is a relevant fact in the proof of the issue of necessity. Individuals and corporations do not ordinarily jeopardize a large proportion of their resources upon a plan long matured unless the end sought is necessary to serve the corporate purposes. *Kountze v. Morris Aqueduct*, 58 N. J. Law, 303, 308, 33 Atl. 252.

[10] Another assigned error is the exclusion of the respondents' offer to prove that their damage from the contemplated taking was of such a nature it could not be compensated, and hence that there could be no condemnation. The ruling was right. All property is held subject to its condemnation for a public use, and the damages awarded will be just compensation as nearly as the nature of the property will admit of.

The respondents further insist that the court erred in overruling its claim that "the time within which such reasonably definite amount of water is necessary must be either present or within a reasonably short time in the future." And they ask to have the finding corrected in certain particulars upon which the conclusion of necessity rests, and insist that the facts found by the judge do not legally support his conclusion of necessity. The subjects are related and may be treated together.

[11] The necessity for the taking of private property for a public use must be a reasonable one, and the property taken must reasonably serve the purposes of the incorporation.

[12] "Necessary," in legislative acts, according to the right of eminent domain, does not mean an absolute or indispensable necessity, but only that the taking provided for is reasonably necessary. *Sayre v. City of Orange* (N. J. Sup.) 67 Atl. 933; *Olmsted v. Proprietors*, 47 N. J. Law, 311, 329; *McCulloch v. Md.*, 4 Wheat. 414, 4 L. Ed. 579.

[13] A private corporation engaged in furnishing a water supply to a community owes it the duty of providing an adequate supply of wholesome water at all times. Experience teaches that consumption increases

largely in the summer season, and that changeable seasons, long droughts, and the liability of accidents are contingencies which must be guarded against; a supply adequate for the ordinary season or the present need will not protect against such contingencies. *Olmsted v. Proprietors*, 46 N. J. Law, 495, 500. Growth in population and industrial activity with consequent increasing use of water must be anticipated and provided for. *Central Pac. Ry. Co. v. Feldman*, 152 Cal. 303, 309, 92 Pac. 849; *Spring V. W. W. v. Drinkhouse*, 92 Cal. 528, 532, 28 Pac. 681; *R. & S. R. Co. v. Davis*, 43 N. Y. 137, 145. Provision for all such likely contingencies must not be scant; it must be ample, so that the health of the people be preserved and their property safeguarded from fire, and all their countless activities—so variously served by an abundant water supply—be sustained and developed. The supply should be so ample as not only to avoid anxiety lest it fail, but so ample that a scarcity could not be reasonably apprehended.

[14] The property taken must be restricted to that which will reasonably serve the public use; more than that would, in effect, be a taking for private use and illegal because an abuse of power. *Boston & N. Y. Air L. R. v. Coffin*, 50 Conn. 150, 155; *Eldridge v. Smith*, 34 Vt. 484, 493; *Randolph on Eminent Domain*, § 185. Nor may private property be taken for speculative purposes, or to secure a monopoly, or forestall a rival. *R. & S. R. Co. v. Davis*, 43 N. Y. 137, 146; *Olmsted v. Proprietors*, 46 N. J. Law, 502. Or in bad faith, or indeed for any other than the corporate purpose. *Smith, Jr., v. C. & W. I. R. Co.*, 105 Ill. 511, 519. Purposes such as these are clearly not among those reasonably necessary.

[15] It cannot be foretold when the contingencies of which we have spoken may be expected, nor can the future requirements and prospective needs within a reasonable time be estimated with exactitude. It is necessarily a matter of judgment based upon knowledge of the present and experience of the past. The reasonableness of the necessity must be ascertained from the facts of each case, and a reasonable discretion in reaching this conclusion will not be interfered with. In *Matter of N. Y. C. & H. R. Co.*, 77 N. Y. 248; *Bryan v. Branford*, 50 Conn. 246; *Anderson v. New Canaan*, 66 Conn. 54, 57, 33 Atl. 593. The reasonableness of the necessity will be determined, having due regard to the principle that a public or private corporation charged with the duty of supplying a community with water falls in its duty if it provides for the present needs and takes no heed of future needs or imminent contingencies. The remedy should precede the untoward happening, and for its accomplishment prospective needs, within a reasonable time, should be considered. *Kountze v. Morris Aqueduct*, 58 N. J. Law, 303, 306, 33 Atl. 252; In *Matter of N. Y. C. & H. R. Co.*, 77 N. Y. 248, 266; *Olmsted*

v. Proprietors, 46 N. J. Law, 495, 500. The applicant is a private corporation; but, on this issue, in reality there are two principal parties in interest, the community, and the individual owner. This is an additional reason why we should give a liberal construction to the term "reasonable necessity" when we determine the extent of land and water rights required for a water supply, to the end that the public purpose in view may not fail. *Boston & N. Y. Air L. R. Co. v. Coffin*, supra; *P. J. Co.'s Appeal*, 122 Pa. 511, 531, 6 Atl. 564, 9 Am. St. Rep. 128; *P. W. Co. v. Bird*, 130 N. Y. 249, 260, 29 N. E. 246.

The finding, in the main, in the parts criticised follows the evidence. From this it appears: The present demand in the ordinary season meets the supply too closely to afford a reasonable margin of safety. In 1910, at one time, the available water was reduced to a two weeks' supply, although the rainfall of 1910 exceeded the rainfall of 1900 by about one-seventh. The probable growth of population in the communities supplied and their consequent increased demand for water makes absolutely necessary an immediate increase in the water supply. The streams to be taken constitute the only available supply within reach. The flow of these streams, taken in connection with the present and prospective requirements of the communities served and the present available supply, fairly justify the finding that there is a present necessity for their taking.

[16, 17] In its conclusion the trial judge enforced the rule of reasonable necessity as we have interpreted it, and disregarded the respondents' claim that provision for the future should be confined to a reasonably short time in the future. Chiefly in two particulars do the respondents criticise this conclusion, if the facts of the finding stand uncorrected: First, they insist that the applicant could largely decrease the consumption of water by the use of meters and as a consequence condemnation be avoided. The facts concerning the use of meters, their cost, their effect upon the communities served, and the attitude of such communities towards their use, do not sufficiently appear to enable us to, on this ground, hold the conclusion of the trial judge erroneous, even though we should hold that the applicant has the power to compel the general use of meters—a proposition whose decision is not on the face of the contract between the city of New Haven and the applicant free from difficulty, and ought not to be made in a proceeding to which New Haven is not a party. Second, the respondents insist that the present supply with adequate storage reservoirs would meet all reasonable demands. The finding shows that such storage reservoirs would entail an enormous cost and add little to the supply and hence are impracticable. The testimony of the engineers fully supports the conclusion of the finding.

There is no error. The other Judges concurred.

GRANDY v. ANDERSON.

(Supreme Court of Rhode Island. Jan. 22, 1913.)

MASTER AND SERVANT (§ 316*)—INJURIES TO THIRD PERSONS—INDEPENDENT CONTRACTOR.

Plaintiff fell over a mortar-bed near a dwelling which defendant had contracted to erect; but the mortar-bed belonged to a subcontractor, who had plastered the house under an independent contract, and had been placed in that position by him after the work was completed, and defendant had no control over the subcontractor's actions after the work was completed. *Held*, that defendant was not liable for plaintiff's injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.*]

Exceptions from Superior Court, Providence and Bristol Counties; Elmer J. Rathbun, Judge.

Action by Celia Grandy against Andrew M. Anderson. Nonsuit, and plaintiff excepted. Exceptions overruled, and case remitted for judgment for defendant on the nonsuit.

Defendant was the original contractor for the construction of a dwelling, and contracted with another to do the plastering, and the mortar-beds were in front of the dwelling; defendant having, however, requested the plastering contractor to remove them.

A. B. Crafts and William H. McSoley, both of Providence, for plaintiff. Washington R. Prescott, of Providence, for defendant.

PER CURIAM. The evidence shows that the mortar-bed, over which the plaintiff claims to have tripped at the time she fell and suffered her alleged injuries, did not belong to the defendant, but was the property of one Walsh, a subcontractor who had done the plastering of the house under an entire and independent contract; that the defendant had nothing to do with the placing of the mortar-bed against the house, in the position where it was at the time of the accident, and did not give any order in relation thereto, other than to request Walsh to take it out of the street; that Walsh, the owner, kept the mortar-bed at the house, because he expected to use it to do other work in the vicinity; and there is no evidence that defendant had any control over Walsh or his disposition of the mortar-bed after his work was completed. The case fails to show that the defendant was in any way responsible for the plaintiff's injury. The evidence offered by the plaintiff on motion to reopen the case had no bearing upon the main question at issue as to the defendant's liability, and the court properly exercised its discretion in refusing to re-open the case.

The nonsuit was properly granted. The plaintiff's exceptions are overruled, and the case is remitted to the superior court, with direction to enter its judgment for the defendant on the nonsuit.

BENOIT v. PAYETTE.

(Supreme Court of Rhode Island. Jan. 22, 1913.)

APPEAL AND ERROR (§ 1005*)—REVIEW—VERDICT.

Though the evidence be conflicting, the verdict will not be disturbed after approval by trial court, where there is no substantial evidence in favor of the losing party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3943-3954; Dec. Dig. § 1005.*]

Exceptions from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

Action by Elie Benoit against Adelard Payette. There was a verdict for plaintiff, and defendant brings exceptions. Affirmed.

Fitzgerald & Higgins, of Providence, for plaintiff. Leonard N. Zisman, of Providence, for defendant.

PER CURIAM. The evidence was somewhat in conflict, but there was no substantial evidence adduced on behalf of the defendant to support any defense to the plaintiff's claim for the balance due on a promissory note. The verdict of the jury for the plaintiff was amply supported, and has received the approval of the trial judge. We find no error therein. The exceptions based upon admission and exclusion of testimony are trifling and immaterial.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter its judgment for the plaintiff upon the verdict.

HAWKINS v. CO-OPERATIVE BLDG. BANK.

(Supreme Court of Rhode Island. Jan. 22, 1913.)

JUDGMENT (§ 743*)—RES JUDICATA.

Where, in a former action between the parties, the boundary of complainant's land was established, and it was found that her piazza was on the land of defendant, defendant will not be enjoined from removing it until title can be established by an action of law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1275-1277; Dec. Dig. § 743.*]

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Bill by Emma A. Hawkins against the Co-Operative Building Bank. From a decree denying an injunction, complainant appeals. Affirmed.

James A. Williams, of Providence, for appellant. Alfred S. & Arthur P. Johnson, of Providence, for appellee.

PER CURIAM. This bill in equity concerns a strip of land about 8 feet wide and 50 feet long, lying easterly of a certain lot

of land belonging to the plaintiff and described in the bill, upon which strip rest the front piazza, bay window, and front steps of complainant's house, the rest of which house is upon land owned by the complainant. The complainant, while admitting that the defendant has title by deed to the strip of land in question, claims title thereto by adverse possession, and prays that the defendant may be enjoined from cutting off the front piazza, bay window, and front steps, as it has threatened to do, until the title to the strip may be determined by an action at law.

This court is of the opinion, however, that the title to said strip of land has already been determined to be in the defendant, by construction of the deed under which the complainant acquired her title, as set forth in *Co-Operative Building Bank v. Hawkins*, 30 R. I. 171, 182, 73 Atl. 617 et seq., where the location of the east line of the complainant's land is shown to be established, and to be nearly coincident with the east line of the body of the house, leaving the bay window, piazza, and front steps on the land of the defendant, and wherein it is also held that the complainant was precluded from setting up title by adverse possession, as against the defendant, for various reasons fully set forth in the opinion.

The title to the strip of land in question having already been determined by this court, as above shown, there is no occasion for a further determination thereof as prayed by the bill.

There was no error in the decree of the superior court dismissing the bill. The decree appealed from is affirmed, the appeal is dismissed, and the cause is remanded to the superior court for further proceedings.

CRAM v. CHASE.

(Supreme Court of Rhode Island. Jan. 20, 1913.)

1. DEEDS (§ 100*)—CONSTRUCTION.

A deed should be construed with reference, first, to the significance of the words themselves, and also with regard to the circumstances surrounding the parties at and before the execution and delivery of the deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 239; Dec. Dig. § 100.*]

2. WATERS AND WATER COURSES (§ 156*)—EASEMENT—CONSTRUCTION.

Under a father's deeds to his children of tracts of his farm, including the right to take water from a nearby spring, and "to pass and repass to and from the shore" bordering the grantor's lands, the right to take water is not limited by the quoted phrase.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.*]

3. WATERS AND WATER COURSES (§ 156*)—EASEMENT—CONSTRUCTION—"TAKE WATER."

A deed to land and "also a privilege to take water" from the spring on the grantor's

adjacent farm, as occasion may require, does not limit the grantee's right to take water by the method customarily used by the parties before and after the conveyance—by means of buckets, barrels, etc.—but permits a taking by pipe and pump for use in a summer hotel, especially since the complaining party acquiesced in the latter method for several years, and where the pipe is laid through rocky and unproductive land.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.*]

4. EASEMENTS (§ 43*)—SECONDARY EASEMENTS—SCOPE.

The extent of an implied or secondary easement depends upon the purpose and extent of the grant of the primary easement.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 97; Dec. Dig. § 43.*]

5. WATERS AND WATER COURSES (§ 156*)—EASEMENT—WATER RIGHTS—ENJOYMENT.

Under a deed including the right to take water from the grantor's nearby spring, his successor cannot complain because the grantee's pumping plant is maintained on a tract other than that covered by the deed, unless water is used on such other tract.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.*]

6. WATERS AND WATER COURSES (§ 156*)—EASEMENT—DURATION.

Under a deed to the grantee, "her heirs and assigns, forever," granting the privilege of taking water from a nearby spring, the privilege passes to the grantee's heirs and assigns.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.*]

7. APPEAL AND ERROR (§ 855*)—QUESTIONS REVIEWABLE.

On appeal from a decree reserving questions as to the amount of water complainant may take under an easement, and the purposes for which it may be taken, a question whether the easement is gross or appurtenant to a particular tract is not reviewable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3406; Dec. Dig. § 855.*]

Appeal from Superior Court, Newport County; Willard B. Tanner, Judge.

Bill by Rachel H. Cram against Paul Chase. Decree for complainant, and defendant appeals. Appeal dismissed, decree affirmed, and cause remanded.

Littlefield & Barrows, of Providence, for complainant. Lewis A. Waterman and Ernest P. B. Atwood, both of Providence, for respondent.

PARKHURST, J. This is a bill in equity brought by Rachel H. Cram against Paul Chase for an injunction to restrain the respondent from interfering with or preventing the complainant from entering upon the respondent's land, and relaying a certain pipe to a spring thereon, and from in any way interfering with or preventing the use by the complainant of the water of said spring by means of said pipe.

The complainant, whose maiden name was Rachel H. Chase and the respondent, Paul Chase, are the children of Daniel Chase, late

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of Portsmouth, deceased, and both reside on Prudence Island, in the town of Portsmouth. Daniel Chase once owned a large tract of land on said island, upon which was situated his homestead with its barns, outhouses and surrounding acres of farm land. Upon this farm, about 1,000 feet from the house, was an excellent spring affording an abundant supply of pure water at all seasons of the year. There were other sources of water supply, including a brook, 700 or 800 feet from the house, which had very little water in the summer, also a well of water near the house which was apt to be dry in the summer, and was very little used, and of doubtful quality, and a cistern supplied with rainwater from the roof of the farmhouse, which at times had very little water. Daniel Chase used the spring freely for drinking and other domestic and farm purposes, for washing, watering stock, etc. During the time he owned the land there was no pumping apparatus or pipe line on the premises, but water was carried from the spring in buckets and barrels. In the year 1890, by deed dated and recorded November 26th, Daniel Chase conveyed two acres of this farm land to Halsey Chase, who was also one of his children. In this deed there are the following words: "And the said Halsey, his heirs and assigns, are to have the right to take water from my spring for his family use. * * *" By another deed dated and recorded December 9, 1890, Daniel Chase quitclaimed to Paul Chase two lots of land from this farm, each containing one acre. In this deed Paul Chase is also expressly given "the right to take water from the spring in my land, west of his house, for his family use. * * *" By deed dated April 5th and recorded April 16, 1892, Daniel Chase conveyed to Rachel Chase 30 acres of the said farm, including the homestead, with its barns, etc. The spring was not on this tract of 30 acres, but the deed expressly gives her "also a privilege to take water from the spring on my farm as occasion may require." Then, in the year 1893, Daniel Chase divided up the remainder of his land among his three children, by the following instruments: A deed to Rachel Chase, containing 8 acres, bounding on the 30-acre tract previously conveyed to her, reserving to himself during his life the right personally and for his own benefit to cultivate any part or all said premises and to feed stock thereon. This was dated November 24th, and recorded December 2, 1893. A deed to Halsey Chase, dated and recorded at the same time as the above, conveying 26 acres, bordering on the 30-acre tract of Rachel Chase, and containing the same reservation as the last-mentioned deed. A deed to Paul Chase, dated and recorded at the same time as the above, conveying 140 acres, bounding on the land conveyed to Rachel Chase and Halsey Chase, with the same reservation of a life interest. Up to the time of these deeds there had been no

pumping apparatus upon any of these premises, but water from the spring had been carried in buckets and barrels by the parties above mentioned, as they saw fit to use it. After the farm was divided up, the spring was on Paul's land, the homestead with the brook and well and cistern was on Rachel's land, and both Rachel and Halsey had such rights in the spring as Daniel Chase had given them in the deeds above mentioned. The mother of Rachel H. Chase died about 1881, 11 years before the deed from her father to her of the 30-acre tract of land April 5, 1892; and during all that time she was housekeeper for her father, and supported him and herself for nine years (1883-1892) by taking summer boarders, some 25 or 30 at a time, and during all this time, her father being the owner of the entire farm and of the spring, she and her father freely used the water of this spring for watering the stock, for cooking, and all domestic purposes in and about this farm and summer hotel, making little or no use of the well and cistern, which seem to have been of doubtful quality and entirely inadequate. The complainant continued to run the house as a boarding house or summer hotel after she received the deed from her father, and he continued to live with her on these premises and to receive his support in part at least from the proceeds of the hotel, until his death in July, 1904. In the meantime, in 1895, the complainant married Madison H. Cram, and they (with the exception of about a year) lived in the house upon the 30-acre tract conveyed to the complainant in 1892, and have continued to run the same as a summer hotel or boarding house down to the present time. Finding it increasingly difficult to secure sufficient pure water for the purposes of this farm and of the hotel thereon by the old method of carrying water from the spring in buckets and barrels, Mr. Cram in 1902 installed a pumping plant with a kerosene engine on the 8-acre tract (conveyed to the complainant by deed dated November 24, 1893, and lying between and adjacent to her 30-acre tract and Paul Chase's land), and, having cleaned out the spring and built a concrete curb about the same, to keep out surface water, laid a pipe of 1¼ inches diameter from the pump to the spring, about 300 feet on Paul Chase's land, and from the pump to a tank on complainant's premises, another pipe of the same diameter, about 700 feet, and thereafter pumped the water from the spring to said tank, and through a branch pipe also to the house of Halsey Chase, who had the right to the use of water from the spring "for his family use" as above shown. The pipe from the spring was buried about two feet deep on the land of the defendant. The plant cost upwards of \$800, besides the labor of Mr. Cram, who superintended the work.

This pumping plant was installed in 1902, during the lifetime of said Daniel Chase, while he was still living with his daughter

Mrs. Cram on the homestead farm, where they were taking boarders as above shown, and while Daniel Chase still had a life interest in the land where the spring was located, and met with his entire approval. It was known also to the respondent, Paul Chase, that the complainant and her husband were expending a large sum of money in this installation. He was at his home on the island at and during the time of the installation of the plant, and must have known all about it. It is uncontradicted that the land in which this pipe is laid, within the limits of defendant's ownership, is a rocky sidehill, worthless for cultivation, and has never been cultivated. Although the defendant refused to sign any paper in relation thereto, he did not make any objection, either at the time of the installation or at or after the time of his father's death, until some time about the year 1909, when he learned that the complainant was selling water to some of the owners of the adjacent lots of land; and then for the first time he raised objection, and thereafter took up the pipe on his land, thereby cutting off the water from the pump. The complainant subsequently caused the pipe to be relaid, and filed this bill to enjoin the defendant from further interference with her right to keep and maintain the pipe to the spring. A preliminary injunction was granted upon hearing, as prayed in the bill; and thereafter, upon full hearing before the presiding justice of the superior court, upon the pleadings and oral testimony a decree was entered June 19, 1911, whereby the defendant was "perpetually enjoined and restrained from interfering in any manner with the complainant and her heirs and assigns taking water from the spring situated on the said respondent's land described in said bill and from digging up, removing, or in any manner interfering with the pipes laid by the complainant's pumping plant, and from preventing or hindering the complainant and her agents going upon the respondent's said land lying along said pipes and around said spring, and repairing or relaying said pipes and cleaning said spring, and repairing the curbing around it whenever it shall be necessary to do so, without prejudice to the rights of the respondent in other proceedings contesting the amount of water which the complainant may take from said spring and the purposes for which it may be taken." It is to be noted that by the last clause of the above-quoted decree it appears that other proceedings involving the questions as to the amount of water the complainant is entitled to take and the purposes for which it may be taken are pending, and those questions are therefore not before this court at this time.

From the above decree the defendant seasonably claimed and perfected his appeal, and thereon the case is now before this court.

The 11 reasons of appeal filed by the re-

spondent may be condensed into the following:

(1) That the court erred in finding that the language of the grant by Daniel Chase to the complainant of a privilege or right to take water from his spring "as occasion may require" gave her the right to take water therefrom by the pipe and pumping plant installed by her for that purpose.

(2) That the court erred in admitting parol testimony for the purpose of explaining the language of the grant of the right to "take water from my spring as occasion may require."

(3) That the court erred in admitting parol evidence of the declarations of Daniel Chase as to the uses which he intended to make of the water of the spring upon the land owned by him and of the meaning of the language "as occasion may require" contained in said deed as showing the extent of the grant and the manner of its enjoyment.

(4) That the court erred in not finding that the complainant was limited to the use of buckets and barrels in taking the water from said spring; and in finding that she had the right to lay and maintain a pipe across the respondent's land for the purpose of conveying the water to a tank located on the land first conveyed to her.

(5) That the court erred in not finding that the fact that the complainant had located the pump by which the water was conveyed to the tank on her 8-acre lot, instead of on the lot first conveyed to her, although no water from the spring has been used on the 8-acre lot, affected her right to lay the pipe connecting the spring with the pump across the respondent's land.

(6) That the court erred in finding that the grant contained in the deed to the complainant and her heirs and assigns of the privilege to take water "as occasion may require" is a right which may pass to the grantee's heirs and assigns.

[1-3] The first and most important question thus raised is as to the construction to be given to the language of Daniel Chase in his deed to the complainant, wherein on April 5, 1892, he conveyed the 30-acre tract of land, and after the description of the land uses these words: "Also a privilege to take water from the spring on my farm, as occasion may require." In construing these words we must take into consideration first the significance of the words themselves; and we are entitled also to consider all of the circumstances surrounding the parties to the deed at the time of and prior to the execution and delivery thereof. It is to be noted in the first place that in the granting of the right to take water from this same spring to each of his two sons Daniel Chase uses the language in the deed to Paul Chase December 9, 1890, "The right to take water from the spring in my land west of his house, for his family use, and also the right

to pass and repass *to and from the shore*, by either of my paths that I use for that purpose"; and in the deed to Halsey Chase, November 29, 1890, "the right to take water from my spring, *for his family use*, and also the right to pass and repass *to and from the shore* by either of my paths, that I now use for that purpose." The parties in their briefs have both fallen into an error in their attempt to limit these grants to the sons of the right to take water from the spring by connecting therewith the language as to the use of the "paths that I now use." It is manifest from a careful reading of both the deeds that the right to use these paths has nothing to do with the spring, but only gives a right of passage "to and from the shore," doubtless made necessary by reason of the fact that these small parcels of land were carved out of the farm, and did not reach the shore to which access is manifestly necessary as giving access to the waters of the bay as the only highway connecting the island with the outside world. These grants of the right to take water from the spring to these two sons are therefore in the most general terms of a right to take water, limited only by the words "for his family use." The grant to the complainant of "a privilege to take water from the spring on my farm, as occasion may require," is in still more general terms, and the omission of the words "for family use" is significant in view of the fact that a much larger tract of land is conveyed to the complainant, and in view, also, of the fact so well known to Daniel Chase that his daughter had used, and was using the homestead house and farm for both his and her support in running a summer hotel. It is fair to assume that in thus giving her the use of the water of the spring he intended to provide, not only for such use as she was with his full knowledge then making of the water, for his benefit as well as for her own, but also with an eye to the future requirements of the business of keeping a summer hotel as indicated by the words "as occasion may require," words which, in their plainest and most obvious meaning, have reference to the future, and are susceptible of a very broad and liberal construction. It is not unfair to deduce from the circumstances above set forth, in connection with the language used, that the grantor had the intention of so making the spring subservient to the purposes of the complainant as to give her a right commensurate with the interests to be served.

The defendant broadly contends that, while there is an undoubted right in the complainant to take the water from the spring, such right must be limited, as to method, to that used commonly and customarily by the parties prior to and after the conveyance by means of buckets, barrels, etc., and does not imply a right to lay and use a pipe, pump, etc. But the right granted is a "privilege

to take water," and it is difficult to find an expression of more general significance. It will not be denied that water may be "taken" by a pipe and pump as effectually as by a bucket or barrel; so that there is nothing in the significance of the word "take" which of itself imports any limitation as to the method of taking, nor do the words "as occasion may require" suggest any limitation as to the method of taking. On the contrary, if it were necessary to regard these latter words as having any relation to the method of taking, they might be deemed to be rather in extension than in limitation, and to imply that the method of taking in the future was intended to be such as occasion might require, in view of the use for which the water might be required. The language in all three of the grants by Daniel Chase to his children is of a right or privilege "to take water," without any limitation as to the method; and it would have been so easy to limit the right to take by reference to the existing methods of use or by some other express limitation that it is inconceivable that the grantor intended any such limitation. And this view is strengthened, if need be, by the fact that the grantor himself, while still in possession of the land and having a right to object, not only failed to object, but actually approved the installation; that his son Paul, the defendant, with full knowledge, failed to object until seven years after the installation, and by the further fact that the pipe was laid through a piece of rocky hillside unfit for cultivation and never cultivated, where there could be no appreciable damage to the owner.

The defendant's counsel seeks to sustain his position that there can be no implied secondary easement to maintain a pump with a pipe laid as an aqueduct from the spring in defendant's land by the citation of certain authorities. But an examination of them satisfies this court that they are not applicable to the case at bar. In *Montana O. P. Co. v. B. & M. Co.*, 20 Mont. 533, 52 Pac. 375, there was a grant of a right to flood and store water from a certain source upon a certain tract of land. The grantee attempted to bring water from another source by a pipe line across grantor's land and to store this other water on the granted land; and it was held that this could not be done, as it was a manifest attempt to extend the granted right beyond proper limits. The case has no application to the case at bar. In most of the other cases cited upon this point there was already in existence, at the time the right to take water was granted or acquired, either a natural or an artificial waterway, ditch, flume, or pipe in or by which the water to be taken had theretofore been taken by the grantee, and to the use of which it clearly appeared that the right was limited; and it was therefore held that there was no implied right to change the exist-

ing method of taking and to substitute another. See *Onthank v. Railroad Co.*, 71 N. Y. 194, 27 Am. Rep. 35; *Myton v. Wilson*, 6 Pa. Super. Ct. 293; *Shaffer v. Bank*, 37 La. Ann. 242; *Snyder v. Colorado, etc., Co.*, 181 Fed. 62, 104 C. C. A. 136; *Allen v. San José L. & W. Co.*, 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93; *Johnston v. Hyde*, 32 N. J. Eq. 446; *Oliver v. Agasse*, 132 Cal. 297, 64 Pac. 401. The facts of these cases are of such varied character and so differ from those of the case at bar that we do not deem them of any weight in this consideration, and an extended review of them would be unprofitable.

[4] The extent of an implied or secondary easement depends upon the purpose and extent of the grant of the primary easement. The rule is thus stated in *Gould on Waters*, at section 306: "The grant of water easements carries with them by implication, as secondary or subsidiary easements, everything that is beneficially necessary or incident to the grant, whether mentioned or not as 'privileges,' 'appurtenances,' or the like. * * * Of two constructions that will be selected which gives to such appurtenant privileges the more convenient and reasonable mode of enjoyment."

"Sec. 318. Grants of rights to use water are to be so construed as to substantially secure the rights which appear to have been contemplated by the parties, and the literal reading of the conveyance will not be followed if a more liberal construction does not impair the rights of the other party."

A grant of the right or privilege "to take water" on the land of the grantor necessarily involves the right of access to the water over and upon the grantor's land. Access for the purpose of taking water from this spring had been by going to and fro on foot and by the use of buckets, also by driving with carts and barrels; but as there is no express limitation in the deeds as to the method of access, and as there is no doubt that the use of a pipe connected with a pump and drawing water from a spring is a most common and usual method of taking water, we are of the opinion that the method used by the complainant in this case under all the circumstances was fully warranted by the terms of the grant to her, and that the same method might have been used by her brothers, had they seen fit, under the grants to them. In view of the facts in evidence as to the use made by the grantor and by the complainant with his concurrence and sanction of the water from the spring during so many years for the purpose of supplying the manifold necessities and conveniences of a summer hotel, and of his approval of the installation and use of the pumping plant, and of the further fact that the pipe was laid through rocky and unproductive soil on the defendant's property doing no substantial damage thereto, and without objection

on his part for so many years, we are of the opinion that there was a substantial agreement on the part of all the parties concerned that access to the spring by means of the pipe as laid was a reasonable method of access, fully covered by the broad terms of the grant, and was in no sense an enlargement of the privilege intended to be granted nor an increase of the burden upon the servient estate. It is impossible to conceive of a method by which water could be taken upon the land in question with less damage to the servient estate than by the means here employed. Very few cases have been cited by either party to this controversy which have a direct bearing upon this question, although a very large number have been cited upon general questions relating to water rights and water easements. We find a few, however, which seem to throw some light. In *Arnold v. Farr*, 61 Vt. 444, 17 Atl. 1004, the owner of a spring had granted to the ancestor of defendant "one undivided sixth part of a certain spring and the aqueduct which conveys the water therefrom" to a certain dwelling house owned by grantors. "with full liberty to take said portion of the water running in said aqueduct from such point in said aqueduct as shall be most convenient, and conduct the same to his premises;" followed by provisions as to payment of expenses of repair and maintenance, etc. It appeared that the original grantee of this privilege had put in a branch aqueduct and conveyed the water to his premises, and that the defendant's one-sixth of the water had been so taken ever since. The defendant was about to put in an independent pipe from the spring to his buildings and the plaintiffs sought to enjoin him, claiming that the grant gave only the right to take one-sixth of the water of the spring through the existing aqueduct, as it had been theretofore taken. The court says (61 Vt., at page 448, 17 Atl., at page 1005): "But in this case there is no uncertainty in the deed. The extent of the grant is clearly defined, and the fact that the defendant and his grantor for many years drew their share from the stone aqueduct is not conclusive against defendant's right to take it directly from the spring by another aqueduct, unless the words in the deed clearly or by necessary implication limit him to the former means, and we hold that they do not. This is in accordance with the reasoning of the court in *Adams v. Warner*, 23 Vt. 395, and *Rood v. Johnson*, 26 Vt. 64. The defendant has not drawn nor threatened to draw more than his share of the water, and, though the master reports that there is no practicable way for the defendant to draw his one-sixth part by a separate pipe and be reasonably sure of getting his share and no more, we think that the orator's rights are not so imperiled by the defendant's proposed means of taking his share as to warrant the intervention of the court of chancery by its injunction or by an

order for a division of the water according to the prayer of the bill."

In *Stevenson v. Wiggin*, 56 N. H. 308, a deed conveyed certain real estate, by description, which was followed by the words: "Also conveying the right to draw water from any and all the springs on said Clement's [grantor's] land easterly and above the aforescribed premises with the right to conduct the same by aqueduct to said premises for all uses and purposes forever." There were no structures on the land conveyed at the time, and the springs were in their natural state. The grantees erected factories on the premises conveyed to them, and entered on the grantor's land and built two reservoirs there for the purpose of collecting the waters of the springs. Plaintiff objected that defendant was given no right to pen up the water or build reservoirs, and sued in trespass *quare clausum* for the injury done to the soil. After examining the evidence of title, and finding that, on the true construction of the language quoted above, the defendants were entitled to take all the water from all the springs on the plaintiff's land for the benefit of such business as should afterwards be carried on upon the land, the court says (56 N. H., at page 311): "It is further contended that the deed gives only the right to draw water from the springs. I am not sure that I understand this point. The right to draw water from a spring, one would think, must involve the right to make all such arrangements as were needful in order to draw the water, and the right to draw all the water must imply the right to make such erections and arrangements as were necessary for that purpose. It is further objected that no right was given to the defendants to pen up the water or build reservoirs; and, to sustain this view, the case of *Walker v. Stewart*, 18 Law Rep. (N. S.) 396, is cited. It appears to me that that case has no application here. From the account given of it in the argument it would appear that in that case the quantity of water to which the party had a right was drawn in question. That quantity being regulated by the size of the pipe through which it was drawn, the court held that the quantity was limited to so much water as would run through the pipe without increasing its head by a dam. I have no doubt that the construction of that deed was correct, but in the case under discussion the defendants have a right to all the water, if taken in good faith, to be used upon the land; and the only question is whether the defendants have a right to use the necessary means in order to avail themselves of all the water. The court has found that the defendants in good faith require all the water to be used on the land, and that they have done what is proper, and no more than what is reasonably right and proper, in order to avail themselves of it. I understand that the adaptation of suitable means for the pur-

pose of utilizing the water of springs is a matter of skill. Sometimes, when the water makes its appearance in a single jet or stream coming out of a hard bank, or a cleft in a rock, the arrangements may be very simple. In other places, where the water seems to be more diffused, oozing as it were out of a considerable surface, and gradually collecting into a stream, a different and more elaborate, if not more complicated, arrangement is required. I do not see how this case can be matter of law. I do not see how the court can ever undertake as matter of law to say that one arrangement is proper and another improper. It must in all cases be a matter of fact, to be determined by the application of the requisite skill and experience. This being so, and the court having found, as matter of fact, that the defendants have done nothing more than was reasonably necessary for the purpose of saving and using all the water, in good faith, required by them for their works, situated on their land, to which this right to take water was made incident by the conveyance, it appears to me that the action cannot be maintained." And after quoting well-known maxims of the law, to the effect that "whoever grants a thing is supposed also tacitly to grant that without which the grant itself would be of no effect," the court proceeds in conclusion to say (56 N. H., at page 313): "The doctrine so fully and clearly expressed in the above extract is so well established as to be elementary. The only difficulty, if any difficulty there be, is in the application. I cannot, however, find any real difficulty in the present case. The means used, and the interference with the land, seem to be not at all disproportionate to the importance of the right granted; and, on the whole, I feel quite clear that there should be judgment for the defendant, without the necessity of considering at all the question as to the form of action."

The principles involved in the decision of the two cases last cited seem to be quite apposite to those involved in the case at bar. The complainant built a concrete curb about the spring to keep out surface water, and this would also tend to keep the water of the spring pure and free from leaves, sticks, dirt, and other rubbish, as well as to keep the flow of the spring from wearing away the soil, by holding the soil in place about the spring permanently, and avoiding the need of frequent repair, and is analogous to the building of the reservoir in the *Stevenson Case*; while the building of the pipe line to the pump and tank, for the purpose of taking the water to the complainant's tank for her use, is very similar to the act of the defendant in *Arnold v. Farr* in building a new and separate aqueduct, although there was one already in existence from which he had always taken his share of the water; and it is to be noted that in the latter case it was held that the fact that the defendant

had always theretofore used the existing aqueduct did not so measure and define his right as to prevent him from building a new aqueduct if he saw fit. In thus coming to the conclusion that the complainant had the right to install the pipe, and connect it with a pump as incident to the grant in such broad and general terms of the "privilege to take water" under the circumstances above set forth, we have relied upon the language of the grant itself, and upon the undisputed facts of the case, and have not found it necessary to rely in any degree upon the evidence offered by the complainant and objected to by the defendant as to the intentions of Daniel Chase regarding the installation of a pump, or as to what he said in relation to the meaning of his language in the grant. We think it is plainly evident upon the undisputed facts that it was his intention to permit the complainant to do as she has done. It therefore becomes unnecessary to discuss the questions as to the admissibility of certain testimony as suggested by the defendant in the second and third paragraphs of the defendant's objections above set forth. And, as to the objections to the decree set forth in the first and fourth paragraphs, we are of the opinion that the justice of the superior court did not err in finding that the complainant had the right to take water from the spring by a pipe and pumping plant, and that she was not limited to the use of buckets and barrels. We do not mean it to be understood by this that, as a general rule and under all circumstances, it should be inferred that a grant of a right to take water necessarily involves a right to use a pump and pipe. As shown in many of the above-cited cases, there may be such limitations express or implied, or such circumstances as to show that such a right is not to be inferred, and would be unreasonable and unduly burdensome to the servient estate.

[5] The defendant further contends that the location of the pump upon the 8-acre lot, instead of the 30-acre lot, affected complainant's right to lay the pipe upon the defendant's property. We find that the question sought to be raised by this contention is wholly immaterial. So long as the complainant erected the pump upon her own land at a convenient point in the pipe line to effect her purpose, it is of no consequence to the defendant whether she erected it upon one lot or the other. The pump is merely one part of the plant, and, if it were necessary or convenient to erect the pump upon the 8-acre lot for mechanical reasons as being the highest point to which the water must be raised from the spring so as most conveniently to get it to the complainant's tank (as may be inferred from the evidence), it is at all events of no consequence to the defendant and no ground of objection on his part, in the ab-

sence of any evidence that the water was used upon the 8-acre tract.

[6] The sixth contention above set forth that the court below erred in finding that the grant to the complainant of the "privilege to take water from the spring" conferred a right which would pass to the grantee's heirs and assigns is without merit, in view of the plain language of the deed. The grant is to "Rachel H. Chase, her heirs and assigns, forever; * * *" and the habendum is "to the said Rachel H. Chase and her heirs and assigns, to their own use and behoof forever." The defendant's counsel is plainly in error when he urges that the words "heirs and assigns" are not "connected with the giving of the water right to the complainant." The deed is plain upon its face, and there is no room for inference or construction. There was no error in framing the decree so as to protect the complainant and her heirs and assigns.

We have not found it necessary to consider the question whether the defendant is estopped by his long acquiescence in the maintenance of the pipe line from contesting the complainant's right so to maintain it, for the reason, as set forth above, that in our opinion the grant is in such broad and general terms that under the circumstances of the case a grant of the right to take the water by a pipe may be inferred; and the only effect which we have given to the defendant's acquiescence has been as to the reasonableness of such an inference in view of the undisputed facts and of the general concurrence of all the parties in interest.

[7] A part of the argument concerns the question whether the complainant's right to take water from the spring is an easement in gross, or is appurtenant to the 30-acre tract. In view of the reservation in the decree of all questions relating "to the amount of water which the complainant may take from the spring and the purposes for which it may be taken," we are of the opinion that the question whether the complainant has an easement in gross or appurtenant will necessarily be involved in the determination of those reserved questions, and is not now before us.

We find no error in the decree appealed from. The appeal is dismissed, the decree of the superior court is affirmed, and the case is remanded to the superior court sitting in and for the county of Newport for further proceedings.

PERKINS et al. v. KIRBY.

(Supreme Court of Rhode Island. Jan. 15, 1913.)

1. DEEDS, (§ 145*) — "CONDITION" — "COVENANTS."

A "condition" in a deed is something inserted in it for the benefit of the grantor empowering him on default of performance to des-

troy the grantee's estate and revest it in himself or his heirs, while a "covenant" is an agreement or consent of two or more by deed in writing sealed and delivered, whereby either one promises to the other that something is done or will be done in the future.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 471; Dec. Dig. § 145.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1394-1400, 1691-1693.]

2. LANDLORD AND TENANT (§§ 47, 103*)—LEASES—CONDITIONS—ESSENTIALS.

No particular form is essential to create a condition in a lease; a lessee's estate being defeated on breach of terms showing that a condition was intended.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 112, 113, 321-327, 337-342; Dec. Dig. §§ 47, 103.*]

3. LANDLORD AND TENANT (§ 47*)—LEASES—CONDITIONS—EXISTENCE—DETERMINATION.

Whether the parties to a lease intended that a requirement that the lessee maintain insurance against fire, accidents, and boiler explosions should have the force of a condition, breach of which by their lessee would work a forfeiture, must be determined from an examination of the lease itself.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 112, 113; Dec. Dig. § 47.*]

4. LANDLORD AND TENANT (§ 47*)—LEASES—CONDITIONS—PROVISIONS CONSTITUTING.

A lease providing that, on the lessee's failure to conform to all the "conditions" of the lease, the lessors could terminate the lease and re-enter, and containing "covenants" or "agreements" binding the lessee regarding the use, care, and protection of the premises, including insurance against fire, accident, and boiler explosions, made the undertaking concerning the insurance a "condition," breach of which would work a forfeiture.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 112, 113; Dec. Dig. § 47.*]

5. LANDLORD AND TENANT (§ 37*)—LEASES—CONSTRUCTION.

A lease or other writing must, if possible, be so construed that meaning may be given to all its parts.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 98; Dec. Dig. § 37.*]

6. LANDLORD AND TENANT (§ 47*)—LEASES—CONDITIONS—PERFORMANCE.

Under a lease requiring the lessee to procure insurance policies covering the premises and to assign and deliver them to the lessor, failure to so assign and deliver cannot be regarded as a mere technical or immaterial breach, though the insurance has been effected.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 112, 113; Dec. Dig. § 47.*]

7. LANDLORD AND TENANT (§ 103*)—LEASES—CONDITIONS—BREACH—RIGHT OF FORFEITURE.

The right of lessors to forfeit a lease for the lessee's breach of a condition requiring him to insure the premises against fire, etc., and to deliver the policies to them, is not affected by a power reserved to them to insure.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 321-327, 337-342; Dec. Dig. § 103.*]

8. LANDLORD AND TENANT (§ 111*)—BREACH OF CONDITION—DEMAND—NECESSITY.

Under a lease binding the lessee to insure the premises against fire, etc., and to deliver

the policies to the lessor, the latter need not demand such delivery before proceeding to give notice of forfeiture under the lease for such breach.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 336; Dec. Dig. § 111.*]

9. LANDLORD AND TENANT (§ 47*)—LEASES—CONDITIONS—PERFORMANCE—TIME.

When a lease requires the lessee to insure the premises against fire, etc., and to deliver the policies to the lessor, but does not fix any time within which such delivery shall be made, the lessee is entitled to a reasonable time in which to make it.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 112, 113; Dec. Dig. § 47.*]

10. LANDLORD AND TENANT (§ 47*)—LEASES—CONDITIONS—PERFORMANCE—"REASONABLE TIME."

The "reasonable time" to which a lessee is entitled to perform a condition of the lease, where no time for performance is specifically fixed, is such time as is necessary in the circumstances to do what is required.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 112, 113; Dec. Dig. § 47.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5977-5983; vol. 8, p. 7780.]

11. LANDLORD AND TENANT (§ 285*)—LEASES—CONDITIONS—PERFORMANCE—REASONABLE TIME—JURY QUESTION.

Whether a lessee acted within a reasonable time in delivering to the lessors policies insuring the premises against fire, etc., as required by the lease, *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1193-1197, 1199-1204; Dec. Dig. § 285.*]

Exceptions from Superior Court, Providence and Bristol Counties; Darius Baker, Judge.

Action by Frederick E. Perkins and another, trustees, against Henry A. Kirby. Verdict for plaintiffs, and defendant brings exceptions. Exceptions partly overruled and partly sustained, and case remitted for new trial.

Waterman & Greenlaw, of Providence (Charles E. Tilley, of Providence, of counsel), for plaintiffs. Bassett & Raymond, of Providence (R. W. Richmond, of Providence, of counsel), for defendant.

VINCENT, J. This is an action of trespass and ejectment commenced in the district court of the Sixth judicial district where a decision was rendered for the defendant for costs. The plaintiffs then claimed a jury trial. In the superior court the plaintiffs filed certain special pleas to which the defendant demurred. The demurrer was overruled and the plaintiffs allowed to file an amended declaration. The defendant demurred to the amended declaration, which last-mentioned demurrer was also overruled. The case was then tried to a jury and a verdict rendered for the plaintiffs by direction of the court. It now comes here upon the defendant's exceptions (1) to the deci-

sion of the superior court in overruling the demurrer to the amended declaration, (2) to the rulings of the trial judge admitting and excluding testimony, and (3) to the direction of a verdict for the plaintiffs.

In June, 1911, the plaintiffs, by an instrument in writing, leased to the defendant certain lands, buildings, and estates, therein described, for a term of two years beginning October 1, 1911, and terminating September 30, 1913. This indenture of lease provided, among other things, "that insurance against loss by fire shall be kept and maintained on the buildings on said premises in such office or offices as the said lessors and their successors, heirs or assigns shall approve, in the following amounts: The 'Ada building' and the addition thereto, in a sum not less than forty-five thousand six hundred and fifty dollars (\$45,650); the buildings and improvements on said tract of land situated at the corner of Harrison and Westfield streets, in the sum of sixteen thousand dollars (\$16,000); the boilers in said 'Ada building' in a sum not less than fifteen thousand dollars (\$15,000); and that accident insurance will be kept and maintained, indemnifying the parties in interest from all loss on account of personal injury, through accidents from or in connection with the elevator in said 'Ada building,' in a sum not greater than ten thousand dollars (\$10,000) for any one accident, and not greater than five thousand dollars (\$5,000) for an injury to a single person, said policy to be in such form and with such company as the said lessors, their successors, heirs or assigns, shall approve; and that all said policies of insurance against loss by fire shall be assigned and transferred, or made payable in case of loss, to the said lessors, their successors, heirs or assigns, as their interest may appear, and shall be delivered to said lessors, their successors, heirs or assigns, by the said lessee, his executors, administrators and assigns, and shall at all times remain in the possession of the said lessors, their successors, heirs or assigns; and that said policy of accident insurance shall indemnify and save harmless the said lessors, their successors, heirs or assigns, from any loss on account of accidents occurring on or in connection with said elevator in manner as aforesaid, and shall be made payable to the said lessors, their successors, heirs or assigns, and shall be delivered to the said lessors, their successors, heirs or assigns, by the said lessee, his executors, administrators and assigns, and shall at all times remain in the possession of the said lessors, their successors, heirs or assigns; and in default of the said lessee, his executors, administrators and assigns, keeping and maintaining such insurance, then the said lessors, their successors, heirs or assigns may effect such insurance in manner as aforesaid, and the premium

or premiums therefor shall be paid by the said lessee, his executors, administrators and assigns."

The defendant entered into possession of the leased premises on October 1, 1911, and on the 9th of October the plaintiffs, as lessors, prepared, signed, and delivered to the defendant the following notice: "Henry A. Kirby, Providence, R. I.: In exercise of the power given us by a certain indenture of lease dated the — day of June, 1911, and made between yourself, of the one part, and ourselves, as trustees under the will of Charles Henry Perkins, late of the town of Warwick, deceased, of the other part, we hereby declare said lease at an end and terminated because of your failure to conform to the conditions of said lease requiring you to keep and maintain the insurance as mentioned in said lease and to have the policies of insurance made payable as required by said lease, and to deliver to us said policies as required by said lease and to permit said policies at all times to remain in the possession of us as required by said lease. And you are notified that we shall immediately take possession of the premises and that you are to quit and deliver up to us the premises mentioned in said lease forthwith."

At the time of the delivery of this notice the policies of insurance, provided for in said lease, had not been delivered to the plaintiffs, but were later, on the same day, taken to the plaintiffs' office by the defendant's bookkeeper. The plaintiffs' treasurer to whom these policies were proffered declined to receive them, whereupon defendant's bookkeeper laid them on a railing in the plaintiffs' office and withdrew. Afterwards the plaintiffs, under advice of counsel, placed the policies in an envelope, marked them as the property of the defendant, and put them in their safe.

It is not claimed that the defendant neglected to obtain insurance in accordance with the terms of the lease, or that at any time on and after October 1, 1911, the plaintiffs were unsecured from loss, or that such insurance had been placed in companies of which the plaintiffs disapproved. The plaintiffs do claim, however, that the defendant was in default through his failure to make delivery of the policies to them, and that such failure amounted to the breach of a condition of the lease and gave to them the right of re-entry under the forfeiture clause contained therein.

The defendant contends that the provision of the lease before referred to, regarding insurance, is simply a covenant, and that any failure on his part to observe the same would not work a forfeiture of the lease, but would only entitle the plaintiffs to damages. The defendant claims further that, when he was notified by the plaintiffs of their intention to terminate the lease, a

reasonable time within which he might deliver the policies had not elapsed.

[1] The attitude of the parties, indicated by their respective claims, leads us, in the first place, to consider the meaning of the terms "condition" and "covenant" and to ascertain their significance as bearing upon the present controversy.

Numerous authorities might be cited in which a "condition" is defined to be something inserted in a deed for the benefit of the grantor giving him the power, on default of performance, to destroy the estate if he will and revest it in himself or his heirs. A "covenant" has been defined to be an agreement or consent of two or more by deed in writing, sealed and delivered, whereby either one of the parties doth promise to the other that something is done or shall be done in the future. While there is more or less variation in the language employed by different courts in defining and giving effect to these terms, the decisions are, in substance, practically the same. Some of the authorities point out various terms and expressions having a well-settled meaning and which are clearly and indisputably indicative of the intent of the parties to the instrument to create a condition or enter into a covenant as the case may be.

[2] A more extended discussion of these authorities would not be profitable in view of the fact that we find it to be the consensus of opinion that no particular form of expression is essential to the creation of a condition, but that, if it is manifest from the terms of the instrument that a condition was intended, the estate will become defeated upon a breach thereof. In *Fowlkes v. Wagoner* (Tenn. Ch. App.) 46 S. W. 586, the court said a condition "may be created by any words which show a clear, unmistakable intention on the part of the grantor or deviser to create an estate on condition; regard being had to the whole of the deed or will in which they occur." It has even been held that the same words may create either a covenant or a condition, depending upon the intention of the parties as such intention may be determined from the context. *Chapin v. Harris*, 8 Allen (Mass.) 594; *Tiffany on Landlord & Tenant*, vol. 2, p. 1363, § 194. The principle therefore upon which this question must be determined is well settled. The authorities are briefly and correctly summarized in the note to be found in 1 L. R. A. 381, as follows: "According to modern authorities a clause only operates as a condition when it is apparent, from the whole scope of the instrument, that it was intended to operate so, or, in other words, there is no technical rule, but courts are in each case to ascertain the intent and give the instrument effect accordingly."

[3] We must therefore determine from the examination of the lease itself whether or not it was the intention of the parties to this suit that the provision covering the matter of

insurance should have the force of a condition, the breach of which by the lessee would work a forfeiture and permit the re-entry of the lessors.

[4] The lease, following the habendum, fixes the amount of the annual rent, provides for the time and method of its payment, and limits the period within which such payments of rent may be made without default; the paragraph concluding as follows: "In case of failure to conform to all the conditions of this lease, the said lessors, their successors, heirs or assigns, shall be at liberty to declare this lease at an end and terminated, and thereupon to take immediate possession of the premises, in which case, the said lessee, his executors, administrators and assigns, shall be considered as tenants holding over their term." The succeeding paragraphs of the instrument set forth the several undertakings of the parties regarding the use, care, and protection of the premises, including insurance against fire, accident, and boiler explosion. In none of these succeeding paragraphs is the word "condition" or "conditions" repeated, but the several undertakings of the parties specified therein are characterized as covenants or agreements. If it had been the intention to confine the right of re-entry to default in the payment of rent, the language immediately introductory to the forfeiture clause, "or in case of failure to conform to all the conditions of this lease," would be useless and meaningless.

[5] A lease or other instrument in writing must, if possible, be so construed that a meaning may be given to all its parts. *Bishop on Contracts* (2d Ed.) § 384; 9 Cyc. 579. The use of the words above quoted seem to us to make it clear that it was the intention of the parties, in making this lease, that the failure of the lessee to observe its requirements respecting insurance should work a forfeiture and entitle the lessors in their discretion to effect a re-entry.

[6] We think that the covenant and agreement to insure must be construed as a condition to which the right of re-entry applies. It has been argued that, inasmuch as the property had been duly covered by insurance from the beginning of the term by policies made payable to the lessors in companies not disapproved of by them, the failure of the lessee to make delivery and place the policies in the physical possession of the lessors was a mere technical or immaterial breach which would not entitle the plaintiffs to exact a forfeiture. We do not think that the court would be justified in adopting this view. We cannot undertake to divide the obligations of the lessee under his lease into two classes, the one being of sufficient importance to require his compliance therewith, and the other so unimportant that he should be excused therefrom. The undertaking of the lessee to deliver the policies, in accordance with his express agreement so to do, is not, in our opinion, a matter so trivial and

unimportant that he should be excused from its performance.

While the importance of such delivery might be worthy of some consideration in reaching a conclusion upon the question as to whether the policies were delivered within a reasonable time, it would not assist us in our present inquiry as to whether or not a failure to deliver the policies amounted to the breach of a condition of the lease which would entitle the lessors to declare a forfeiture.

[7, 8] The power given to the lessors to insure, in case of the default of the lessee so to do, is simply permissive and can have no effect upon the right of the lessors to declare a forfeiture and terminate the lease. It is a provision entirely for the benefit of the lessors enabling them to protect their property and interests should occasion require. They have the right to procure insurance, in case of the lessee's default and charge the premiums to the lessee, or they may proceed to declare a forfeiture and re-enter in a similar manner as a mortgagee may insure or foreclose in his discretion. *Brown v. Cairns*, 63 Kan. 584, 66 Pac. 639; *Proctor v. Keith*, 12 B. Mon. (Ky.) 252; *Liggett v. Shira*, 159 Pa. 350, 28 Atl. 218; 18 Am. & Eng. Ency. of Law, 371. And we do not think that the lessors would be required to make a demand for the policies before proceeding to give notice under the forfeiture clause of the lease.

[9, 10] The defendant claims: (1) That he did not have a reasonable time in which to make delivery of the policies of insurance prior to the notice given to him by the lessors for the purpose of terminating the lease; and (2) that the question of reasonable time was a question of fact for the jury. The lease does not fix any time within which the lessee should deliver the policies to the lessors, and it therefore became incumbent upon the lessee to make such delivery within a reasonable time. A "reasonable time" has been well defined to be "so much time as is necessary, under the circumstances, to do conveniently what the contract or duty require in the particular case should be done." *Brown v. Detroit City Ry. Co.*, 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822. In determining therefore what constitutes a reasonable time, it is necessary to take into consideration all circumstances which may surround that portion of the transaction, including, among other things, the time required in the preparation of the policies and the further time which might be necessary for their careful examination by the lessee. The lessee would not be required to maintain insurance prior to the commencement of his term. If the lessee in the usual course of the insurance business had arranged to have the property covered from October 1, 1911, he would be entitled to a reasonable time after that date

in which the several policies could be properly prepared and delivered by the insurance companies, and such further time as might be needed to make examination of their contents to determine their correctness both in form and substance, and to see that they were in accordance with the terms of the lease, and finally to deliver them to the lessors at their place of business.

[11] It appears from the testimony that October 1, 1911, fell upon Sunday; that the policies, which had been ordered prior thereto, were transmitted to the defendant's office by the insurance agents on the Tuesday or Wednesday following while the defendant himself was absent from the city on business; that he returned some time during the day Thursday; and that between the time of his return and the following Monday noon he examined the policies and sent them to the plaintiffs' office.

Taking into consideration the foregoing facts, we cannot say, as a matter of law, that the time occupied by the defendant in obtaining, examining, and delivering these policies, 11 in number, covering different classes of insurance and aggregating more than \$70,000, was an unreasonable time. We think that in the present case the question whether or not the defendant acted within a reasonable time in delivering the policies is purely a question of fact depending upon the circumstances surrounding the transaction, and that such question should have been submitted to the determination of the jury under proper instructions. We do not, however, mean to say that under no circumstances would the question of reasonable time be a question of law for the court, for we can readily conceive that the failure of a defendant might be of such duration that the court would be fully justified in treating it as a question of law.

The question as to whether the several and particular acts of the parties or their agents disclosed by the record and relating to the delivery and acceptance of the policies on October 9, 1911, amounted to a legal delivery and acceptance does not seem to us to be relevant to the present discussion in view of the conclusions already reached. It all depends upon the determination of the question as to whether the delivery was undertaken within a reasonable time. It appears that the policies were offered to the plaintiffs at their place of business on October 9, 1911, at 1:50 o'clock p. m. If such offer was made within a reasonable time, the plaintiffs were bound to accept the policies, and their refusal so to do would be of no consequence.

The defendant's exceptions numbered from 1 to 8 both inclusive are overruled, and his exception numbered 9 is sustained, and the case is remitted to the superior court for a new trial.

COHEN v. SUPERIOR LODGE NO. 516,
I. O. B. A.†

(Supreme Court of Rhode Island. Jan. 15, 1913.)

1. INSURANCE (§ 804*)—MUTUAL BENEFIT ASSOCIATIONS—CONFLICTING CLAIMS.

In an action by a member of a mutual benefit order, such member cannot consistently claim that he is entitled to the sick benefits provided for by the laws of the order, and that such laws are, in other respects, of no validity, on the ground that the constitution and by-laws had not been regularly adopted.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 804.*]

2. INSURANCE (§ 805*)—MUTUAL BENEFIT ASSOCIATIONS—GRIEVANCES—REMEDY.

One who voluntarily submits himself to a law of an order that, if he feels aggrieved at the action of the lodge, he must appeal to the executive committee and await its final decision before suing in a public court must exhaust his remedy within the order before he can prosecute his claim in a court of law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1987, 1988; Dec. Dig. § 805.*]

Exceptions from Superior Court, Providence and Bristol Counties; Elmer J. Rathbun, Judge.

Suit by I. Cohen against Superior Lodge No. 516, Independent Order Brith Abraham. To an order granting plaintiff's motion for a directed verdict and denying defendant's motion for a directed verdict, the defendant excepts. Exceptions sustained.

See, also, 78 Atl. 897.

Bellin & Bellin, of Providence, for plaintiff. Charles Z. Alexander, of Providence, for defendant.

VINCENT, J. The plaintiff brought suit in assumpsit in the district court of the Sixth judicial district against Superior Lodge No. 516, Independent Order Brith Abraham, to recover the amount of certain sick benefits to which he claimed to be entitled under the laws and regulations of that society. Judgment for the plaintiff for the sum of \$70 and costs was rendered in the district court. The defendant claimed a jury trial. The case was tried to a jury in the superior court, and a verdict, by direction, was returned in favor of the plaintiff for \$70, the amount claimed.

The case is now before this court upon the defendant's exceptions 2 and 4, the truth of which, as well as the correctness of the transcript of testimony, appears to have been duly established. These exceptions cover the denial of the defendant's motion to direct a verdict and the granting of a motion to direct a verdict in favor of the plaintiff.

Under the constitution and laws of this society, a member in good standing, who may become ill and unable to pursue his usual avocation, is entitled to a benefit of \$7 a week for a period not exceeding 10 weeks in any one year, provided that he gives im-

mediate notice of his illness to the secretary, and a further notice upon leaving any hospital which he may have entered, if, upon discharge therefrom, he is still sick and unable to work.

The plaintiff, in order to recover, must establish the fact of his illness, must show that he has given the required notice or notices thereof to the secretary of his lodge, and that he has otherwise complied with the constitution and by-laws of the society entitling him to the benefits which he claims.

It appears from the testimony that the plaintiff, on the 13th of November, 1909, being at the time a member of the defendant lodge in good standing, became ill and was removed to a hospital, where he remained for a period of 26 days. From the hospital he returned to his home; his illness and inability to work continuing for a further period of 10 weeks. The plaintiff claims that upon his removal to the hospital he duly notified the lodge of his illness, and that when he left the hospital he gave a further notice of his continued inability to work. The receipt of the first notice does not seem to be disputed, but as to the second notice there is a conflict of testimony; the plaintiff claiming that such notice was given, and the secretary of the lodge positively denying that any notice that the plaintiff had left the hospital and was still unable to work had ever been received.

After the plaintiff had recovered, he visited the lodge and made a claim for benefits covering a period of 10 weeks, amounting to the sum of \$70. This claim the lodge refused to pay, and handed the plaintiff a check for \$21 covering the time the plaintiff was in the hospital; such check, by its terms, being in full of all demands to date. The plaintiff thereupon asked for a hearing before the lodge, but was suppressed by the presiding officer and compelled to discontinue his efforts in that direction. He retained the check for \$21, but has never cashed it.

[1] Much of the record is taken up with the examination of witnesses as to whether the defendant lodge had ever regularly adopted any constitution and by-laws defining the rights of its members and prescribing the method of procedure in disputed matters; but we think it sufficiently appears that the lodge was carrying on its business and operations under both its own constitution and by-laws and the constitution and by-laws of the Grand Lodge of the I. O. B. A. of the United States of America, of which the defendant lodge was a part. In fact, the certificate of membership issued to and accepted by the plaintiff recites that he is entitled to all the benefits provided for by the laws of the order and of the lodge as they may exist or may be later amended, altered, or modified, subject to his compliance therewith. The plaintiff cannot consistently claim

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† For opinion on rehearing, see 86 Atl. 745.

that he is entitled to the sick benefits provided for by the laws of the order and the lodge, and that such laws are in other respects of no validity.

The subordinate lodges, as the testimony shows, are permitted to make such provisions as they may see fit regarding the matter of sick benefits, and the by-laws of the defendant lodge, relating to that subject and in force at the time when the plaintiff's claim accrued, is as follows: "Every male member of this lodge who shall have been a member thereof at least six months, who shall become sick, without any fault on his part, and, by reason thereof unable to attend to his work or business, shall be entitled to a benefit of \$7 per week during such sickness not exceeding ten weeks each year. Every male member who becomes sick and intends to draw sick benefits must report this to the secretary immediately. Sick benefits will not be paid unless the physician elected by the lodge, and the committee on the sick shall report that the brother is sick and unable to attend to his work or business. A member leaving the hospital and unable to follow his usual occupation, and desires to draw sick benefit, he shall immediately notify the recording secretary."

The law of the order regulating the procedure which a member must follow, if aggrieved by the action of his lodge, is to be found in article 4 of the constitution of the I. O. B. A. of the United States of America, and is as follows:

"Section 1. Every officer and member of this order binds himself to support the constitution, laws and rules, edicts, directions and resolutions of the Grand Lodge, and Executive Committee, as well as those of the lodge of which he is a member, and shall render all services to his lodge required by him, and perform all duties devolving upon him.

"Section 2. It is the duty of the members to be friendly to each other in their associations and on all occasions to conduct themselves respectfully toward each other. In cases of disagreement or dispute among them they should not resort to the public courts of law or equity before attempting to settle the same in this order by appeal to the Executive Committee.

"Section 3. Any member feeling himself aggrieved at the action of his lodge, or who regards the action of his lodge unjust, or illegal, may appeal to the Executive Committee or to the Grand Lodge. If an appeal takes place the lodge, upon the application of such member, shall furnish him with a complete transcript of the proceedings bearing upon the subject-matter of his grievance or appeal.

"Section 4. Any member feeling aggrieved at the action of his lodge, unjust or illegal, must appeal to the Executive Committee and

await his final decision, before he shall have the right to sue the subordinate lodge of the order in a public court of law or equity."

[2] The plaintiff has never attempted to take any appeal from the action of his lodge, either as to the amount awarded him, or to the refusal to grant him a hearing. Having voluntarily submitted himself to the laws of the order in consideration of the advantages and benefits to be derived therefrom, we think that the plaintiff was bound to exhaust his remedy, by taking the appeal provided for, before he would be entitled to prosecute his claim in a court of law.

The defendant's exceptions are sustained, and an opportunity will be given to the plaintiff to appear and show cause on January 22, 1913, at 10 a. m., why judgment for the defendant should not be entered.

SARGENT, Atty. Gen., v. RUTLAND R. CO.
(Supreme Court of Vermont. Rutland. Jan. 9, 1913.)

1. CONSTITUTIONAL LAW (§ 48*)—DETERMINATION OF CONSTITUTIONAL QUESTIONS—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY.

A statute is never to be held unconstitutional if it can be reasonably held constitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

2. CONSTITUTIONAL LAW (§ 48*)—DETERMINATION OF CONSTITUTIONAL QUESTIONS—TEST.

The constitutionality of a law is to be tested, not by what has been done under it, but by what may rightfully, by its authority, be done.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

3. COMMERCE (§ 61*)—CONSTITUTIONAL GRANT TO CONGRESS—STATE LAW—DEMURRAGE RATES.

Laws 1906, No. 122, §§ 8, 10 (P. S. 4539, 4541), which provides that no railroad doing business in the state shall charge any demurrage on freight received at any station in the state until four days, not including Sundays or holidays, after notification to the consignee of its arrival, with a penalty for its violation, and Laws 1910, No. 147, § 1, which contains the same regulation as to cars placed for loading by a shipper, purport to apply to demurrage charges, regardless of whether the freight belongs to intrastate or interstate commerce, and hence are repugnant to the commerce clause (Const. U. S. art. 1, § 8), and to Interstate Commerce Act Feb. 4, 1887, c. 104, §§ 1, 6, 12, 24 Stat. 379, 380, 383 (U. S. Comp. St. 1901, pp. 3155, 3156, 3162), as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1288), enforced by the Interstate Commerce Commission by demurrage rules allowing a free time of only two days for loading or unloading interstate freight shipments.

[Ed. Note.—For other cases, see Commerce. Cent. Dig. §§ 81-84; Dec. Dig. § 61.*]

4. STATUTES (§ 64*)—EFFECT OF PARTIAL INVALIDITY IN GENERAL.

The fact that part of a statute is in violation of the Constitution does not authorize courts to declare the whole statute void, un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

less all its provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning that they are not severable; but, if the valid part can be eliminated leaving a statute complete in itself and capable of being executed as intended by the Legislature, it must be sustained.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

5. STATUTES (§ 64*) — PARTIAL INVALIDITY—INTERSTATE COMMERCE—DEMURRAGE RATES.

The unconstitutionality of Laws 1906, No. 122, §§ 8, 10 (P. S. 4539, 4541), and Laws 1910, No. 147, § 1, providing that no railroad shall charge demurrage for freight received or for cars placed for loading until four days, excluding Sundays and holidays, after verbal or mailed notice to the consignee or consignor, because not limited to intrastate commerce, is inseparable from the statutes as a whole and renders them wholly void.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

6. COMMERCE (§ 58*)—INTERSTATE COMMERCE—POWER REMAINING IN STATE.

Nothing can be done by a state which will operate as a burden on the business of a carrier engaged in interstate commerce, or impair the usefulness of its facilities or instruments of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77-86; Dec. Dig. § 58.*]

Appeal from Order of Public Service Commission.

Petition by John G. Sargent, Attorney General, against the Rutland Railroad Company. From an order of the Public Service Commission of Vermont forbidding the railroad to make certain demurrage charges, it appeals. Injunction dissolved, order and decree vacated and set aside, and petition dismissed.

The allegations of fact in the petition, also in the answer, are admitted to be true, and these facts are made a part of the report of the Public Service Commission. It appears: That the petitionee is a public service corporation of the states of Vermont and New York, for the transportation of passengers and freight for hire therewithin. That it operates a railroad extending from Ogdensburg, N. Y., to Chatham, N. Y., via Alburgh, Burlington, Rutland, and Bennington, all in the state of Vermont, also a railroad within the latter state, extending from Rutland to Bellows Falls, and from Leicester Junction, same state, to Ft. Ticonderoga, in the state of New York, and from Alburgh, Vt., to No-yan Junction, Canada. That it connects with other railroads at nearly all these places, and at other places named in the petition, located in the state of New York and in Canada, and at all said points interchanges freight cars with such other railroads. That substantially all the freight cars in the United States and in Canada have for a long time been and now are interchanged, operated, and used under an agreement entered into by all the railroad companies operating therein; the agreement being commonly known as the "American Railway Association Car Service Rules." That these rules (some

parts of which are set forth at length in the answer) provide, among other things, that when a railroad company's cars are loaded upon its own line, destined to points beyond its line, they shall be carried through to the destination of the freight; that foreign cars, i. e., cars on roads to which they do not belong, must be promptly returned to their owners, and to this end such cars may be loaded for interstate or intrastate shipments in the direction of the owner, with certain preferences and upon conditions not material here to mention. The rules also provide that foreign cars shall be paid for at the rate of 30 cents per car per day for the months of March, April, May, June, and July of each year and 35 cents per day for the remaining seven months. The operation of all cars on the petitionee railroad is in accordance with these rules, and the petitionee is in this state both an intrastate and an interstate carrier of freight and passengers for hire.

December 18, 1909, the Interstate Commerce Commission issued the following: "Circular Letter No. 2, Series 1909. Interstate Commerce Commission. Proposed Uniform Demurrage Code. The National Association of Railway Commissioners has adopted the uniform demurrage code reported by its committee on car service and demurrage, and recommends that it be made generally applicable on both state and interstate traffic. The Interstate Commerce Commission, recognizing the great benefits to be derived from uniformity in car-service rules, is desirous of lending its influence to the movement. The Commission therefore indorses the rules adopted by the national association, and recommends that they be made effective on interstate transportation throughout the country. This action is, of course, subject to the right and duty of the Commission to inquire into the legality or reasonableness of any rule or rules which may be made the subject of complaint. Edward A. Moseley, Secretary. Washington, D. C., December 18, 1909. Demurrage Rules. Rule 1. Cars Subject to Rules. Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules, except as follows. * * * Rule 2. Free Time Allowed. (a) Forty-eight hours (two days) free time will be allowed for loading or unloading on all commodities. (b) Twenty-four hours (one day) free time will be allowed: (This subdivision 'b' is not material to the questions involved in this case.) * * * Rule 7. Demurrage Charge. After the expiration of the free time allowed, a charge of \$1 per car per day, or fraction of a day, will be made until car is released."

August 30, 1910, Rutland Railroad Company issued, published, and filed with the Interstate Commerce Commission as provided by law for issuing, publishing, and filing tar-

iffs, a tariff designated "I. C. C. A-28," to become effective October 1, 1910, containing the car demurrage rules set forth in said Commission's order of December 18, 1909, applicable to all cars moving on its road.

September 27, 1910, the Interstate Commerce Commission issued an order suspending said tariff, as follows: "At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 27th day of September, A. D. 1910. Docket No. 3400, Sub. 8. In the matter of the investigation and suspension of certain demurrage schedules. It appearing from the records of the Interstate Commerce Commission that there has been filed with the Commission by the within-named carriers schedules designated as follows: (Here the schedules of eight railroad companies, including that of 'I. C. C. A.-28' of the petitioner, are named)—which schedules state new individual or joint rates, fares or charges, or new individual or joint classifications, or new individual or joint regulations or practices affecting such rates, fares or charges: It is ordered, that the Commission, upon its own initiative and upon complaint, without formal pleading and without answer by the interested carriers, do enter upon a hearing concerning the propriety of such rates, fares, charges, classifications, regulations or practices stated in said schedules, with a view to making such order in the premises as may after full hearing, seem just and proper, and that such hearing be held at such time (not later than October 18, 1910), and place as may be hereafter fixed by the Commission. The Commission being further of the opinion, that pending such hearing and decision of the Commission concerning the propriety of such rates, fares, charges, classifications, regulations or practices, the operation of such schedules should be postponed for the reason that from a consideration of the character and amount of such rates, fares, charges, classifications, regulations or practices, and the circumstances under which they have been made, it appears to the Commission there is sufficient ground for claiming that the rates, fares, charges, classifications, regulations or practices, established by said schedules are unjust and unreasonable, and therefore unlawful, and that the public interest requires that the operation of said schedules be deferred until sufficient time has been given for an investigation by this Commission. It is further ordered, that the operation of the aforesaid schedules be suspended, and that the use of the rates, fares or charges therein specified be deferred until November 1, 1910. It is further ordered, that the several carriers above named that have filed schedules, be and they are hereby made defendants to this proceeding, and that a copy of this order be forthwith served upon each of them. A true copy. Edw. A. Noseley, Secretary."

October 22, 1910, the Interstate Commerce Commission issued another order further suspending the operation of said schedules until the 1st day of December, 1910, pending its hearing and decision in the premises.

It was finally determined by that Commission that the demurrage rules indorsed by it in its order of December 18, 1909, and contained in the petitioner's tariff of August 30, 1910, would be reasonable as applied to New England territory, and thereupon the petitioner on July 31, 1911, issued, published, and filed as provided by law for issuing, publishing, and filing tariffs, a tariff putting said rules into effect September 1, 1911, which rules have hitherto remained in effect, and the petitioner is collecting, and intends to continue to collect, demurrage in accordance therewith. These same rules have been adopted by, and are in effect upon, all railroads in the United States.

On the facts admitted by the petition and answer, the Public Service Commission held that the prayer of the petition should be granted, and by its order and decree the petitioner was strictly forbidden and enjoined from charging, collecting, or receiving any demurrage charge on any car placed by the petitioner within this state for the unloading of freight shipped from a place within this state, over a route wholly therein, or for cars placed within this state for the loading of freight therein for shipment over routes wholly within this state, until four days, not including Sundays or holidays, after the petitioner shall have notified, verbally or by mail, the consignor that such car is held, or has been placed, to his use. From this report, order, and decree, the petitioner appealed.

By article 1, § 8, of the Constitution of the United States, "the Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and "to make all laws which shall be necessary and proper for carrying" this power into execution. By the Interstate Commerce Act of 1887, c. 104, 24 Stat. 379, as amended June 18, 1901, April 13, 1903, and June 29, 1906 (see U. S. Comp. St. Supp. 1911, p. 1284), the provisions of that statute shall apply "to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, * * * from one state or territory of the United States or the District of Columbia, to any other state or territory of the United States or the District of Columbia, * * * or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States: * * * Provided, however, that the provisions of this act shall not apply to the transportation of passengers, or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to

any state or territory as aforesaid. * * * The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto, and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto."

By section 6, every common carrier subject to the provisions of this act is required to file with the Interstate Commerce Commission and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, etc.; and such schedules shall also state all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. No carrier shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any services in connection therewith, than the rates, fares, and charges specified in the tariff filed and in effect at the time.

By section 12, the said Commission shall have authority to inquire into the management of the business of all such common carriers, shall keep itself informed as to the manner and method in which the same is conducted and is authorized and required to execute and enforce the provisions of the act.

Argued before ROWELL, C. J., and MUNSON, WATSON, and HASELTON, JJ.

Edwin Lawrence, of Rutland, for appellant. John G. Sargent, Atty. Gen., for appellee.

WATSON, J. By the Laws of 1906, No. 122, § 8 (P. S. 4539), "no railroad or transportation company doing business in this state shall charge, collect, or receive any demurrage charge on freight received at any station in this state until four days, not including Sundays or holidays, after it shall have notified, verbally or by mail, the consignee of such freight of its arrival." By section 10 (P. S. 4541) a penalty is provided for each violation of these provisions. And by the Laws of 1910, No. 147, § 1, "no railroad or transportation company doing business in this state shall charge, collect, or receive any demurrage charge upon any car placed or held for loading in this state until four days, not including Sundays or holidays, after it shall have notified verbally or by mail, the consignor that such car is held or has been placed to his use according to the order previously received."

The defense is that these statutes are void, as repugnant to the commerce clause of the Constitution of the United States, because: (1) They apply to interstate as well as intrastate commerce; and (2) if they apply to intrastate commerce only, such application works a substantial burden upon and discriminates against interstate commerce.

[1] The Public Service Commission construed the law of these sections as pertaining only to commerce wholly within the state, and its order in the premises was limited accordingly. This construction the petitioner says is as it should be, for otherwise the law might be subject to constitutional objections, and a statute is never to be construed so as to be unconstitutional if a reasonable construction can be placed upon it, which will give its provisions constitutional effect.

As to the soundness of the last-stated principle of construction the parties are at one. But the appropriateness of its application to the provisions under consideration is questioned; it being said that the statute in terms applies to interstate, as well as to intrastate, commerce, and that the two elements are inseparable, and, since the valid portion cannot be separated from the invalid, that principle of construction does not apply.

The petitioner, as a common carrier, is operating a railroad or railroads in character intrastate, interstate, and international. Its business in this state, as regards commerce, partakes of each of the same elements of character. At various places in the states of New York and Vermont, and in Canada, its road connects with other railroads, and at such places of connection there is an interchange of freight cars with such other railroads, under the "American Railway Association Car Service Rules," common to all the railroad companies operating in this country, and under which substantially all

the freight cars in the United States and in Canada are made interchangeable. Under these car service rules, a home car, loaded with freight to points beyond that line, shall be carried through to the destination of the freight, a practice essential to the economic efficiency of such public service companies, and alike beneficial to the carriers and to the public. By the same rules foreign cars must be promptly returned to their owners. But in so doing they may be loaded to the road from which originally received, if such loading is in the direction of the home road; loaded in local service in the direction of any junction point with the home road; loaded locally in an opposite direction from the home road or home route, if to be loaded according to certain rules toward the home road, or so it will participate in the freight rate.

[2] The effect of these provisions seems to be such, among other things, that when a foreign car comes into this state loaded with freight of a nature to be taken from the car by the consignee, destined in part for each of two points in the state, domestic freight of like nature between such places, going in the same direction, may be carried at the same time in the same car; and in returning the car to the home road it may be engaged at the same time in carrying freight of the same nature in part destined for some point within this state and in part for some point beyond the state. Thus such cars may concurrently be instruments of state and of interstate commerce, and this seems likely to be of such frequent occurrence in the practical operations under the car service rules, as to render it proper of notice in determining the questions before us; for the constitutionality of a law is to be tested, not by what has been done under it, but by what may rightfully, by its authority, be done. *Montana Co. v. St. Louis Mining & Milling Co.*, 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398.

[3-6] Under the act of 1906, whence the freight was shipped, and under the act of 1910, the destination of the freight to be loaded into the car placed or held at a consignor's request does not by any reasonable construction enter into the essential elements of the thing prohibited. The plain general terms of the enactments purport to apply to demurrage charges on all freight received by consignees direct from cars at any station in this state, and upon all cars placed or held, at the request of consignors, for loading in this state, without regard to the class of commerce to which the former belongs, or in connection with which the latter are being used. The two sections are clothed in language plain and most apt to cover the whole field. The part which is unconstitutional, if there be any such, is inseparable from that which is not.

It is true, as argued, that the fact that a

part of a statute is in violation of the Constitution does not authorize courts to declare the whole statute void, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that they are not severable, or it cannot be presumed the Legislature would have passed the valid part without the other. If the invalid portion can be eliminated and that which remains be complete in itself and capable of being executed in accordance with the apparent intent of the Legislature, wholly independent of the eliminated portion, it must be sustained. *State v. Scampini*, 77 Vt. 92, 59 Atl. 201; *State v. Abraham*, 78 Vt. 53, 61 Atl. 766; *State v. Paige*, 78 Vt. 286, 62 Atl. 1017, 6 Ann. Cas. 725; *Howard v. Illinois Central R. Co.*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. But when, as here, the provisions of the statute are clothed in plain language, and unambiguous, there is no room for construction. The effect is not to be determined on the basis of striking out or disregarding some of the words in the statute, nor by inserting others not there. It is not within the judicial province to give the words used a broader or a narrower meaning than they were manifestly intended to have, in order to bring the scope of the statute within the constitutional power of the Legislature to enact. *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563; *United States v. Harris*, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; *Trade-Mark Cases*, 100 U. S. 82, 25 L. Ed. 550; *Baldwin v. Franks*, 120 U. S. 678, 7 Sup. Ct. 656, 30 L. Ed. 766; *James v. Bowman*, 190 U. S. 127, 23 Sup. Ct. 678, 47 L. Ed. 979.

In *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, questions were before the court based upon the Chinese Exclusion Acts. After stating that the act purports to make the decision of the department final, whatever the ground on which the right to enter this country is claimed, as well when it is citizenship as when it is domicile, and the belonging to a class excepted from the exclusion acts, that the relevant portion of the act of August, 1894, was not void as a whole, and that the statute had been upheld and enforced, the court, through Mr. Justice Holmes, said: "But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again."

In *Howard v. Illinois Central R. Co.*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, the question of the validity of the Federal Employer's Liability Act (Act April 22, 1906, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) was involved. By section 1, "every

common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, * * * shall be liable to any of its employes, * * * for all damages which may result from the negligence of any of its officers, agents, or employes. * * *

The questions raised concerned the nature and extent of the power of Congress to regulate commerce; it being contended, among other things, that the repugnancy of the act to the Constitution clearly appeared, as the face of the act made it certain that the power asserted extended not only to the regulation of master and servant among themselves as to things which were wholly interstate commerce, but embraced those relations as to matters and things domestic in character, and not coming within the authority of Congress. The court, Mr. Justice White, now the Chief Justice, delivering the opinion said that from the first section it was certain that the act extended to every individual or corporation engaged in interstate commerce as a common carrier; that its all-embracing words left no room for any other conclusion; that the statute was addressed to the individuals or corporations engaged in interstate commerce, but was not confined solely to regulating the interstate commerce business which might be done by such persons or corporations; that the liability of a common carrier was declared to be in favor of "any of its employes"; that, as the word "any" was unqualified, it followed that the liability to the servant was coextensive with the business done by the employers embraced by the statute—the court instancing a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state.

It was held that as the act included subjects wholly beyond the power to regulate commerce, and depended for its sanction upon that authority, it was unconstitutional and could not be enforced unless there was merit in the propositions advanced to show that the statute might be saved. None of the propositions to which allusion is made was sustained; but we are here interested more particularly in the one that the statute might be interpreted so as to confine its operation wholly to interstate commerce, or to means appropriate to the regulation of that subject. Thereon the court said the argument that because the statute says carriers engaged in commerce between the states, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business and none other of such carriers and the words "any employe," as found in the statute should be held to mean any employe when engaged only in interstate commerce, required the court to read into the statute words of limitation and restriction not found in it. To quote from the opinion: "The principles of construction invoked are undoubted, but are inapplicable. Of

course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy." It was further held that since the act, by its terms, related to every common carrier engaged in interstate commerce, and to any of the employes of every such carrier, the court was unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate. Although the questions involved in this and in the preceding case noticed, were based upon federal statutes in terms overreaching congressional power, and not upon state enactments extending beyond state control, as in the case at bar, the governing principles of construction are the same. Other cases illustrative of this point are *Louisville & Nashville R. Co. v. Central Stockyards Co.*, 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 441, and *Illinois Central R. Co. v. McKendree*, 203 U. S. 514, 27 Sup. Ct. 153, 51 L. Ed. 298.

[6] There is much force in the contention that the statutory provisions in question, by the free time fixed therein which shall be allowed for loading and unloading cars in this state, directly burden interstate commerce, and are therefore an encroachment upon the exclusive power of Congress, on the principle that nothing can be done by a state which will operate as a burden on the interstate business of a common carrier engaged therein, or impair the usefulness of its facilities or instruments of interstate traffic (see *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962; *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; *Interstate Commerce Com. v. Illinois C. R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280); but we do not decide this question, for, conceding the subject-matter of the statute to be one within the power of the state to regulate for the comfort and convenience of its citizens, in the absence of congressional action, even though

it may indirectly affect interstate commerce (see *Missouri Pacific R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352; *Hardwick Farmers' Elevator Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088; *Bagg v. Wilmington, etc., R. Co.*, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 28 Am. St. Rep. 569), yet by the Interstate Commerce Act, executed and enforced through the Interstate Commerce Commission, there had been congressional regulation of the same subject-matter, so far as it pertained to commerce among the states, and the rules thus prescribed are materially different from the provisions of the state enactments. By the former, the free time allowed is 48 hours (2 days), while under the latter it is 4 days. In such circumstances the two statutes cannot both be operative; and, the power of the state being subordinate to that of the nation, it must yield. In *Gulf, Colorado & Santa Fé Ry. Co. v. Hefley & Lewis*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910, a statute of Texas, providing that it should be unlawful for any railroad company in that state to charge and collect, or to endeavor to charge and collect, from the owner, agent, or consignee of any freight, goods, wares, and merchandise a greater sum for transporting said freight, goods, wares, and merchandise than was specified in the bill of lading, was held to be in conflict with the Interstate Commerce Act, and therefore the state statute must give way, for, said the court, speaking through Mr. Justice Brewer, "generally it may be said in respect to laws of this character that, though resting upon the police power of the state, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the states, is subordinate to those in terms conferred by the Constitution upon the nation." To the same effect are *Hennington v. State of Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; *Southern Ry. Co. v. King*, 217 U. S. 524, 30 Sup. Ct. 594, 54 L. Ed. 868; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257.

The injunction is dissolved, the order and decree are vacated and set aside, and the petition is dismissed.

WOODWARD v. DAIN et al.

(Supreme Judicial Court of Maine. Jan. 20, 1913.)

1. WILLS (§ 673*)—CONSTRUCTION OF TESTAMENTARY TRUST—SUPPORT—"TRUST."

A will, directing that if the testator's sister should be in distress or in need of financial assistance the executors should furnish her out of the residuary estate such sums as might be actually necessary for her support, created a

"trust" in the residuary estate for the actual necessary support of the sister, which was superior to the interest of the life tenant therein. [Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1582-1584; Dec. Dig. § 673.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7119-7124.]

2. TRUSTS (§ 178*)—INSTRUCTIONS TO TRUSTEE.

When trustees, vested with the exercise of discretion, fail to properly exercise that discretion, either from bad faith, or because of a misunderstanding of the trust and their duties therein, a court of equity has jurisdiction to interfere and to give directions to the end that the trust may be properly carried out.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 232; Dec. Dig. § 178.*]

3. APPEAL AND ERROR (§ 1009*)—REVIEW—QUESTIONS OF FACT—FINDING OF COURT.

The decision of a justice sitting in equity, as to matters of fact, will not be reversed, unless clearly erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Supreme Judicial Court, Sagadahoc County.

Bill by Sarah S. Woodward against Charles J. Dain and others, trustees. Decree for complainant, and defendants appeal. Affirmed.

Argued before WHITEHOUSE, C. J., and CORNISH, KING, BIRD, and HANSON, JJ.

George W. Heselton, of Gardiner, for appellants. E. C. Plummer, of Bath, for appellee.

PER CURIAM. This cause in equity is before this court on an appeal from the final decree of the sitting justice.

In the third paragraph of his will, Charles F. Rideout, late of Bath, Me., provided as follows:

"I do hereby expressly declare and direct that, in case my sister Sarah S. Woodward at any time falls into distress, or is actually in need of financial assistance, my executors shall furnish and provide for her out of my residuary estate such sum or sums as may be actually necessary for her support."

By a decree of the Supreme Judicial Court of this state, dated August 18, 1909, it was decreed that "out of said residuary estate the trustees shall forthwith provide the said Sarah S. Woodward such sum or sums as may be actually necessary for her support in accordance with the provisions of the third paragraph of said will."

In this bill in equity now before the court Mrs. Woodward complains that under the decree referred to the trustees have fixed upon the sum of \$3.50 per week to be paid to her, which sum she claims is inadequate for her actual necessary support, and she asks that the trustees may be ordered to pay her a larger sum per week, and also to pay certain bills which she has contracted for her neces-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

sary support, and which she is unable to pay.

The sitting justice, hearing the same, ruled in substance and effect that the provisions of the third paragraph of the will of Mr. Rideout created a trust in the residuary estate for the necessary support of Mrs. Woodward as therein specified, which trust was superior to the interest of the life tenant in said residuary estate; and that, although the testator vested in the trustees the discretion to determine the amount of the payments to be made to Mrs. Woodward, yet, where it appears that the trustees have not properly exercised that discretion, either from lack of good faith, or because of a misconception of the legal scope of the trust and of their duties thereunder, the court has jurisdiction to interfere.

And he found as a fact that the trustees had "in some respects misconceived their duties," and that they had failed to furnish and provide for Mrs. Woodward such sums as were reasonably adequate for her actual necessary support. Whereupon he ordered, adjudged, and decreed as follows:

(1) That the trustees shall pay to the complainant out of the residuary estate of Charles F. Rideout, monthly, from and after the date of this decree, not less than \$20 a month, which sum is adjudged to be actually necessary for her support, and shall from time to time pay such further sum as her actual necessities shall require.

(2) That the trustees shall forthwith pay to the complainant out of said residuary estate the sum of \$30 for medical expenses already incurred.

(3) That the residuary estate shall bear the costs and expenses of this proceeding to this extent: The trustees shall pay to the complainant's solicitor the taxable costs, together with a solicitor's fee of \$40, and charge the same in their account.

Held:

[1] (1) The sitting justice correctly construed the provisions of the third paragraph of the will of Charles F. Rideout as creating a trust in the residuary estate for the actual necessary support of the complainant, which was superior to the interest of the life tenant therein.

[2] (2) His ruling was appropriate and correct that when trustees who are vested with the exercise of a discretion, fail to properly exercise that discretion, either from lack of good faith, or because of a misunderstanding of the scope of the trust and their powers and duties therein, a court of equity has jurisdiction to interfere and give directions to the end that the trust may be properly carried out.

[3] (3) The decision of the sitting justice, as to matters of fact, will not be reversed, unless it clearly appears that such decision is erroneous. It does not so appear in this case; on the other hand, his findings of fact appear

to be fully supported by the evidence, and his conclusion and judgment just and reasonable. Decree below affirmed, with costs.

RUTLEDGE v. RUTLEDGE et al.

(Court of Appeals of Maryland. Nov. 18, 1912.)

1. INSANE PERSONS (§ 62*)—POWER TO CONTRACT DEBTS.

Since a lunatic cannot contract a debt after inquisition found, claims of creditors must exist before the inquisition, or may consist of liens on his property created before that time.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 108, 109; Dec. Dig. § 62.*]

2. INSANE PERSONS (§ 71*)—DEBTS—PROCEEDINGS FOR COLLECTION.

A creditor of a lunatic may collect his debt or enforce a lien on the lunatic's property only in an adversary proceeding prescribed by Code Pub. Gen. Laws 1904, art. 16, § 118, providing that in all applications by a guardian or trustee of the property to sell realty or personalty, etc., the court shall, before passing a decree, have proof taken as in other chancery cases as to the value, quantity, and condition of the property, and may decree a sale if it deems it to be in the lunatic's interest.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 118-124; Dec. Dig. § 71.*]

3. INSANE PERSONS (§ 71*)—SALE OF PROPERTY—APPLICATION OF TRUSTEE.

A sale of a lunatic's property may only be ordered under Code Pub. Gen. Laws 1904, art. 16, § 121, providing that, where a trustee is appointed for the management of the "person and estate," the court may decree that the person's property be sold for his support, or the payment of reasonable expenses incurred by the trustee, where the application is by a trustee of the "person" and estate for the lunatic's support and payment of expenses incurred by the trustee.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 118-124; Dec. Dig. § 71.*]

4. INSANE PERSONS (§ 36*)—COMMITTEE—APPOINTMENT—COMMITTEE OF PERSON.

Where the petition prays for the appointment of a committee of a lunatic's "person and estate," but the decree only appoints a committee of the estate, it cannot be assumed that the court also intended to appoint such persons committee of the "person."

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 54, 55; Dec. Dig. § 36.*]

5. INSANE PERSONS (§ 71*)—SALE OF PROPERTY—SUPPORT OF LUNATIC—PROCEEDINGS FOR SALE.

While the proceedings required by Code Pub. Gen. Laws 1904, art. 16, § 118, providing that in all applications to sell a lunatic's real or personal property the court shall have proof taken as in other chancery cases as to the value and condition of the property, are not necessary in order to sell the property for the lunatic's support or for payment of the trustee's expenses pursuant to section 121, the application for the sale of the realty for such support and expenses should show the object and necessity for the sale.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 118-124; Dec. Dig. § 71.*]

6. INSANE PERSONS (§ 71*)—SALE OF PROPERTY—REPORT OF COMMITTEE—PROOF OF SALE.

The language of the report of a sale of a lunatic's realty that "your committee believes

the same to be for the interest and advantage of" the lunatic indicated that the purpose of the sale was for reinvestment, and not for the lunatic's support or payment of the committee's expenses.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 118-124; Dec. Dig. § 71.*]

7. INSANE PERSONS (§ 71*)—SALE OF PROPERTY—INVALID SALE—DISPOSITION OF PROCEEDS.

Though an attempted sale of a lunatic's realty was invalid so that her devisee was entitled to the proceeds, such devisee would be estopped from claiming the realty if she accepted the proceeds, and must give the purchaser or its grantee a deed therefor upon either of them coming into the proceedings and asking that their title be perfected, and, if such purchaser or its grantee does not come into the proceedings after reasonable notice, the proceeds, less a reasonable compensation for the use of the land and any injury done to it by the purchaser, and the costs of the proceedings, should be returned to the purchaser upon its surrender of the property to the devisee.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 118-124; Dec. Dig. § 71.*]

8. INSANE PERSONS (§ 103*)—SALE OF PROPERTY—DISPOSITION OF PROCEEDS—COSTS OF PROCEEDING.

Upon reversing a decree denying the petition of a devisee of a lunatic for the proceeds of the sale of her land by a committee of the estate because the sale was invalid, and adjudging the devisee's right to the proceeds, the costs should be paid out of such proceeds, and not out of the estate or by the committee-defendants individually.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 187; Dec. Dig. § 103.*]

Appeal from Circuit Court, Harford County, in Equity; Wm. H. Harlan, Judge.

Petition by Julia W. Rutledge against John R. Rutledge and another. From a decree for defendants, petitioner appeals. Reversed and remanded for further proceedings.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

John S. Young, of Bel Air, for appellant. Philip H. Close and S. A. Williams, both of Bel Air, for appellees.

BOYD, C. J. On the 1st day of March, 1910, Monica Ann Rutledge was, by an inquisition of a jury, found to be of unsound mind and a lunatic, and not capable of the management of her property and estate. On the 12th of that month the inquisition was confirmed by the circuit court for Harford county, and Dr. Charles A. Rutledge and John R. Rutledge were appointed a committee of her estate. On the 6th of April, 1910, a report was filed by the committee which recited that in pursuance of leave granted by the court under the order passed on that day they reported a sale to the Susquehanna Pole Line Company of Harford County for the sum of \$1,200 of a parcel of land 100 feet wide, extending through the lands of Monica Ann Rutledge, and which is therein particularly described. What is

called an order of the court was simply an indorsement on the report of sale of, "Leave granted to file this report," which was signed by Judge Van Bibber on April 6, 1910. After the publication of an order nisi, the sale was ratified and confirmed on May 7, 1910. In May, 1911, Julia W. Rutledge filed a petition stating that Monica Ann Rutledge had departed this life leaving a last will and testament by which she devised all of her real estate to the petitioner, and alleging that the committee had in their hands \$1,200, being the proceeds of the sale of real estate, which she was entitled to as devisee under the will. An order was passed directing the committee to pay to her the said \$1,200, unless cause to the contrary was shown. The docket entries show that each of the committee filed an answer. They are not in the record, but a copy of the one of John R. Rutledge was by consent of counsel left with us. In it he admits that the committee have in their hands the \$1,200, out of which certain expenses attending the sale should be paid, but denies that the proceeds of the real estate passed under the devise in the will, and alleges that, by the ratification of the sale, the proceeds of said real estate were converted into personal property, and should pass under the will as such. The court passed a decree dismissing the petition, and declaring that the money in the hands of the committee arising from said sale was personal estate from the ratification of the sale, and decreeing that the committee account with the executor of the will for the same after deducting therefrom such costs, expenses, fees, or allowances as may have been theretofore or may thereafter be allowed by the court, and the case was referred to the auditor. From that decree this appeal is taken.

[1, 2] In order that we can properly determine the questions involved, it will be necessary to consider the provisions of our Code in reference to the sales of a lunatic's property. What is now section 114 of article 16 of the Code gives the courts of equity of this state large powers in superintending and directing "the affairs of persons non compos mentis, both as to the care of their persons, and the management of their estates." But while the language of that section is broad, and was intended to confer large powers on courts of equity, subsequent sections of that article prescribe what is necessary to be done before the property of such persons can be sold or disposed of. By section 115 the court is authorized, on the application of a creditor, to decree a sale of the real or personal estate of a non compos mentis, or such part thereof as may be necessary, to pay the claim of the creditor, if the court is satisfied of the justice of the claim, and that there is no other means of paying it. It will be observed that that is done on the application of a creditor of the lunatic, and "as the lunatic

himself cannot, after inquisition found, contract a debt, the claims of creditors must exist before the inquisition, or may consist of liens or incumbrances on his property. In cases where the creditor seeks to collect his debt, or enforce his lien, an adversary proceeding, such as is prescribed in section 83 (now 118), of the Code, is the proper one." *Estate of Dorney, Lunatic*, 59 Md. 67.

[3] There was no such proceeding instituted for the sale of this property, and therefore, even if we could assume from the meager information furnished by the record that John R. Rutledge and Charles A. Rutledge had claims against the lunatic, it cannot be said that the sale was made for the purpose of paying debts due by her. There was not even an application filed by them, or either of them, as creditors for the sale of any part of her estate, and nothing was done to satisfy the court of the justice of the claim, and that there was no other means of paying the same. It is manifest, therefore, that this sale was not authorized on the ground that the lunatic owed debts, and when it is remembered that the inquisition was ratified on the 12th day of March, and the sale reported on the 6th day of April, 1910, it would be difficult to find anything in the record to sustain the suggestion made at the argument that the claim of John R. Rutledge was for such support of the lunatic as would justify a sale of property worth twelve hundred dollars at the instance of the committee, for, if John R. Rutledge's claim be conceded or established, it would be as a creditor against the lunatic, and not for her support or expenses incurred by the trustee, after she was adjudged a lunatic, which are what section 121 refers to. Section 116 authorizes the court to order or decree the sale of any real, leasehold, or personal property to which the lunatic may be entitled, on the application of a guardian, committee, or trustee of the property of a person non compos mentis for the purpose of investing the proceeds as therein directed, and section 117 confers power on the court, upon application of the guardian, committee, or trustee, to order or decree the real or leasehold property of the lunatic to be leased, or to order or decree the surrender of any lease of the estate or the property of such a person to be accepted, and the same to be demised anew. But section 118 distinctly provides that in all applications by a guardian, committee, or trustee of the property of a person non compos mentis to sell any of the real, leasehold, or personal property of such person, or to demise any of the real or leasehold property, or accept the surrender of a lease thereof, "the court shall, before passing an order or decree, have proof taken as in other chancery cases as to the value, quantity and condition of the property, and after considering all the circumstances, if the court shall deem it to the interest

and advantage of such person non compos mentis, it may order or decree a sale, lease or surrender of a lease of the whole or any part of the said property on such terms and conditions as the court may prescribe." Then section 119 provides that "no sale, lease or surrender of a lease of the property, real or personal, of a person non compos mentis, shall be valid unless the same shall be reported to and confirmed by the court." It is not contended that the provisions of section 118 were complied with, but, on the contrary, the committee simply filed a report of sale, with the indorsement thereon as above stated. There was no application for authority to sell filed by the committee, and the report does not show the object of the sale. It may readily be inferred that the purchaser was buying the strip of land for the purpose of using it in connection with other property in constructing its line of wires, and, although there is no evidence in the record, we can perhaps assume that the committee and the lower court believed that a large price was being obtained for it. It is claimed, however, that the court can assume or infer that it was sold for the support of the lunatic under the authority of section 121. In *Estate of Dorney, Lunatic*, supra, it was held that it was not necessary to adopt the proceedings required by what was then section 83 (now section 118) to enable the court to order a sale of any of the property of the lunatic for the purpose of paying his reasonable and just expenses. It was there said: "As the expenses of the lunatic are going on all the time and as it would be improper in the court to sell more of the property than would be sufficient to pay for the support and expenses of the lunatic for the time being, the process might have to be repeated to the great cost of the estate. The custody of the person and property of the lunatic must have been already committed to the trustee before this 86th (now 121st) section can apply, and he, the trustee, by virtue of his appointment, is under the control and jurisdiction of the court, and subject to its orders, and we can see no good reason why he should institute an adversary proceeding against the lunatic committed to his charge to enable him to do what may be absolutely necessary for the lunatic's comfort and well being, and the security of his estate." If, then, we were only called upon to determine whether the court could order a sale of a part of the lunatic's property for her support, or for the payment of all reasonable and just expenses, which the committee may have incurred, without the proceedings provided for in section 118 first being adopted, we would have no hesitation in holding that that could be done, but that is not the question in this case.

As pointed out by Judge McSherry in *Hamilton v. Traber*, 78 Md. 26, 27 Atl. 229, 44

Am. St. Rep. 258, the English Court of Chancery did not have power to decree a sale of the lunatic's real estate for his maintenance and support until that power was distinctly conferred by acts of Parliament passed after the American Revolution, and it was not until Acts 1800, c. 67, that courts of equity of this state had such power. It was said in the case of *Estate of Dorney*, supra, that "the custody of the person and property of a lunatic must have been already committed to the trustee before this eighty-sixth (now 121st) section can apply," and in *Hamilton v. Traber*, supra, that, "in a word, his status as a lunatic must first be established by the inquisition of a jury, and a guardian or committee of his person and estate must then be appointed according to law, before any proceeding can be taken by any one to procure a sale of his estate for his maintenance, or for a change of investment." In *Hamilton v. Traber* the provisions of article 16 as they were found in the Code of 1888 were considered. Section 98 of that article provided that "the court upon the application of the guardian, committee, or trustee of any person non compos mentis may decree the sale," etc., and that was construed to mean the guardian, committee, or trustee for the management of the person and estate of a person non compos mentis. Acts 1894, c. 221, repealed and re-enacted sections 98, 99, and 100 of that article of the Code of 1888, and they are now sections 116, 117, and 118 in the Code of 1912. In all of them the expression now used is "a guardian, committee or trustee of the property of a person non compos mentis," but section 103 of the Code of 1888 provided that "in all cases where a trustee has been appointed by the court for the management of the person and estate of a person non compos mentis, the court may decree that the property of such non compos mentis, or so much thereof as may be necessary, be sold for the support," etc. That is section 121 of the Code of 1912, and the language has not been changed. It is therefore seen that since the act of 1894 the guardian, committee, or trustee of the property of a lunatic can apply for the sale for investment, for lease, etc., but the trustee for the management of the person and estate of a lunatic is the one to apply for a sale for his support and for the payment of expenses incurred by the trustee. In this case it was alleged in the petition for the writ de lunatico inquirendo that "it would be to her interest that some suitable committee be appointed of her person and estate," but the order only appointed the appellees committee of the estate. It is said in *Alexander's Chancery Practice*, 227, that the chancellor "may intrust the person of the lunatic to one committee and his estate to another. But it is more usual in this state to appoint the same person committee of the person and estate." We do not find

anything in the record to sustain the claim that the appellees were appointed committee for the management of the person of the lunatic.

[4] It may very well be that a person is willing to be the committee of the estate of one who is non compos mentis, but not of the person, and when the petition prays that some suitable committee be appointed of her person and estate, and the decree only appoints a committee of the estate, we cannot assume that the court intended to also appoint them committee of the person. So, to say the least, it would be a very violent presumption to hold that this sale was made under section 121, which only authorizes a sale when a trustee has been appointed for the management of the person and estate of the lunatic.

[5] But regardless of that if a sale of the real estate of a lunatic, or some part thereof, is to be made for the support of such lunatic, or for the payment of expenses incurred by the trustee, there should be an application to the court showing the object and necessity for the sale. The language of section 118 is very broad: "In all applications * * * to sell any of the real, leasehold or personal property * * * the court shall, before passing an order or decree, have proof taken as in other chancery cases," etc. And while this court has held, and we still hold, that that is not necessary when the sale is to be made for the purposes mentioned in section 121, such sales are exceptions to the general rule adopted in dealing with a lunatic's property, and, if a sale is to be brought within that exception, the court should be so informed and properly advised by what is called in *Estate of Dorney, Lunatic*, "the presentation of a prima facie case," which in that case was a petition verified by affidavit of the committee, the tax bills which were to be paid, and a letter from the collector filed as exhibits. We do not mean to say that exhibits must always be filed with an application for a sale for such purposes, but we are of the opinion that, when there is no chancery proceeding, there should at least be something of record to show the purpose of the sale, especially in reference to real estate, for, although section 118 refers to personal property as well as real estate, titles to real property should not be left in such uncertainty.

[6] Again, the report of sale states that "your committee believes the same to be for the interest and advantage of the said Monica." That is not such language as would likely have been used if it had been intended to apply the principal to her support, or to the payment of expenses incurred by the committee. It is the kind of expression generally used in proceedings for the sale of an infant's property for the purpose of reinvestment. So, from whatever standpoint we consider the case, we are unable to reach

the conclusion that the sale was made for any of the purposes mentioned in section 121, and the court had no power to authorize or ratify a sale for investment of the proceeds by reason of an utter failure to comply with the provisions of section 118. It is true that since the act of 1894 it has not been necessary to issue any process, or have an order of publication, against the lunatic as it was when the proceedings were taken in *Willis v. Hodson*, 79 Md. 327, 29 Atl. 604, but the provisions of section 118 must be substantially complied with before the court is authorized to pass an order or decree for sale or lease under sections 116 or 117. In this case there was not even an order or decree passed, as the mere leave to file the report of sale cannot be so regarded. It follows from what we have said that in our judgment there was no valid sale of this property, and, of course, there was no conversion of the real estate into personality.

[7] The only remaining question we need to consider is, What disposition shall be made of the \$1,200 received by the committee? The appellant did not object to the sale, but asked in her petition that the money be turned over to her. As she seeks the relief of a court of equity, she must do equity. Indeed, if this money is paid over to her and she accepts it, she would be estopped from making any claim for the property intended to be sold, but, if she is to get the benefit of the fund, she should give the purchaser a deed, so it can have such title as it supposed it was getting by the sale which was ratified by the court. The *Susquehanna Pole Line Company* is not a party to this proceeding, but if it still holds the property attempted to be sold to it, and desires to have its title perfected, it should be permitted to come into court and state its willingness to have the sale thus perfected. If it has disposed of such interest as it acquired, or was supposed to have acquired under the sale, then the present owner of that interest should be permitted to stand in the place of that company. Upon said company or its assigns thus coming into court and stating its or their willingness to have the sale perfected, an order should be passed directing the said sum of \$1,200, less the costs and expenses connected with the attempted sale and costs of this case, to be paid over to the appellant upon her executing and delivering to the *Susquehanna Pole Line Company*, or its assigns, a good and sufficient deed for the property described in the report of sale. If that company or its assigns does not within such reasonable time after notice to it or them as the lower court may fix thus come into court, then the said sum of \$1,200, less such amount as the lower court may determine to be a reasonable compensation for the use of the land and any injury done to it by that company, or its as-

signs, and the costs of this case, should be returned to the company or its assigns upon it or their surrendering the property to the appellant.

[8] We deem it just that the costs be paid out of the \$1,200, as it will not be right under the circumstances to require the committee to pay them individually or make the estate liable for them. It follows that the decree of the lower court must be reversed, and the case remanded for further proceedings in accordance with this opinion.

Decree reversed and cause remanded for further proceedings, the costs, above and below, to be paid out of the \$1,200 in the hands of the committee.

ROWELL v. SANBORN.

(Supreme Court of New Hampshire. Rockingham. Dec. 3, 1912.)

1. ASSOCIATIONS (§ 15*)—PROPERTY—RIGHTS OF MEMBERS.

Where associates undertook to build a hall on land to be given by defendant, but the building was never completed, and all the other associates, except defendant and another, abandoned it, the association did not forfeit the building; and any of its members could maintain an action against defendant for an accounting as soon as he took adverse possession of it.

[Ed. Note.—For other cases, see *Associations*, Cent. Dig. §§ 19-25; Dec. Dig. § 15.*]

2. LIMITATION OF ACTIONS (§ 95*)—POSSESSION AS AGAINST ASSOCIATION.

Under Pub. St. 1901, c. 217, § 3, which requires that personal actions shall be brought within six years after the cause of action accrued, action by a member of an association, who knew in 1890 that another member had taken possession and was holding the building thereon adversely to the association, not begun until 1898, was barred.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 337, 473, 474; Dec. Dig. § 95.*]

Exception from Superior Court, Rockingham County; Wallace, Judge.

Bill by Beede H. Rowell, administrator, against Nellie C. Sanborn, administratrix. Judgment for defendant, and plaintiff excepts. Exception overruled.

In October, 1884, Smith A. Rowell, the plaintiff's intestate, associated himself with Alvah S. Sanborn, the defendant's intestate, and a number of others, to build a hall. It was a part of the agreement that Sanborn should give the association the land on which to build. The building was begun in 1884, but the association never completed it. All the associates, except Rowell and Sanborn, abandoned the undertaking as early as 1896. In 1890 Rowell notified Sanborn that he should have nothing more to do with the building, and Sanborn thereupon took possession of and afterward held it as his own property.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

G. K. & B. T. Bartlett, of Derry, for plaintiff. Page, Bartlett & Mitchell, of Portsmouth, for defendant.

YOUNG, J. [1] Although the association forfeited whatever right it may have had to demand a conveyance of the land on which the building stood when it abandoned the undertaking, it did not forfeit the building, and could have either moved it to another lot, or sold it and divided the proceeds; but, instead of doing either of these things, it suffered Sanborn to take possession of and hold the building as his own property. Any member of the association could have maintained an action against Sanborn for an accounting as soon as he took possession of the building.

[2] None of the members, therefore, who either knew or ought to have known how he was holding the building, can maintain such an action, unless it was begun within six years from the time of his taking possession. *Clark v. Slayton*, 63 N. H. 402, 1 Atl. 113; *Currier v. Studley*, 159 Mass. 17, 19, 33 N. E. 709; P. S. c. 217, § 3. Rowell knew in 1890 that Sanborn was holding the building adversely to him and to the association, but did not begin this action until 1898. Consequently the statute is a bar to its maintenance.

Exception overruled. All concurred.

E. A. STROUT CO. v. HOWELL et al.

(Supreme Court of Delaware. Jan. 21, 1913.)

1. CORPORATIONS (§ 654*)—FOREIGN CORPORATIONS—CARRYING ON BUSINESS IN STATE—COMPLIANCE WITH STATUTES—LICENSES.

Doing the things required by the Constitution and statute of a foreign corporation before it can do any business in the state does not entitle such a corporation to carry on a real estate agency without obtaining the license, which Rev. Code 1852, amended to 1893, p. 56 (13 Del. Laws, c. 117), requires any person or corporation to obtain before engaging in such business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2551, 2556; Dec. Dig. § 654.*]

2. LICENSES (§ 39*)—FAILURE TO OBTAIN—EFFECT ON CONTRACT—STATUTES.

Rev. Code 1852, amended to 1893, p. 56 (13 Del. Laws, c. 117), providing that no one, without first obtaining a license, shall engage in any of certain enumerated pursuits, including that of a real estate agency, without first taking out a license, and making it a misdemeanor so to do, while primarily a revenue statute, must also be considered a regulative statute, rendering unenforceable a contract for commissions for one engaged in such business without a license; some of the kinds of business named in the statute, when first passed, being properly subject to regulation.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 76-78; Dec. Dig. § 39.*]

Error to Superior Court, Newcastle County. Action by the E. A. Strout Company against Alfred P. Howell and another. Judgment for

defendants (82 Atl. 288), and plaintiff brings error. Affirmed, and judgment rendered.

See, also, 82 Atl. 1081.

Argued before CURTIS, Ch., and CONRAD and WOOLLEY, JJ.

Alexander B. Cooper and Richard S. Rodney, both of Wilmington, for plaintiff in error. Levin Irving Handy, of Wilmington, for defendants in error.

CURTIS, Ch. (delivering the opinion of the court). The writ of error in this case is to the final judgment sustaining the demurrer to the replication to the fifth plea. The action was in assumpsit to recover payment for commissions for selling land for the defendant. By the fifth plea the defendants set up the defense that the plaintiff did not have a license from the state of Delaware to engage in the business of conducting a real estate agency. To this plea the plaintiff replied that it was incorporated under the laws of Maine, had complied with the laws of Delaware respecting foreign corporations doing business in Delaware, and that one Zepp, a real estate agent, duly licensed under the laws of Delaware, did, as the agent or representative of the plaintiff, make the sale, for the making of which the commission was demanded and sued for. A demurrer of the defendant to this replication was sustained by the court below, on the authority of the case of *Reeder v. Jones*, 6 Pennewill, 66, 65 Atl. 571, a case like this one, except that the real estate agent was an individual and not a corporation.

In the court below both court and counsel treated and considered the question raised as though there were in the pleadings an allegation that the defendant company was itself engaged in, prosecuted, followed, or carried on the trade, business, pursuit, or occupation of a real estate agency, and, therefore, that in making the sale referred to in the declaration it violated the following section of a statute of the state of Delaware, entitled "An act to raise revenue and provide for the current expenses of the state government":

"Section 1. That no * * * company or corporation, without having first obtained a proper license therefor, as hereinafter provided, shall within the limits of this State, be engaged in, prosecute, follow, or carry on any trade, business, pursuit, or occupation in this Section hereinafter next mentioned; that is to say, * * * real estate agency. * * *" See chapter 117, vol. 13, Laws of Delaware, p. 105, passed March 22, 1887, and published as amended in Revised Code of 1893, p. 56.

In this court, also, it was argued by counsel on both sides as though it was averred clearly that the plaintiff was conducting a real estate agency in Delaware by branch

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

office, or agency located here, and without a license. Applying critical tests to the pleadings, perhaps this averment is not clearly made, but the case will be decided as though it was so made.

[1] The plaintiff relied largely on the decision of this court in the case of *Model Heating Co. v. Megarity*, 81 Atl. 394. There it was held that a corporation incorporated under the laws of a state other than Delaware, doing business here by branch office, or agent located here, could recover here for goods sold and delivered to a resident here, notwithstanding the constitutional and statutory provision that no such corporation could so do business here until it had complied with certain requirements, which the vendor in that case had not done. In the case now before the court, the plaintiff, in its replication to the fifth plea, avers compliance with these regulations. But it is quite clear that this compliance does not of itself authorize the defendant company to carry on a particular kind of business, regardless of laws of this state requiring that a license be had before that particular kind of business can be carried on. When a foreign corporation comes into this state by branch office, or agents, or representatives, located here to do a particular kind of business here, it must comply with the statutory regulations prescribed for those who transact that kind of business. If it engages in any of the kinds of business mentioned in the above statute, it must have a license therefor, and it is not sufficient for it to have complied with other legislative provisions applicable to all foreign corporations irrespective of the nature of the business which they transact. Therefore, the plaintiff in making the sale for the defendant violated the statute above referred to, notwithstanding it had complied with the Constitution and provisions of other statutes relating to foreign corporations generally, because it had not received a license to carry on the business of a real estate agency.

[2] Does this failure to have such license prevent the plaintiff from recovery in this case? In this case the act was one for raising revenue as its primary object and it is so stated in its title. By the statute no person, without having first obtained a license therefor, shall carry on any of the several kinds of business therein designated, including a real estate agency, and a penalty was provided "for every such offense." Unenforceability of contracts was not made a further penalty and contracts made by those without licenses were not made unlawful.

In the case of *Model Heating Co. v. Megarity*, supra, the act there under consideration made it unlawful for a foreign corporation to do business in Delaware by branch office, etc., until it had complied with certain regulations, and any corporation doing business without having first complied was made

subject to a penalty for each and every offense. There the question was whether a contract made by a foreign corporation doing business in Delaware by branch office, without having complied with the requirements relating to such corporations, was enforceable in this state. It was held that the court should consider the purposes and object of the act, and not impose the penalty of unenforceability of its contracts as an additional penalty, not imposed by the act, when, as the court found, the main purpose of the act was to bring all foreign corporations doing business here within the reach of the process of the state courts, without respect to their purposes, and did not impose the penalty of unenforceability of contracts. When a statute is silent as to the enforceability of contracts made by one who has not complied with the statute, the whole act and its purposes should be considered in determining whether the contract is enforceable. *Model Heating Co. v. Megarity*, 81 Atl. 394, 397.

The provision of the law under consideration is primarily an act to obtain revenue, but it evidently represents the public policy of the state respecting certain kinds of business therein specified. To ascertain this policy and find within the act its ultimate purposes beyond the primary one of the raising of revenue, the act as it was originally passed should be considered, for there was manifested most clearly the legislative intent, rather than at later periods when amendments had been made striking out some and putting in other kinds of business as subject to license regulations.

The original act was passed March 22, 1867. By repealing prior acts specifically and by general words, it represented a new and, perhaps, different policy in legislation respecting revenue raising. It required licenses for several classes of business, including insurance agencies, real estate agencies and sellers of intoxicating liquors. The necessity of a judicial recommendation of persons applying for licenses to sell intoxicating liquors was omitted. By later amendments insurance agencies and liquor sellers were removed from the operation of the statute and made subjects of special statutes, and lawyers, doctors, dentists, conveyancers and bankers were added. Such is in general the present form of the statute.

The court in the case of *Model Heating Co. v. Megarity*, supra, did not express an opinion whether the case of *Reeder v. Jones*, supra, was properly decided, or not, but pointed out some elements of difference between the two cases, and expressly disclaimed an intention to approve or overrule *Reeder v. Jones*, or any other Delaware case. In all of the Delaware cases the court found evidence of legislative purpose, or express phraseology which showed they were not useful as guides to judicial interpretation

of the provisions of law relating to foreign corporations then under consideration. So far as the license statute in question is concerned, this court has not heretofore expressed itself in a definite way.

Looking at the statute as originally passed, it seems clear that it was not enacted merely to raise revenue, but to promote some object of public policy, viz., to prevent the carrying on of certain specified kinds of business, at least some of which involved danger to the morals of the people and some others at least unusual opportunities to deceive and defraud. Of the first class are sellers of intoxicating liquor, and this class is well recognized as peculiarly subject to legislative restriction and regulation. Of the other class are agencies for foreign life and fire insurance companies. The legislative purpose to make unenforceable contracts made by persons engaged in these kinds of business, until compliance with the statute, is clear, and unmistakable. This purpose is to be read into the statute not because it has a recurring penalty for each and every offense, and even though it does not in terms make it unlawful to carry on these kinds of business until compliance therewith, or in terms declare unlawful, or make unenforceable, the contracts of those who engage in them without a license. Such purpose seems clearly to exist, even though there are not in the act as passed any detailed regulations for the conduct of the kinds of business mentioned therein, such as an official inquiry as to mental, moral or physical fitness, or financial responsibility. The very omission of these features strengthens the view that in addition to the recurring penalties named in the act, the aid of the courts in enforcing contracts should be refused to all who do not comply with the condition fixed by the statute as a prerequisite to the right to carry on the specified kinds of business, in the course of which the contract in question was made.

The original legislative purpose is not affected by the fact that insurance agencies, insurance companies and sellers of intoxicating liquor are not now subject to the provisions of the act, but are now regulated by special statutes with numerous restrictions to protect the public from imposition, fraud, or to promote morality, peace and good order. The object of the statute as originally passed was primarily to raise money, but also to restrict and regulate business of certain kinds by withholding the right to carry

them on except from those who obtain a license therefor. It operates on the business as well as on the person. Granting the license is the means by which the named kinds of business are in a measure restricted, regulated and controlled, and is also a method for obtaining revenue.

The principle here alluded to is well stated by Judge Cooley:

"When the tax takes the form of a tax on the privilege of following an employment, convenience in collections will commonly dictate the requirement of a license, and the person taxed will be compelled to pay the tax as a condition to the right to carry on the business at all. In such a case the business carried on without a license will be illegal, and no recovery can be had on contracts made in the course of it." Cooley on Taxation (2d Ed.) p. 572.

The statute is not a general administrative statute, applicable to all persons, but a regulative statute, applicable to certain kinds of business with revenue raising as a primary feature, but not its only purpose. It is to be considered a regulative statute even though some of the kinds of business therein mentioned do not at this period of time seem to be subjects for regulation, if there be named in it other kinds of business which at the time the act was passed were and now are regarded as properly subject to regulation. There can be no doubt that the framers of the statute intended to render unenforceable a contract made for the sale of intoxicating liquor by a person unlicensed to carry on that business, for the character of the business indicates such intent. This same intent must apply to all the kinds of business named in the act when passed, and it therefore includes contracts made by those engaged in business as real estate agencies for services in making sales of real estate.

It does not seem necessary, or important, to review the cases cited on both sides, which show an irreconcilable conflict. All recognize, or at least do not controvert, the principle, that the legislative intent and purpose of the act should be ascertained and if clearly indicated, or be clearly or reasonably inferable from the subject-matter affected by the act, as well as its language, then it should control the court.

The demurrer to the replication to the fifth plea was rightly sustained, and there was no error in the court below, and the judgment will, therefore, be affirmed.

DEPUTY v. DELMAR LUMBER MFG. CO.

(Court of Chancery of Delaware. Jan. 21, 1913.)

1. RECEIVERS (§ 198*)—COMPENSATION—DISCRETION OF COURT.

While the amount of compensation of receivers is discretionary, and based upon the particular facts in each case, the court should consider the responsibility assumed by the receiver, the labor and acts involved, and prices usually paid for similar services in connection with the particular kind of business.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 392-396; Dec. Dig. § 198.*]

2. RECEIVERS (§ 197*)—COMPENSATION—REORGANIZING CORPORATION.

It is no duty of a receiver or court to establish a new corporation to avoid the expense of a receivership, and the receiver should not receive compensation for endeavors in that direction.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 388; Dec. Dig. § 197.*]

3. RECEIVERS (§ 196*)—COMPENSATION—ACTS OF RECEIVER BEFORE APPOINTMENT.

The acts of a receiver, who, as president, before the receivership of the corporation, had made preferential payments, should not affect the allowance to him of suitable compensation for work done as receiver, when such conduct did not affect his administering the estate under order of the court.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 387, 389-391; Dec. Dig. § 196.*]

4. RECEIVERS (§ 154*)—COUNSEL—COMPENSATION.

Compensation to counsel for a receivership should be limited to such work done for the receivers as requires special legal skill, and not such things as the receiver himself is capable of performing.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 279-282; Dec. Dig. § 154;* Costs, Cent. Dig. § 341.]

5. RECEIVERS (§ 154*) — COUNSEL—COMPENSATION.

Services of an attorney of a receiver in formulating a reorganization plan will not be allowed; it not being a duty of a receiver to reorganize a corporation.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 279-282; Dec. Dig. § 154;* Costs, Cent. Dig. § 341.]

Final accounting of the receiver of the Delmar Lumber Manufacturing Company, to which the trustee in bankruptcy, Willard F. Deputy, excepts. Decree entered.

After the appointment by this court of receivers for the Delmar Lumber Manufacturing Company, a trustee in bankruptcy for said company was appointed in the Circuit Court of the United States for the District of Delaware, and upon petition the said receivers were directed to turn over the assets of said company, exclusive of cash in their hands, to said trustee and to file in this court a report of their proceedings under the order of their appointment and an account of their receipts and disbursements. In the report filed, the receivers prayed allowances for their services, services of their counsel and for personal expenses incurred in connection with the administration of the receivership

estate. The trustee in bankruptcy filed exceptions to said prayers for allowances, and the matter was heard on said report and exceptions, at which time much testimony was heard.

Andrew E. Sanborn and John W. Huxley, both of Wilmington, F. Leonard Wallis, of Salisbury, Md., and Stephenson A. Williams, of Belair, Md., for exceptant. Marvel, Marvel & Wolcott, of Wilmington, for receivers.

THE CHANCELLOR. The report of the receivers and the prayers for allowances for their services and for services of counsel have been presented, and there are objections, first, to allowances to the receivers for expenses; second, against allowing them the amount of compensation asked; and, third, to the amount of compensation asked for their counsel.

First, as to expenses: These objections are not well founded. The receivers have presented itemized statements and vouchers for every item of expense, especially for traveling expenses, and while they are large in amount they do not seem to be too large in view of the location of the place of business of the company in relation to the places of residence of the receivers.

[1] Second. The compensation asked for by the receivers is the sum of \$1,000 each. At the hearing of the exceptions it appeared that the receivers operated the plant, under order of the court, for three months at some profit, which was to the advantage of the creditors, and there is no exception or objection taken to the manner of their conducting the receivership, other than as to the large item of personal expense of the receivers. While the amount of compensation is discretionary and based upon the particular facts in each case, courts in fixing compensation should consider the responsibility assumed by the receiver, the labor and acts involved, and due regard should be had to the prices usually paid for similar services in connection with the particular kind of business managed by the receiver. Here the receivers had the benefit of services of a manager, book-keeper and foreman, the duty of the manager being in substance such as the treasurer of a corporation would perform. The manager has been paid by the receivers, as have the other two persons. While it would have been proper to have had an order of court authorizing such large expenses, yet no serious criticism of the conduct of the receivers in incurring these expenses can fairly be made.

[2] A claim was made on behalf of the receivers that their time and effort were used in endeavoring to work out a plan by which the assets of the company should be turned over to creditors, through a new corporation, and so avoid the expense of a receivership. This plan fell through because it

did not receive sufficient support from creditors, only a portion of whom favored it. This should not be taken into account in fixing the compensation of the receivers. It was not their duty to create a new enterprise and they had no authority of the court to do so. It is not the duty of the receiver to formulate or promote one or other proposed plan of re-organization. Whether there shall be a new organization formed of stockholders, bondholders, or creditors, with what respective interest and upon what terms, is one that should be left for the determination of the persons interested, without interference in any way by the court, or its officers. The court in these cases is a harbor of refuge and not a repair shop. It will hold the property of the corporation safe from outside attacks and in proper cases keep its business going, so that whatever value there may be in it qua business may be preserved for all concerned; but it will not undertake, either of itself or by its officer, to re-organize the old corporation, or to create a new one, or solicit subscribers to some syndicate or prospective purchasers. This was said by Judge Lacombe in the case of *Chable v. Nicaragua, etc., Co.* (C. C.) 59 Fed. 846, where the question arose as to the right of a stockholder to inspect books of the company in the hands of a receiver, in order to obtain evidence upon which to oppose a plan of re-organization.

In the case of *Northern Alabama R. R. Co. v. Hopkins*, 87 Fed. 505, 31 C. C. A. 94, receivers of a railroad company who had, at the request of a committee representing all of the bondholders, made several trips to Europe in an effort to relieve the embarrassed financial condition of the company, were allowed compensation for such services and their expenses, upon the ground of estoppel, in that it was, under the circumstances, inequitable for the bondholders to object to paying for the services so performed.

Other cases having a bearing upon this subject are *Central Trust Co. v. R. R. Co.* (C. C.) 58 Fed. 500; *Clarke v. Central R. R. Co.* (C. C.) 54 Fed. 556; *Central Trust Co. v. Wabash R. Co.* (C. C.) 25 Fed. 69.

[3] Much testimony was offered respecting the conduct of one of the receivers, Theodore A. Veasey, while president of the company prior to his appointment, and it was claimed that he then made preferential payments to creditors of the company. It was also urged that he should have disclosed these and other facts to this court so that they could have been considered by this court before appointing him. But none of these matters should affect the allowance to him of suitable compensation for that work which he has done as receiver, when they did not affect his conduct in administering the estate under the order of this court.

Neither receiver, nor their counsel, are entitled to any compensation for opposing the

bankruptcy proceedings against the company, and none is claimed by them.

The receivers adequately explained at the hearing their method of accounting to this court, including their reasons for claiming that the business had been conducted at a profit and with benefit to the estate, and their compensation should not be affected by criticism of the manner of stating the account.

An allowance of \$600 will be made to each of the receivers as compensation for their services.

[4] As to compensation of counsel: All administrative and executive work in the management of a receivership estate should be performed by the receiver, and compensation to counsel should be limited to such work done for the receivers as requires special legal skill, and not for such things as the receiver himself is capable of performing. Elsewhere it is the rule that counsel are not employed in such cases so as to bind the estate, but should be so employed by authority of an order of the court. Large discretion in this state has been given to receivers in employing counsel without an order, and there was no abuse of it in this case.

[5] In this particular case the same reasons which would deprive the receivers of compensation for the re-organization plan would apply to counsel for the receivers. A considerable part of the services rendered by counsel for the receivers in this case was in formulating this re-organization plan. No other special work has been shown to have been done by counsel for the receivers here, except the routine work of advising the receivers. I will, therefore, make an allowance to counsel for the receivers of \$500.

Let a decree be entered accordingly.

FIMARA v. GARNER.

(Supreme Court of Errors of Connecticut. Jan. 15, 1913.)

1. CRIMINAL LAW (§ 27*)—"MISDEMEANOR."

The term "misdemeanor" is descriptive of a crime not so grievous as a felony, though some misdemeanors may involve greater moral turpitude than some felonies.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 29-31; Dec. Dig. § 27.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4533-4535; vol. 8, p. 7722.]

2. CRIMINAL LAW (§ 27*)—"HIGH CRIMES AND MISDEMEANORS."

"High crimes and misdemeanors" are the more serious or aggravated misdemeanors; those more nearly allied and equal in guilt to felony, but which do not fall within its definition.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 29-31; Dec. Dig. § 27.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3236-3237.]

3. CRIMINAL LAW (§ 1208*)—PUNISHMENT—STATUTES—"ANY OTHER OFFENSE AT COMMON LAW."

Gen. St. 1902, § 1523, provides that, on conviction of a high crime or misdemeanor at com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Indexes

mon law, the offender shall be imprisoned in the state prison, etc., and, on conviction for any other offense at common law, the offender shall be imprisoned in jail not less than 31 days nor more than one year, etc. Held, that the clause "any other offense at common law" comprises only petty or simple misdemeanors.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3281-3287, 3289-3295; Dec. Dig. § 1208.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 434-437; vol. 8, p. 7577.]

4. CONSPIRACY (§ 36*)—NATURE OF OFFENSE—MISDEMEANOR.

At common law a conspiracy to commit either a misdemeanor or a felony is only a misdemeanor.

[Ed. Note.—For other cases, see *Conspiracy*, Dec. Dig. § 36.*]

5. CONSPIRACY (§ 23*)—WHAT CONSTITUTES.

The crime of conspiracy is committed whether the criminal or unlawful act, which is the object of the conspiracy, is accomplished or not, or whether it be of heinous character or not, being a distinct offense independent of the crime or unlawful act which is its purpose.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. §§ 30-39; Dec. Dig. § 23.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

6. CONSPIRACY (§ 23*)—WHAT CONSTITUTES.

A conspiracy is a confederation for an unlawful purpose or for a lawful purpose by unlawful means.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. §§ 30-39; Dec. Dig. § 23.*]

7. CONSPIRACY (§ 51*)—PUNISHMENT—CONSPIRACY—"HIGH CRIME AND MISDEMEANOR."

The crime of conspiracy is "a high crime and misdemeanor" within Gen. St. 1902, § 1528, providing that, on conviction for a high crime or misdemeanor at common law, the offender may be punished by specified imprisonment and fine, and on conviction for any other offense at common law by a specified less punishment.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. § 114; Dec. Dig. § 51.*]

Appeal from Superior Court, Hartford County; Howard J. Curtis, Judge.

Petition for writ of habeas corpus by Pasquale Fimara, to which Ward A. Garner, having petitioner in custody, filed a return. From an order overruling a demurrer to the return and remanding petitioner to respondent's custody, he appeals. Affirmed.

John C. Chamberlain, of Bridgeport, for appellant. Stiles Judson, State's Atty., of Bridgeport, and John S. Pullman, Special State's Atty., for respondent.

WHEELER, J. The return showed that the respondent held the petitioner under a warrant issued by the superior court ordering him to receive and keep the petitioner until the expiration of the term of imprisonment imposed by said court during a period not exceeding five years as a maximum term, and not less than three years as a minimum, upon his conviction for the crime of conspiracy. The petitioner demurred to the return upon the ground that "said judgment sentenced the prisoner to a place not war-

ranted by law for the crime with which he stood charged, and for a longer term than justified by any statute." The accused was sentenced under G. S. § 1528, providing that, "In case of conviction for any high crime or misdemeanor at common law, the offender may be imprisoned in the state prison not more than five years, or in a jail not less than two months, nor more than one year, or fined not more than five hundred dollars, or both; and in case of conviction for any other offense at common law, the offender shall be imprisoned in a jail not less than thirty-one days, nor more than one year, or fined not more than three hundred dollars, or both."

The single question for decision is whether the crime of conspiracy is a high crime and misdemeanor within the intentment of this statute. The term "high crime and misdemeanor" is peculiar to our statutes. We find the same term used in the impeachment article of the federal Constitution. The interpretation given the term in decisions under this article cannot help in interpreting our statute, as the appellant claims, since that applies primarily to instances of official misconduct, and is used as a term of general description rather than as technical words of art under the common law. *Pomeroy on Const.* (7th Ed.) § 715; *Black on Const.* (3d Ed.) §§ 83, 85; *Elliott's Debates*, pp. 158, 218, 222, 228.

Our statute, as first passed in 1830, read: "In all cases of conviction of any person or persons for any high crime and misdemeanor or at common law." It continued in this form to the Revision of 1875, when "or" was substituted for "and," making the statute read, "In case of conviction for any high crime or misdemeanor at common law." The study of the statute, in the light of the decisions thereunder, has convinced us that the subsequent change in phraseology was not intended to change the meaning of the statute; that "high" qualifies "misdemeanor" as well as "crime"; and that the term "high crimes and misdemeanors" includes no crimes other than high misdemeanors. When this statute was passed, crimes were divided into three classes: Treason, felony, and misdemeanor. Felonies comprised those crimes which are such at common law or have been made such by statute. Misdemeanors comprised all crimes less than felonies.

[1] The term "misdemeanor" is descriptive of a crime not so grievous as the felony, although some misdemeanors may involve greater moral turpitude than some felonies. This statute was intended to provide a penalty for the commission of every misdemeanor, known to the law, whose penalty was not otherwise provided for. By it, misdemeanors were divided into two grades; those whose criminality was nearly akin to felony—that is, the more serious misdemeanors—and those

of an inferior kind, called petty or simple misdemeanors.

[2] High crimes and misdemeanors are the more serious or aggravated misdemeanors; those which are nearly allied and equal in guilt to felony, but do not fall within its definition. *Ross v. Crofutt*, 84 Conn. 370, 374, 80 Atl. 90, Ann. Cas. 1912C, 1295.

[3] "Any other offense at common law" of the statute comprises the petty or simple misdemeanors.

[4] Under the common law, a conspiracy to commit either a misdemeanor or felony is only a misdemeanor. *State v. Thompson*, 69 Conn. 720, 725, 38 Atl. 868; *State v. Setter*, 57 Conn. 461, 464, 18 Atl. 782, 14 Am. St. Rep. 121; *Berkowitz v. United States*, 93 Fed. 452, 455, 35 C. C. A. 379; *Commonwealth v. Putnam*, 29 Pa. 296, 297; *Bishop Cr. L. (8th Ed.)* vol. 1, § 240; 8 Cyc. 637.

[5] The crime of conspiracy is committed whether the criminal or unlawful act which was the object of the conspiracy was accomplished or not, or whether it be of a heinous character or not. *State v. Thompson*, 69 Conn. 720, 725, 38 Atl. 868. It is a distinct offense, entirely independent of the crime or unlawful act which is the purpose of the conspiracy.

[6] The confederation for an unlawful purpose or for a lawful purpose by unlawful means is the offense. *State v. Setter*, 57 Conn. 461, 469, 18 Atl. 782, 14 Am. St. Rep. 121; *State v. Glidden*, 55 Conn. 47, 69, 8 Atl. 890, 3 Am. St. Rep. 23; *State v. Thompson*, supra.

[7] An unlawful act may not prove injurious to an individual or to a community when attempted by an individual, and may be readily prevented; the same act attempted by the confederation of two or more may become dangerous to the public peace and to the security of persons and property, and harmful to public morals by the very weight and power of numbers. *State v. Glidden*,

supra; *State v. Gannon*, 75 Conn. 206, 211, 52 Atl. 727. These characteristics of the crime indicate that the law regards it as a serious crime of far-reaching criminality.

Every assault, except certain statutory kinds, whether aggravated or simple, are at common law misdemeanors. Assaults vary greatly in character, in their danger to the individual, and in their violation of the public peace. An assault with intent to kill is by our common law a misdemeanor, but one of an aggravated type, and it is held a high crime and misdemeanor, punishable under the severest penalty of G. S. § 1528. *State v. Danforth*, 8 Conn. 112. A conspiracy to commit an assault because of the numbers engaged may easily lead to consequences greater even than those intended. In its effect upon the public peace, and in its disregard of law through deliberate and premeditated agreement, it ordinarily exceeds in criminality the simple assault, and indeed the ordinary assault with intent to kill.

The confederation by the many to commit a crime is apt to be larger in its measure of evil to the community than the mere commission of the crime by the individual. From its nature and consequences, a conspiracy is at common law a high misdemeanor. Originally it was punishable by fine and imprisonment at the discretion of the court. *Bishop Crim. Law (8th Ed.)* vol. 1, § 940; *Ency. of Law of Eng.* vol. 3, p. 472. In some jurisdictions the penalty is prescribed as for a felony, or a crime akin to felony. In no instance, so far as we have found, is it treated as a simple or inferior misdemeanor. With us, since G. S. § 1528, was first enacted, we have treated and held every conspiracy to commit a crime, as the common-law offense, high misdemeanor, punishable under the penalty as such. *State v. Setter*, 57 Conn. 461, 469, 18 Atl. 782, 14 Am. St. Rep. 121.

There is no error. The other Judges concurred.

CRAFTS v. TRAFFORD et al.

(Supreme Court of Rhode Island. Feb. 8, 1913.)

PRINCIPAL AND AGENT (§ 136*)—RECOVERY OF PAYMENT MADE TO AGENT.

Where money paid by plaintiff to defendant as a premium upon a policy of insurance issued and delivered to him was received by defendant as agent for the insurance company, from which he was receiving a salary and to which he turned over all the money so received, plaintiff had no action for money received.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 447-450, 478-491; Dec. Dig. § 136.*]

Action by Albert B. Crafts against C. A. Trafford and one Metcalf. Plaintiff nonsuited as to defendant Metcalf, and verdict directed for defendant Trafford, and plaintiff petitions for a new trial. New trial denied, and case remitted to the superior court, with direction to enter its judgment for the defendant Metcalf on the order of nonsuit, and for defendant Trafford on the verdict.

Albert B. Crafts, of Providence, pro se. Bassett & Raymond, of Providence (Russell W. Richmond, of Providence, of counsel), for defendants.

PER CURIAM. The action is for "money had and received" by the defendants to the plaintiff's use. The evidence shows that the defendant Metcalf never had or received any money of the plaintiff, and the plaintiff was properly nonsuited as to him. The evidence further shows that the moneys paid by the plaintiff to the defendant Trafford were received by him as agent for an insurance company, as premiums upon a policy of insurance issued and delivered to the plaintiff; that Trafford was receiving a salary as such agent, and had no commission upon the sums collected; but that he turned over to his principal all of the moneys received from the plaintiff, and had in his hands none of the moneys of the plaintiff.

There was no evidence to support an action for "money had and received," and the plaintiff was properly nonsuited as to the defendant Metcalf, and the verdict was properly directed as to defendant Trafford. As it appears that there was no cause of action, the plaintiff's petition for new trial is denied. The case is remitted to the superior court, with direction to enter its judgment for the defendant Metcalf on the order of nonsuit, and for defendant Trafford on the verdict.

PASHALIAN v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Jan. 29, 1913.)

STREET RAILROADS (§ 117*)—INJURY TO PEDESTRIAN—EVIDENCE—NONSUIT.

In an action for death of one run over by a street car, where there was no evidence

that decedent exercised due care, of any negligence of defendant in operating the car, or that the motorman saw or could have seen her crossing the street in time to avoid running over her, but there was evidence that he stopped the car within a few feet after hearing an outcry as to peril, a nonsuit was proper.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

Exceptions from Superior Court, Providence and Bristol Counties; Darius Baker, Judge.

Action by John Pashalian against the Rhode Island Company. Exception to an order granting a nonsuit. Overruled.

Gorman, Egan & Gorman, of Providence, for plaintiff. Joseph C. Sweeney and Alonzo R. Williams, both of Providence, for defendant.

PER CURIAM. There is nothing in the evidence to show that the deceased was in the exercise of due care when she attempted to cross the street in front of a moving car; nor is there any evidence to show that there was negligence on the part of the defendant in the operation of the car, or that the defendant's motorman saw, or could have seen, that the deceased was intending to cross the car track in a position of danger in time to have avoided running over her. It is in evidence that the motorman stopped the car almost immediately when there was an outcry calling attention to the danger of the deceased, bringing the car to a standstill in a very few feet. There is no evidence upon which the doctrine of the "last clear chance" could be invoked; and no evidence upon which the case should have been submitted to the jury upon any issue involved. Upon the facts as disclosed by the record it seems to have been an unavoidable accident as far as the defendant was concerned.

There was no error in the granting of the nonsuit. The plaintiff's exception to the ruling of the justice of the superior court granting a nonsuit is overruled, and the case is remitted to the superior court, with direction to enter its judgment for the defendant upon the order of nonsuit.

IMPERIAL BROOM CO. v. WESTERN WAREHOUSE CO.

(Supreme Court of Rhode Island. Jan. 29, 1913.)

APPEAL AND ERROR (§ 1002*)—VERDICT—CONFLICTING EVIDENCE.

A verdict on conflicting evidence will not be disturbed on review.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Action of assumpsit by Fannie Strauss, doing business as the Imperial Broom Company, against the Western Warehouse Company. Verdict for plaintiff, new trial denied, and defendant excepts. Exceptions overruled, with directions to enter judgment on verdict.

Leonard N. Zisman, of Providence, for plaintiff. Willis B. Richardson, of Providence, for defendant.

PER CURIAM. This is an action of assumpsit, brought by Fannie Strauss, doing business under the name and style of the Imperial Broom Company, against the Western Warehouse Company, a corporation located at Wichita, Kan., to recover the sum of \$438 for damages which she claims she has suffered through the failure of the defendant company to furnish her with broom corn of the grade, quality, and quantity ordered by her, and also to recover the amount of certain moneys laid out and expended by her in the payment of the freight upon said broom corn, which freight, by agreement of defendant and under the course of dealing for a long time existing between the parties, should have been paid by the defendant company. The plaintiff having ordered a carload of broom corn from the defendant company, the same was shipped from the latter's branch office in Galveston, Tex., to the plaintiff at Providence, R. I. The bill of lading was forwarded, with a draft attached therefor for \$801.40, to the National Exchange Bank in Providence, where the draft was paid and the bill of lading obtained by the plaintiff. Upon going to the steamship dock with her teamers for the purpose of removing the broom corn, the plaintiff was obliged to pay the freight charges, amounting to \$101. Later the plaintiff found that the broom corn was 1¼ tons short in weight, which at \$85 per ton, the price paid, amounted to \$106; that the remaining 7¾ tons, for which she had paid \$85 per ton, was of a grade and quality inferior to that called for by her contract with the defendant, and instead of being of a marketable value of \$85 per ton was only worth \$60 per ton, entailing a loss to her of \$193; and, further, that a large part of the broom was shipped loose, instead of in bales, which compelled her to expend the sum of \$40 for the extra labor required in its removal. For the recovery of all of these sums of money the plaintiff brought her suit. The defendant company, through its president and manager, Harve Pelton, and its vice president, Harry Lee, both testifying by deposition, denied the alleged agreement and custom as to the payment of freight, that the broom was shipped unbaled, that there was any shortage in weight, and that the quality was inferior or the price above the market value at the time of sale. The jury found a verdict for the plaintiff for \$300,

and the trial court, upon motion of the defendant, refused to grant a new trial. There is a direct conflict of testimony, and we cannot say, after a careful examination of the record, including the transcript of testimony, that the verdict was wrong.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

SAYLES v. PROBATE COURT OF TOWN OF BURRILLVILLE.

(Supreme Court of Rhode Island. Jan. 29, 1913.)

CERTIORARI (§ 41*)—DISCRETION OF COURT—REVIEW OF APPOINTMENT OF ADMINISTRATOR—LACHES.

Where an administratrix was present when an order was entered releasing her bondsman and requiring a new bond, and subsequently secured more time to file such bond, and upon failing to file same was removed and another administrator appointed, and where she took no appeal or did nothing for over a year, although aware of the new appointment within that time, she was not entitled to a writ of certiorari to review the appointment of the new administrator, because made without notice to her; the writ being discretionary, and only granted in furtherance of justice.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 59; Dec. Dig. § 41.*]

Petition by Laura M. Sayles against the Probate Court of Town of Burrillville for writ of certiorari. Petition denied.

Frank L. Hanley, of Providence, for petitioner. Tillinghast & Collins, of Providence, for Varnum Steere, administrator d. b. n.

PER CURIAM. This is a petition by Laura M. Sayles, daughter of Elliott S. Sayles, for a writ of certiorari to the clerk of the probate court of the town of Burrillville, commanding him to certify to this court, for review, the record of the proceedings in said probate court by which Varnum Steere was appointed administrator d. b. n. of the estate of said Elliott S. Sayles.

The petitioner, Laura M. Sayles, upon the death of her father, Elliott S. Sayles, was duly appointed administratrix upon his estate, and gave the bond required by the probate court of Burrillville, with the American Surety Company of New York as surety thereon. Later, on February 27, 1909, the surety company petitioned to be released from further liability upon the bond, and the said petition was referred to the 27th day of March, 1909, upon which last date the said Laura M. Sayles was ordered to give a new bond with sufficient surety in the sum of \$5,000 at or prior to the next session of the court, to be holden on April 24, 1909. Upon her failure to file the bond, as ordered, the time for so doing was extended to the session of the court to be holden on May 29, 1909,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

when the said Laura M. Sayles, still having failed to comply with the order, was removed as administratrix upon the estate of her father, Elliott S. Sayles, the bond of the American Surety Company of New York was canceled, and the surety company relieved from further liability thereon, whereupon the matter was further continued to June 26, 1909, for the appointment of a new administrator. At the session of the court on June 26, 1909, upon the application of Edgar F. Sayles, a son of Elliott S. Sayles, deceased, Varnum Steere was appointed administrator de bonis non, and later qualified as such administrator by giving the bond required by said probate court of Burrillville.

From the decree of said probate court appointing the said Varnum Steere the said Laura M. Sayles took no appeal, nor did she within the period of one year prefer to the Supreme Court any petition for a new trial, as she might have done under the provision of the statute, although she was fully aware of such appointment within that time. She now petitions this court for a writ of certiorari to review the proceedings of the probate court of Burrillville in the appointment of said Varnum Steere, as administrator as aforesaid, on the ground that such appointment was made without notice to her, as a party in interest, as required by law. It is self-evident that upon the removal of an administrator a successor should be appointed as speedily as possible, to the end that the estate may not be left without proper care. The statute (chapter 320, § 10) seems to recognize the necessity for prompt action, and to contemplate that when an executor, administrator, or guardian is removed, for failure to give bond as required, his successor should be immediately appointed.

In the case at bar the petitioner was present when the order was entered relieving the surety company from further liability on her bond and requiring her to give a new bond in the sum of \$5,000 by April 24, 1909. Apparently the petitioner must have appeared later and obtained an extension of time in which to file her bond to May 29, 1909. She must have known that her failure to file a bond would subject her to removal and bring about the appointment of a successor. If she did not care to attend upon the court and be heard as to the appointment of the new administrator, and did not see fit to take an appeal or to petition this court for a new trial, we do not think that she is now entitled to further disturb or hinder the settlement of the estate by having a review of the proceedings of the probate court making such appointment. The granting of the writ of certiorari is discretionary with this court, and such writ should not be granted except in furtherance of the ends of justice.

We do not think that justice demands that

the writ should issue in the present case, and the petition therefor is accordingly denied and dismissed.

H. H. FRENCH & SON v. ANTONE et al.
(Supreme Court of Rhode Island. Jan. 29, 1918.)

Exceptions from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

Action by H. H. French & Son against Isabella Antone and another. Verdict for plaintiffs, and defendants except. Exceptions overruled.

Quinn & Kernan, of Providence, for plaintiffs. Maximilian L. Lizotte, of Fitchburg, Mass., for defendants.

PER CURIAM. There was evidence from which the jury was warranted in the belief that the defendant Isabella Antone, with her full consent and approval, was charged, together with her husband, Joseph Antone, with the goods sold and delivered by the plaintiffs to the defendants and used by the defendants. The defendant Joseph Antone admitted his liability, and the jury found a verdict against both defendants, which is amply supported by the testimony; and there was no error in the denial of the motion for a new trial.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter its judgment for the plaintiffs upon the verdict.

ROSENSTEIN et al. v. ZENTZ.

(Court of Appeals of Maryland. Nov. 13, 1912.)

INJUNCTION (§ 60*) — SUBJECTS OF PROTECTION.

Though a contract by a piano salesman and collector contained a negative provision that he would not be connected with any one other than complainants in a similar business, no injunction will issue to restrain him from violating such provision, where it does not appear that the services to be performed were in any sense extraordinary, or that he had any peculiar fitness; the mere fact that in the course of his previous employment with plaintiff he had gained experience and information in regard to that business being no ground for injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 117-119; Dec. Dig. § 60.*]

Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

Bill by Jesse Rosenstein and Isidor Rosenstein, trading as the Rosenstein Piano Company, against Charles F. Zentz. From a decree for defendant, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Augustus C. Binswanger, of Baltimore, for appellants. Israel B. Brodie, of Baltimore, for appellee.

PATTISON, J. The appellee, defendant below, entered into a written agreement with

the appellants, dated March 11, 1912, by which he was to enter into the services of the appellants, who were engaged in the sale of pianos and other musical instruments, for the period of one year from the date of the agreement. His employment, as expressed in the contract, was to embrace the states of Maryland and Virginia and the District of Columbia, and his duties were those of salesman, collector, and general utility man, and he was to devote the whole of his time to the performance of such duties. In the agreement is found the negative covenant that "he will not enter into any contract or employment or be in any way interested or connected with any one, other than the said merchants, in said territory, during said period of one year, in similar employment," etc. The contract or agreement contained the further provision that "the services of said salesman are engaged during the working hours of the day and when necessary during the night." His compensation named therein was \$15 per week, payable weekly, from the commencement of his services, accounting from March 16, 1912.

The bill of the appellants, filed on March 13, 1912, charges that the said defendant subsequent to 2 o'clock on March 9, 1912, the time when the contract between the plaintiffs and defendant is said by the plaintiffs to have been executed, entered into a written contract of employment with the Hub Piano Company, and at the time of entering into this contract, and prior to the signing of it, the contract previously made with them by the defendant was exhibited to the members of the firm of the Hub Piano Company. And they further charge that at the time of the filing of their bill the defendant was in the employ of the Hub Piano Company in breach of the covenants contained in their written contract with him and "in fraud of their rights" thereunder. The bill further discloses that prior to the 15th day of February, 1912, the plaintiffs, with Rachel Rosenstein and the members of the firm thereafter composing the firm of the Hub Piano Company, were conducting department stores in the city of Baltimore under the firm name of L. Rosenstein & Sons, and that the plaintiffs with the members of the firm of the Hub Piano Company, as thereafter formed, also conducted a piano and musical instruments business in said city under the firm name of Rosenstein & Bros. The differences and disagreements as to the conduct of the business arose among the different members of the firms as they then existed. These differences and disagreements were submitted to arbitration, and by the award it was provided that the piano business and piano accounts of the firm were to be sold and disposed of to such member or members of the firms who would pay the most therefor, and, when sold, the purchaser or purchasers should be entitled to the good will of said firms in so

far as the same related to the piano business, and the unsuccessful bidders and members of the old firm not among the purchasers were not to deal or attempt to deal with any of the existing customers of the said firms, either directly or indirectly, nor were they in any manner to seek to supplant with other musical instruments the instruments at that time held by the customers of the old firms. Under these provisions of the award, the plaintiffs became the purchasers of the piano business and the piano accounts of said firm. The defendant was in the employ of the old firm at the time of its dissolution, and, as alleged in the bill, "had the particular run of a class of trade in the employ of the said two firms."

The prayer of the bill asks that the defendant be restrained from engaging, either directly or indirectly, at any time within one year from March 11, 1912, within the territory heretofore mentioned, as salesman, collector, and general utility man in and about the piano or other musical instrument business. A preliminary injunction was issued as prayed, and a demurrer to the bill was thereafter filed. By an order of court passed on the 8th day of April, 1912, the preliminary injunction was dissolved, the demurrer to the bill sustained, and the bill dismissed. It is from this order that this appeal is taken.

We have been referred to no case in Maryland, nor have we been able to find one, where the law applicable to the facts of this case has been stated. The first case before this court where an attempt was made to restrain an employé, under a contract for personal services, from rendering service to another in violation of such contract, was the case of *Burton v. Marshall*, 4 Gill, 487, 45 Am. Dec. 171. In that case Charles Burke made a contract for and on behalf of his wife that she should perform at the Holli-day Street Theater, Baltimore, Md., of which the appellee was the manager, for the period of time and at the salary therein named. There was no negative covenant in the contract that she should not during that time perform at any other theater. As alleged in the bill of the appellee, in violation of her contract, the husband refused to permit his wife to perform at said theater, and engaged her services to a rival company, of which Burton was the manager. The bill also discloses that the complainant had brought an action at law to recover damages because of the breach of the contract. The prayer of the bill asked, among other things, that Margaret Burke be restrained from performing as an actress in any other theatrical corps during the continuance of said contract, etc. This court in that case held that the injunction should have been refused because oppressive when considered in connection with the suit at law then pending, saying: "Equity will not listen to a complainant who thus presents himself for re-

lief, until he makes his election in which court he desires to proceed in pursuit of his rights, and has dismissed, or agreed to dismiss, his proceedings in the other." This court in its opinion in that case referred to the cases of *Kemble v. Kean*, 6 Simons, 333, and *Kimberley v. Jennings*, 6 Simons, 340. In those cases the contracts were for personal services, and each contained an affirmative and a negative covenant. The court was asked to restrain the employé from rendering services to one other than the plaintiff in violation of his contract with the plaintiff. The court there held that it could not enforce the positive part of the contract, and therefore it would not restrain by injunction a breach of the negative part. The court in its reference to these cases did not approve or disapprove of the principle of law laid down in them, but simply said: "If these cases are to be regarded as of any authority, upon what principle could the complainant, under a contract affirmative in all its provisions, and the execution of which could not be specifically enforced, ask a court of equity, in effect, to ingraft upon it a negative stipulation, the breach whereof was to be restrained by injunction, as if it had formed a part of the written agreement of the parties?"

The next case we find in this court involving the right under a contract for personal services to restrain the violation of the covenants therein is that of *Hahn v. Concordia Society*, 42 Md. 460, which, unlike the case of *Burton v. Marshall*, contained an express negative stipulation that the defendant would not do that which the injunction prohibited him from doing. By the agreement in the case of *Hahn v. Concordia* the appellees engaged the defendant, an actor, for the time therein mentioned, at a monthly salary, and he was not during the time for which he was employed to act in any other theater without the express permission, in writing, from the appellees. The agreement also contained the stipulation to the effect that, if the defendant should break it, that he should pay to the appellees a conventional fine of \$200, which sum was to be forfeited in any violation of the contract, and required no legal proceedings for its execution. The court, after briefly alluding to the decision in the case of *Kemble v. Kean*, referred to and quoted from the case of *Lumley v. Wagner*, 1 De G. Mac. & G. 604, which expressly overrules the cases of *Kemble v. Kean* and *Kimberley v. Jennings*, and which was decided after the case of *Burton v. Marshall*. This court in speaking of the case of *Lumley v. Wagner* said: "By this decision we understand the law to be now settled in England that, though a court of equity cannot enforce the specific performance of a contract for the rendition of mere personal services, yet it will not hesitate to interfere by injunction to prevent the violation of a nega-

tive stipulation, where the terms and nature of the contract are similar to those in that case. In this country, the authorities, and especially those in New York of *Hamblin v. Dinneford*, 2 Edw. Ch. (N. Y.) 529, and *Sanguirico v. Benedetti*, 1 Barb. (N. Y.) 315, appear to have followed *Kemble v. Kean*, and have denied the relief. In fact, we have not been referred to, nor have we found, any American decision in which an injunction has in a like case been sustained." The court then proceeded to say: "But in our judgment the present case does not require us to decide this important jurisdictional question." The court then, upon entirely different grounds from those it had been discussing, reversed the court below and dismissed the bill. This is the last case in this court that we have been able to find, or to which our attention has been called, involving the rights of an employer, under a contract for purely personal services, to restrain the employé for a breach of a negative covenant in the contract of employment. In other jurisdictions, however, the rights of employers in such cases have since been frequently heard and determined and the law governing such cases is also found in the works of the text writers covering this branch of the law. 3 Page on Contracts, § 1644, in summarizing the law applicable to cases of this character, says: "If the executory covenants are in part affirmative ones which cannot be enforced by specific performance, and in part negative ones, the question whether equity will grant relief against breach of the negative covenants by injunction is one on which there is conflict of authority. The cases in which this question is presented are usually cases of contracts for personal services. The original rule in this country seems to have been that equity would grant no relief, affirmative or negative, in contracts for personal services, even if there was an express negative covenant. Modern courts have, however, receded somewhat from this extreme and uncompromising position. In some cases it has been held that if the services contracted for are unique in character, and if by reason of special knowledge, skill, ability, or reputation of the party rendering them it is difficult for the adversary party to provide a substitute therefor, equity will give an injunction against the breach of a negative covenant by the employé not to render services to any other person during his term of employment. Thus an injunction has been given against breach of a contract by an actor (*Lumley v. Wagner*, 1 De G., M. & G., 604), or baseball player (*Philadelphia Ball Club v. Lajole*, 202 Pa. 210, 217, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627), each of peculiar ability and great reputation. * * * If the services contracted for are not of a unique or extraordinary character, equity will not enjoin the employé from accepting other employment during his term."

In the case of *Wm. Rogers Manufacturing Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278, the defendant agreed that he would serve the plaintiffs for a stipulated time under the direction of their general manager, traveling for them as directed, and rendering such services in the capacity of secretary or other officer as they might desire, and that he would not be engaged, or allow his name to be used, in any other hardware or cutlery business, either as manufacturer or seller, but would give his entire time and services to the interest of the plaintiffs. In a suit to restrain the defendant from a breach of such negative covenant, the court there said: "The courts in this country and in England formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation. The courts in both countries have, however, receded somewhat from the latter conclusion, and it is now held that where a contract stipulated for special, unique, or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of a specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages. The reason seems to be that services of the former class are of such a nature as to preclude the possibility of giving the injured party adequate compensation in damages, while the loss of services of the latter class can be adequately compensated by an action for damages." And the court in that case, in speaking of the character of services to be rendered by the defendant, said: "These services, while they may not be material and mechanical, are certainly not purely individual, nor are they special or unique or extraordinary; nor are they so peculiar or individual that they should not be performed by any other person of ordinary intelligence and fair learning." The court thus sustained the judgment of the lower court in refusing to grant the injunction.

The defendant in the case of the *Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 432, was a salesman for the company under a contract to receive \$20 per week and $\frac{1}{2}$ per cent. on all sales made by him for a period of one year. The contract contained a negative covenant by which he has not to engage in like services for any one else during that time. In that case an injunction was asked for to restrain the defendant from a breach of his negative covenant, which was refused, and upon appeal the court in that case in sustaining the lower court, after referring to both the cases of *Kemble v. Kean* and *Lumley v. Wagner*, said of the *Lumley* Case that it had received only a qualified indorsement by the courts of this country; "that is, to

the extent that if the services contracted for are purely intellectual and personal in their character, such as the services of authors or actors, or if the services are mechanical and material, but which require unusual skill and practice, they are held to form a class, and a court of equity will interfere to restrain the breach of a contract for such services upon the ground that the services are unique, individual, and peculiar. When such a contract is broken, the same service is not readily or easily obtainable from others, and the resulting damage is irreparable, in that it cannot be estimated. This forms the basis for the exercise of equitable jurisdiction."

And again in the case of *Gossard Co. v. Crosby*, 132 Iowa, 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115, the plaintiff corporation, wholesale and retail dealers in ladies' corsets, and in the importation and sale of trimmings, laces, silks, and dress furnishings, whose business was largely carried on by and through the agency of traveling representatives, contracted with the defendant whereby she was to work for the plaintiffs for a period of three years as corset saleswoman and demonstrator. As alleged in the bill, her work involved the necessity of lectures pertaining to the physical culture of woman and the proper corsage to secure to her health, comfort, and physical beauty, and at the same time exhibiting the many advantages of the corsets as adding to her physical beauty, and alleged in their petition for an injunction that such services were special, unique, and extraordinary in their character, and called for a person of high mental culture and refinement, of strong and pleasing individuality, good address, prepossessing appearance, striking and pleasing development, possessing a knowledge of physical culture, and ability as a lecturer, etc., which attainments and qualifications the bill alleged the defendant possessed in a marked degree. The court there said: "Even where there is an express negative covenant, injunction will not be granted save in those exceptional cases where, by reason of the peculiar or extraordinary character of the promised service, a violation of the agreement will cause injury to the other party for which an action at law will afford no adequate remedy." In that case the court held that although the petition alleged that the services to be performed by the defendant were unique and extraordinary, requiring peculiar and marked ability to prosecute them successfully, that it was but the statement of a conclusion and was not supported by the facts, and the court sustained the lower court in its refusal to grant the injunction. The court in discussing that case also said: "The mere fact that she may not be financially responsible is not alone any reason for invoking equity in any case."

In 22 Cyc. p. 857, we find the law governing such cases to be that in the case of contracts to render services requiring no

special skill or qualification the rule still holds that a breach by an employé will not be enjoined, even though he has expressly agreed to work for no one else or to devote all his time to the services of the complainant; but the reason for this is that other employés can be found to do the work and damages at law are adequate compensation for the breach of the contract. Upon this general proposition the courts are substantially agreed, but variations will be found in determining whether certain positions do or do not require special qualifications. *Cort v. Lassard & Lucifer*, 18 Or. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726; *Simms v. Burnette*, 55 Fla. 702, 46 South. 90. 16 L. R. A. (N. S.) 389, 127 Am. St. Rep. 201, 15 Ann. Cas. 690; *Hammond v. Georgian Co.*, 133 Ga. 1, 65 S. E. 124; *Kessler & Co. v. Chappelle*, 73 App. Div. 447, 77 N. Y. Supp. 285; 4 *Pomeroy's Eq. Jur.* § 1643.

The bill in this case is not full and explicit in its charge that the negative covenant was violated by the defendant. While it charges the defendant with entering the employment of the Hub Piano Company, it does not specifically allege that this latter company was engaged in a business similar to that of the plaintiff company, nor does it clearly allege that the duties to be performed by him, even though for a company doing a business similar to that of the plaintiff, were to be performed within the territory in which he was prohibited by his negative covenant. But assuming, and not deciding, that the allegations in the bill are sufficient in alleging a breach of the negative covenant, the court below, in our opinion, committed no error in refusing the injunction prayed.

Following the line of authorities that we have discussed above, there is nothing in the bill showing that the duties to be performed by the appellee, under the contract of employment between him and the appellants, were unique and extraordinary, requiring peculiar and marked ability to prosecute them successfully. The duties that he was to perform were those of a salesman, collector, and general utility man in a business conducted, as we understand, for the sale of pianos and other musical instruments. Nowhere in the bill is it alleged that the duties that he was to perform were of the class we have mentioned. The only other allegation characterizing his duties or disclosing the character of the position to be filled by him under the contract was that he had "the particular run of a class of trade in the employ of said firms." We cannot gather from this allegation that the services to be performed by him were either intellectual, or peculiar and individual in their character, or in any sense unique or extraordinary. They were but the duties of an ordinary piano and musical instrument sales-

man, whose services could be readily acquired, and where the damages, if any, suffered by the plaintiffs would not be irreparable, but could be readily ascertained and recovered by a suit at law.

The mere fact that the defendant should thereafter profit by the experience and knowledge gathered from his service with the old firm could in no sense be regarded as a legal wrong committed by him. The experience and information which he possessed was in no sense acquired under the contract which he is alleged to have broken. This experience and information he had at the time of the execution of the contract. When his employment by the old firm ceased, he could not leave with it the experience or knowledge there acquired, and it is not disclosed that there was anything to prevent him from thereafter using it to his own profit. Such knowledge or information could not be considered in the character of trade secrets, which in many jurisdictions, under certain circumstances, he would be prevented from using for his own benefit. The experience gathered by him, so far as disclosed by the bill, was a legitimate addition to his personal equipment which he had a perfect right to use for his own advantage and benefit.

The compensation to be received by him, \$15 per week, for his services "during the working hours of the day and when necessary during the night," considered in the light of characterizing his duties and in no other sense, would indicate that the duties that he was to perform were not of a very extraordinary character. From what we have said, we think the court below committed no error in refusing the injunction.

Order appealed from affirmed, with costs to the appellee.

KINLEIN et al. v. MAYOR AND CITY COUNCIL OF CITY OF BALTIMORE et al.

(Court of Appeals of Maryland. Nov. 13, 1912.)

1. MANDAMUS (§ 116*) — TAX LEVY TO PAY JUDGMENT.

Code Pub. Loc. Laws, art. 4, § 36, as amended by Laws 1904, c. 677, requires the board of estimates of the city of Baltimore annually between the 1st days of October and November to make lists embracing all moneys to be expended for the next ensuing fiscal year for all purposes, and to prepare a draft of an ordinance to be submitted to the city council providing appropriations sufficient to meet the amounts called for by such lists. On December 2, 1911, after the ordinance of estimates for 1912 had been prepared and introduced in the city council, a judgment against the city was rendered, and two days later the ordinance was approved. On June 20, 1912, the judgment creditors applied for a writ of mandamus requiring the city authorities to make a special levy to pay such judgment, which petition was denied September 17th. There had been

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

no refusal to pay the judgment and there was nothing to show an intention not to pay it. *Held*, that the writ was properly denied; it being assumed that the city would provide for payment of the judgment in its appropriation for the year 1913, since the issuance of writs under such circumstances would cause great disorder and confusion in the administration of the city's finances and subject it to unnecessary expense.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 243-248; Dec. Dig. § 116.*]

2. MANDAMUS (§ 7*) — DISCRETION AS TO GRANTING.

The remedy by mandamus is not accorded as of legal right, but the writ is granted or withheld largely in the court's discretion; such discretion, however, not being an arbitrary one to be capriciously exercised.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 5; Dec. Dig. § 7.*]

3. MANDAMUS (§§ 15, 16*)—GROUNDS FOR DENIAL—WRIT INEFFECTUAL OR NOT BENEFICIAL.

The writ of mandamus will not be granted where it is unnecessary, would work injustice, or would be unavailing or nugatory.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 47-49, 59, 60; Dec. Dig. §§ 15, 16.*]

4. MANDAMUS (§ 15*)—AGAINST MUNICIPAL CORPORATIONS—WHEN DENIED.

A writ of mandamus directed to the municipal authorities will not be granted where it would introduce great confusion or disorder into the municipal administration.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 47, 49; Dec. Dig. § 15.*]

Appeal from Baltimore Court of Common Pleas; John J. Doblen, Judge.

Petition by Julius A. Kinlein and others copartners, trading as J. A. Kinlein & Company, against the Mayor and City Council of the city of Baltimore and others. From a judgment dismissing the petition, petitioners appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, and STOCKBRIDGE, JJ.

George Washington Williams and John H. Richardson, both of Baltimore, for appellants. Robert F. Leach, Jr., Asst. City Sol., of Baltimore, for appellees.

BURKE, J. [1] On the 20th day of June, 1912, the appellants on this record filed in the court of common pleas a petition praying that a writ of mandamus be issued directed to the mayor and city council of Baltimore, and the board of estimates of the city, commanding them to make a special levy upon the taxable property of Baltimore City in a sufficient amount to pay a certain judgment mentioned in the petition. The mayor and city council answered the petition, and assigned various reasons why the writ should not be issued. The appellants demurred to the entire answer, and also to each separate paragraph thereof. The court overruled the demurrer to the whole answer, and also overruled the demurrer to the fifth, sixth, and seventh paragraphs; but sustained it as to

the eighth and ninth paragraphs. The cause was then submitted to the court upon the admissions of the pleadings, and on the 17th day of September, 1912, the court dismissed the petition and entered a judgment for the respondents for costs. The appeal before us was taken by the petitioners from that judgment.

The appellants, Julius A. Kinlein, Joseph J. Kinlein, and Julius Stengel, copartners, trading as J. A. Kinlein & Co., recovered a judgment in the court of common pleas against the mayor and city council of Baltimore on the 2d day of December, 1911, for the sum of \$950. On the date the petition was filed the judgment, interest, and costs amounted to \$1,024.20. It is alleged in the petition that the mayor and city council had not paid this judgment, or any part thereof, although it had been repeatedly requested to do so, and that it showed no disposition whatever to pay the judgment; that on several occasions on which requests had been made that it pay the judgment "it was asserted, through the office of the city solicitor, that there were no funds out of which this judgment, interest, and costs could be paid." The answer of the respondents admitted all the allegations of the petition, except the one that the mayor and city council "shows no disposition whatever to liquidate said judgment." This allegation is directly denied. There is therefore upon the pleadings no evidence of a refusal on the part of the city to pay the judgment, nor are there any circumstances which clearly evince an intention on its part not to pay. On the contrary, the answer proceeded to give a full explanation of its failure to pay the petitioners' claim. After setting out several reasons why the claim had not been paid, the seventh paragraph of the answer contains the following averments: "(7) That further answering said petition, your respondent shows that the judgment herein referred to was entered up subsequent to the making up of the ordinance of estimates by said board of estimates and the introduction of the same for passage into the city council. That in fact said ordinance of estimates was approved after its passage by the council only two days after the date of the entering of the judgment herein referred to. And your respondent avers that said ordinance of estimates fixed and established its tax rate for the year 1912: that after the passage and approval of said ordinance your respondent was and is without power or authority to enlarge or increase any of the appropriations therein made to provide for the discharge and satisfaction of the judgment referred to herein, and the amounts in said ordinance appropriated to the law department and board of estimates are, as already stated, entirely inadequate and insufficient to discharge the judg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment referred to, without greatly hampering and embarrassing it in the prosecution of its usual duties and the discharge of its financial obligations."

Under section 36, art. 4, of the Code of Public Local Laws, title "City of Baltimore," subtitle "Charter," as amended by the Acts of 1904, c. 877, it is made the duty of the board of estimates annually between the 1st day of October and the 1st day of November to make three money lists, which shall embrace all moneys to be expended for the next ensuing fiscal year for all purposes by the city, and to cause to be prepared a draft of an ordinance to be submitted to the city council providing appropriations sufficient to meet the amounts called for by said lists. We said in *Baltimore City v. Gorter*, 93 Md. 1, 48 Atl. 445, that the evident object of the board of estimates as a feature of the charter was to provide a more orderly administration of the finances of the city, to secure more deliberation and careful judgment as to the expenditure of the public money, and greater watchfulness over and economy in making this expenditure; thereby avoiding, as far as practicable, unnecessary taxation and accumulation of debt by reason of unsystematic methods. It is the duty of the city to provide by levy for the payment of the appellants' claim; but we are of opinion that, under the circumstances disclosed by the record, the orderly and proper provision for its payment would be to include it in the ordinance of estimates for the year 1913.

The learned counsel for the appellants have fallen into an error in assuming that their clients are entitled to the writ of mandamus merely because the board of estimates did not include the claim in the estimates for the fiscal year 1912 and in the ordinance of estimates prepared by them for that year. Without deciding whether or not the court would have the power in exceptional cases, where, for example, the city had wilfully or deliberately refused to perform its clear duty, to direct a *special* levy to be made, we discover in this record no reason or necessity for resorting in this case to such an unusual and extraordinary procedure.

It must be assumed that the city will provide for the payment of this claim in the appropriation which will very shortly be made for the year 1913, and there was certainly no imperative duty imposed upon the court to have directed on the 17th day of September, 1912, a special levy to pay a claim, which in the usual course the city would have provided for in less than 60 days in the annual appropriations for the ensuing year. Judge Bartol, in *Weber v. Zimmerman*, 23 Md. 45, in discussing the changes in the law in cases of mandamus made by the Acts of 1858, c. 285, now embodied in article 60, Code of 1912, said that: "First. That while these material changes have been made by

the Code, in the course and manner of proceeding in cases of this kind, the essential nature of the remedy or of the writ is not changed. It is still what it was at the common law, a prerogative writ, not demandable *ex debito justitiæ*, but granted at all times in the sound discretion of the court, under the rules long recognized and established at the common law. When the Code therefore directs that, upon the verdict being found in favor of the petitioner, a peremptory writ of mandamus shall be granted thereupon without delay, it is not to be understood as taking away the discretion of the court still to refuse the writ, if for sufficient legal cause it shall appear in its discretion the writ ought not to issue." And the same distinguished Judge, in *Pumphrey v. Baltimore*, 47 Md. 145, 28 Am. Rep. 446, approved the doctrine announced in *Railroad Co. v. Hall*, 91 U. S. 355, 23 L. Ed. 428, that the granting of the writ is *discretionary with the court*, and it may well be assumed that it will not be unnecessarily granted.

[2-4] The remedy by mandamus is not one which is accorded as of legal right. The granting or withholding of the writ rests largely within the discretion of the court; but this discretion is not a purely arbitrary one, and cannot be capriciously exercised, but it will not be granted where it is altogether unnecessary, or would work injustice, or would be unavailing or nugatory, or would introduce into municipal administration great confusion or disorder. *Weber v. Zimmerman*, supra; *Brooke v. Widdicombe*, 89 Md. 386; *Hardcastle v. Md. & Del. R. R. Co.*, 32 Md. 82; 19 Am. & Eng. Ency of Law, 751. In *George's Creek C. & I. Co. v. Co. Com.*, 59 Md. 255, Judge Alvey said: "The application for the writ being made to the sound judicial discretion of the court, all the circumstances of the case must be considered in determining whether the writ will be allowed or not; and it will not be allowed unless the court is satisfied that it is necessary to secure the ends of justice, or to subserve some just and useful purpose."

When the record before us is examined in the light of these principles, there can be no doubt that the petition was properly refused. To grant the remedy under the facts in this case would be not only unnecessary, but would be to establish a principle that would introduce very great disorder and confusion in the administration of the finances of the city, and subject it to unnecessary expense. It would accord to every judgment creditor, who had obtained a judgment against the city *after* the appropriations for the ensuing fiscal year had been made in conformity to the charter, the right to have a *special levy* made to pay his judgment. The serious consequences to the public interests and the administration of city affairs, which might result from the recognition of such a doctrine,

are manifest. Instead of one annual levy, which the charter contemplates, there might be as many levies as there were judgments obtained against the city after the estimates had been made for the ensuing year. This would destroy one of the essential objects of the board of estimates, hamper the conduct of city business, and subject the taxpayers to needless expense. For these reasons the judgment will be affirmed.

Judgment affirmed, with costs to the appellees.

BIDWELL v. BECKWITH.

(Supreme Court of Errors of Connecticut.
Jan. 15, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 225*) —PRESENTATION OF CLAIMS—ASSESSMENTS ON CORPORATE STOCK.

An assessment of a stockholder's liability by a court against stock held by a decedent's estate, the corporation having failed, accruing within the time limited for presenting claims against the estate, but not presented during that time, was barred under Gen. St. 1902, § 326, limiting the time for presenting claims against the estates of deceased persons.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 789-803, 806; Dec. Dig. § 225.*]

2. HUSBAND AND WIFE (§ 162*)—CONTRACTS —ACCEPTANCE OF CORPORATE STOCK.

The acceptance in 1899, by a woman married in 1872, of stock created a contract between her and the corporation, and she became liable for any part of the share of the capital stock unpaid, and also for the amount of an assessment thereafter arising through an obligation created by law existent at the date of the acceptance.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 637-640; Dec. Dig. § 162.*]

3. HUSBAND AND WIFE (§ 11*)—SEPARATE ESTATE—CONDUCT.

Where a husband treats certain stock held by his wife as though owned by a feme sole, and does not assert his right to its possession and income, he will be deemed to have divested himself of his marital statutory rights over it, and to have vested her with its sole and separate estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 47-57; Dec. Dig. § 11.*]

4. EXECUTORS AND ADMINISTRATORS (§ 318*) —COMPROMISE OF CLAIMS—DISTRIBUTION.

Where a probate court had upon due application authorized the settlement of certain claims against the estate, and from its order, made within its jurisdiction, no appeal had been taken, one taking under the will, who had actual notice of the application for leave to settle, cannot set up a defense thereto in an action against him by the executor for contribution.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1319-1326, 1328-1331; Dec. Dig. § 318.*]

5. EXECUTORS AND ADMINISTRATORS (§ 269*) —COMPROMISE—"DOUBTFUL OR DISPUTED CLAIMS."

Assessments of stockholder's liability against the estate of a deceased stockholder ordered by a court, one accruing within the time allowed for presenting claims against the estate of a deceased person and one after that time, were "doubtful or disputed claims" with-

in Gen. St. 1902, § 347, authorizing their compromise.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 941, 1092; Dec. Dig. § 269.*]

For other definitions, see Words and Phrases, vol. 3, p. 2187.]

6. EXECUTORS AND ADMINISTRATORS (§ 318*) —CLAIMS ACCRUING AFTER DISTRIBUTION.

Where the court has found that an executor has, without knowledge of an existing claim, distributed the estate, and thereafter an accruing claim is presented, the executor may, after due defense, await judgment and then compel the beneficiaries to satisfy the judgment, or he may compel them to repay a sufficient amount to satisfy the claim and his own legitimate expenses in its settlement.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1319-1326, 1328-1331; Dec. Dig. § 318.*]

7. EXECUTORS AND ADMINISTRATORS (§ 307*) —MUTUAL DISTRIBUTIONS.

Where the beneficiaries under a will all approve of a division otherwise than provided for by the will, such distribution is valid, and the executor is protected against any inequity therein.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1251-1256; Dec. Dig. § 307.*]

8. EXECUTORS AND ADMINISTRATORS (§ 318*) —DISTRIBUTION OF ESTATE—SALE.

In an action to compel contribution by distributees to an after-accruing claim, evidence held to warrant a finding that the settlement between the executor and a beneficiary of an estate was a distribution of the estate and not a sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1319-1326, 1328-1331; Dec. Dig. § 318.*]

9. EXECUTORS AND ADMINISTRATORS (§ 318*) —MUTUAL DISTRIBUTION—LIFE TENANT— REMAINDERS—AFTER-ACCRUING CLAIMS.

Where the life tenant and the remainderman of an estate entered into an agreement for a distribution of the estate, which was executed, the life tenant being the executor of the estate, each should pay his proportion of an after-accruing claim, regardless of which had the real estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1319-1326, 1328-1331; Dec. Dig. § 318.*]

10. EXECUTORS AND ADMINISTRATORS (§ 318*) —COMPROMISE OF CLAIMS—REFUNDING ESTATE DISTRIBUTED.

An order of a probate court authorizing the compromise of certain claims accruing after distribution was a determination of the existence thereof, and it made no difference that authority had not yet been given to the receiver, with whom such compromise was made, by the court, and the executor could at once compel the beneficiaries to repay an amount sufficient to cover the amount agreed on.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1319-1326, 1328-1331; Dec. Dig. § 318.*]

Appeal from Superior Court, Hartford County; Howard J. Curtis, Judge.

Action by Jasper H. Bidwell, as executor of his wife, against Oliver R. Beckwith. Judgment for plaintiff, and defendant appeals. Affirmed.

On July 30, 1902, Mrs. Bidwell died, leaving a will by which she appointed her hus-

band, Jasper H. Bidwell, plaintiff herein, as executor, and gave to him the life use of her large estate and the remainder to the defendant, with the privilege to her husband of giving the whole or any part of said estate to the defendant. The plaintiff, pursuant to said will, transferred to the defendant certain of said estate of the value of \$11,750. Thereafter, in 1906, the plaintiff and defendant, by mutual agreement, arranged for each of them to take a definite portion of said estate free from the claims of the other party, and that the title and possession of such portion should pass to the party receiving the same. In execution of said agreement, the defendant made and delivered to the plaintiff a conveyance of his interest in the property to be retained by the plaintiff, and authorized him, as executor, to obtain such orders of distribution of said estate as were necessary for the distribution of said estate under this agreement, and the final settlement of the same. The plaintiff, as executor, then released and delivered to the defendant property of said estate which, together with the said property of said estate previously surrendered to the defendant, amounted in value to the sum of \$53,272, and Mr. Bidwell then received, as his share under said agreement, property to the value of \$34,560. The plaintiff executor thereupon filed in the court of probate said agreement, and what he designated as a "mutual distribution," containing an itemization of the several pieces of property with the valuation thereon as agreed to, as the share of each, together with the expenses and claims paid by the executor. The court on January 21, 1907, accepted and approved said account and distribution.

Among the items of Mrs. Bidwell's estate acquired by her in 1899 was 100 shares of the capital stock of the Minnesota Thresher Company, then insolvent, and said stock was and remained without value, and was neither included in the inventory of said estate nor in said "mutual distribution" and final account. Said company was adjudged insolvent by a Minnesota court in 1901, and a receiver was duly appointed and qualified, and in 1902 an assessment of 36 per cent. ordered paid upon the outstanding stock, par value \$50, by the holders thereof. No claim for said assessment was ever presented to said executor within the time limited for the presentation of claims.

On June 11, 1907, said court duly ordered another assessment of 64 per cent. paid upon the par value of each outstanding share, being on said 100 shares \$3,200. Said receiver on October 9, 1907, duly presented to said executor a claim against said estate for each of said assessments, amounting in the whole to \$5,000. The plaintiff executor disallowed said claim, and the receiver brought action against him to recover said several assessments, which action is now pending in the Circuit Court of the United States. Be-

fore said last assessment was made or any claim thereon presented to said executor, the said "mutual distribution" was consummated, and it and the final account of the executor approved by said court of probate.

Upon the institution of said action of Converse, receiver, against the plaintiff, as executor of said estate, the plaintiff gave the defendant notice of the pendency thereof and requested him to defend or assist in the defense of the same, which the defendant refused to do. The plaintiff, as executor, thereupon entered to defend said case, and duly pleaded therein that the claim for said first assessment accrued while said estate was in settlement, and was not presented to the plaintiff as executor either during the time limited for the presentation of claims or within one year after said order of limitation was passed. Subsequently negotiations were had for the settlement of said case which resulted in an agreement between the attorneys of the parties that the sum of \$3,000 would be accepted by the receiver in the final settlement and satisfaction of said claim. The plaintiff, as executor, thereupon made application to said court of probate for authority to compromise and settle said claim for said sum of \$3,000. Said court, after due notice to the defendant, which he received, and public notice and hearing, found that it was for the best interest of said estate to make the settlement described in said application, and passed an order that the plaintiff, as executor, be authorized to compromise and settle said claim by the payment of the sum of \$3,000. The defendant, upon request, having refused to pay any part of said \$3,000 or of \$250, the expense of defending said action of Converse, receiver, against the plaintiff, executor, this action was brought to recover the amount he should properly pay towards the settlement of said claim. Mr. and Mrs. Bidwell were married in October, 1872.

In the inventory of said estate was real estate which the defendant transferred to the plaintiff in part consideration of the said transfer by the plaintiff to him.

Joseph P. Tuttle, of Hartford, for appellant. William M. Maltbie, of Hartford, for appellee.

WHEELER, J. (after stating the facts as above). [1] The assessments were lawfully ordered by the Minnesota court and constituted lawful claims against the estate of Mrs. Bidwell, enforceable so far as properly presented. The claim originating in the first assessment, ordered in 1902, against her estate, accrued within the time limited for presenting claims against the estate, and was not presented within that period to the executor, and so the receiver became "forever debarred of his demand against said estate." G. S. § 326. The claim originating in the second assessment ordered in 1907, was duly presented against said estate by the receiver,

and is a valid obligation of the estate unless, as the defendant insists, Mrs. Bidwell's coverture prior to April 20, 1877, prevents its collection.

[2] Mrs. Bidwell's status, as a woman married in 1872, differed largely from the status attached to that relationship by the common law. Her rights and obligations were in part the same as now expressed in G. S. § 591. She was liable upon her contract made for the benefit of herself, or her separate or joint estate. Her acceptance of the bequest of this stock created a contract between her and the company. By force of this contractual relation, she became, on the one hand, a joint owner with the other stockholders of the company, and entitled to share in its dividends, when declared, and on the other hand she became liable for any part of her share of the capital stock unpaid, upon the faith of which the company conducted its business, and also for the amount of an assessment thereafter arising through an obligation created by law existent at the date of her acquisition of stock imposing upon stockholders a liability equal to the par value of their holding. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163. Her acquisition of the stock was for the benefit of herself and her estate. She was ready to share its benefits; her estate must bear its burdens.

The claims arising out of these assessments were obligations springing from her contract and created by law, and, so far as duly presented against her estate, were valid claims. Contracts of a woman married prior to 1877, for the benefit of herself, her family, or her estate, have been frequently sustained by us, and these decisions give good ground for holding these claims obligations of her estate. *Shelton v. Hadlock*, 62 Conn. 143, 154, 25 Atl. 483; *Corr's Appeal*, 62 Conn. 403, 409, 26 Atl. 478; *Williams v. King*, 43 Conn. 569, Fed. Cas. No. 17,725.

[3] Mr. Bidwell had by law the life use of all of his wife's personal property, including these shares of stock. The certificate of stock always remained in her name; her husband never took possession of it nor saw it; thus indicating that he had not, in her lifetime, secured its possession or the right to its income. As executor he never caused it to be inventoried, and never accounted for it; it was in fact worthless, and he, as executor, treated it as such. He administered the property as though it had been held to her sole and separate use. We have not before us the terms of the bequest to Mrs. Bidwell, and do not know whether it was made to her sole and separate use or not. The disposition made by her of this stock, and the failure of the husband to assert his statutory right to its possession and income, and the manner in which he administered his trust, unmistakably indicate that she and he regarded and treated these shares of stock as though owned by a feme sole.

As a consequence he must be deemed, in law, to have divested himself of his marital statutory rights over this stock, and to have invested her with its sole and separate estate. *Coe's Appeal*, 64 Conn. 352, 357, 30 Atl. 140; *State v. French*, 60 Conn. 478, 481, 23 Atl. 153; *Williams v. King*, 43 Conn. 569, 574, Fed. Cas. No. 17,725.

The trial judge in his memorandum says: "But this property was clearly held by her as her own." Obviously he draws his conclusion from the course of conduct of the parties in interest toward these shares of stock, and not from the terms of the bequest to Mrs. Bidwell, as the defendant seems to think.

[4] If coverture had been a defense to these claims and available to the defendant in spite of his failure to plead it, the fact that the court of probate had, upon due application, after actual notice to the defendant, authorized their settlement, and from its order made within its jurisdiction no appeal had been taken, would preclude the defendant from now making this defense.

[5] The claims were within the class of "doubtful or disputed claims" (G. S. § 347), and the court had authority to order their compromise. The defendant cannot now attack the jurisdiction of the court of probate or question the validity of the claims ordered compromised. *Johnson's Appeal*, 71 Conn. 590, 595, 42 Atl. 662; *Seymour v. Seymour*, 22 Conn. 272, 280.

[6] When the court has found that an executor has, without knowledge of an existing claim, distributed a testate estate, or the parties in interest have divided it among themselves in accordance with law, and thereafter an accruing claim is presented against the estate, at least two courses are open to the executor by which to secure his release from this claim. He may, after due defense, await judgment and then compel the beneficiaries to repay into the estate a sufficient amount to satisfy the judgment, or he may compel the beneficiaries to repay a sufficient amount to satisfy the claim and his own legitimate expenses in its settlement. *Davis v. Vansands*, 45 Conn. 600, 604, Fed. Cas. No. 3,655; *Mathewson v. Wakelee*, 83 Conn. 75, 75 Atl. 93.

[7] Conceding these positions, the defendant asserts that the trial court erred in holding the transaction between him and the plaintiff, as to the disposition of this estate, to be a distribution and not a sale, and hence did not relieve the defendant from liability for after-accruing claims arising out of these assessments. Our statutes, sections 310, 395, furnish the necessary legal machinery for making a distribution in testate and intestate estates when the law requires it and the property is other than cash and there be more than one beneficiary, and they also provide the machinery for a mutual division between the parties. These methods, if followed, secure a legal division and protect the admin-

istrator or executor against the invalidity and inequity of their making. If the parties make a division which they approve of, and the executor or administrator is willing to take the risk of having the property in his hands so divided, it is as valid as one made under the sanction of the statute. The aim of the law has been attained and a fair division had. *Merwin, Trustee, Appeal*, 75 Conn. 33, 40, 52 Atl. 484; *Dickinson's Appeal*, 54 Conn. 224, 6 Atl. 422.

[8] Mr. Bidwell and the defendant made such a division, each receiving title to and possession of his share, free from the claims of the other, and the defendant agreed that the court of probate might enter any orders necessary to carry out the instrument of division, and that his interest in the estate, not transferred to him, should be distributed to Mr. Bidwell. The purpose of the parties was plain; it was not to effectuate a sale, but a division mutually satisfactory to each.

The subordinate facts, so far as this record discloses, in finding and proposed draft finding, confirm the conclusion of the trial court. The defendant proposes a division of the estate and accepts Mr. Bidwell's offer "in settlement of the estate," and the executor files his final account, heading it "mutual distribution." Though the defendant did say during the negotiations that he would "buy or sell," and referred to an "offer looking to such division," the parties did not intend a sale, as the entire transaction, looked at as a whole, shows. The plaintiff pointedly observes that the defendant should not be heard to object to a proceeding "undertaken at his request, consummated by his participation, and the benefits of which he is now enjoying." The division was as the parties wished. The claim arose after it had been made. Neither individually nor as executor did Mr. Bidwell have notice or knowledge of it. It would be the height of inequity if he must suffer the entire loss.

[9] There is no greater reason why the life tenant should bear the loss rather than the remainderman; it would indeed seem harsh, when the life tenancy is terminated at the suggestion of the remainderman, that the latter should escape and the former suffer the payment of a subsequently arising claim. Neither in the agreement nor in the recital of facts is there basis for the claim that Mr. Bidwell agreed to relieve the defendant of the obligation of this or any other after-accurring claim. Equity requires each to pay his proportion of the unexpected claim. *Mansfield v. Lynch*, 59 Conn. 320, 22 Atl. 313, 12 L. R. A. 285.

The defendant has no right in good conscience to retain more than his pro rata share of the estate after all the debts of the estate have been paid. The defendant assigns as error the holding of the trial court that there was such an agreement between the plaintiff and the receiver as bound the defendant to pay his pro rata share of the

claims ordered compromised before the claims had been reduced to judgment, and the further holding that the authority to compromise given by the court of probate was equivalent to a judgment establishing the validity of the claim.

[10] The order of the court of probate was over a subject of which it had jurisdiction, and made upon due notice to the defendant. So far as the plaintiff individually and as executor, and the defendant, are concerned, the order was a determination of the existence of a claim or claims, at least for the amount named in the order, and as binding upon the parties before the court as any judgment within its jurisdiction. *Johnson's Appeal*, 71 Conn. 590, 42 Atl. 662; *Thomas' Appeal*, 85 Conn. 53, 81 Atl. 972; *Mathewson v. Wakelee*, 83 Conn. 75, 75 Atl. 93; *Davis v. Vansands*, 45 Conn. 600, 604, Fed. Cas. No. 3,655. It is too late for the beneficiary with notice or the executor to withdraw. The receiver has not as yet secured the approval of the Minnesota court, but his failure so to do does not affect the validity of the claim allowed, nor lessen the duty of the executor to secure funds from the distributees of the estate with which to pay it. If that court should finally refuse to approve of the agreement of compromise, the executor will hold this fund as executor for application towards payment of this claim, or, in case it is not required for that purpose, for division proportionately among its contributors.

The defendant's liability is also contested because the order of compromise included the claim under the first as well as the second assessment, which was already barred. The authorization did not exceed the claim under the second assessment. The receiver's action was on both claims. The order of compromise was of both claims. Ordinary prudence in the administration of this estate dictated this course; the estate will be the gainer in getting rid of an outstanding claim made the subject of a legal action, as well as the claim under the second assessment, at a cost less than the face of the claim under the second assessment. The defendant, having had full opportunity to contest the order of compromise, cannot now attack it on this or any other ground.

The defendant's last claim is that the executor should apply the real estate as found in the inventory, to the payment of this claim before seeking to compel the defendant to pay any part of it. The defendant overlooks the fact that the real estate in the division went to Mr. Bidwell. Upon a mutual division of an estate, it would be highly unjust to compel the beneficiary, receiving real estate as part of his share under the division, to pay the whole of an after-discovered claim. It seems equitable, as the court decreed, that each of the parties should pay a part of the claim proportionate to the assets received on the division. As we un-

derstand the record, the defendant does not complain of the manner in which the court made this division.

There is no error. The other judges concurred.

NEILSON v. PERKINS.

(Supreme Court of Errors of Connecticut.
Jan. 15, 1918.)

1. COURTS (§ 214*)—APPELLATE JURISDICTION—CONNECTICUT SUPERIOR COURT—STATUTES.

Act Aug. 29, 1911 (16 Sp. Laws, p. 500), effective on its passage without any saving clause, expressly repealing Act April 17, 1905 (14 Sp. Laws, p. 600) § 10, which gave any party aggrieved by a final judgment or decree of the city court of Hartford in cases where the demand exceeded \$500, took from the superior court appellate jurisdiction of an action pending in the city court in which no judgment had been rendered or any appeal taken at the time of its passage; the intent being clear and Gen. St. 1902, § 1, declaring that the repeal of an act shall not affect any action then pending, having no application.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 528-530; Dec. Dig. § 214.*]

2. STATUTES (§ 276*)—REPEAL—STATUTORY PROVISION.

Gen. St. 1902, § 1, which provides that the passage or repeal of an act shall not affect any pending action, is merely declaratory of a rule of construction, and is effective only when the repealing statute does not make clear the legislative intent that it shall affect pending cases.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 371-373; Dec. Dig. § 276.*]

3. CONSTITUTIONAL LAW (§ 111*)—VESTED RIGHTS—APPEAL.

Parties have no vested rights to an appeal, and, where a statute giving an appellate court jurisdiction of the appeal is repealed without saving clause, appeal, though previously taken, falls with the statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 267-269; Dec. Dig. § 111.*]

Wheeler, J., dissenting.

Appeal from Superior Court, Hartford County; Joel H. Reed, Judge.

Action by Otto Neilson against Daniel C. Perkins. Judgment for defendant in the city court of Hartford, and plaintiff appealed to the superior court. From an order denying his motion to erase the case from the superior court docket for want of jurisdiction, defendant appeals. Error.

Action to recover damages for injuries alleged to have been caused by the negligence of the defendant and his servants, brought to the city court of the city of Hartford where trial was had to the jury before Bulard, J., and a verdict and judgment was rendered for the defendant. From that judgment an appeal was taken by the plaintiff to the superior court, and a motion was there made by the defendant that the case be erased from the docket for want of jurisdiction, which motion was denied by the

court (Reed, J.), and the case was afterwards tried to the jury (Williams, J.), and the plaintiff had a verdict, upon which judgment was rendered. The defendant appeals, assigning the court's denial of the motion to erase as error.

A. Storrs Campbell, of Hartford, for appellant. Andrew J. Broughel and Birdsey E. Case, both of Hartford, for appellee.

THAYER, J. The only question in this case is whether the superior court erred in refusing to erase the case from the docket. It is an appeal from the city court of Hartford.

[1] The question is whether at the time the city court allowed the appeal the superior court had jurisdiction of the case. Section 10 of an act concerning the city court of Hartford, approved April 17, 1905 (Special Acts 1905, p. 600), provides that any party aggrieved by a final judgment or decree of that court in any cause in which the matter in demand exceeds \$500 may appeal therefrom to the superior court. This provision was in force when the present action was commenced. During the pendency of the action, and before the judgment appealed from had been rendered by the city court, said section 10 was repealed by an act approved August 29, 1911, which took effect from its passage. Special Acts 1911, p. 500. The judgment was rendered in the city court, and the appeal therefrom was taken in the month of November following. While the repealed provision had life, the superior court and the city court of Hartford had original concurrent jurisdiction of a large number of cases, namely, those wherein the matter in demand exceeded \$1,000, and the parties or one of them resided in the city of Hartford. The superior court also, by virtue of the act in question, had appellate jurisdiction of the same cases. It also had appellate jurisdiction of similar cases wherein the matter in demand lay between \$500 and \$1,000, in which cases the court of common pleas also had original jurisdiction concurrent with the city court. A party was thus able to bring his action in these cases in the city court and have a jury trial, and, if unsuccessful, there appeal to the superior court and have another jury trial there, as was done in this case. An appeal in all these cases for errors in law is allowed to this court from the judgments of the city court of Hartford, the same as from the superior court and the court of common pleas. There was therefore no necessity for a second trial to either court or jury of the questions of fact in these cases. The manifest intent of the repealing statute was to take from the superior court this appellate jurisdiction, and that was its effect.

[2] The superior court held that, as this case was pending in the city court at the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

time of the repeal, it was saved from its effect by section 1 of the General Statutes, which provides: "That the passage or repeal of an act shall not affect any action then pending." This provision is merely declaratory of a rule of construction. *Rowen v. N. Y., N. H. & H. R. Co.*, 59 Conn. 384, 387, 21 Atl. 1073. We have held in several cases that, where it is clear that the Legislature intended that a creating or repealing act relating to procedure should affect pending cases, the act was to be so construed, notwithstanding the provision in section 1 of the General Statutes referred to; that being a mere legislative enactment, the provision must yield to the later expression of the legislative will. *Hubbard v. N. Y., N. H. & H. R. Co.*, 70 Conn. 563, 565, 40 Atl. 533; *Atwood v. Buckingham*, 78 Conn. 423, 426, 62 Atl. 616; *Lew v. Bray*, 81 Conn. 213, 217, 70 Atl. 623. Section 1 of the General Statutes does not preserve or attempt to preserve to parties, as against a repealing statute, rights which they possessed under the statute repealed. It is one of the sections of chapter 1 of the title "construction of statutes," which is the first title of the General Statutes. It simply lays down a rule of construction to be adopted when the repealing statute does not make clear the legislative intent that it shall affect pending cases. This is the effect of the construction which we have already put upon it. There can be no doubt that, in the absence of this section, the repealing statute in the present case would be held to affect pending cases.

[3] Parties have no vested right to an appeal. The rule is that if even after an appeal has been taken, the statute giving the appellate court jurisdiction of it is repealed, and there is no saving clause, the case falls with the statute. *Insurance Co. v. Ritchie*, 72 U. S. (5 Wall.) 541, 544, 18 L. Ed. 540. There is no saving clause in the statute under review. It is an express repeal of the statute allowing an appeal. It in express terms says that it shall take effect from its passage. At the time of this repeal, no appeal had been taken in the case before us. We think that it is not a case for the application of the rule of construction provided in section 1 of the General Statutes, and that it should have been erased from the docket of the superior court.

There is error.

WHEELER, J. (dissenting). The case was taken to the city court of Hartford and, from the judgment there rendered, an appeal taken to the superior court, where a motion to erase the case from the docket was denied. The sole question on the appeal to this court from the judgment of the superior court is whether that court erred in refusing to erase the case from the docket. Section 10 of an act concerning the city court of Hartford (Special Acts 1905, p. 600)

provides that any party, aggrieved by a final judgment or decree of that court in any cause in which the matter in demand exceeds \$500, may appeal therefrom to the superior court. This provision was in force when the present action was commenced. During its pendency, and before judgment in the city court, said section 10 was repealed (Special Acts 1911, p. 500) as follows:

"Section 1. Section ten of an act concerning the city court of Hartford, approved April 17, 1905, being section two hundred and three of the compiled charter of the city of Hartford is hereby repealed.

"Sec. 2. This act shall take effect from its passage."

Before the passage of this act, a litigant was thus able to bring his action in these cases in the city court and have a trial, and, if unsuccessful, then appeal to the superior court and there have another trial on the facts, as was done in this case. The double trial upon issues of fact and law was unduly burdensome to litigants and wasteful to the public. The manifest intent of the repealing act was to take from the superior court this appellate jurisdiction. The superior court refused to grant the motion to erase, undoubtedly because it was of opinion the repealing statute did not act retrospectively as well as prospectively, and apply to pending cases. "The presumption is that statutes are intended to operate prospectively. They should never be construed as having a retrospective effect unless their terms show clearly and unmistakably a legislative intention they should so operate." *Humphrey v. Gerard*, 33 Conn. 346, 352, 77 Atl. 65, 67; *Smith v. Lyon*, 44 Conn. 175, 178.

The majority opinion would seem to hold that this general presumption does not hold in respect to statutes relating to procedure and remedy, and that such statutes apply to pending cases and cases to be brought alike. Some support is found for this contention in *Hine v. Belden*, 27 Conn. 384. But the rule adopted in *Perkins v. Perkins*, 7 Conn. 558, 563, 18 Am. Dec. 120; *Thames Mfg. Co. v. Lathrop et al.*, 7 Conn. 550, and *Skinner v. Watson*, 35 Conn. 124, was the rule of construction of this jurisdiction before the passage of G. S. § 1. In *Skinner v. Watson* we considered the effect upon a pending case of an act changing the basis of costs awarded, and held that the act did not apply. We there said: "It seems, therefore, to be the settled law of this state that a statute is not to be so construed as to have a retrospective effect, unless it appears that such was the manifest intention of the Legislature. We are not satisfied that the Legislature intended that the statute now before us should have such an effect. * * * Had it been intended that the proviso should embrace appeals then pending, such an in-

tention could easily have been expressed, and it is reasonable to presume that the Legislature would have clearly expressed it. The fact that there is nothing in the language of the act to indicate such an intention is strong evidence that it did not exist."

We thus made the determinative test the legislative intent; unless the act by its terms or its necessary implications indicated an intention that the act should have a retroactive effect, we held it inapplicable to the past. We think the rule of construction adopted in G. S. § 1, "The passage or repeal of an act shall not affect any action then pending," was declaratory of our existing law. But whatever the law may have been before the passage of this act, this enactment is so precise and unambiguous as to admit of no doubt as to its meaning. G. S. § 1, did not limit the power of the Legislature to provide that an act should apply to pending cases. It did limit the power of the court to construe any act as according such power, unless the legislative intent to have the act apply to pending cases was clear. *Lew v. Bray*, 81 Conn. 213, 217, 70 Atl. 628. The last expression of the legislative will must control the earlier.

Rowen v. N. H. & H. R. Co., 59 Conn. 364, 367, 21 Atl. 1073, presented this case. The defendants had, under the law existing when the action was begun, a right to have the hearing in damages to the court upon taking a certain course. A statute passed, pending the action, provided that this hearing should be to the jury unless defendant gave a certain notice, the time for which, as to this case, had expired. The question at issue was whether the act affected the pending case. The court, by Seymour, J., said: "Is the statute thus retroactive? There is no provision in the act itself that it shall affect pending suits. As a rule of construction, section 1 of the G. S. declares that the passage or repeal of an act shall not affect any action then pending. * * * Such an intention, if existing, should not be left in doubt. In view of the rule of construction expressly imposed by the statute, the language should necessarily carry an intention to act upon pending suits, or pending suits should in terms be made subject to it."

In *State v. N. Y., N. H. & H. R. Co.*, 71 Conn. 43, 48, 40 Atl. 925, 927, mandamus was brought to require defendant to build a bridge across its tracks; while the action was pending, an act was passed providing that no such structure should be built without the approval of the railroad commissioners determining the plan and manner of its building, and the necessity for it. We held: "The language of the act does not expressly make it applicable to cases pending in court, much less to cases already adjudicated; and, in the absence of express words or necessary implication, it cannot be so construed."

In *Peltier v. Bradley, etc.*, Co., 67 Conn.

42, 48, 34 Atl. 712, 713 (32 L. R. A. 651), the plaintiff filed exceptions to the finding, and the evidence was made a part of the record under the act of 1893. We held (*Baldwin, J.*): "This act was repealed in 1895, but by G. S. § 1, such repeal did not affect actions then pending, of which the present suit was one."

In *Lew v. Bray*, 81 Conn. 213, 217, 70 Atl. 628, 630, we held that the Legislature had the power to enact laws relating to procedure and affecting pending cases by changing the costs to be recovered, and that it could do so "when the legislative intent is clear."

In *Atwood v. Buckingham*, 78 Conn. 423, 62 Atl. 616, we held the legislative intent to be clear to apply an act to the pending case. *Ferguson v. Borough of Stamford*, 60 Conn. 433, 443, 22 Atl. 782.

In our construction of G. S. § 1, we have never varied in our application of this rule of construction except in the case of *Hubbard v. N. Y., N. H. & H. R. Co.*, 70 Conn. 563, 564, 40 Atl. 533. This case follows the rule adopted in *Hine v. Belden*, 27 Conn. 384, and fails to follow the construction given to section 1 in *Rowen v. N. H. & H. R. Co.*, and is at variance with the construction invariably thereafter adopted. It makes no difference whether the act relates to procedure or not. Section 1 applies to all acts of every kind, and we do not have one rule for determining the legislative intent in an act relating to procedure and another rule for all other kinds of acts. There is nothing in the language of the act, and nothing to be implied, that points to the past.

The circumstance that the Legislature esteemed the act a beneficial one, and the change in the remedy, provided desirable, does not tend to indicate that it intended the act to have a retrospective effect. Nor is its provision that it shall take effect from its passage at all persuasive of the legislative intent that it should apply to pending cases. Such a provision is not uncommon in legislative enactments, and it has never been regarded as furnishing indication of an intent that the act should apply to pending cases. *State v. N. Y., N. H. & H. R. Co.*, supra, is an example of the construction of an act taking effect from its passage. If this act were held to apply to all pending cases, we should have this anomalous situation: A case tried in the city court of Hartford is on appeal tried in the superior court, and, while pending on appeal to the Supreme Court, is by the passage of the act ended since the appeal from the city court vacated its judgment. So, too, a case pending on appeal to the superior court on the passage of the act is ended. The rights of litigants are thus destroyed by the legislative act. No other result is possible unless it be held that the cause pending in the city court cannot be appealed to the superior court because affected by the act, while the cause pending

in the superior court already appealed is not affected by the act.

No legal or logical reason can be suggested why we should hold that it was the legislative intent that the act should apply to cases pending in one court and not the other. To hold that the language of section 1, G. S., "The passage or repeal of an act shall not affect any action then pending," applies to matters of substantive law affecting pending cases, and not to matters of adjective law, is to import into the statute something the Legislature did not place there, and to ignore a provision, the terms and history of which, from its first appearance in our statute law, show the Legislature intended should apply to all matters relating to pending cases, whether of substantive law or matters of procedure.

The majority opinion is clearly contrary to our repeated decisions, and it assigns no adequate reason for overruling the settled law and refusing to give effect to the plain terms of the statute.

In my judgment, the trial court did not err in its denial of the motion to erase.

MAGUIRE v. KIESEL.

(Supreme Court of Errors of Connecticut.
Jan. 15, 1913.)

1. TRIAL (§ 396*)—FINDINGS—CONFORMITY TO PLEADINGS.

Under Court Rules, § 149, providing that immaterial variances shall be disregarded, the fact that a finding for plaintiff, in an action for breach of a contract to share any profits to be derived from the purchase, improvement, renting, and sale of certain real property, recited the manner in which the anticipated profit was to be derived, while the complaint was silent on the subject, was immaterial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935-938; Dec. Dig. § 396.*]

2. PLEADING (§ 388*)—"MATERIAL VARIANCE."

A variance, to be available, must be a disagreement between the allegation and proof as to a matter essential to the charge or claim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1305-1308; Dec. Dig. § 388.*]

For other definitions, see Words and Phrases, vol. 5, p. 4408.]

3. FRAUDS, STATUTE OF (§ 56*)—TRANSFER OF AN INTEREST IN LAND—PROFITS TO BE DERIVED FROM LAND.

A contract for the sharing of profits to be derived from a joint purchase of certain land, the construction of certain tenements thereon, the renting thereof, and the ultimate sale of the property, if possible, was not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.*]

4. APPEAL AND ERROR (§ 219*)—ASSIGNMENTS OF ERROR—QUESTIONS NOT RAISED AT TRIAL.

Assignments of error not presented to the trial court by request for finding, either directly or by reasonable implication, as required by Gen. St. 1902, § 793, will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315-1324; Dec. Dig. § 219.*]

5. ACTION (§ 53*)—CAUSES OF ACTION—SINGLE CAUSE OF ACTION.

Where plaintiff and defendant contracted to share profits to be derived from the purchase of certain real property, the construction of a building thereon, the renting of the building, and an ultimate sale of the property, if possible, and defendant breached the contract by an entire refusal to recognize plaintiff's interest therein, plaintiff had but a single cause of action to recover entire damages, both past and prospective.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-623; Dec. Dig. § 53.*]

6. DAMAGES (§ 40*)—MEASURE OF DAMAGES—BREACH OF CONTRACT—PROFITS.

Where defendant refused to recognize plaintiff's rights in a contract to jointly share the cost and profits to be derived from the purchase, improvement, and sale of certain real property, plaintiff's measure of damages was such a sum as would afford reasonable compensation for his loss, as determined from proof of such profits as had accrued, if any, and such as could be shown to be reasonably expected in the ordinary course of events in the future.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88; Dec. Dig. § 40.*]

7. DAMAGES (§ 176*)—EVIDENCE—PAST PROFITS.

On an issue as to damages sustained by plaintiff's loss by being deprived of the right to participate in a contract for the improvement and sale of real property, evidence of past profits was admissible as bearing on the profits reasonably to be expected in the future.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 461, 468, 471, 493; Dec. Dig. § 176.*]

Appeal from Superior Court, Fairfield County; Lucien F. Burpee, Judge.

Action by Charles F. Maguire against E. Kiesel to recover damages for breach of an oral contract respecting real estate. From a judgment for plaintiff assessing his damage at \$1,100, defendant appeals. Affirmed.

The following facts are established by the finding of facts and the finding of the issues in favor of the plaintiff:

About January 1, 1911, the plaintiff and defendant entered into an oral agreement to share equally in the profits that should be made from the purchase of a lot of land, the building and rental of a house thereon, and the sale thereof, if an opportunity to sell should be had. No time limit was placed upon the continuation of the agreement, but it might have been fully performed within one year. It was a part of the agreement that the defendant should have the title of the land conveyed to himself and the plaintiff jointly. Each party undertook to do certain things to carry out the agreement and necessary to complete the transaction. The plaintiff agreed to pay one-half of the price of the lot, to wit, \$1,200, render or cause to be rendered certain services in connection with the enterprise, and contribute \$900 toward the cost of erection of the building which was to cost \$7,800. The defendant was to contribute \$600 in money toward the purchase of the lot, his services as builder

or contractor, and also \$900 toward the cost of the building, and, in addition, pay any excess in the cost of the building over \$7,800. The plaintiff performed or caused to be performed at his expense the services which he undertook to render, and either did or offered to do, and was at all times able and willing to do all the other things required of him to be performed under the terms of the contract. The defendant purchased the lot, taking title in his own name, and paying the entire purchase price, although plaintiff stood ready and willing to contribute his share thereof. The same day he conveyed the property to his wife, in whose name it has stood ever since. Thereafter the defendant stated to the plaintiff that he had procured the money for the purchase of the lot from his wife, and that, when the building had proceeded, he would turn over the plaintiff's share to him upon the plaintiff paying his share of the money. This explanation satisfied the plaintiff. Thereafter, in pursuance of the partnership agreement between them, the plaintiff and defendant agreed to erect a six-family house upon said lot. The defendant subsequently refused to allow the plaintiff to contribute the \$900 agreed upon, although he offered to do so, and repudiated the agreement, and then and ever since has refused to abide by it. A building was erected upon the land by defendant, pursuant to and in substantial accordance with the plans and specifications agreed to by the plaintiff, which was completed and ready for occupancy August 1, 1911. The rental profit of the building was estimated by the parties to be and in fact was at the rate of \$800 per year. The value of the property at the time of the completion of the property was and remained \$1,500 more than its cost. The allegation of the complaint was that "the plaintiff entered into an agreement by parol whereby they were to purchase real estate jointly and construct a building thereon and to share in the profits arising therefrom."

Spotswood D. Bowers, of Bridgeport, and James E. Brinckerhoff, of Stamford, for appellant. Warren F. Cressy, of Stamford, for appellee.

PRENTICE, J. (after stating the facts as above). The plaintiff sues to recover for damages alleged to have been suffered by him from the breach of an agreement between himself and the defendant for the conduct of a joint enterprise, and for services claimed to have been rendered and expenses incurred by him in compliance with the terms of the agreement and in aid of the joint undertaking, the benefit of which has been appropriated by the defendant as a consequence of his wrongful conduct in the breach of the agreement. The agreement which is thus made the basis of recovery

was an oral one, and is found to have been one "to share equally in the profits that should be made from the purchase of a lot of land, the building of a house thereon and the sale thereof, if an opportunity to sell should be had." Four of the reasons of appeal charge the trial court with error in the rendition of its judgment upon the ground that the agreement was not actionable by reason of two provisions of the statute of frauds. In the brief and argument the only provision of the statute relied upon is that which makes nonactionable any agreement not in writing "for the sale of real estate or any interest in or concerning it." General Statutes, § 1089.

[1] As preliminary or incidental to this claim, the defendant urges that the judgment was erroneous because it was not supported by the pleadings. He says that one agreement was alleged as the basis of recovery, and recovery had upon another. We find no fair foundation for this contention in the reasons of appeal. But, that matter aside, it is not well made. The question it presents is essentially one of variance between the allegation and the proof as evidenced by the fact established. The claim as made invokes the ancient common-law rule of strict construction and application, and ignores the more liberal one of our practice which is expressed in the provision of section 149 of our Rules that immaterial variances shall be disregarded. This rule we have consistently enforced in a long line of cases not only in its letter, but also in its spirit, to the end that claims of variance be discouraged. *Osborn v. Norwalk*, 77 Conn. 663, 666, 60 Atl. 645. The language of the complaint in which the description of the agreement was couched is not, it is true, identical with that used by the court in its finding. There is, however, no variation in respect to the essential fact that it was one to share in the profits of a joint deal in a piece of real estate to be bought, and improved by them for speculative purposes. The difference is found in that the finding recites the manner in which the anticipated profit was to be derived, while the complaint is silent upon that subject. The difference is one which results from a greater particularity in the finding, and not one which relates to the essential thing charged or one through which the defendant could be prejudiced.

[2] The characteristics of a variance which under our practice will be fatal are not here present. *Davis v. Guilford*, 55 Conn. 351, 354, 11 Atl. 350; *Osborn v. Norwalk*, 77 Conn. 663, 666, 60 Atl. 645. "A variance to be available must be a disagreement between the allegation and the proof in some matter essential to the charge or claim." *Plumb v. Griffin*, 74 Conn. 132, 136, 50 Atl. 1, 2. See, also, *White Sewing Machine Co. v. Feeley*, 72 Conn. 181, 186, 44 Atl. 36. This

was the rule even under our former practice. *House v. Metcalf*, 27 Conn. 631, 638; *State v. Wadsworth*, 30 Conn. 55, 58.

[3] The agreement was not within the operation of the statute. The statute "contemplates only a transfer of lands or some interest therein." *Bostwick v. Leach*, 3 Day, 76, 484; *Hall v. Solomon*, 61 Conn. 476, 483, 23 Atl. 876, 29 Am. St. Rep. 218. The subject-matter of the agreement was not land or any interest therein. It was a fund of money representing profits from a joint enterprise in the nature of a partnership. *Bunnell v. Taintor*, 4 Conn. 568, 573. This enterprise, to be sure, was one which contemplated and involved a real estate transaction, and the fund to be divided was to be derived from that source. But that touching which the agreement was made, and in which by reason of the agreement the plaintiff claims an interest, was the fund. *Bunnell v. Taintor*, supra, presented a situation strikingly similar in its details to the present, and having the same essential features, and we there held that the contract was not within the statute. 4 Conn. 568, 573. The overwhelming weight of authority in other jurisdictions is to the same effect, that an agreement for a joint enterprise in the nature of a copartnership which has for its purpose the purchase, improvement, and sale of real estate for the profit arising therefrom to be divided among the joint undertakers as among partners, and which does not undertake to operate upon the ownership of or title to the realty, or anything annexed thereto as a part or parcel of it and transferable alone by deed, is not within the statute. *Dale v. Hamilton*, 5 Hare, 382; *Chester v. Dickerson*, 54 N. Y. 1, 8, 13 Am. Rep. 550; *Bates v. Babcock*, 95 Cal. 479, 484, 30 Pac. 305, 16 L. R. A. 745, 29 Am. St. Rep. 133; *Eaton v. Graham*, 104 Ill. App. 296; *Bruce v. Hastings*, 41 Vt. 380, 98 Am. Dec. 592; *Richards v. Grinnell*, 63 Iowa, 44, 54, 18 N. W. 668, 50 Am. Rep. 727; *Fountain v. Menard*, 53 Minn. 443, 445, 55 N. W. 601, 39 Am. St. Rep. 617; *Jones v. Davies*, 60 Kan. 309, 314, 56 Pac. 484, 72 Am. St. Rep. 354; *Dudley v. Littlefield*, 21 Me. 418, 422; *Howell v. Kelly*, 149 Pa. 473, 475, 24 Atl. 224.

All of the remaining reasons of appeal deal with the award of damages. They are, in substance, that the court erred (1) in ruling that the agreement was one for profits capable of being ascertained or computed with certainty before a sale of the property was had or rental profits had been made; (2) in speculating as to the amount of damages; (3) in ruling that there was evidence of damage justifying an award of more than nominal damages; (4) in adopting a wrong rule of damages; (5) in allowing for the value of the services alleged to have been contributed to the joint enterprise by the plaintiff; (6) in ruling that recovery could be had for damage accruing after the commencement of the action; and (7) in awarding the sum of \$1,100.

[4] All of these assignments of error except the first named might be disregarded since the appellant's request for a finding did not include them, either directly or by reasonable implication, among the questions of law desired to be reviewed. General Statutes, § 793; *Banks v. Warner*, 85 Conn. 613, 84 Atl. 325. The court was neither directly asked nor indirectly called upon to state the rule which it adopted for the assessment of damages, the factors which it recognized in their assessment, or any rulings it made touching that subject. We are thus left with the meager information which results by inference from certain facts which chance to appear in the finding, and which we could not fairly regard as complete.

[5] A perusal of the assignments, however, makes it apparent that they rest upon a mistaken notion of the character and scope of the action. It is not one to secure the plaintiff's claimed share of accrued profits under a subsisting contract, or profits at all as such. The allegations of the complaint are unexplainable upon that basis. It is one to recover, once for all, for the damage suffered by the plaintiff through a wrongful termination of a valuable contract which is treated as at an end. The complaint alleges a repudiation of the alleged agreement by the defendant, treats it as no longer existent, and seeks redress upon that basis. "Whether a contract be single and entire or apportionable, if there is a total abandonment or breach by one party, the other has a single cause of action upon the entire contract if he think proper to act on the breach as a total one. *Sutherland on Damages*, § 108; *Parker v. Russell*, 133 Mass. 74, 75; *Remelee v. Hall*, 31 Vt. 582, 585 [76 Am. Dec. 140]; *Lamoureux v. Roife*, 36 N. H. 33, 36; *Kalkhoff v. Nelson*, 60 Minn. 284, 288 [62 N. W. 332]; *Keck v. Bieber*, 148 Pa. 645, 648 [24 Atl. 170, 33 Am. St. Rep. 846]. This is true in the case of a continuing contract, the conduct of the party in default being such as to evince an intent on his part to abandon the contract and not to be bound by its terms. *Fish v. Folley*, 6 Hill [N. Y.] 54, 55. Where such is the situation, the entire damage, both past and prospective, may be recovered in a single action, and the judgment is a bar to any subsequent action." *Hale on Damages*, 117; *Parker v. Russell*, 133 Mass. 74, 76; *Kalkhoff v. Nelson*, 60 Minn. 284, 288, 62 N. W. 332; *Dillon v. Anderson*, 43 N. Y. 231, 237.

[6] The measure of damages in the present case is therefore reasonable compensation for the loss which the plaintiff suffered in being wrongfully deprived of the benefit of the agreement. That which it provided for was a sharing of anticipated profits. Such profits were, therefore, within the contemplation of the parties. *Cohn v. Norton*, 57 Conn. 480, 490, 18 Atl. 595, 5 L. R. A. 572; *Comstock v. Connecticut Ry. & Ldg. Co.*, 77 Conn. 65, 67, 58 Atl. 465. The measure of the loss must be found in the profits which under

the agreement the plaintiff would have been entitled to receive. *Bagley v. Smith*, 10 N. Y. 489, 496, 61 Am. Dec. 756; *Dennis v. Maxfield*, 10 Allen (Mass.) 133, 142; *Sedgwick on Damages*, § 625. If the compensation is to be adequate, as the law endeavors, as best it can, to make it, prospective as well as past profits must be taken into account in so far as the former are established with the requisite degree of certainty in respect to both connection and amount. *Griffin v. Colver*, 16 N. Y. 489, 491, 69 Am. Dec. 718; *Brigham v. Carlisle*, 78 Ala. 243, 249, 56 Am. Rep. 28; *Schumaker v. Heinemann*, 99 Wis. 251, 256, 74 N. W. 785; *Sutherland on Damages*, § 63.

The question which arises in such cases relates not so much to the legal right of recovery as to the sufficiency of proof. There will be questions as to the proximate or remote character of the connection between the claimed profits and the alleged breach, and as to the certainty of the proof as to the amount. *Cohn v. Norton*, 57 Conn. 480, 493, 18 Atl. 595, 5 L. R. A. 572. The requirement of the law, however, is not that prospective profits, in order to furnish a foundation for recovery, must be established with absolute certainty. It is sufficient that it be shown that they are, in the ordinary course of events, reasonably to be expected. *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y. 305, 306; *Wakeman v. Wheeler & W. Co.*, 101 N. Y. 205, 209, 4 N. E. 264, 54 Am. Rep. 676; *Johnson v. Connecticut Co.*, 85 Conn. 438, 441, 83 Atl. 530; *Hale on Damages*, 101; *Sutherland on Damages*, § 63. It follows that the court in the situation before it was entitled to discover what the period prior to the trial had revealed in the way of gain for the double purpose of determining what profits, if any, had accrued, to enter directly into its award, if the conditions seemed to justify it, and to draw therefrom, in connection with the other pertinent facts, such reasonable inferences as it might as to additional future profits.

[7] Evidence of past profits is admissible upon an inquiry as to prospective, but not, of course, conclusive. *Bagley v. Smith*, 10 N. Y. 489, 496, 61 Am. Dec. 756. The rule to be applied being as stated, the defendant's objections to the court's award, when looked at in the light of what the record does disclose, fade rapidly away. The facts which are found show that there was evidence before the court, not only justifying a judgment for substantial damages, but rendering it impossible for us to say that the amount for which it was rendered was unwarranted, or reached by including speculative items.

The defendant is, of course, quite right in his contention that in award of full damages for the breach of the agreement as such and additional damages for the plaintiff's claimed services to and expenditure for the joint

enterprise would be in the nature of a double allowance for the latter items, since they formed a part of the plaintiff's contribution to the undertaking. But we cannot assume that such an award was made.

There is no error. The other judges concurred.

FWOLIE'S ADM'X v. McDONALD, CUTLER & CO.

(Supreme Court of Vermont. Washington. Jan. 9, 1913.)

1. MASTER AND SERVANT (§ 265*) — ACTION FOR INJURIES—BURDEN OF PROOF—ASSUMPTION OF RISK.

In an action for the wrongful death of his intestate, plaintiff has the burden of proving that deceased did not assume the risk of the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

2. MASTER AND SERVANT (§ 288*) — ACTION FOR INJURIES — QUESTION FOR JURY — ASSUMPTION OF RISK.

In an action for a servant's wrongful death, where plaintiff has the burden of proving that deceased did not assume the risk of the accident, facts tending to show that he was ignorant of the risk, and evidence as to the character of the risk, deceased's short experience, and his opportunity to take note of conditions, are sufficient to take the question of his assumption of risk to the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

Exceptions from Washington County Court; Frank L. Fish, Judge.

Action by James Fowlie's administratrix against McDonald, Cutler & Co. Judgment for plaintiff, and defendant excepts. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

John W. Gordon and S. Hollister Jackson, both of Barre, for plaintiff. H. R. Bygrave, of Boston, Mass., and R. A. Hoar, of Barre, for defendant.

HASELTON, J. The action is case for negligence. Trial by jury was had, and the plaintiff obtained a verdict on which judgment was rendered. The defendants excepted.

The plaintiff's intestate was killed in the defendants' employment, and while assisting in the operation of a dump car. While he and the man he was assisting were pushing a car into which a stone had been previously loaded, the car tipped up towards them in consequence, as some of the evidence tended to show, of defects in the car, the stone came off, and the intestate was killed. The case has been twice before this court (82 Vt. 230, 72 Atl. 989; 85 Vt. 439, 82 Atl. 677), and enough has already been said to make a gen-

eral statement of the case unnecessary at this time.

The sole claim which the defendants now make is that there is no evidence in the case tending to show nonassumption by the intestate of the extraordinary risk, and that, therefore, a verdict should have been directed for the defendants. The question is raised by an exception to the action of the trial court in overruling a motion for a directed verdict. This same question was in the case when it was first here, and the contention of the defendants was not sustained.

The transcript of the evidence has been made a part of the exceptions in this case, and we do not undertake to say that the evidence is so far the same as that received on the first trial as to make the doctrine of the law of the case applicable here. But the evidence bearing upon this question is so similar that the decision of the point made when the case was first here is of great authority.

[1,2] The court then recognized the rule as to the burden of proof for which the defendants contend and which is familiar law in this state, but, applying a general rule to the specific case, said of the nonassumption of risk: "It may be established by the proof of such facts and circumstances as warrant the jury in drawing therefrom an inference that Fowle was ignorant of the defects or its dangers. * * * The character of the alleged defects, their location and extent, Fowle's short experience with the car, his opportunity to take note of its condition in the course of his employment, and the other circumstances disclosed by the record, made a proper case for the jury on that point, for it cannot be said as matter of law that the defects were so plainly visible and the consequent dangers of such a character that Fowle was chargeable with knowledge and comprehension thereof either actual or presumed." The language of the last clause of the quotation does not quite conform to the rule in this state as to the burden of proof. But that this is so was obviously unintentional, and the meaning is clear, for the court had just stated the rule as to the burden of proof, and had said that the circumstantial evidence made a case for the jury under the rule. See *Barney v. Quaker Oats Co.*, 85 Vt. 372, 82 Atl. 113. The quotation above made states the doctrine of the voluntary assumption of an extraordinary risk due to defective machinery, or appliances, as it is recognized in this state. *Fowle's Adm'x v. McDonald, Cutler & Co.*, 82 Vt. 230, 72 Atl. 989; *Duggan v. Heaphy*, 85 Vt. 515, 83 Atl. 726; *Dalley v. Swift & Co.*, 86 Vt. 189, 84 Atl. 603; *Vaillancourt v. Grand Trunk Ry. Co.*, 82 Vt. 416, 436, 437, 74 Atl. 99; *Williams v. Norton Bros.*, 81 Vt. 1, 8, 69 Atl. 146; *Severance v. New England Talc Co.*, 72 Vt. 181, 47 Atl. 833.

Our examination of the transcript in this case has been thorough, and has been greatly aided by numerous references made by counsel, and, in view of the careful attention given to the details of the testimony on the former hearings, we deem it sufficient here to say that the tendency of some of the plaintiff's evidence was such as to take the case to the jury under the rule above quoted and approved.

Judgment affirmed.

SABRE et al. v. RUTLAND R. CO. et al.
(Supreme Court of Vermont. Grand Isle.
Jan. 21, 1913.)

1. CONSTITUTIONAL LAW (§ 46*)—DETERMINATION OF VALIDITY.

The constitutionality of an act will not ordinarily be considered, unless such consideration is necessary to the disposition of the cause.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

2. RAILROADS (§ 86*)—APPROACHES TO STATIONS—DUTIES.

It is the duty of a railroad company to make the surroundings and approaches to its stations reasonably safe.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 227-231, 233; Dec. Dig. § 86.*]

3. RAILROADS (§ 243*)—APPROACHES TO STATIONS—POWERS OF PUBLIC SERVICE COMMISSION.

Under P. S. 4611, providing that the Board of Railroad Commissioners shall have jurisdiction on due notice to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter of any railroad corporation or in the statutes of this state relating to railroads, and shall have like jurisdiction in all matters, among others, respecting the location, sufficiency, and maintenance of proper depots, or stations, the board has authority to require railroad companies to make the surroundings and approaches to their stations reasonably safe, and hence had authority, where a dangerous crossing outside a city or village was near a station, and was used by a large number of persons going to and from the station, to require it to be made safe by the erection of gates, notwithstanding section 4433, authorizing the board to order a gate or electric signal to be erected or a flagman to be stationed at crossings within cities or villages, or to order an electric signal to be erected at crossings within towns.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 754, 757; Dec. Dig. § 243.*]

4. RAILROADS (§ 9*)—PUBLIC SERVICE COMMISSION—NECESSITY OF HEARING.

Where the Public Service Commission, after a hearing on an application for an order requiring railroad companies to erect gates at a crossing, employed an expert to investigate the necessity therefor, and without giving the railroad companies an opportunity to examine him present evidence in rebuttal or argue the case as it finally stood, based their conclusion in part on the expert's report, its order was erroneous.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

5. RAILROADS (§ 9*)—PUBLIC SERVICE COMMISSION—NATURE.

Under Laws 1906, No. 126, creating a Board of Railroad Commissioners, and defining and regulating its powers and duties, the board (now known as the Public Service Commission

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

under Laws 1906, No. 116) is an administrative body clothed, in some respects, with quasi judicial functions, authorized in the exercise of the police power to make rules and regulations required by the public safety and convenience, and to determine facts upon which existing laws shall operate, and in a sense having auxiliary or subordinate legislative powers.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

6. CONSTITUTIONAL LAW (§ 60*)—LEGISLATIVE POWERS—DELEGATION.

There are many powers so far legislative that they may properly be exercised by the Legislature, but which may nevertheless be delegated.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 89, 90, 93; Dec. Dig. § 60.*]

7. CONSTITUTIONAL LAW (§ 62*)—DISTRIBUTION OF GOVERNMENTAL POWERS.

Laws 1906, No. 126, creating a Board of Railroad Commissioners, and defining and regulating its powers and duties, in its general features does not conflict with the constitutional provision as to distribution of the powers of government, since that provision does not require an absolute separation of functions, but permits the functions of an administrative officer or body to be to a large extent, judicial, and regulative in character.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.*]

8. CONSTITUTIONAL LAW (§ 56*)—ESTABLISHMENT OF COURTS—POWERS OF LEGISLATURE.

The Legislature may create courts not mentioned in the Constitution, but may not confer upon them powers which could not have been conferred upon the courts already existing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 62, 63-65; Dec. Dig. § 56.*]

9. RAILROADS (§ 9*)—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.

In construing the minor provisions of Laws 1906, No. 126, creating a Board of Railroad Commissioners, and defining and regulating its powers and duties, the settled policy of the state in legislating upon this subject-matter is to be regarded, and the cardinal purpose of the Legislature which was to render efficient that policy by the establishment of an effective administrative body for the supervision and regulation of railroads should control.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

10. CONSTITUTIONAL LAW (§ 48*)—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY.

Laws 1906, No. 126, creating a Board of Railroad Commissioners, and defining and regulating its powers and duties, should be so construed as to make it constitutional if such construction is reasonably possible; there being a very strong presumption of a constitutional purpose on the part of the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

11. CONSTITUTIONAL LAW (§ 81*) — POLICE POWER—PUBLIC SAFETY AND CONVENIENCE.

A state, under its police power, has the same power to provide for the public safety and convenience as to protect the public health and morals.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

12. CONSTITUTIONAL LAW (§ 81*) — POLICE POWER.

Under Const. c. 1, art. 5, providing that the people of the state, by their legal represen-

tatives, have the sole inherent and exclusive right of governing and regulating the internal police of the same, the people may provide for the exercise of visitatorial and police powers to secure compliance with laws enacted under the general reserved powers of government never surrendered to the federal government, and a corporations and persons are subject to this power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

13. CONSTITUTIONAL LAW (§ 81*) — POLICE POWER.

A state cannot divest itself of its right and duty in respect to the full exercise of the police power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

14. CONSTITUTIONAL LAW (§ 81*) — POLICE POWER.

The exercise of the police power by a state is beyond interference by the federal government, except by virtue of some authority derived from the Constitution of the United States.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

15. CONSTITUTIONAL LAW (§ 62*)—PUBLIC SERVICE COMMISSION—LEGISLATIVE POWERS.

The General Assembly cannot delegate functions purely and strictly legislative, but having, by general law and by charters, made legislative provisions applicable to railroad corporations, it may confer on the Public Service Commission the power upon investigation to apply the general provisions of law to particular circumstances and situations, and may leave much of detail to the discretion of the commission.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.*]

16. CONSTITUTIONAL LAW (§ 74*)—PUBLIC SERVICE COMMISSION—REVIEW OF ACTS BY COURT.

Where, a board, such as the Board of Railroad Commissioners, is given power to make rules and regulations in furtherance of the police power, the statute is construed as conferring only power to make reasonable regulations, and the question whether its rules and regulations are reasonable is a judicial one, which the courts may determine, although the statute does not provide for such determination.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 124; Dec. Dig. § 74.*]

17. RAILROADS (§ 243*)—PUBLIC SERVICE COMMISSION—GATES AT CROSSING.

The Legislature had power to authorize the Public Service Commission, as it has by P. S. 4611, to investigate the necessity of gates at a crossing near a station used by a large number of persons in going to and from the station, and, if it found it dangerous, to require the erection of gates.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 754, 757; Dec. Dig. § 243.*]

18. STATUTES (§ 64*)—PUBLIC SERVICE COMMISSION—STATUTORY PROVISIONS—PARTIAL INVALIDITY.

If Laws 1906, No. 126, creating a Board of Railroad Commissioners, and defining and regulating its powers and duties, confers upon that board powers which cannot be conferred upon an administrative body under the constitutional provision that the departments of government shall be kept separate, such provisions do not render the statute as a whole unconstitutional: since it is to be presumed from the statute itself and from the history of legislation on this subject-matter that the constitutional part would

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

have been passed without the unconstitutional part.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

19. STATUTES (§ 64*)—PUBLIC SERVICE COMMISSION—STATUTORY PROVISIONS—PARTIAL INVALIDITY.

If the provision of Laws 1906, No. 126, authorizing the Board of Railroad Commissioners to compel the attendance of witnesses and the production of evidence by proceedings for contempt, is invalid as conferring judicial powers on an administrative body, this does not render the whole act unconstitutional in view of its other provisions that witnesses refusing or neglecting to appear and testify shall be subject to the penalties applicable to witnesses neglecting or refusing to appear and testify before the courts, and providing a penalty for persons willfully obstructing the commissioners in the discharge of their duties by refusing to furnish information.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

20. CONSTITUTIONAL LAW (§ 55*)—FAILURE TO APPEAR BEFORE ADMINISTRATIVE BOARD—ENFORCEMENT OF PENALTIES.

Under the provisions of Laws 1906, No. 126, that witnesses refusing or neglecting to appear and testify before the Board of Railroad Commissioners shall be subject to the penalties applicable to witnesses neglecting or refusing to appear and testify before the court, imposing a penalty on persons willfully obstructing the commissioners in the discharge of their duties by refusing to furnish information, and imposing a penalty on persons failing within a reasonable time to obey a final order or decree of the board, the penalties mentioned are enforceable in the courts in the same manner as other penalties prescribed by statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 58-62, 69, 71, 80, 81, 83; Dec. Dig. § 55.*]

21. STATUTES (§ 64*)—PUBLIC SERVICE COMMISSION—STATUTORY PROVISIONS.

If the provision of Laws 1906, No. 126, authorizing the Board of Railroad Commissioners to enforce its own decrees by suitable process issuable by a court of law or equity, is invalid as conferring judicial powers on an administrative body, this provision is severable from the other provisions of the act, and does not render the whole act unconstitutional, in view of the provision imposing a penalty on persons failing to obey a final order or decree of the board.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

22. CONSTITUTIONAL LAW (§ 318*)—PUBLIC SERVICE COMMISSION—STATUTORY PROVISIONS—DUE PROCESS OF LAW.

Laws 1906, No. 126, creating a Board of Railroad Commissioners, and defining and regulating its powers and duties, is not invalid on the theory that, by failing to provide an adequate judicial review of the orders of the commission, it authorizes the taking of property without due process of law, since a railroad by an orderly, and not burdensome, course may present to the Supreme Court the commission's ruling in receiving or excluding evidence, the sufficiency of the evidence to sustain its findings, and the sufficiency of its findings to warrant its order, and, moreover, under Const. c. 2, § 4, providing that the court shall be open for the trial of all causes proper for their cognizance, the courts, regardless of the statute, may determine whether the board has exceeded its powers.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949; Dec. Dig. § 318.*]

23. STATUTES (§ 64*)—PUBLIC SERVICE COMMISSION—STATUTORY PROVISIONS—PARTIAL INVALIDITY.

If Laws 1906, No. 126, creating a Board of Railroad Commissioners and defining and regulating its powers and duties, confers on the board matters over which Congress has a right to assert and has asserted its paramount authority, its provision in this respect does not render it invalid in other respects.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

Watson and Powers, JJ., dissenting.

Appeal from an order of the Public Service Commission.

Proceeding before the Board of Railroad Commissioners (now Public Service Commission) by George W. Sabre and others against the Rutland Railroad Company and another. From an order of the Commission, the defendant named appeals. Reversed and remanded.

Argued before MUNSON, WATSON, HASELTON, and POWERS, JJ., and BUTLER, Superior Judge.

Edwin Lawrence, of Rutland, for appellant Rutland Railroad. John G. Sargent, Atty. Gen., and George L. Hunt, of Montpelier, for the State.

HASELTON, J. This is a petition of citizens of Alburgh, addressed to the Board of Railroad Commissioners, now the Public Service Commission, asking for better protection at the railroad station in Alburgh, and requesting, among other things, that the commission order the defendant companies to install and operate gates at the highway crossing near the station. After due notice a hearing on the petition was had at Alburgh, November 16, 1911; the defendant companies appearing by their respective attorneys. Some time after the hearing, the commissioners employed an expert, who examined the condition complained of, and made a detailed report to the commissioners. June 1, 1912, an order was made by the commission directing the defendants to construct and operate gates at the crossing in question. The Rutland Railroad Company brings the case to this court by an appeal duly taken from the order of the commission.

[1] The questions chiefly argued are constitutional ones; but we first discuss the other questions raised, for the constitutionality of an act will not ordinarily be considered unless such consideration is necessary to the disposition of the cause in hand.

[2, 3] It is claimed that the commission does not have, under the statute, authority to order gates and flagmen at highway crossings in towns as distinguished from cities and villages. P. S. 4433, is referred to, and the reading of that section indicates that the Legislature did not intend to confer upon the commission authority to order gates to be erected and operated at crossings outside

of villages or cities merely because of the situation created by such crossing. But the crossing in question is only some four or five rods from the station at Alburgh, which is a through station on the Central Vermont Railway, is also on the main line of the Rutland Railroad, and is the terminus of the Ogdensburgh Division of that railroad. The passenger platform extends westerly from the grade crossing, and southerly of the platform are first the Central Vermont traffic track, then the main line of the Rutland Railroad, and then the line on which the trains of the Ogdensburgh Division arrive and depart. We omit mention of a house track, so called, used by both roads, since the commission, while stating its existence, do not emphasize it as an element of danger. The traffic and the movement of locomotives and cars at the place of the crossing is very considerable, and many persons daily pass over some or all of the tracks. East, or easterly, of the highway and crossing—that is, on the other side of the highway from the passenger station—are the freightyard, engine house, water crane and coaling plant of the appellant. The roundhouse is east of the crossing. A large number of persons cross a track, or tracks, in going to and from the station. The situation is a very dangerous one. The facts that we have recited appear from the report of the commissioners. The railroad companies have under our practice, which is conformable to the practice in chancery, a right on appeal to raise the question of the sufficiency of the evidence to support the findings, but they have not done so, and in arguing the question now under consideration they rely solely upon the claim that the statute does not undertake to give the commission authority to make the order which it in fact made. But a railroad company is under obligation to make the surroundings and approaches to its stations reasonably safe, and the statute undertakes to confer upon the Railroad Commission authority to enforce that obligation. P. S. 4611; *Bacon v. Boston & Maine*, 83 Vt. 421, 442, 443, 445, 76 Atl. 128. See, also, *Rutland etc., Co. v. Clarendon, etc., Co.*, 86 Vt. 45, 54, 83 Atl. 332; *Clarendon v. Rutland R. Co.*, 75 Vt. 6, 52 Atl. 1057; *Beard v. Connecticut & Passumpsic Rivers R. Co.*, 48 Vt. 101; *Sawyer v. Rutland & Burlington R. Co.*, 27 Vt. 370; *Hale v. Grand Trunk*, 60 Vt. 605, 15 Atl. 300, 1 L. R. A. 187; *Nelson v. Vermont & Canada R. Co.*, 26 Vt. 717, 62 Am. Dec. 614; *Covington Stockyards v. Keith*, 139 U. S. 128, 11 Sup. Ct. 469, 35 L. Ed. 73. The appellant also contends that the order of the commissioners must be reversed on the ground that the hearing required by statute was not given to the railroad companies.

[4] In matters like that in question the statute contemplates that the commission shall act upon due notice and hearing, and it here sufficiently appears from the report that

after the hearing of November 16, 1911, the commission employed an expert who made investigations and laid the result thereof before the commission, and that no opportunity was afforded the defendants to examine the expert or to present evidence in rebuttal or to argue the case as it finally stood. And it sufficiently appears that the report of the expert was considered by the commission and aided them in arriving at their conclusions. So we think that the order was not made in pursuance of statutory authority.

This brings us to the constitutional questions. The appellant claims that the statute creating the Board of Railroad Commissioners is void, and that the board is without legal existence or authority, and, further, that in any view, the provisions of the statute under which the board acted in this case are unconstitutional and void. The decision of these constitutional questions is essential to the disposition of the case here; for, if the Railroad Commission is a legally existing body and had authority to act in the premises, this case should be remanded for a new hearing before the commissioners, but if the Railroad Commission has no legal existence, or has no authority in the premises, the case should be disposed of here, for we have no right to send the case for hearing to any illegal body or to a body which has no authority to act. The appellant claims that all laws creating or relating to the Public Service Commission or conferring any authority upon it, and particularly the provisions of P. S. 4611, are unconstitutional because they undertake to confer legislative, executive, and judicial functions upon the commission, and that such functions are, by the laws referred to, hopelessly commingled, contrary to the provisions of the Constitution of this state. In order to gather the legislative intent expressed in the act of 1906, the constitutionality of which is questioned, it is permissible and desirable to trace briefly the history of previous legislation upon the same subject.

In 1854 a bill establishing the office of Railroad Commissioner was introduced into the Senate, and passed that body. However, the bill failed to pass the House. But at the session of the year named a joint resolution was adopted requesting the Governor to appoint three commissioners, who should be required, among other things, to report, upon an investigation, what legislation was necessary for the protection of the rights of the state and of the public in respect to railroad corporations, and for the protection of the shareholders, bondholders, and general creditors of such corporations. *Journal of the House*, 1854; *Journal of the Senate*, 1854; *Acts of 1854*, p. 72. The Governor accordingly appointed three commissioners who reported at the legislative session of 1855. These commissioners were Jacob Collamer, Daniel Kellogg, and Hyland Hall, all of whom had been judges of this court, and were profound con-

stitutional jurists. At the time when the report was made, Collamer had entered upon his distinguished service as Senator from this state. They recommended the passage of an act establishing a Board of Railroad Commissioners to be appointed by the Governor, with power to examine into the physical and pecuniary condition of every railroad in the state, to require each railroad to report to them under oath, and to examine the books, papers, and documents of a railroad corporation, or its officers, to examine such officers or the employes of a road, or other persons under oath, to issue subpoenas, and administer oaths in the same manner and with the same powers to enforce obedience thereto "as belong and pertain to courts of law in this state." They recommended that every person who should hinder or impede the commissioners in the execution of their duties should be subject to the punishment provided by law for hindering and impeding officers, judicial or executive; that any person who should fail to make the return required should be deemed guilty of a misdemeanor and punishable by fine and imprisonment; that any person refusing access to the papers referred to, or refusing information required by commissioners in the discharge of their duties, should in like manner be deemed guilty of a misdemeanor and be liable to fine and imprisonment, and that any person who should be guilty of willful falsehood, or suppression of truth, in making any return, or in furnishing information or making a statement under oath to the commissioners, should be deemed guilty of perjury and punished accordingly. The provisions referred to looked to the power of the commission to gather information and to report to the Legislature; and at the session of 1855 they were enacted into law without any material change, except that, instead of a board of commissioners one commissioner was provided for, and except that, instead of providing for his appointment by the Governor, the law provided for his annual appointment by the judges of this court.

The eminent jurists whom we have named further recommended that the Railroad Commissioners should from time to time make all such rules, orders, and regulations for the repairs, conduct, and management of the respective railroads as they should judge necessary for the public safety, and that the commissioners should have power to enforce the same effectually, and that to that end they have authority to remove the rails of a railroad or otherwise to prevent the use of a road until compliance with such orders and regulations was secured. This recommendation was not adopted by the Legislature. But it shows the views of the constitutional lawyers who made it as to the scope of the powers which they thought might properly be conferred under our Constitution upon an administrative body, for in making their rec-

ommendations they expressly refrained from touching upon matters which they thought were properly for determination by the courts and declined "to recommend any doubtful regulations." *Journal of the House 1855*, pp. 642-649; *Acts of 1855*, No. 26. We take it for granted that in their broad recommendations, made after full time for deliberation, these men well understood that the courts are open to prevent an administrative body, exercising the police power, from exceeding its jurisdiction, and from taking arbitrary and unreasonable action, and that no special provision of law is necessary to confer upon the courts authority already possessed by them under our state Constitution.

As every one knows, in the early days of railroading when these recommendations were made, the interruption of interstate commerce and interference with the transportation of the mails were not much if at all considered, otherwise some other method for the prompt and efficient enforcement of orders than that recommended would doubtless have been suggested. In 1856, the appointment of the Railroad Commissioner was taken from the judges, but in other respects the law remained practically unchanged until 1886, except that in 1876 the Railroad Commissioner was empowered to establish a uniform system of keeping railroad accounts, and the several railroad companies of the state, by whomsoever operated, were required to conform to such system so far as it was compatible with law. *Acts of 1876*, No. 26. See *Revised Laws of 1880*. Meanwhile, in the early part of the period named—that is, in 1857 and 1858—George P. Marsh was Railroad Commissioner for this state. He was then a ripe lawyer in the maturity of his powers of discrimination and judgment, and about to enter upon that large career which made such powers manifest both in America and in Europe. He declared that he had no doubt of the legal power of the Legislature to subject railroad corporations in all respects to such general regulations as the public interest might demand, and expressed the opinion that such legislation would violate no fundamental law. He pointed out that the authority of the commissioner to make investigations and reports was inadequate, that in view of the comparatively short time during which the Legislature is in session there should be a board to which regulative power should be delegated, and he expressed the belief that there was no sound constitutional objection to the recommendations in that regard made by Collamer, Kellogg, and Hall in 1855, and he said further that there ought to be a board of commissioners with even larger powers than those which they recommended, that the power to make regulations affecting the public convenience as well as the public safety should be conferred upon a commission. *Report of Railroad Commissioner, 1858*; *Report of Railroad*

Commissioner, 1859. Nothing for a long time came of his suggestions. In 1886 the Railroad Commissioner was superseded by a board of three Railroad Commissioners. Acts of 1886, No. 23. The board was authorized to appoint a clerk, whose duties should be to keep records, file and preserve documents and papers, prepare for service such papers and notices as might be required by the commissioners, to issue subpoenas for witnesses, and to administer oaths. Speaking generally, the board was given the administrative powers which are conferred upon it by the act now in question. Many of the sections in the two acts are identical.

Under the act of 1886, if, in the performance of their duties, the commissioners issued subpoenas which were disobeyed or sought proper information which was refused, they could apply to a judge of the Supreme Court, who could summon before him the person so disobeying or refusing, and determine whether or not the requirements of the commissioners were proper and necessary to the performance of their duties. If the judge found affirmatively, he was to enforce the attendance and examination of the person in question, and the exhibition of the books, accounts, and papers required. How the judge was to do this was not provided for in the statute. The commission was not to give publicity to the information acquired by them under the provisions of the act, except so far as was necessary in reports to the Legislature or "in judicial proceedings," unless specially required so to do by the law. This provision that the board should not give publicity to information acquired by it, unless required by law, except in reports to the General Assembly or in "judicial proceedings," is a part of the act particularly under consideration. It was further provided by the act of 1886 that any person who should willfully hinder the commissioners in the discharge of any of their duties might be summoned before any Supreme or county court, six days notice being given, and that, after hearing the parties, the court might make such orders "as should be necessary to carry out the provisions of the act." False returns to the commissioners made under oath as required by the law and false testimony before them were to be deemed perjury. Violation on the part of any railroad corporation of any constitutional provision or of any provision of general law or of its charter, any failure to properly provide for the security of the public, any unjust discrimination in charges, any conspiracy whereby rates were unduly increased, any willful refusal of compliance with any reasonable recommendation of the commissioners, was to be called to the attention of the offending corporation by a notice in writing, and, if the thing complained of was continued after such notice, the board were to report the same to the next session of the General Assembly, and, if the judgment of

the commissioners so required, they might at any time make an application to the Supreme Court, or county court, for "any remedy warranted by law." With regard to many matters, "in order to promote the security, convenience and accommodation of the public, or to prevent violations of law, or unjust discriminations, usurpations or extortions," the board, after giving notice of its recommendations, might fix a time within which its recommendations should be complied with, and it was provided that the Supreme Court "sitting as a court of equity" might compel compliance with such recommendations, if in the judgment of the Supreme Court, upon hearing and legal proof, the recommendations were just and reasonable.

The law was not greatly changed from 1886 to 1906, when the law under consideration was enacted. In the interval, however, it was provided that the board should have a seal on which should be the words "State of Vermont, Board of Railroad Commissioners, Official Seal," and that this seal should be used in the attestation of all copies of the files and records of the board. The jurisdiction, too, of the commissioners was made to cover electric railroads. An act passed in 1902 re-enacted a number of sections with changes so slight as to be immaterial to this discussion. The only important changes we note. There was a clause designating as "orders" to a person, or corporation, what the act of 1886 had called "recommendations," and providing a penalty for each day's neglect thereof. It was provided that a person or corporation receiving the notice referred to had 30 days thereafter in which to appeal to the Supreme Court, and the appeal was to be heard at the stated term next after 21 days from the filing of the appeal. In 1902 we had only three stated terms of the Supreme Court, one in January, one in May, and one in October. If the appeal involved any question of fact, any person interested might apply to any two judges to have the facts found, and such two judges were thereupon to make an order providing for the determination of the facts. The matter might be referred and heard on a finding of facts or testimony might be reported to the court. If an appeal was taken, the order was thereby stayed, and no fine could be imposed for the time during which the appeal was pending. The fine was collectible by the state's attorney on complaint of the commissioners by means of "an action on the statute." It was further enacted that, if a Railroad Commissioner should neglect or refuse for a period of 60 days to perform any of the duties imposed upon him, he should be removed from his office. But no duties worth mentioning were imposed upon an individual Railroad Commissioner. The duties of consequence were imposed upon the board, and this provision, while high sounding, seems somewhat frivolous. See *State v. Plumley* &

Redfield, 83 Vt. 491, 76 Atl. 146. Moreover, the Railroad Commissioners were appointed by the Governor by and with the advice and consent of the Senate for a fixed term, and this provision for the removal of a commissioner after 60 days of neglect and refusal to act, without any suggestion as to the method of removal, seems to have been merely a rather early and inefficient suggestion of the recall. The provisions of the act of 1902 were by way of amendment of and addition to different sections of the Vermont Statutes, Revision of 1894, and need to be read as a part of chapter 172 of the Vermont Statutes, which was superseded by the act of 1906, No. 126 of that year, the act now under consideration.

The review of legislation which we have made shows the fairness and justice of the statements made by the Chief Judge of this court in *Central, etc., Ry. Co. v. State*, 82 Vt. 145, 150, 72 Atl. 324, 327, to the effect that down to 1906 in this state very little had been accomplished in the way of the "regulation and control of railroads." Referring to the nature of the proceedings on appeal, the court justly said that the orders had been enforced mostly, "if at all," through such proceedings. The opinion in that case does not treat the act of 1906 as constituting a new body, but as conferring additional authority upon the commissioners with a view to remedy a shortage of authority, and to enable the commissioners "to deal with the matters within their jurisdiction more effectually and speedily than they had ever been able to do before." In considering the act in question and the pre-existing acts, the opinion properly refers to what had been accomplished in other states. The law of 1906, the constitutionality of which is in question, retains the administrative features of the law of 1886. Many sections of both laws are identical. New provisions were made in 1906, but the law then enacted, taken as a whole, looked simply to a more efficient supervision and regulation of railroads in accordance with the long settled, though largely insufficient policy of the state.

[5-7] We consider that under the law of 1906 the Railroad Commission, now legally known as the Public Service Commission, by virtue of the act of 1908 (Laws 1908, No. 116), is an administrative body clothed in some respects with functions of a judicial nature, quasi judicial functions they may be called, authorized in the exercise of the police power to make rules and regulations required by the public safety and convenience, and to determine facts upon which existing laws shall operate. In a sense it has auxiliary, or subordinate, legislative powers; for, while the supreme legislative power cannot be delegated, there are many powers so far legislative that they may properly be exercised by the Legislature, which may, nevertheless, be delegated. The law in its general features is

not open to the objection that it conflicts with the provision of our Constitution as to the distribution of the powers of government. The functions of an administrative officer or body may be to a large extent judicial and regulative in character. *State v. Howard*, 83 Vt. 6, 74 Atl. 392; *State v. Harrington*, 68 Vt. 622, 636, 35 Atl. 515, 34 L. R. A. 100; *Morgan v. Deverennes*, 86 Vt. 137, 83 Atl. 660; *Lock's Appeal*, 72 Pa. 491, 13 Am. Rep. 716, 723; *State v. Corvallis*, 59 Or. 450, 117 Pac. 980; *Michigan Central R. Co. v. Michigan R. Comms.*, 160 Mich. 355, 361, 125 N. W. 549; *R. R. Comm. Cases*, 116 U. S. 336, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; *Minn., St. Paul, etc., Railway Co. v. R. Comms.*, 136 Wis. 146, 162, 116 N. W. 905, 911, 17 L. R. A. (N. S.) 821. The provision for keeping the departments of government separate does not mean an absolute separation of functions; for, if it did, it would really mean that we are to have no government, whereas our Constitution was ordained for the establishment of efficient government. The proposition is obvious, but we cite some cases. In *re Trustees, etc., v. Saratoga, etc., Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713; *Atlantic Coast Line v. N. C. Corporation Comm.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398; *State v. Bates*, 96 Minn. 110, 115, 119, 104 N. W. 709, 113 Am. St. Rep. 612; *State v. Railroad Comm.*, 52 Wash. 17, 100 Pac. 179; *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *N. Y. Life Ins. Co. v. Hardison*, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478; *State v. Railroad Comm.*, 140 Wis. 145, 121 N. W. 919; *Chicago, etc., Railroad Comm. v. Dey* (C. C.) 35 Fed. 866, 1 L. R. A. 744; *South., etc., Ry. Co. v. Railroad Comm.*, 172 Ind. 113, 87 N. E. 966.

[8] We do not take the view urged by the appellant that the Constitution prohibits the Legislature from creating courts not named in the Constitution, but, if the Legislature had created the Railroad Commission a court in the strict sense, it could have conferred upon it no powers which might not have been conferred upon the courts already existing if they did not already possess them and nothing really would have been accomplished except to create new offices and provide for more officials.

[9] That it was the cardinal purpose of the Legislature to render efficient the policy already pursued, a policy in general harmony with that which prevails in most of the states, by the establishment of an effective administrative body for the supervision and regulation of railroads, seems sufficiently clear. The cardinal purpose of the act is to control in the construction of minor provisions, and the settled policy of the state in legislating upon the subject-matter is to be regarded in construing the act. Ryegate

v. Wardsboro, 30 Vt. 746; Montpelier Savings Bank v. Montpelier, 73 Vt. 364, 50 Atl. 1117.

[10] And the act is to be given such a construction as makes it constitutional where such construction is reasonably possible. In *re Allen*, 82 Vt. 365, 73 Atl. 1078, 26 L. R. A. (N. S.) 232. Moreover, there is a presumption of a constitutional purpose on the part of the Legislature, a presumption as strong, perhaps, as any that is not conclusive, and if the main purpose of the act cannot be declared unconstitutional, as it cannot, then unconstitutional provisions, if there are such, simply become inoperative without affecting the validity of the act as a whole; since they are such that they are severable. *State v. Paige*, 78 Vt. 286, 62 Atl. 1017, 6 Ann. Cas. 725; *State v. Haselton*, 78 Vt. 467, 63 Atl. 305; *State v. Peet*, 80 Vt. 449, 68 Atl. 661, 14 L. R. A. (N. S.) 677, 130 Am. St. Rep. 998; *State v. Kibling*, 63 Vt. 636, 22 Atl. 613; *State v. Scamplin*, 77 Vt. 92, 59 Atl. 201; *Reagan v. Farmer's Loan & Trust Co.*, 154 U. S. 362, 365, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Wisconsin, etc., R. Co. v. Jacobson*, 179 U. S. 287, 301, 21 Sup. Ct. 115, 45 L. Ed. 194. In the case of the Central Vermont Railroad Co. v. Public Service Commission (C. C.) 189 Fed. 683, it was held by the Circuit Court of the United States for the District of Vermont, after a discussion of our statute and the decisions construing and applying it, that our commission is not "a court," and that this court had carefully preserved all of the rights of parties in such a proceeding as this, had protected them to the fullest extent, and quotations from our opinions were made showing the reasonable view which this court had taken in putting its construction upon the powers of the commission in respect to supervision and regulation. The Public Service Commission is not in the strict sense a court, though, like many administrative bodies, it may exercise quasi judicial functions, but it is a governmental agency provided for the administration, in respect to certain specific matters, of what in a broad, though true, sense may be called the police power. In *Bacon v. Boston & Maine R.*, 83 Vt. 421, at page 451, 76 Atl. 128, it was said of the police power that it might be deemed sovereignty itself rather than a mere attribute of sovereignty; and very recently the Supreme Court of the United States has declared the same thing by saying, "in a sense, the police power is but another name for the power of government" (*Mutual Loan Co. v. Martell*, 222 U. S. 225, 32 Sup. Ct. 74, 56 L. Ed. 175), and long ago that same tribunal declared that "the police powers of a state are nothing more nor less than the powers of government inherent in every sovereignty to the extent of its dominions" (*License Cases*, 5 How. 504, 583 [12 L. Ed. 256]).

[11] Power to provide for the public safety and convenience stands upon the same ground as the power to protect the public

health and the public morals. *House v. Mayes*, 219 U. S. 270, 282, 31 Sup. Ct. 274, 55 L. Ed. 213; *Lake Shore, etc., Ry. Co. v. Ohio*, 173 U. S. 285, 300, 19 Sup. Ct. 465, 43 L. Ed. 702; *Thorpe v. Rutland R. Co.*, 27 Vt. 140, 149, 62 Am. Dec. 625; *Bacon v. Boston & Maine*, 83 Vt. 421, 449, 451, 76 Atl. 128; *Carty v. Winooski*, 78 Vt. 104, 108, 62 Atl. 45, 2 L. R. A. (N. S.) 95, 6 Ann. Cas. 426; *State Board of Health v. St. Johnsbury*, 82 Vt. 276, 285, 73 Atl. 581, 23 L. R. A. (N. S.) 766, 18 Ann. Cas. 496.

[12] The people of this state may provide for the exercise of visitatorial and police powers to secure compliance with laws enacted under the general reserved powers of government never surrendered to the federal government, and this they may do in accordance with article 5, of chapter 1, of our Constitution, which provides "that the people of this state by their legal representatives have the sole inherent and exclusive right of governing and regulating the internal police of the same." Railroad corporations and all corporations and persons are subject to this power.

[13, 14] It is indeed beyond the power of a state to divest itself of its right and duty in respect of the full exercise of this power, and the federal government cannot interfere with a state in the exercise of that right and duty except by virtue of some authority derived from the Constitution of the United States. *Northern Pac. Ry. Co. v. Minnesota*, 208 U. S. 593, 596, 597, 598, 28 Sup. Ct. 341, 52 L. Ed. 630; *House v. Mayes*, 219 U. S. 270, 282, 31 Sup. Ct. 274, 55 L. Ed. 213; *Chicago, etc., Ry. Co. v. Arkansas*, 219 U. S. 453, 465, 31 Sup. Ct. 275, 55 L. Ed. 290; *Cincinnati, etc., Ry. Co. v. Connersville*, 218 U. S. 336, 344, 31 Sup. Ct. 93, 54 L. Ed. 1090, 20 Ann. Cas. 1206; *Barbier v. Connolly*, 115 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *New York & New England R. Co. v. Bristol*, 151 U. S. 556, 567, 571, 14 Sup. Ct. 437, 38 L. Ed. 269; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 252-253, 17 Sup. Ct. 581, 41 L. Ed. 979; *Detroit R. Co. v. Osborn*, 189 U. S. 333, 23 Sup. Ct. 540, 47 L. Ed. 860; *New Orleans Gaslight Co. v. Drainage Comm.*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831; *Chicago, etc., Ry. Co. v. Illinois*, 200 U. S. 561, 592, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1173. The efficient exercise of the police power inherent in the people of this state is not to be frittered away by overnice speculations upon the distribution of the powers of government. Our Constitution makes a general distribution of powers, but does not descend to those details which are found in some Constitutions and which have resulted in discussions calculated to debilitate government itself. The Interstate Commerce Commission is an administrative body, and is referred to by the appellant as a constitutional pattern for such bodies, and the appellant does not question that the judicial review of its orders

by the courts is such as consists with the division of the powers of government into three great departments. But in the last volume of the United States Reports, the Supreme Court of the United States, in a unanimous opinion delivered by Chief Justice White in overruling a decision of the Commerce Court, say of the Interstate Commission and the review of its orders: "Originally the duty of the courts to determine whether an order of the commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that, in considering the subject of orders of the commission for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so." *Proctor & Gamble Co. v. United States*, 225 U. S. 282, 297, 298, 32 Sup. Ct. 761, 767 (56 L. Ed. 1091). See *Int. Comm. v. Union Pac. R. R. Co.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308; *Int. Comm. v. Delaware, etc., Co.*, 220 U. S. 235, 251, 31 Sup. Ct. 392, 55 L. Ed. 448; *Int. Comm. v. Illinois Central R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; *Baltimore, etc., R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292.

[15] We have spoken of the commission as being clothed with auxiliary or subordinate legislative functions. The General Assembly cannot delegate functions which are purely and strictly legislative, but, having by general law and by charters made legislative provisions of unquestionable constitutional applicability to railroad corporations, it may confer upon the commission the power upon investigation to apply the general provisions of law to particular circumstances and situations, and may leave much of detail to the discretion of the commission. *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Union Bridge Co. v. United States*, 204 U. S. 384, 27 Sup. Ct. 367, 51 L. Ed. 523; *United States v. Grimaud*, 220 U. S. 506, 516, 31 Sup. Ct. 480, 55 L. Ed. 563.

[16] But where a board as the board of health, or the Board of Railroad Commissioners, has conferred upon it the power to make rules and regulations in furtherance of the police power, the statute is interpreted as though it conferred only the power to make reasonable regulations, and so the legislative act becomes complete, and the question of whether the rules and regulations presented are reasonable, or are unreasonable and arbitrary, is a strictly judicial one, of which the courts must take cognizance whether the statute provides for proceedings in that re-

gard or not. *State v. Speyer*, 67 Vt. 502, 32 Atl. 476, 29 L. R. A. 573, 48 Am. St. Rep. 832; *In re Trustees v. Saratoga, etc., Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713; *State v. Haskell*, 84 Vt. 429, 431, 70 Atl. 852, 34 L. R. A. (N. S.) 286; *Brownell v. Russell*, 76 Vt. 326, 57 Atl. 103; *State v. Audette*, 81 Vt. 400, 70 Atl. 833, 18 L. R. A. (N. S.) 527, 130 Am. St. Rep. 1061; *Bacon v. Boston & Maine*, 83 Vt. 421, 76 Atl. 128; *State v. Central Vermont Ry. Co.*, 81 Vt. 459, 71 Atl. 193, 21 L. R. A. (N. S.) 949; *Butte, etc., Co. v. Baker*, 196 U. S. 119, 126, 25 Sup. Ct. 211, 49 L. Ed. 409; *Cosmos Co. v. Gray Eagle Co.*, 190 U. S. 309, 23 Sup. Ct. 692, 47 L. Ed. 1064; *Grand Trunk Ry. Co. v. Railroad Comm. of Md.*, 221 U. S. 400, 403, 31 Sup. Ct. 537, 55 L. Ed. 786.

[17] The Legislature might properly authorize a commission to make an investigation such as was here made and on the facts found to make an order such as is appealed from; and since this is so, and since the statute in its general features is constitutional as against the objection which we are now considering, there is no propriety in our considering provisions not directly drawn in question.

[18] If there are powers conferred upon the board which cannot be conferred upon an administrative body because of the constitutional provision that the departments of government be kept separate, they do not render the statute as a whole unconstitutional, for in the light of the history of legislation upon this subject-matter and from a reading of the statute itself it is to be presumed that the Legislature would have passed the constitutional part of the statute without the unconstitutional part. *State v. Scampini*, 77 Vt. 92, 59 Atl. 201; *State v. Abraham*, 78 Vt. 53, 61 Atl. 766; *Howard v. Illinois Central R. Co.*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *Huntington v. Worthen*, 120 U. S. 97, 102, 7 Sup. Ct. 469, 30 L. Ed. 588.

[19, 20] In arguing that the Legislature has undertaken to confer upon the board full judicial powers such as cannot be conferred upon an administrative body, the appellant in its brief calls attention to the fact that the statute confers upon the board power to compel, by proceedings for contempt, the attendance of witnesses and the production of evidence. The brief does not discuss the power of the Legislature directly to exercise the power of punishing for contempt or to confer it upon either of its branches, or upon committees, or established boards, constituted for the purpose of gathering information for the Legislature or of ascertaining and declaring facts, which call into operation the legislative will. We do not need to consider the matter here, for, assuming, but not deciding, nor intimating, that this power could not be conferred upon

the Railroad Commissioners, we meet a situation in which the commission is not inefficient, for the Legislature further provided that witnesses duly subpoenaed who refuse, or neglect, to appear before the board, or who refuse to testify before it, shall be subject to the penalties of the statute applicable to witnesses who neglect or refuse to obey subpoenas to appear and testify before the courts, and a penalty is provided for any person who willfully obstructs the commissioners in the discharge of their duties by refusing to furnish information. The penalties referred to, it must be understood, are enforceable in courts of law in the same manner as are other penalties prescribed by statute; and in providing for penalties as well as for summary punishment by contempt the Legislature was doing nothing in its nature inconsistent (In re Chapman, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. Ed. 1154), nothing from which the inference can be drawn that, if it could not lawfully do both, it would have done neither. As has been said of some statute of this sort: "The object of the statute was not the imposition of penalties." If the one provision fails, the other is not as a consequence rendered invalid, and the right of the commissioners to conduct investigations with such powers and sanction as are left is unaffected.

[21] In arguing this matter, mention is further made of the fact that the board may by "suitable process" issuable by a court of law or equity enforce its own decrees. This, indeed, the statute gives it authority to do, except as its orders are stayed by judicial action on the part of the courts. It is not necessary to inquire, and we give no consideration to the question of, whether there is any just analogy between the collection of taxes without the intervention of the courts and the enforcement of police regulations by means of process issuing directly from an administrative or ministerial body, if the courts are not called on to interfere. If the statutory provision in question, when properly construed, is unconstitutional, and we do not decide the point or intimate an opinion upon it, it cannot be presumed that without this provision the Legislature would not have passed the act, for it further provides a penalty for any person who shall fail within a reasonable time to obey a final order or decree of the board. These penalties are to be enforced through the courts, for they are put on the same footing with the crime of perjury in giving false testimony before the board. No claim is made that the provisions as to penalties are unconstitutional. Some provisions of the law not herein referred to are claimed to be unconstitutional, and the reason they are not here referred to is that, if after full discussion by parties directly interested in them in a particular case it should turn out that they are unconstitutional, they are so clearly severable that the constitutionality

of the law as a whole would not be affected.

[22] The appellant further claims that the Public Service Commission laws are void on the ground that, for want of a provision for an adequate judicial review of the orders of the commission, they are in violation of the provisions of our state Constitution and of the federal Constitution prohibiting the taking of property without due process of law. Under the statute providing for appeals, the party upon whom an order is made may, if it pursues the orderly and not burdensome course pointed out by the statute, present to this court the questions of the propriety of the rulings of the commission in receiving or excluding evidence, the sufficiency of the evidence to sustain the findings under the rule which obtains in this state that a mere scintilla of evidence will not sustain a finding, and the question of the sufficiency of the findings to warrant the order under the rule that the order must not be unreasonable or arbitrary in its character, and that it must bear some just relation to some reasonable purpose with a view to which authority to make it was conferred. Moreover, the rights of a party are not necessarily limited to those which he may secure by an appeal. Section 4, c. 2, of our Constitution, providing that "the courts shall be open for the trial of all causes proper for their cognizance," means, among other things, that by a proper proceeding the question of whether an administrative body has exceeded its powers may be brought before and determined by the established courts. No special machinery need be provided for this purpose for the common law which is a part of the law of this state provides the requisite machinery. As the courts have authority to determine the constitutionality of legislative acts, so in all cases they have, and must have, authority to determine whether or not any board or commission claiming to act under legislative authority has exceeded its powers. The powers given to this court on appeal and the common-law remedies for the protection of rights which cannot be safeguarded by means of the hearing and appeal provided for by statute are sufficient to secure to every party interested in the orders of the Railroad Commission a vindication of his full rights against arbitrary and unreasonable action, usurpation of powers, and acts in excess of authority. These principles are firmly established in this jurisdiction. *State v. Speyer*, 67 Vt. 502, 32 Atl. 476, 29 L. R. A. 573, 48 Am. St. Rep. 832; *State v. Morse*, 84 Vt. 387, 80 Atl. 189, 34 L. R. A. (N. S.) 190; *State v. Haskell*, 84 Vt. 429, 79 Atl. 852, 34 L. R. A. (N. S.) 286; *State Board of Health v. St. Johnsbury*, 82 Vt. 276, 73 Atl. 581, 23 L. R. A. (N. S.) 766, 18 Ann. Cas. 496. The appellant invokes the case of *Oregon & Co. v. Fairchild & State Railroad Commissioners*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L.

Ed. 863, but we understand that the doctrine of that case is in accord with that herein announced and fully set forth in the cases decided by this court that are above referred to, as well as in other decisions of this court. In that case the judgment of the state court was reversed because the fundamental principles here recognized were not there fully regarded. We do not, of course, assert the right of the state to regulate interstate commerce for that right all the states surrendered to the general government. But in this case it is not claimed that the order of the commissioners conflicts with the Constitution of the United States on the ground that it interferes with interstate commerce.

[23] As this question is not raised, we do not discuss it. Nor do we discuss the question of whether any subject over which the commission has been given jurisdiction has been so covered by federal legislation that the state enactment in that respect is superseded. If that should be found to be the case in respect to any matter over which Congress has a right to assert, and has asserted, its paramount authority the force of the state law as a whole would not be in other respects impaired.

Our conclusion is that the Public Service Commission is a legally constituted body with authority to act and make orders with reference to the dangerous situation which, as the case now stands, appears to exist in the vicinity of the Alburgh station, and the cause is remanded to the Public Service Commission for further proceedings upon due notice and hearing.

WATSON and POWERS, JJ., dissent.

POWERS, J. (dissenting). The Public Service Commission made an order requiring the defendants to install, maintain, and operate suitable gates at a grade crossing at the railroad station Alburgh. The Rutland Railroad Company appealed from that order, and seeks an annulment thereof on the grounds (1) that the findings of the commission are predicated, in whole or in part, upon evidence received after the hearing provided for by law had finally adjourned; and (2) that the act creating the commission is unconstitutional and void.

1. The record before us shows that these proceedings were begun by a petition filed with the commission on September 23, 1911; that a subpoena was duly issued by the clerk of the commission, therein specifying a time and place for a hearing on the petition; that service of this subpoena was duly accepted by the defendants, and that a hearing was had on November 24, 1911, both defendants being represented by counsel. The commission reports that the question what ought to be done in the matter had caused it a good deal of embarrassment, and had resulted in

the employment by the board of an expert who had carefully examined the condition complained of in respect of the crossing, and made the commission a detailed report. The commission further reports that on April 8, 1912, an actual count, made under the supervision of its expert, showed that 688 persons traversed the crossing between 5 a. m. and 9 p. m., and that during that time there were 49 train movements over it, and that these figures showed about the daily traffic at that point. The commission makes some further analysis of these figures, and says that "enough has been said to show that this crossing is a very dangerous one." An electric alarm bell is now installed there and operated by the Central Vermont Railway Company, but, owing to certain conditions pointed out by the commission, it does more harm than good. The commission goes on to say that its expert reports that all the evidence showed (and the commission so finds) that it is impracticable to install an electric bell system of alarm so connected with the tracks of both defendants as to afford any protection to this crossing. The commission considered the elimination of the crossing: but the large expense involved and the limited appropriation available precluded this. "We therefore find," concludes the commission, "that public safety requires that this crossing be protected by the installation and maintenance of gates and fences for that purpose," as indicated in the order appealed from. It is quite apparent from the report of the commission that its findings are based partly, if not wholly, upon the report of its expert. He was not appointed until after the hearing on November 16th, and it is evident that the dangers of the crossing are in a great measure due to the large amount of daily traffic by persons and trains, over it. This was wholly ascertained, so far as the facts are shown, by the count supervised by the expert, without which it would not appear that enough had "been said to show that this crossing is a very dangerous one." Besides, it was the evidence before the expert, and not that before the board, that resulted in a finding rejecting the idea of a more efficient electric signal.

So we cannot escape the conclusion that in reaching its ultimate finding the commission made use of evidence taken outside the public hearing, which the defendants had no opportunity to meet either by way of cross-examination or otherwise. This is not in accordance with the provisions of the law, and the order predicated thereon is irregular, and will be set aside. This conclusion would dispose of the case, and would ordinarily preclude an examination of the constitutional question raised; for the general rule is that the court will not pass upon the constitutionality of a statute, unless it is necessary to do so in order to finally dispose of the case. *Blanchard v. Barre*, 77 Vt. 420, 60

Atl. 970; *State v. Wilson*, 79 Vt. 379, 65 Atl. 88; *Post v. Rutland R. Co.*, 80 Vt. 551, 69 Atl. 156; *State v. B. & M. Railroad*, 82 Vt. 121, 71 Atl. 1044. But this rule has its exceptions: When the settlement of such question is one of public importance, the court may properly consider and dispose of it, although such a course is not necessary to a disposition of the case. *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489. This is well shown by the statement in *Light v. United States*, 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570: "Where a case in this court can be decided without reference to questions arising under the federal Constitution, that course is usually pursued, and is not departed from without important reasons." The settlement of the constitutional question involved in the case in hand is of great public importance, and it is of the highest consequence that it be passed upon while the Legislature is in session, that such amendments in the law as may be found necessary, if any, may be promptly made, without awaiting another session of that body. So it is deemed best to treat the case as exceptional, and to dispose of the constitutional question presented.

The claim of the defendant is that by the act creating the commission and defining its powers and duties (No. 126, Acts of 1906) legislative, executive, and judicial powers are so blended and conferred upon it as to transgress the provisions made for the separation of those powers by chapter 2 of the Constitution of this state. A consideration of this claim is unembarrassed by two features which may as well be set aside at the outset: We need not consider what powers and duties may, without constitutional objections, be conferred upon the members of the commission as individuals, for the legislation referred to relates solely to the board as such. Nor are we called upon to examine the Constitution of the United States upon the question directly raised, for it contains nothing to prohibit a state, under its own laws, from conferring different governmental powers upon the same body or agency (*Livingston's Lessee v. Moore*, 7 Pet. 469, 8 L. Ed. 751; *Reetz v. Michigan*, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563; *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658; *Prentiss v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150). though, as we shall see, the decisions of the federal Supreme Court are most valuable guides to a proper decision of the question. It is one of the fundamentals of the American system of constitutional government that all governmental power shall be separated into three classes and conferred upon three distinct, but co-ordinate, departments—legislative, executive, and judicial. Such a distribution has always been considered by the American people as necessary to the security

of the liberties of the citizen, the certainty of popular government, and the perpetuity of free institutions. The founders of our state believed with Blackstone that: "In tyrannical governments the right both of making and enforcing the laws is vested in one and the same man, or one and the same body of men, and that, wherever these powers are united together, there can be no public liberty." It was said by Judge Aldrich in *Bates v. Kimball*, 2 D. Chip. 77, that "the necessity of a distinct and separate existence of the three great departments of government was well understood by the people of this state at the time of the adoption of our Constitution. Its importance to the security of public liberty and private rights had been proclaimed and enforced by some of the wisest and most eminent men of other countries and of this, among whom are Montesquieu, Sir William Blackstone, Jefferson, and Madison." Accordingly, our first Constitution, adopted in 1777, and borrowed from that of Pennsylvania adopted the year before, provided for this distribution of governmental powers, but contained no prohibiting clause. And it must be admitted that during the first septenary of our state government this constitutional provision was too often disregarded. To a student of the history of the times, however, it is not altogether surprising to find the Legislature, with some frequency, encroaching upon the domains of the other departments, especially that of the judiciary. It passed acts prohibiting the trial of cases involving title to land; prohibited trials predicated upon certain contracts; set itself up as a court of chancery; appointed a commission to decide disputes over titles and made its own decree conclusive; it granted new trials. Nor during the same time was the council free from similar transgressions. It remitted a part of a debt contracted in Continental money; authorized the Surveyor General to settle the accounts of those running lines under his direction; passed a resolution requiring certain papers belonging by law to the office of the Secretary of State to be deposited with its clerk; substituted a charter of another gore of land for one granted by the Assembly; it granted divorces. All this is not to be taken as an indication that the people lacked in appreciation of the importance of the provisions of the Constitution referred to, or that they were indifferent to the limitations imposed by that document. But rather as a result of inexperience in governmental affairs, of impressions and prejudices acquired before they removed to this state, and the pressing necessities of the times. The first council of censors promptly and vigorously condemned these practices, revised the Constitution, and called a convention to consider and act upon certain proposals of amendment. The result was that, while many of these were rejected, the one containing the

prohibiting clause found in section 6 of chapter 2 of our present Constitution was adopted, "the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other," since which time transgressions of the kind mentioned have been infrequent.

Our attention is called to the difference in phraseology in different prohibiting clauses—how some are in terms more restrictive than ours. But I do not consider this of consequence. While these clauses differ somewhat in the terms used, the fundamental purpose and the ultimate object is the same in all, and the result is unaffected by the form of expression. The Constitution of the United States contains no prohibiting clause at all, yet it is held that the powers confided to one of the departments cannot be exercised by any other. *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377. In the Alabama Constitution it was provided that "no person or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others," while the Virginia Constitution contained a prohibiting clause just like ours. Yet the Supreme Court of the United States, in *Watkins v. Holman's Lessee*, 16 Pet. 25, 10 L. Ed. 873, construed them to mean the same thing, saying: "The inhibition of the Alabama Constitution contains in terms that which arises from the construction of the Constitutions of other states." And it was said by Judge Cooley in *Butler v. Saginaw County*, 26 Mich. 27: "It is well settled that the apportionment of legislative power to one department of the government will not authorize it to exercise any portion of the judicial power which is apportioned to another department. The apportionment is of itself an implied prohibition upon its exercise by the Legislature." But that a complete and absolute separation of these governmental powers was not contemplated when our Constitution was adopted appears from the instrument itself. The Governor is therein endowed with the veto power, and has, to a limited extent, a part in legislation. The House of Representatives may order, and the Senate try, impeachments, therein acting as a judicial body. Each house of the General Assembly may judge of the qualifications of its own members. Moreover, it has been found impossible in practice to keep the departments entirely separate, so that under no circumstances should one perform duties which partake of the character of those appertaining to another. No such exact division of governmental powers is possible. *State v. R. R. Com.*, 52 Wash. 17, 100 Pac. 179; *State v. Bates*, 96 Minn. 110, 104 N. W. 709, 113 Am. St. Rep. 612; *So. Ry. Co. v. Melton*, 133 Ga. 277, 65 S. E. 665. "The division of governmental powers into executive, legislative, and judicial," said the court in *Minneapolis, etc., R. Co. v. Railroad*

Com., 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821, "while of great importance in the creation or organization of a state, and from the viewpoint of institutional law and otherwise, is not an exact classification. No such exact delimitation of governmental powers is possible." It may safely be said that it has come to be everywhere recognized that Constitutions do not forbid the exercise by one department of the government of functions partaking of the character of those belonging to another, when that shall be incidentally necessary to the proper discharge of its own duties. Although the powers of one department, in a full and complete sense of the term, cannot be delegated to another department, one department may perform acts which partake of the character of those of another, when they are coupled with the exercise of its own paramount power, and are essential to its complete and efficient use. *Watkins v. Holman's Lessee*, 16 Pet. 25, 10 L. Ed. 873. Thus the Legislature cannot delegate to this court power to make a law; yet it may leave to this court authority to prescribe rules of practice which have the force and effect of a law. Therein the court exercises functions which partake of the legislative character, but only as an incident to the discharge of its proper judicial functions, and because essential to an efficient exercise thereof. So a commission of the character here in question in the prosecution of its duties and as a preliminary to final action hears and decides after the manner of judicial bodies. The Legislature itself does this in some measure. But these are not transgressions of the limitations of the Constitution, because they come within the rule just stated. Turning now to an analysis of the powers and duties of the commission as established by the act of its creation, we find that by section 23 the supervision and regulation of railroads is intrusted to the commission. Power to that end is conferred with a lavish hand. It would be impossible to find terms with which to make a jurisdiction more inclusive. This power of governmental regulation is one of the attributes of that all-pervading police power, by force of which the state conserves the health, safety, convenience, and welfare of its people. This power is committed to the Legislature, and, subject to certain limitations not here involved, may be exercised directly by legislative enactment, or it may be vested in boards created for administrative purposes, to be applied according to a general legislative scheme. The power to supervise and regulate public service does not differ in kind or quality from that which is exercised in safeguarding the public health. *L. S. & M. S. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702. It is delegable under the same circumstances and to the same extent. The maxim of the law that legislative power cannot be delegated applies in the one case in the same way and with the same result

as in the other. Much time and learning have been expended by the courts in distinguishing between functions which are essentially and wholly legislative and so non-delegable, and those which involve the adoption of mere administrative regulations and so are delegable. It would not be profitable to review all that has been said on this subject or at this late day to inquire whether the courts have pushed the law too far in their anxiety to sustain the acts creating these most useful commissions. It is enough for me to say that it is now the settled law of the American courts that the power now spoken of—the power of governmental regulation—may be turned over to an administrative body without violating the provisions of the Constitution. The theory of the cases being that the Legislature lays down the general plan, and only leaves to the commission the power to fill in the details. *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563. "The elementary proposition," says Mr. Justice White in *Atlantic Coast Line R. Co. v. Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398, "that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority, or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine." A more recent and equally satisfactory statement is found in *Southern Ind. Ry. Co. v. Railroad Com.*, 172 Ind. 113, 87 N. E. 966: "The adjudications seem to be agreed that, as the state Legislature possesses the power to regulate the business of railroads, they may delegate that power to a commission or other administrative body, and what such administrative agent does, within the powers with which it is endowed, is as valid and conclusive as if done by the Legislature itself." And this is saying no more than this court has said; for in *Board of Health v. St. Johnsbury*, 82 Vt. 276, 73 Atl. 581, 23 L. R. A. (N. S.) 766, 18 Ann. Cas. 496, in speaking of the police power, we said: "That right, to say the least, embraces such reasonable rules and regulations, established directly by legislative enactment, as will protect the public health and the public safety. And the state may invest local or state boards, created for administrative purposes, with authority in some proper way to safeguard the public health and the public safety." And, again, in *State v. Morse*, 84 Vt. 387, 80 Atl. 189, 34 L. R. A. (N. S.) 190, in speaking on the same subject, we said: "The power may lawfully be delegated to municipalities, to local or to state boards, * * *

and, when so delegated, the agency employed is clothed with power to act, as full and efficient as that possessed by the Legislature itself."

The primary object in creating such commissions is to see to it that the legislative purpose and mandate are observed and carried out. This purpose may find expression in enactments directly applicable, or in the legislative adoption of the common law. Whichever way it is expressed, the commission is charged with the duty of making it effective. Such a commission is everywhere held to be a mere administrative body. It is neither legislative nor judicial. I am now speaking of a commission the legality of which is admitted, and using the terms "legislative" and "judicial" in their full, legal sense. The distinction between legislative powers (in this sense) which all agree cannot be delegated and mere administrative duties, the performance of which is essential to the effectiveness of the law, and which may be delegated, is well shown in *State v. Chicago*, etc., R. Co., 38 Minn. 281, 37 N. W. 782, approved in *State v. Great Northern R. Co.*, 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250, wherein it was held that legislative power was not delegated to the commission, but that it was simply charged with the administration of the law as enacted. See, also, *C. B. & Q. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278. In *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, Mr. Justice Brewer speaks on this subject with his usual directness: "There can be no doubt of the general power of the state to regulate the fares and freights which may be charged and received by railroads and other carriers, and that this regulation can be carried on by means of a commission. Such commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation." This is the theory of the *Railroad Commission Cases*, 118 U. S. 307, 6 Sup. Ct. 334, 338, 1191, 29 L. Ed. 636, and is the view which has always been entertained by the Supreme Court of the United States. *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 30 Sup. Ct. 356, 54 L. Ed. 435; *Interstate Com. Com. v. Goodrich Transit Co.*, 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729; *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; the last-named case being a most instructive one. And it is a fact of much significance that, while the power of the Interstate Commerce Commission has been extended from time to time, it has not been invested with judicial power, nor has the federal Supreme Court ever modified its view that it is a mere administrative body. Upon such a body the

unctions of a court cannot be conferred. *State v. Wolfer* (Minn.) 138 N. W. 315; *George v. People*, 167 Ill. 447, 47 N. E. 741; *People v. Mallary*, 195 Ill. 582, 63 N. E. 508, 8 Am. St. Rep. 212; Louisville, etc., R. Co. v. *McChord* (C. C.) 103 Fed. 216; *Shoulitz v. McPheeters*, 79 Ind. 373; *In re Dumford*, 7 Kan. App. 89, 53 Pac. 92; *Hayburn's Case*, 1 Dall. 409, 1 L. Ed. 436; *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42, and note in *United States v. Todd* prepared by Chief Justice Taney under the direction of the court. See, also, *Interstate Com. Com. v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047, wherein Mr. Justice Harlan refers to these cases, and says of the statute involved in the *Hayburn* and *Todd* Cases, and which was held to be inoperative: "It thus appears that the act of 1792, above referred to, attempted to impose upon the courts of the United States duties purely administrative in character."

Moreover, the power of regulation is legislative in character, and in exercising it the administrative body must be classed as a legislative agency. The particular branch of his power which has been most frequently before the courts is the rate-making power. *Interstate Com. Com. v. Cin., etc., R. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243, was a case involving the question whether the Interstate Commerce Commission was invested with power to establish rates. In deciding that that power had not then been conferred upon that commission Mr. Justice Brewer says: "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act—but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act. * * * It will be perceived that in this case the Interstate Commerce Commission assumed the right to prescribe rates which should control in the future, and their application to the court was for a mandamus to compel the companies to comply with their decision; that is, to abide by their determination as to the maximum rates to be observed in the future. * * * The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative. * * * The power to prescribe a tariff of rates for carriage by a common carrier is a legislative, and not an administrative or judicial function. * * *" *Prentiss v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, involved the validity of passenger rates fixed by the corporation commission of Virginia. The point was made that the courts of the United States could not interfere because the commission was a court within the meaning of Rev. Stat. § 720 (U. S. Comp. St. 1901, p. 581). In rejecting this claim, the court, speaking through Mr. Justice Holmes, says: "A ju-

dicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind. * * *" To the same effect is the statement of Mr. Justice Field in the *Sinking Fund Cases*, 99 U. S. 761, 25 L. Ed. 504. *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 867, 4 Sup. Ct. 185, 28 L. Ed. 291, was a proceeding to compel one railroad to unite with another to form a through line and for the exchange of business. The court declined to interfere on the ground that the remedy was legislative rather than judicial. In *McChord v. L. & N. R. Co.*, 183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289, an injunction was sought to restrain the Kentucky Railroad Commission from proceeding under an alleged unconstitutional statute of that state to establish maximum passenger and freight rates. The injunction was denied on the ground that to grant it would be to restrain legislation. Mr. Chief Justice Fuller, in expressing the unanimous opinion of the court, says: "The fixing of rates is essentially legislative in its character, and the general rule is that legislative action cannot be interfered with by injunction."

The significance of this case should not be overlooked. From it we learn that while these commissions are held to be administrative agencies, to which these matters may be committed without an unconstitutional delegation of legislative power, their functions are so far legislative in character as to be free from interference in advance. There can be but one conclusion drawn from the cases: The delegation of the power of regulation does not, and cannot, change its character. It remains a legislative function, and the body to which it is committed is a legislative agency (*Mr. Justice Bradley in Railroad Co. v. Minnesota*, 134 U. S. 466, 33 L. Ed. 970), without whose action legislation is incomplete and inefficient. It is only in theory and in a technical sense that the orders of a commission differ from a legislative enactment, and the delegation of the power to prescribe rules of this character is to be defended quite as much upon the ground of necessity as on legal principles. "It is not the mode of doing a thing, nor by the pretended capacity in which it is done, but the nature of the act itself that its propriety or impropriety is to be determined," said Judge Alkens in *Bates v. Kimball*, 2 D. Chip. 77. He also drew the distinction between a legislative and judicial act just where it was drawn in the *Prentiss* Case above referred to, saying: "That which distinguishes a judi-

cial from a legislative act is that the one is a determination of what the existing law is in relation to a particular thing done or happened; while the other is a predetermination of what the law shall be for the regulation and government of all future cases falling within its provisions." Whether this rule would answer as a test in all cases that might arise I need not stop to consider. It certainly is one frequently to be found in the books. Chairman Knapp, whose intelligence and experience add great weight to his opinions, testified before the committee on interstate commerce in the United States Senate (Vol. 4, pp. 3299, 3300), as follows: "To my notion regulation is legislation. * * * A tariff is a law. It is a rule of action of general application. So long as it is in force, it has all the characteristics and all the binding obligations of a statute. To depart from it is a misdemeanor, * * * and in the very nature of the case the proposal to use the methods of a court to deal with a purely legislative question is incongruous and unsuitable." A moment's reflection will convince any one, it seems to me, that it is the rule or order of the commission (administrative though you may call it) which alone is of any practical importance to the railroad or the public. It is this which is to have operative effect upon the carrier. It is this which is to accomplish the reform and correct the abuse. It is this which must be obeyed. It is this, the disobedience of which is made penal. Without it legislation is incomplete. Legislation does not end and administration begin until this act of the commission is added to what has gone before. There is an implied confession of all this in the holdings that the commission may be authorized to "fill in the details" of legislation.

So the question here presented is not alone can administrative functions be conferred upon a court, but can these administrative functions be conferred on a court; or, to state it the other way, can full judicial power be conferred upon such an administrative board. Let it be borne in mind all along that in all practical senses, to all intents and purposes, it is the commission which does the legislating. Theorize about it as much as we may, it must be confessed that its orders so closely resemble and bear such close affinity to legislative enactments that it takes an expert to distinguish between them. For example: The difference between a legislative mandate to erect a gate at a certain railroad crossing and a commission's order to do the same thing cannot be pointed out except by drawing a distinction so subtle as to elude the untrained mind. Except in the limited and incidental way already specified, judicial powers cannot be conferred on such a commission without confusing that which the Constitution says shall be kept separate. Whether our Public Service Commission is a court in a judicial sense depends, of course,

not upon what it is called by the Legislature but on the powers conferred upon it. Such a body is not to be held nonjudicial simply because it is called a commission, nor is it to be held to be a judicial body simply because the Legislature denominates it a court. It was said in *State v. Wilson*, 121 N. C. 47, 28 S. E. 554, that the Railroad Commission of that state was an administrative, and not a judicial, court, and that, while it had been made by statute a court of record, the object was simply to give authenticity to its records and proceedings, as the act added nothing to its duties or powers. But our legislation does not stop there. It goes further. By section 8 of the act in question it confers upon the commission "the powers of a court of record, both at law and in equity, in the determination and adjudication of all matters over which it is given jurisdiction," and the power to issue any process which either of those courts may issue to enforce its judgments and decrees. The majority says it is not a court. If this means that it is not a court because the Constitution forbids conferring judicial powers upon such a commission, and that the attempt to do so in this case is unconstitutional, I agree. If it means that assuming the validity of the act it is not a court, I ask why? What more is needed to make it a court? What element is lacking? It seems perfectly plain to me that it is a court. Its functions are in the respect I am now speaking of clearly those of the judiciary. They "properly belong" to the judiciary department. They are not incidental; they are primary. If there is a distinction between administrative courts and judicial courts, there can be no question but this commission comes within the latter class. "The award of executions," said Chief Justice Taney, in *Gordon v. United States*, 117 U. S. appx. 697, "is a part and an essential part of every judgment passed by a court exercising judicial power." Within its own domain, this commission is clothed with the most extensive judicial powers; indeed, there is no court known to the law that can do more within the sphere of its own activities than this one can. And it is apparent that it was so considered when we decided *Central Vt. Ry. Co. v. Hartford*, 82 Vt. 145, 72 Atl. 324, and *Hyde Park v. St. J. & L. C. R. Co.*, 83 Vt. 562, 77 Atl. 913.

We have here, then, a court exercising practically, if not technically, the most important legislative and judicial functions in the very same matter. This certainly cannot be, unless the theory of the Constitution is to be utterly rejected. The difficulty is not met by those who say that the commission, being an administrative body, is not exercising any of the powers of which the Constitution speaks. The question may well be asked, What is it doing? It is certainly a governmental agency. *Carty's Adm'r v. Winooski*, 78 Vt. 108, 62 Atl. 45, 2 L. R. A.

(N. S.) 95, 6 Ann. Cas. 436. Its powers and authority must come from the state government, and therefore must fall into one of the three classes. "No power can be properly a legislative and properly a judicial power at the same time; and, as to mixed powers, the separation of the departments precludes the possibility of their existence." *Bates v. Kimball*, 2 D. Chip. 77. If we were to hold that this commission as constituted by this statute could stand this constitutional test, then the state board of health, local boards of health, state board of pharmacy, state board of dental examiners, state board of medical registration, state fish and game commissioner, state cattle commissioner, commissioner of weights and measures, and various other boards that exercise administrative functions under the police power may be invested by the Legislature with equal judicial power and authority within their respective spheres; they may sit in the judgment seat, issue writs of injunction, mandamus, and perhaps quo warranto and other process, and exercise judicial authority "equal in all respects" to that of the regular courts of the state. Moreover, if this law is upheld, the Legislature can confer this power of regulation of public service corporations upon its own committee, appointed from its own members, and by appropriate legislation authorize it to sit continuously and to exercise these vast judicial powers. Indeed, it may do all this itself. Not only this, but all the duties of all these commissions may be loaded onto the county court, the court of chancery, or even this court, to the extent of crowding out the exercise of its proper judicial duties. Nor is this an excursion into the realms of fancy. Our table is already spread for just this kind of a repast. There is now pending in this court an appeal from an order of this commission made in the matter of the Burlington Union Station, taken under No. 288, Acts of 1910, which authorizes us—and so, of course, requires us—upon hearing, to revise, modify, or reverse the order of the commission, and to order the taking of testimony in such manner as we deem best. The authorities, I confess, are not in harmony on these questions, but the following are in accord with the view herein expressed. In *Tyson v. Washington County*, 78 Neb. 211, 110 N. W. 634, 12 L. R. A. (N. S.) 350, it is held that the question whether a drainage ditch will be conducive to the public health, convenience, or welfare, or whether the route thereof is practicable, are questions of governmental or administrative policy, and are not of judicial cognizance, and that jurisdiction over them by appeal or otherwise cannot be conferred upon the courts by statute on account of the constitutional separation of the powers of government, approving *State v. Johnson*, hereinafter cited. In *Supervisors v. Todd*, 97 Md. 247, 54 Atl. 963, 62 L. R. A. 809, 99 Am. St. Rep. 438, an act of the

Legislature imposing upon a court the duty of receiving and acting on petitions for the submission to the voters of the question whether or not intoxicating liquors should be sold, was void under a constitutional separation of governmental departments. In *Spencer's Appeal*, 78 Conn. 301, 61 Atl. 1010, it was held that a statute giving an appeal from the decision of the railroad commissioners in the matters relating to grade crossings, and providing that the court, on appeal, might re-examine the question of the propriety and expediency of the order appealed from, and, in case the order is not affirmed, may make any other order in the premises that it may deem proper and which might have been made by the railroad commissioners, was unconstitutional. The court says that the acts of the commission are administrative all through, and that the court below, in what it did, was not exercising judicial functions. "They were distinctly administrative, and therefore such as it was powerless to exercise, no matter what authority legislation may have sought to confer." It was said in *Railroad Com. v. Neville*, 96 Tex. 394, 73 S. W. 529, that the Legislature had conferred on the court the question of the reasonableness of rates as they affected the rights of railroads and shippers, which was, as presented, a judicial question, and that legislative power was not conferred upon the court. But that "the making of rates by the commission is the exercise of legislative authority, which the court cannot exercise." In *Denny v. Des Moines Co.*, 143 Iowa, 466, 121 N. W. 1066, it was held that a determination by a board of supervisors that the establishment of the district and the making of the contemplated public improvement therein is not advisable on the ground that such action would not be conducive to the public health, convenience, or welfare, or to the public benefit or utility, is discretionary and of a legislative character, which is not reviewable in the courts, because of the constitutional separation of the powers of government. It is to be observed that it seems that in Iowa they distinguish between constitutional courts and statutory courts, and hold that the latter may be given legislative or administrative, as well as judicial functions. No such distinction, however, exists in this state.

The very question was squarely met in *Western Union Tel. Co. v. Myatt* (C. C.) 98 Fed. 335, and *State v. Johnson*, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662. These cases involved the validity of a statute of the state of Kansas not materially different from our own. They arose about the same time, but the results were reached upon independent reasoning. Both declared the statute unconstitutional on the ground that it sought to confer upon the court of visitation, as it was there called, powers legislative, administrative, and judicial, in violation of the Con-

stitution of the state of Kansas. The opinion of the state court was criticised in the argument before us, but to my mind it is sound, logical, and satisfactory. The limitations upon the powers of judicial bodies in these administrative matters appear from what has been said by the Supreme Court of the United States. Mr. Justice Brewer, in *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, says: "The courts are not authorized to revise or change the body of rates imposed by a Legislature or a commission. They do not determine whether one rate is preferable to another or what under all the circumstances would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work." That I do not mistake the force of this statement of Judge Brewer appears from *St. Louis, etc., R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, wherein it is said in speaking of that case: "The opinion of this court on appeal was that while it was within the power of a court of equity in such case to decree that the rates so established by the commission were unreasonable and unjust, and to restrain their enforcement, it was not within its power to establish rates itself. After recognizing the previous cases as establishing the proposition that, while it is not the province of courts to enter upon the merely administrative duty of framing a tariff of rates for carriage," it was within the scope of their authority to protect the constitutional rights of the carrier. In the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791, in speaking of the action of the trial court in fixing and regulating the terms upon which the railroad company and express company should do business, the court said: "In this way, as it seems to us, the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves. * * * The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide, but that it must come, when it does come, from some source of legislative power, we do not doubt." And this is the very ground on which was put *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 673, 4 Sup. Ct. 185, 28 L. Ed. 294, and *Pullman's Palace Car Co. v. Mo. Pac. Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499, that the court could not make for the parties such a business arrangement as they ought to have made for themselves.

One further question stands for consideration: Are these provisions of the act which confer judicial powers upon the commission such an integral part of the legislative plan as to vitiate the whole act? The majority

says that they are not. That is to say, after holding that the case demands a consideration of the constitutional question raised the majority only goes far enough into a consideration of that question to enable it to say that the provisions attacked can be separated from the rest and the latter stand leaving the whole question of whether or not there are any unconstitutional provisions in the statute, and, if so, what they are, in uncertainty. In considering the question of the divisibility of the statute, we should look not only to the structure of the act itself but to the circumstances which preceded and attended its passage. For many years we had had a commission with more or less authority over the railroads of the state. It was and is now admitted that this was purely administrative, and therefore legal. Previous to the passage of the act of 1906, the commission had practically no power to enforce its own orders, but were authorized, as is the Interstate Commerce Commission and the statutory state commissioner, to proceed in the courts for their enforcement. I note the fact that the commission in its annual reports had been asking for more power. In the two which preceded the passage of the act in question the commission "recommended" that the whole law be revised and reconstructed so as to strengthen the commission. What the commission wanted was "a law with teeth." The majority says that the primary purpose of the act was to strengthen the administrative functions of the commission. But when *Central Vermont Ry. Co. v. Hartford*, 82 Vt. 145, 72 Atl. 324, was before us, it was considered by the unanimous court that power of enforcement of the orders of the commission was the primary purpose of the passage of the act. This appears from what was said by Chief Judge Rowell in the opinion in that case: "When No. 125, Acts of 1906, was passed, the Railroad Commissioners had practically no power to enforce their orders. They had been enforced mostly, if at all, by the Supreme Court on appeal, exercising equity powers for the purpose; and sometimes there was a punitive sanction for noncompliance. When said last-mentioned act was passed, though considerable had been accomplished elsewhere in respect of legislative regulation and control of railroads, this state had never conferred sufficient authority upon the railroad commissioners to make them very effective in that regard; and No. 126, Acts of 1906, which, though passed after No. 125, took effect before it, seems to have been the first time the Legislature took the matter in hand with a view to remedy that shortage of authority by conferring enough more to enable the commissioners to deal with the matters within their jurisdiction more effectively and speedily than they had ever been able to do before. This is evidently why the board is given such ample authority both to judge and execute its judgments. * * *

In passing No. 126, the Legislature seems to have had a unified and comprehensive plan in mind, and evidently intended to provide a singleness of means to carry it into effect. * * * If any further evidence was required to establish the fact that the primary purpose of No. 126 was to confer authority upon the board to carry into effect its own orders, it is to be found in the acts of the same session which had been passed before it. It appears that by Nos. 118, 119, 120, 122, and 125, Acts of 1906, that very Legislature had legislated upon every single administrative matter of any consequence covered by section 23 of No. 126, but had said not a word about authorizing the commission to enforce its own orders. By these acts ample authority over highway crossings, rates, demurrage, furnishing cars, cattle guards and farm crossings, gates, signals and flagmen, connections with other roads, crossing other roads, mortgages, and so forth had been conferred on the commission; and through all this legislation V. S. 3990, as amended by No. 68, Acts of 1902, which authorized this court, sitting in equity, upon application of the board, to compel compliance with its orders, remained untouched. What the status of these prior acts would be if No. 126 should fail for unconstitutionality is a question which has not been discussed, and so I give it no attention. What "shortage of authority" was there, then? What more power did the commission require in order to deal with matters within its jurisdiction "more effectively and speedily?" Nothing, to be sure, except the power to execute its own orders. Accordingly, No. 126 gathered up and re-enacted the administrative duties which the board had already been given, and possibly (I cannot say) may have added something of small consequence thereto, doing this as an incident of the grant of the missing power, the power to put into execution its own orders. Notice, too, that the last section of No. 126 expressly repeals V. S. c. 172, which includes section 3990 covering the authority of the commission to go to the court for the enforcement of its orders.

Can it be believed that the Legislature, when it was attempting to strengthen the hands of the commission, would have passed this act repealing the section giving it the authority to enforce its orders through the courts, if it had known that the provision giving the board power to enforce its own orders was unconstitutional and void? How are the orders of the board to be enforced if that part of the act falls? It may easily be imagined that a case might arise where the railroad company would prefer to pay the penalty than to comply. Take the case of the Burlington Union Station. It involves the expenditure of something like half a million dollars. The maximum penalty for disobedience of the commission's order is \$5,000. Who can say which the companies

will like best. Can the commission proceed in the courts? I think not. Their power is purely statutory, and is only what the statute makes it. *Rutland Ry. L. & P. Co. v. Clarendon Power Co.*, 86 Vt. 45, 83 Atl. 332, shows this. A railroad commission is a tribunal unknown to the common law, and possesses only such powers as are conferred upon it by statute. *State v. Atlantic Coast Line R. Co.*, 60 Fla. 465, 54 South. 394; *Wabash R. Co. v. Com'rs (Ind.)* 95 N. E. 673, and cases cited; *Railroad Com'rs v. Oregon R. & N. Co.*, 17 Or. 65, 19 Pac. 702, 2 L. R. A. 195. Consequently, unless the Legislature has conferred upon the commission authority to do so, it cannot maintain an action to enforce its order. *Wabash R. Co. v. Com'rs*, supra; *Railroad Com. v. Railroad Co.*, 26 S. C. 353, 2 S. E. 127. Is there any other way that the court can proceed by way of mandamus or otherwise? Possibly. But, if there is, its interference is a matter of independent discretion upon full hearing—quite a different thing than the act in question contemplates. To me it is utterly unbelievable that a Legislature in an effort to confer more power would have been willing to take a course which would take away what little the board then had. I cannot think that the Legislature would have approached this effort saying, "But from him that hath not shall be taken away even that which he hath." It is not the question of what other acts the Legislature would have passed. It is simply the question, Would they have passed this act with the objectionable provisions stricken out? On this question the burden of proof, so to speak, is on the act. If it contains one unconstitutional provision, we must be able, in order to save any of it, to say affirmatively that the Legislature would have passed it had they realized that a part would fail. Again, I call upon the Supreme Court of the United States for a correct statement of the rule: "Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated." *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. This court correctly indicated the primary purpose of this act in *Cent. Vt. Ry. Co. v. Hartford*, supra. If the court was right then, the majority is wrong now; for, of course, that purpose has not changed. To me it seems apparent that the grant of judicial power was an essential and inseparable feature of the legislative plan, without which the act would be incomplete and inadequate to accomplish the legislative intent, and the whole act must fail. *State v. Scampini*, 77 Vt. 92, 59 Atl. 201; *State v. Paige*, 78 Vt. 286, 62 Atl. 1017, 6 Ann. Cas. 725.

I have not reached this conclusion without a keen and appreciative sense of the respon-

sibility resting upon me; nor have I been unmindful of the rule which requires all reasonable doubts to be solved in favor of the statute. But I also have in mind that other unbending rule that, when a statute is in plain conflict with the fundamental law, "it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." We are living in a time of great political unrest. From one direction comes the call that the government be restored to the people; from another comes the warning that constitutional government is imperiled; from all directions comes the demand, clamorous, persistent, and not always reasonable, for more and more drastic regulation of public service corporations. It is a time when legislative usurpations may be expected to be more frequent. It is a time for judges to be fearless, and courts to be firm. It is a time for that "recurrence to fundamental principles" which is "necessary to preserve the blessings of liberty, and keep government free." This court has "lost an opportunity."

I am authorized to say that WATSON, J., concurs in this dissent.

REDDING v. REDDING.

(Court of Chancery of New Jersey. Dec. 31, 1912.)

1. DIVORCE (§ 109*)—EVIDENCE—BURDEN OF PROOF—CONDONATION.

In an action for divorce on the ground of adultery, the wife, who admitted adultery, but set up condonation, had the burden of proving condonation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 354-364; Dec. Dig. § 109.*]

2. DIVORCE (§ 135*)—SUFFICIENCY OF EVIDENCE—CONDONATION.

Evidence, in a husband's action for divorce, where the wife admitted the adultery charged and set up condonation, held to affirmatively establish such defense.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 451; Dec. Dig. § 135.*]

3. DIVORCE (§ 294*)—CUSTODY OF CHILDREN—JURISDICTION.

The court has no jurisdiction over the custody of a child upon a petition for divorce, where the divorce is not granted.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 777; Dec. Dig. § 294.*]

Petition for divorce by George A. Redding against Margaret E. Redding. Decree advised refusing a divorce and dismissing the petition.

Jonathan Hand, of Wildwood, and Lewis Starr, of Camden, for petitioner. Wm. Frank Sooy, of Atlantic City, for defendant.

GREY, Adv. M. The petition charged that the parties were married February 12, 1901, and that on October 22, 1903, defendant attempted to enter the bonds of matrimony with one William Sample or Semple, the marriage ceremony having been performed at

Camden, N. J., on that date, and that defendant and Semple lived together as husband and wife from October, 1903, until May, 1904. The answer admits these charges of the bill, but asserts that defendant went through the marriage ceremony with Semple, believing her husband to be dead; that the petitioner sought her out in March, 1905 (she was not then living with Semple), and requested her to return and live with him and resume marital relations; that she thereupon went with him to Anglesea, N. J., although at that time and prior thereto petitioner knew of her attempted marriage to and of her living with Semple, and that the defendant and petitioner lived together as husband and wife from thence until May, 1912, when they parted by reason of cruel treatment on the part of the husband. The questions raised are entirely of fact. No legal principles are involved. From the facts admitted by the parties in the pleadings, and from the testimony taken, it appears that the parties were married in Philadelphia on the 12th of February, 1901. They quarreled and separated in October, 1902, and resumed marital relations again in December, 1902. They had another falling out in March, 1903, shortly after the birth of the only child, a daughter, and separated, not to again resume marital relations until March, 1905, during which period the attempted marriage and living with Semple by the defendant occurred.

There are but two issues in the case—one as to whether condonation has been proven, and the other as to who should have the custody of the child, if a divorce is granted.

[1] The burden was upon the defendant to prove condonation. Various witnesses were called who swore that petitioner was fully aware of defendant's living with Semple as his wife for several months during the period of separation of petitioner and defendant from March, 1903, to March, 1905. This testimony of the defendant was contradicted by witnesses called for the petitioner, resulting in a very confused and unsatisfactory condition of the proofs. To ascertain the truth in this situation, it is helpful to scrutinize closely the character of the parties and their general conduct and their relations to each other. For this reason considerable latitude was given counsel in the examination of petitioner and defendant. George A. Redding, the petitioner, was engaged in the fish business at the time of his marriage. Since 1904 he has been borough clerk of Anglesea, N. J., at a salary of \$500 a year and is still engaged in the fish business. In the summer of 1902 and 1903 he was employed as a life guard at Atlantic City. In the winter of 1902 he drove a wagon for Gimbel Bros. During the summer of 1904 he was employed at a hotel called "Singer's," a saloon in Atlantic City. On the witness stand he appeared to be a man of considerable physical pow-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

er and bold in character. He testified that because his wife did not tell him in May, 1912, why she was leaving him, he swore at her, using such language as "to hell with you," and worse language not necessary to quote. In September, 1902, he wrote his wife a letter (Exhibit D 13), in which he said: "I went to St. Louis and found out that the job was not what it was cracked up to be. I came home yesterday, Wednesday"—when, in fact, he testified he had not been to St. Louis, and had no job there. He was arrested in May, 1903, on a charge of theft, and was in jail about a week, and was then discharged, the grand jury finding no bill, but he forgot this episode, and also that he had written a letter from jail to Mrs. Redding, and it was only upon the production of the letter at the trial that he remembered his incarceration. He testified that while he and his wife were living together at Anglesea, after the Semple affair, he carried on correspondence and had séances with other girls. He swore that he had had no correspondence with other women within the last two years. He denied that he intended to admit adultery with any one when he testified that he had séances with other women. He seems to be fond of his child, and has voluntarily contributed \$10 a month for the child's support since the separation in May, 1912.

Mrs. Redding, during the periods when she was separated from her husband (and not living with Semple) and at the time of the trial, was living with her mother, Mrs. Jones, either in Millville or Atlantic City. The testimony of various witnesses tended to show that, excepting the single instance of her illicit matrimonial adventure with Semple, she is a woman of good character, not addicted to drink, who took good care of her child, and when she kept house for her husband, the petitioner, he swore she took good care of him and the household. He said he believed she was true to him since they resumed their life together in March, 1905. Her appearance on the stand indicated to my mind a woman of somewhat weak or vacillating, but not of bad character.

Having in mind these general characteristics of the parties, the defendant offered evidence tending to show her husband's knowledge of her life with Semple. She says she lived with Semple until November, 1904; that they then parted, and she went to live at Millville, with her mother and her child. In the month of March, 1905, Mrs. Jones, the defendant's mother, having written to Redding that the child was sick, Redding, the petitioner, appeared at the Jones house, and a conversation occurred between petitioner and defendant, which the petitioner opened by saying, "What has become of your man?" to which she replied substantially that she had not any man, that he had gone. The man was not further discussed between them, and Semple's name was not mentioned.

That same night Redding stayed with his wife at her mother's, and they resumed marital relations, and a few days afterwards he went to Anglesea, and she followed, and they lived together as man and wife until May, 1912.

This story of Mrs. Redding's is substantiated by her mother. Redding admits having received the letter from Mrs. Jones, the defendant's mother, and that, as requested by it, he went to Millville, and saw his wife, and arranged that they should live together again. In conformity with that arrangement, he says they shortly afterwards resumed marital relations at Anglesea, which continued until May, 1912. He denies, however, having held the conversation above referred to. Mrs. Yard, Mrs. Redding's sister, testifies that she made them a visit when petitioner and defendant were living together at Anglesea in 1905, and that the parties quarreled, and, in her presence, Redding said to his wife: "I am doing you a favor to live with you after you being married." Redding denies having made this statement. The next occasion when Redding is said to have disclosed knowledge of Mrs. Redding's relations with Semple was in January, 1907. Mrs. Redding testified that her husband showed her and read her two letters (which were offered in evidence). The first of these letters was contained in an envelope addressed, "Mrs. George Reading, Anglesea, New Jersey." The postmark on it reads, "Atlantic City, N. J. Dec. 29, 1906. 6 a. m." The letter itself, dated "12/28/06," starts thus: "Mrs. Sample or Mrs. Reading eather one will do I guess all right as yours father wishes me to tell you he has proofs that you have two Husbands living at this present time as youre Husband No. 2 visits us quite often." The letter contains frequent reference to husband No. 2. The second of these letters was contained in an envelope addressed to "Mr. George Redding, Anglesea, New Jersey, Book 106." It was postmarked Atlantic City January 3, 1907. The letter itself is dated "1/2/07," and begins: "Mr. George Redding Kind Sir Yours letter received where you said you Opened youre Wifs letter wich I am very glad you did for I wanted you to see what was in it as far as I am consuraned I am not afraid of any thing what I have said. you said the letter came to you like a thunderbolt I do not see how that can be for I was told that you had warned this mr. Sample and Mag frome going to geather so therefor you must of knowed him or you would not of doen that," etc.

Mrs. Redding says she did not receive the letter addressed to her, above mentioned, until she was shown that letter and the one addressed "Mr. George Redding," that they were both shown to her by her husband in 1908. She says her husband read the letters to her, and said: "I am not going to pay any attention to it because somebody is going to

try to make trouble again for us." Later she testifies that he said: "I have two letters from Mrs. Cronin at Atlantic City about your marriage. What have you got to say about it?" She replied: "Nothing. You knew it long ago." To which he replied: "What if I did know?" and she answered: "Poor time to start trouble." Mrs. Cronin testifies as to these letters that she wrote the letter of December 28, 1906, to defendant, and received a reply signed, "George Redding." Although she did not know his handwriting, and did not know him personally, she took it to be his letter, and wrote the answer of January 2, 1907. She did not produce Redding's reply, and said she must have destroyed it with some other papers. Redding denies ever seeing the letters before the trial, and denies any conversations with his wife about them. I am inclined to believe the testimony of Mrs. Redding and Mrs. Cronin in regard to these letters, and Redding's possession of them. It will be observed that the letter of December, 1906, is addressed to "Mrs. George Reading," the writer apparently being unfamiliar with the proper spelling of the last name, but the letter of January, 1907, addressed to "Mr. George Redding" is correct in this respect; the latter's name being spelled as petitioner spells his name. The envelope containing the letter of January, 1907, also bears a post office letter box number, which was not on the envelope containing the former letter, thus indicating that the writer must have been informed on those two points.

The next exhibition of knowledge on the part of the petitioner is testified by the wife to have occurred in 1908, when Redding showed her a marriage certificate which was offered in evidence and marked "Exhibit D 1." It is dated October 22, 1903, and certifies that William Sample and Miss Maggie Jones, both of Atlantic City, were married by W. H. Burrell at Camden. The certificate is witnessed by Alma H. Burrell. Defendant testifies that her husband came to her with this paper, and said: "Look what I have got. This is good proof of your having married," etc. She says, after he had showed it to her, it was in his possession in Anglesea up to the time of their separation. A sister of the defendant testifies that Redding showed the certificate to her, and said: "Here is a certificate, the proof of Maggie's marriage." The true history of this certificate is hard to come by. Mrs. Redding testifies that, when her husband showed it to her, he said he got it from Mrs. Cronin. Mrs. Yard, a sister of Mrs. Redding, swears she saw the certificate in the Redding house, while the parties were living together. Mrs. Warren Gordon, a neighbor of the Reddings, swore that she saw the certificate, Exhibit D 1, three or four years ago in the Redding house at Anglesea, when Mrs. Redding took it out of a bureau drawer and showed it to her. Mrs. Cronin testified that she got the certificate by mail after a person-

al visit to Miss Burrell in Camden, and that she gave the certificate to Mrs. Redding's father or grandfather some time prior to June, 1909, and did not give it to Redding whom she did not know. Miss Burrell testified she was visited by Mrs. Cronin, and at her request made out the certificate (D 1) which was a copy of a lost original, and gave it to Mrs. Cronin some time in October, 1909. Mrs. Cronin says that certificate (D 1) was not the certificate received from Miss Burrell. Miss Burrell says she never made out the one certificate since the original, and that Exhibit D 1 is the one she gave to Mrs. Cronin. So far as matters of date are concerned, the witnesses were very hazy and unsatisfactory. I could conclude nothing from their testimony in regard to dates. Even the petitioner and the defendant in their pleadings both err in stating they resumed marital relations in March, 1904, and each so testified on the witness stand, but at the closing of the case they corrected their testimony in this regard, asserting that it was in March, 1906, which I believe was the true date.

All this testimony touching Redding's producing and talking of the marriage certificate and having it in his possession is denied by him explicitly, and he tells this story. The certificate (D 1) being produced by him at the trial in response to the call of the defendant's counsel, he says that in May, 1911, while he and his wife and child were living together at Anglesea, his wife left him without cause, taking the child with her. Some three weeks afterwards he received a letter from a man named Ed. Fair, which letter was admitted in evidence, dated June 3, 1912, stating that their mutual friend, Frank Wilmer, was dead, and that before he died he had told the writer that Maggie (meaning Mrs. Redding) had married another man while Redding was in Florida seven or eight years ago. The letter requested that the petitioner should call upon the writer. Redding testified that he did call in response to the letter, and that Fair then gave him the certificate (D 1), and that that was the first time he had ever seen it and was the first time he had ever heard of his wife's attempted marriage or of her living with Semple. Fair says that he called upon Wilmer when he was sick; that Wilmer told him to get some papers out of his trunk, which he did, and among which was the certificate (D 1). Fair in his first examination says he got the certificate from Wilmer's trunk in September or October, 1911; that he kept it from that time until June, 1912, without saying anything to Redding about it, but that, when he heard of Redding's separation from his wife in May, 1912, he felt justified in showing it to him. Fair was recalled at the end of the case to correct his dates, and he then said he got the certificate from Wilmer's trunk in July or August, 1910, or 1911, so that he must have had this certificate for either 10 months or a year and 10 months, but does not seem to

know which, before he showed it to Redding. There was no testimony to show how Wilmer came by the certificate. He was a friend of Redding's, however, and may have had it from the petitioner. There seems to be no conflict of dates in this regard, i. e., Wilmer may have had the certificate from July, 1910, till Fair delivered it to Redding, and still the story told by Mrs. Redding and her witnesses as above detailed may be true, so far as mere possession of the certificate is concerned. So, as to Redding's knowledge of the existence of the certificate, the preponderance of the evidence is certainly against his story of how he came by the certificate.

The final separation of petitioner and defendant occurred in May, 1912. She testifies (and in this she is supported by her mother) that he told her to get out; that he could not stand any longer her having lived with Semple; that she must leave his home. He denies this story, and says he did not know she was going, but came to his home one day in Anglesea and found her packing up. She would not tell him why she was going, but asked him to kiss her good-bye. A few days after her departure, he wrote two letters, one to Mrs. Redding's mother. This letter is dated May 10, 1912, in which he asks her: "Don't you think that Maggie and little Maggie had better come home, as I am very sorry for which I have done and said, and I promise you that I will forget and forgive the past and I will never mention it again," etc. He further says he is going to write to Maggie. Then he says: "Now that I come to think of it I have no one to blame but myself as I know that I was the cause of it all years ago, but I am in right here and I don't want to break up my home as I know what it is and what it will mean to little Maggie and myself. Now I am going to write to Maggie and ask her to come home before it gets out and I know that she will never regret it as I promise to do as I say," etc. He then wrote a letter dated May 11, 1912, addressed to "My dear wife & child." In this letter he says he is sorry for what he has said and done, and wants to come home. He says, "I will never cause you to regret it and will forget what has happened." Then he goes on to say: "Now I don't want to break up this home, as I have been quite a while making it, and I know that it is all my fault, and that I was the cause of it some years ago, while we were living in Atlantic, now don't think I will ever mention what has happened, I will forget and forgive the past, and I want you to do the same." What facts, then, in their previous marital life are referred to by the allusions in these letters about forgetting and forgiving the past and that he was the cause of it all years ago? Redding undertook to explain these references in the two letters; his explanation being that in the letter of May 10th, when he said he had no one to blame but himself, he referred to what hap-

pened in September, 1902, which was the time of their first separation. The testimony of Mrs. Redding in regard to the separation of September, 1902, was this: "In September (1902) my husband chased me out, and went away with another married woman (naming her) from Atlantic City." This testimony does not seem to be specifically denied by the petitioner. He explains the language in this letter, "I have no one to blame but myself because I was the cause of it all years ago," by saying that he referred to trouble in Atlantic City; that there was too much mother-in-law; that she wanted to live with her mother, and he could not see it, etc. At that time they were living on Texas avenue, and the mother was living in another house just back of them. These explanations do not explain, but, having in mind what had occurred between the parties, the letters seem to bear out the theory that Redding knew of the Semple marriage. These letters show an assumption by Redding for all the blame of their matrimonial troubles, and that he was the original cause of the trouble, and therefore is willing to forget and forgive acts which she did which required such forgiveness on his part, in order that there should be a continuation of marital relations.

The language in these letters perfectly fits the following facts appearing in the testimony: In September, 1902, she says he left her to go with a married woman. They resumed marital relations in January or February, 1903, following, and she testifies that in February, 1903, he was out every night meeting a woman called Nellie Burk. She refused to put up with this, and told him he could go, and he went. Then she says she did not see him again until March, 1905, when he came to Millville and persuaded her to resume housekeeping with him. Redding had admitted on the stand having séances with other women, correspondence with other women, and having received letters from Nellie Burk, one of them being dated as late as September 1, 1910, when he was living with his wife at Anglesea. If these things are true and the separation of September, 1902, and February, 1903, were on account of his running with other women, then he was the first at fault in offending against their marriage contract, and having left her for that reason she thereafter, by reason of his absence, went through the form of marriage and lived with Semple. For this he was in these letters taking the blame upon himself, stating that he was the original cause of all the trouble, asking her to forgive him for that and saying that he would forget and forgive her part in their troubles. This seems to me to be the natural explanation of the language he uses in the two letters of May 10 and May 11, 1912. In each letter he says, "I will forget and forgive the past," and that he wants her to do the same. In each letter he says

he will never mention again what has happened. It is difficult to come to any other conclusion than that Redding knew that his wife had lived with Semple. The defendant lived with Semple as his wife openly from March, 1903, to November, 1904. Part of the time they were living together as husband and wife in the home of her sister and her sister's husband. They were so living together in Atlantic City and Philadelphia. During most of this time Redding was living in the same localities. In the spring of 1904 he was living at Anglesea. He was in Atlantic City in the summer of 1904, tending bar for Singer. While at Singer's his mother-in-law brought the little girl in to see him frequently, and he gave Mrs. Jones money for his wife. He says in reply to a question from his own counsel that he would not talk with Mrs. Jones about Mrs. Redding because he constantly saw the latter, his wife, all this occurring in 1904, when she was living with Semple in Atlantic City.

The probabilities are with the defendant's story. This case differs radically from the numerous cases in which the wife has a lover whom she clandestinely meets. Here is the open and notorious character of the living together of his wife with Semple in the community in which he was working. They had mutual friends, who knew of the Semple affair, and he had friends who knew of it. Indeed, most of the witnesses who testified on the subject (except Redding, himself) seemed to have known of the relations between Mrs. Redding and Semple—Yard, his brother-in-law, who was called as a witness; Wilmer, who Fair swore had the certificate (D 1) in his trunk prior to his death in 1910; Fair, who took that certificate from Wilmer's trunk, and had it from one to two years before the separation of the parties in May, 1912. It is difficult to believe that all of these close friends of the petitioner having this knowledge should not have mentioned it to him, and should have carefully kept their knowledge from him. I have endeavored to confine this discussion to such facts as the defendant has supported by her own testimony and that of additional witnesses or of circumstances supporting her testimony, and which facts have only been controverted by Redding himself or by one witness.

[2] Upon the whole, my conclusion is that the burden of proving condonation has been sufficiently carried by the defendant, under the rule prescribed in *Letts v. Letts*, 79 N. J. Eq. 630, 82 Atl. 846; *Graham v. Graham*, 50 N. J. Eq. 709, 25 Atl. 358. I will therefore advise a decree refusing a divorce and dismissing the petition.

[3] Application for the custody of the child is also denied, as the court has no jurisdiction over the custody of the child in this proceeding, unless a divorce is granted. *Weigel v. Weigel*, 60 N. J. Eq. 331, 47 Atl. 183.

TATMAN v. PHILADELPHIA, B. & W. R. CO.

(Court of Chancery of Delaware. Jan. 22, 1913.)

1. COMPROMISE AND SETTLEMENT (§ 17*)—POLICY OF LAW.

It is the policy of the law to sustain the compromise of disputed claims, and in the absence of fraud or mistake an executed agreement of settlement of an unliquidated claim is as effectual as an estoppel against the parties again litigating it as a final judgment.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 66-74; Dec. Dig. § 17.*]

2. RELEASE (§ 16*)—SETTING ASIDE—GROUNDS—MUTUAL MISTAKE.

To invalidate a release because of mutual mistake, it must relate to a past or present fact material to the contract, and not to an opinion as to future conditions.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 81; Dec. Dig. § 16.*]

3. RELEASE (§ 16*)—PERSONAL INJURIES—VALIDITY—MISTAKE OF FACT.

Where a release for personal injuries covers only particular injuries, while there were others unknown to both parties, there is such a mistake of fact as will authorize equitable relief against using the release as a bar to a claim for the unknown injuries, though the specific description was followed by general language.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 31; Dec. Dig. § 16.*]

4. RELEASE (§ 17*)—PERSONAL INJURIES—MISTAKE.

An innocent misrepresentation by defendant's physician, relied on by both parties, as to the kind of injury received by plaintiff, may avoid the release.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 32; Dec. Dig. § 17.*]

5. RELEASE (§ 16*)—PERSONAL INJURIES—"MISTAKE OF FACT."

A release for personal injuries was of "all claims and demands which we or any of us have or can have" against the railroad company named "for or by reason of any matter or thing whatsoever, and more especially by reason of losses and damage sustained" because of personal injuries, and further recited that the company paid the money in compromise of the claim released, not admitting any liability. When the release was executed, both parties believed that the injury to releasor was only a superficial scratch on the cornea of the eye, relying upon statements by the company's physician, made in good faith, to that effect, when in fact the injury was from a deep penetration through the eye, including the retina, which afterwards caused loss of sight. *Held*, that there was a "mistake of fact" as to the extent of the injuries, so that equity would enjoin the use of the release as a bar to an action by releasor for damages for the injuries not known when the release was executed.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 31; Dec. Dig. § 16.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4542, 4543; vol. 8, p. 7723.]

6. INJUNCTION (§ 108*)—RELIEF—CONDITIONS PRECEDENT.

Where defendant railroad company paid a claim for personal injuries to releasor by way of compromise without admitting liability, releasor should repay the consideration received as a condition to securing an injunction to restrain the use of the release as a bar to fur-

ther recovery on the ground of mistake in executing it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 184-186; Dec. Dig. § 108.*]

Action by Blema B. Tatman against the Philadelphia, Baltimore & Washington Railroad Company. Decree for plaintiff as stated.

The bill in this cause was filed by Blema B. Jones, a minor, by her next friend, Alexander Jones, to restrain the pleading of a release by the Philadelphia, Baltimore & Washington Railroad Company in a suit at law for damages as a result of injuries sustained by the complainant by the explosion of powder in transportation over said company's railroad. Upon the complainant's arrival at 21 years of age, upon petition, she was permitted to prosecute this cause in her own name and right; she having married one Tatman since the filing of the bill. The matter was heard on bill, answer, testimony and exhibits.

Hugh M. Morris, of Wilmington, for complainant. Ward, Gray & Neary, of Wilmington, for defendant.

THE CHANCELLOR. This was a bill to enjoin a defendant in a suit at law from pleading a release. On December 2, 1903, Blema B. Jones and her mother, Addie M. Jones, were injured at Greenwood by an explosion of powder being transported in a car by the Philadelphia, Baltimore & Washington Railroad Company. At the February term, A. D. 1904, of the Superior Court of New Castle County, suit was brought by the complainant, then a minor, by her next friend, against the company for damages for her injuries so received. After the declaration had been filed in that suit, the plaintiff therein, by her next friend, filed a bill in this court asking that the defendant be enjoined from using as a defense the release made by Blema B. Jones and others, dated February 4, 1904, given under the following circumstances: Beyond slight bruises, the injury received by Blema B. Jones was to one of her eyes. She was attended by the physician usually employed by the family, and by another physician, an eye specialist of repute, both of whom were employed for the purpose by the railroad company and by it paid for their services. These physicians told the injured girl, her parents and one Dorrance, an agent of the company, engaged in settling claims of those injured by the explosion, that the injury to the girl's eye was only a scratch on the surface of the eye, and one of them said that glasses would bring the eye right. Relying on these representations the parents of Blema B. Jones, who was then a minor over 14 years of age, agreed with Dorrance upon a settlement for the injuries sustained by Blema B. Jones and her mother, who also received personal injuries by the same explosion. On February 4, 1904, a joint release

was executed by Blema B. Jones, her father and mother, and John C. Barwick, who had been appointed guardian for the child. The sum of \$3,400 was paid for the release for the injuries to Blema B. Jones and her mother without either stating in the release the character of the injuries, or distributing or separating among those entitled thereto the sum paid for the injuries to the two persons. It was agreed, however, between all parties thereto, including Dorrance for the railroad company, that the sum of \$500 was for the injuries to Blema B. Jones, and this sum, being part of the \$3,400 mentioned in the release, was received by her guardian.

Afterwards the injuries to the eye of Blema B. Jones were found to be different from that which all concerned considered to exist at the time of the release. She lost the sight of the injured eye, and another specialist found that the eye, instead of being superficially scratched, had been penetrated deeply through four coats, including the retina, and the injured eye was removed. There was no dispute as to the testimony and the defendant offered no evidence. The complainant tendered herself ready to repay to the company the sum of \$500, which she received through her guardian, and this offer, though made on her behalf when she was an infant, is now enforceable as a condition for a decree in her favor, since she has now attained her legal majority.

By the bill the complainant seeks to prevent the use of the release as a defense to her suit for damages. To the bill the defendant demurred generally. This demurrer was overruled by Chancellor Nicholson, who in a brief opinion found that the facts constituted a mistake with regard to an actually existing fact and an erroneous description of the wound actually inflicted, and, therefore, that it was such a mistake as falls within the well-established principle that a court of equity will give relief by way of canceling a contract based on a mistake of actually existing facts.

The release was that of Blema B. Jones, her father, mother and guardian (her mother having been injured by the same explosion), of "all claims and demands which we or any of us have or can have, against the said the Philadelphia, Baltimore & Washington Railroad Company, or their successors, for or by reason of any matter, cause, or thing whatsoever, and more especially by reason of losses and damages sustained by us in consequence of personal injuries received by the said Addie M. Jones, wife of the said Alexander Jones, and injuries received by the said Blema B. Jones, minor daughter of the said Alexander Jones and Addie M. Jones, which were caused by the explosion of glycerine powder in a car of a train at Greenwood, in the state of Delaware, on December 2, 1903. And the said the Philadelphia,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Baltimore & Washington Railroad Company, in paying the said sum of money, do so in compromise of the said claim and demand above released, not admitting any liability on account of the same."

By the pleadings and proofs, then, it appears that a release was given for personal injuries, all the parties to the release, both releasors and releasee, believing that the injuries were of a certain kind, while in fact they were not only more serious in extent, but different in kind, for it is fair to say that a superficial scratch of the cornea of the eye is quite a different kind of an injury from a deep penetration through four coats of the eye, including the retina. Again it appears clearly proven that all parties relied on the physicians of the company and their representations without independent advice, and that the statements were made and treated as the basis of the settlement which was induced thereby. It is also true that there is no evidence of bad faith on the part of the medical attendants, but of a mistake in diagnosis. Under such circumstances no fault is attributable to the complainant, or those acting for her, in accepting the settlement and giving the release, under the circumstances here alluded to, or under any shown in the evidence.

[1] In this state the particular questions here raised have not been passed on, though there are some decisions here on the general subject of equitable relief against mistakes. None of them, however, seem to be pertinent. The law respecting unsettling settlements is well stated by Judge Sanborn thus:

"The policy of the law has always been to promote and sustain the compromise and settlement of disputed claims. It loves peace, hates broils and dissensions, and discourages the prolongation of litigation and the revival of controversies which have once been closed. The judgment of a court settles the claims submitted to it, and estops the parties from again litigating them after they have been adjudicated. In the absence of fraud or mistake, an executed agreement of settlement of an unliquidated or disputed claim constitutes as conclusive and as effectual an estoppel against the parties to the compromise from again litigating the claim thus settled as the final judgment of a court of competent jurisdiction, to the effect that the rights of the parties are as they are set forth in the agreement; and such a contract is always upheld by the courts. *Kercheval v. Doty*, 31 Wis. 476, 484; *Bank v. McGeoch*, 92 Wis. 286, 313, 66 N. W. 606, 614; *Hennessey v. Bacon*, 137 U. S. 78, 11 Sup. Ct. 17, 34 L. Ed. 605; *Van Trott v. Wiese*, 36 Wis. 439; *Zimmer v. Becker*, 66 Wis. 527, 29 N. W. 228; *Woodford v. Marshall*, 72 Wis. 132, 39 N. W. 376. Nor will such agreements be lightly disturbed upon confused, conflicting, or uncertain evidence of fraud or mistake. The burden is always upon the assailant of the

contract to establish the vice which he alleges induced it, and a bare preponderance of evidence will not sustain the burden. A written agreement of settlement and release may not be rescinded for fraud or mistake unless the evidence of the fraud or mistake is clear, unequivocal, and convincing." *Chicago, etc., Ry. Co. v. Wilcox*, 116 Fed. 913, 54 C. C. A. 147, 148.

[2] In order to invalidate a release on account of mutual mistake, the mistake must relate to a past or present fact material to the contract and not to an opinion respecting future conditions as results of present facts. *Chicago, etc., Ry. Co. v. Wilcox*, 116 Fed. 913, 54 C. C. A. 147; *Nelson v. Chicago, etc., R. Co.*, 111 Minn. 193, 126 N. W. 902, 20 Ann. Cas. 748; *Houston, etc., Co. v. Brown* (Tex. Civ. App.) 69 S. W. 651 (1902); *Homuth v. Railway Co.*, 129 Mo. 629, 31 S. W. 903.

The case of *Chicago, etc., Co. v. Wilcox*, 116 Fed. 913, 54 C. C. A. 147 (1902), well illustrates the difference between a prognosis and diagnosis. There the plaintiff's hip had been broken and she compromised and released her claim, knowing when she settled that her hip had been broken and that it was a bad break. Her physician, who was also the physician of the company, stated his belief that she would be well within a year and believing this she settled. She was mistaken as to the duration of the injury and the disability turned out to be permanent. The bill to rescind the release was dismissed because her mistake was not a mistake of fact, but an opinion or belief as to the future event. Judge Sanborn well expressed the distinctions between mistakes in prophecy as to future, uncertain events:

"Again, it is not every mistake that will lay the foundation for the rescission of an agreement. That foundation can be laid only by a mistake of a past or present fact material to the agreement. Such an effect cannot be produced by a mistake in prophecy or in opinion or by a mistake in belief relative to an uncertain future event. A mistake as to the future unknowable effect of existing facts, a mistake as to the future uncertain duration of a known condition, or a mistake as to the future effect of a personal injury, cannot have this effect, because these future happenings are not facts, and in the nature of things are not capable of exact knowledge; and everyone who contracts in reliance upon opinions or beliefs concerning them knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may turn out to be mistaken, and assumes the chances that they will do so. Hence, where parties have knowingly and purposely made an agreement to compromise and settle a doubtful claim, whose character and extent are necessarily conditioned by future contingent events, it is no ground for the avoidance of the contract that the events happen very dif-

ferently from the expectation, opinion, or belief of one or both of the parties."

This is the test he applied: "Is the evidence in this case clear and convincing that the complainant was induced to compromise her claim and to execute her release by a mistake of past or present fact material to her contract?"

In *Houston, etc., Co. v. Brown* (Tex. Civ. App. 1902) 69 S. W. 651, the plaintiff's arm had been broken by the defendant company, and the physician of the company, who attended him, told him it had knitted together and that the arm was well. Relying on this the plaintiff settled and gave a release. The court found that the doctor made the representation for the purpose of inducing a settlement. In fact the arm had not knitted and was practically useless. The court said the statement about the knitting of the fracture was not a matter of opinion but of fact. The fact that it was not intentionally false, and was an innocent misrepresentation, did not affect the right to a rescission. The release was not binding when given under such circumstances.

In *Nelson v. Chicago, etc., Ry. Co.* (1910) 111 Minn. 193, 126 N. W. 902, 20 Ann. Cas. 748, the plaintiff had a broken leg and the attending physician expressed a mistaken, but honest, opinion as to the period within which the plaintiff, suffering from a known injury, would recover. The opinion had no connection with the settlement. A release relying on the statement was held to be valid.

"The mistake related to the length of time probably required for recovery for a broken leg. It was not a misrepresentation or misstatement relating to a past or a present existing fact."

[3] Where the release given states the particular injuries compensated for, and there were other injuries unknown to both parties to the release, there is such a mistake of fact as will invalidate the release and equity will give relief against the use of the release to bar the claim for damages for the injury unknown at the time of the release. *Lumley v. Wabash R. Co.*, 76 Fed. 66, 22 C. C. A. 60; *Railroad Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581. This principle would apply even if there were in addition general language following the description of specific injuries, for the general language would be held to refer to the specific injuries. *Lumley v. Wabash R. Co.*, 76 Fed. 66, 22 C. C. A. 60.

"We put our judgment upon the facts stated in this bill, to wit, that both parties supposed the complainant had received certain injuries, the extent and character of which were considered and discussed with reference to the time which the injured party would probably lose in consequence thereof. In such a case, if a release is given specifically mentioning the particular injuries, known and considered as the basis of settlement,

general language following will be held not to include a particular injury then unknown to both parties of a character so serious as to clearly indicate that if it had been known the release would not have been signed." *Lumley v. Wabash R. Co.*, supra.

But there are cases which hold that where the release compromises and settles for all injuries known and unknown resulting from a particular accident, the discovery of other injuries unknown at the time of the settlement would not of itself be ground for setting aside the release. In the case of *Lumley v. Wabash R. Co.*, supra, the matter is thus stated:

"If one agrees that he will receive a given amount in satisfaction and settlement of his damages sustained through a particular accident it is not essential that every possible consequence of that tort shall be mentioned, considered or enumerated. The subsequent discovery by one giving such a release, that he was worse hurt than he had supposed, would not, in and of itself, be ground for setting aside the settlement or limiting the release."

When the parties to the release deal at arms' length and the person injured has advice independent of that of the physicians of the releasee, then it may be a sound rule to adopt that a general release for all injuries, known and unknown, received by a particular accident, which release does not specify particular injuries, would be binding though injuries unknown at the time of the release were afterwards discovered.

The case of *McCarty v. Houston, etc., Co.*, 21 Tex. Civ. App. 568, 54 S. W. 421 (s. c., 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 854), was such a case. There, there was a general release substantially similar to that in the case before this court. There the only injury considered was a broken ankle, while in fact there were internal injuries unknown to all the parties. It was held that because of the general form of the release it could not be set aside, there being no fraud and the releasor having had an equal opportunity to know the extent and character of his injuries.

"In the face of such an instrument, it cannot be said that all injuries which might be developed as a result of the accident, known or unknown, were not in the contemplation of the parties to the instrument and were not embraced within its terms."

The court distinguished the case before it from *Lumley v. Wabash R. Co.*, because in the latter case certain injuries were specified and the general language of the release was held applicable to those named injuries.

[4] In the case before this court there was an entire reliance on the physicians of the railroad company in the negotiations for the settlement, and but for their statements as to the extent of the injury it is but fair to say that the settlement would not have been

made. These statements as to the wound were untrue. An innocent misrepresentation made by the physician of the releasee, relied on by both the releasor and releasee, as to the kind of injury received by the releasor may be effective to avoid a release induced thereby. *Great Northern Ry. Co. v. Fowler*, 136 Fed. 118, 69 U. C. A. 106; *Thayer, J.*, in *Chicago, etc., Co. v. Wilcox*, 116 Fed. 913, 919, 54 C. C. A. 147; *Lumley v. Wabash R. Co.*, 76 Fed. 66, 22 C. C. A. 60; *Houston, etc., Co. v. Brown* (Tex. Civ. App.) 69 S. W. 651; *McCarty v. Houston, etc., Ry. Co.*, 21 Tex. Civ. App. 568, 54 S. W. 421, s. c., reversed, 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 854.

A case in point is that of *Great Northern Ry. Co. v. Fowler*, supra. There the complainant, a brakeman on the railroad, after being injured went with a claim agent of the company to the physician of the company, who found a scalp wound and a contusion of the shoulder and nothing more, but told the injured man that he was practically well and would be able to go to work in a week or two. Without other advice the complainant settled for an amount equal to wages he would lose, and bills for doctors and nurses. A release was given, which apparently was general in form, without specifying the injuries. Later it developed that the injuries were serious, the disability permanent and a dangerous surgical operation was performed. The Circuit Court of Appeals affirmed the decision of the Circuit Court annulling the settlement and release. The appellate court found that there was a mutual mistake as to the nature and extent of the injuries and that the settlement was induced by the advice of the surgeon of the releasee without other advice, and, therefore, that the release should be set aside. The court distinguished the case before it from one where there was no misrepresentation on the part of the releasee and the releasor simply relied on the opinion expressed by the physician of the releasee employed to examine and report on the injuries. Such a case was *Nelson v. Minneapolis, etc., Co.*, 61 Minn. 168, 63 N. W. 486. Judge Gilbert thus distinguished:

"But it is equally true that a mutual mistake of fact or an innocent misrepresentation of the facts of the releasor's injury, made by the releasee's physician, may be effective to avoid a release induced thereby."

After reviewing a number of cases, the court said that all the cases cited by the appellant were in harmony with the view expressed by the court. Also the court in the case cited found that in *Kowalke v. Milwaukee, etc., Co.*, 103 Wis. 472, 79 N. W. 762, 74 Am. St. Rep. 877, *Seeley v. Citizens', etc., Co.*, 179 Pa. 334, 36 Atl. 229, *Homuth v. Metropolitan, etc., Co.*, 129 Mo. 629, 31 S. W. 903, and *Houston, etc., Co. v. McCarty*, 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86

Am. St. Rep. 854, the releasor either did not rely on the representations of the physician of the company, or had an advice independent of such physician. The decision in *Great Northern, etc., Co. v. Fowler*, supra, made in 1905, has not been reversed or criticised in any case in the federal courts, and indeed has not been cited there. It should be noted that the exact character of the release, i. e., whether general in form, or relating to all injuries from the accident, or for specified injuries, does not clearly appear in the statement of the case last above cited and was not commented on.

In the syllabus by the court in *Chicago, etc., Co. v. Wilcox*, supra, it appeared that the complainant compromised and released a claim for a broken hip, known to her as a bad break. She was induced by the statement of her physician, who was also the physician of the company, to believe, and did believe, that she would be well within a year, and settled on that basis. She was mistaken and her injury and disability turned out to be permanent. The court, reversing the court below, refused to annul the release, because there was no mistake of fact, but of opinion, or belief, as to a future event. Judge Thayer in concurring in the decision, the opinion being by Judge Sanborn, said the settlement should not stand if it was made "while the complainant was laboring under some serious mistake of fact, for which the railroad company was in some measure responsible." He agreed that the testimony did not bring the case within the rule. He further took the ground that if the releasor had been misled by statements of the physician of the releasee as to mere matters of opinion, or prophecy, the settlement was invalid, because of the confidential relation of the physician to the releasor.

McCarty v. Houston, etc., R. R. Co., 21 Tex. Civ. App. 568, 54 S. W. 421, was a case where a passenger was injured and while ill was visited by the physician and claim agent of the company. The only injuries seemed to be a broken ankle. The physician's attention was called to severe pains in the back and bowels of the injured person, but the physician told the injured man that they would be well in six weeks. Relying on this statement, the release, general in form, was for all injuries from the accident without stating any particulars as to what the injuries were. Soon serious trouble with the spine and bowels of the releasor developed. It was sought to annul the release as a bar to an action for damages. The Court of Civil Appeals held that, notwithstanding the form of the release, the misrepresentation of the physician of the company was sufficient to upset the settlement. On appeal the decision was reversed by the Supreme Court, because of the form of the release (see 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 854). It is significant that the reliance of the

releasor on statements of the physician of the company was not certified to the Supreme Court in the statement of facts and so was not considered by that appellate court. The decision in the court below is, therefore, entitled to be regarded as of more weight than that of the Supreme Court.

In *Great Northern, etc., Co. v. Fowler*, supra, the court noted that in the *McCarty* Case on appeal it did not appear that the releasor relied upon the statements or examinations of the physician of the releasee and, therefore, distinguished it from the case there heard.

In the case of *Lumley v. Wabash R. Co.* 76 Fed. 66, 70, 22 C. C. A. 60, 64, the injured person was examined by the physician of the company which had caused the injury. It was supposed that the only injury was a broken arm, and when complaints were made of shoulder pains no examination of that part was made by the surgeon, who told the injured man that it was due to the broken arm and they were sympathetic pains. Based on these facts a release was given. Later a broken shoulder was discovered. The release was set aside. Judge Lurton, in giving the opinion, said there were two grounds of relief, and thus stated the first:

"If the existence of this injury was known or suspected by the surgeon of the defendant, it was his duty, under the facts stated in this bill, to have informed Lumley of the trouble. To say to him that the pain of which he complained was sympathetic, and was caused by the fracture below his elbow, was a positive misrepresentation of the truth, and an operative fraud. To say that Lumley ought not to have trusted or relied upon his opinions or representations, knowing that he was in the service of the company against whom he had a claim, is no answer. On the facts stated he knew that a release was being bargained for upon the basis of his opinion as to the extent and character of the injuries complainant had received, and the probable time he would lose from his occupation by reason thereof. He was under strong obligation to give his honest opinion upon a matter of professional knowledge, upon which he had every reason to know this ignorant man was implicitly relying."

Another ground for giving the relief sought is the mutuality of the mistake as to the kind of injury sustained by the complainant.

[5] Notwithstanding the general terms of the release, the case before this court is not one where it was sought to compromise and settle a general claim for all injuries resulting from a particular accident, known and unknown, but only those known to exist, as reported by the defendant's physician, on whose reports all parties to the negotiations and release rightly relied. If the physicians honestly supposed that the eye was only scratched on the surface, and not penetrated deeply to the retina, either because their ex-

aminations had been superficial, or for other reasons, then the case is one where the release is comprehensive enough to cover a matter of claim unknown to both releasor and releasee, and, therefore, not considered in the settlement. From such mistake, according to settled principles applicable to all mistakes of fact, instead of opinion, equity will relieve.

On both grounds, either of which is sufficient, the court should relieve the complainant from the consequences of the release.

It is undisputed in this case that the releasor and releasee depended on the statements of the physicians of the releasee as to the kind and extent of the injury; that the settlement was induced by these statements, made for that purpose; and that the statements were wrong. Under such circumstances, by all the cases which have been brought to the attention of, or examined by, this court, there exists such a clear mutual mistake as to existing facts, and not as to opinions, as should invalidate the release as a binding settlement, though the release be in form for all injuries received from the accident without specifying the injuries.

[6] By her bill the complainant tendered herself ready to pay back to the defendant, or into court, if and as the Chancellor shall direct, the sum of \$500 received by her guardian from the respondent at the time the release was executed. This is not an unqualified offer, but an offer to repay if so directed. No argument was made on this subject by counsel. Inasmuch as the settlement was made without a binding acknowledgment of liability by the defendant for the injuries to the complainant, but on the contrary the release states that the liability was not admitted and the settlement made as a compromise, the complainant should repay to the defendant the sum of \$500, or make a legal tender of such sum, as a condition precedent to the operation of the injunction, for it may result that the complainant would fall in her action at law for damages.

Let a decree be entered accordingly.

PHILADELPHIA, B. & W. R. CO. v. GATTA.

(Supreme Court of Delaware. Jan. 22, 1913.)

1. APPEAL AND ERROR (§ 977*)—MOTION FOR NEW TRIAL—DISCRETIONARY RULING.

A motion for a new trial being addressed to the court's discretion, a writ of error will not lie to review the court's decision upon it, in the absence of an abuse of discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

2. APPEAL AND ERROR (§ 270*)—EXCEPTION— NECESSITY—DENIAL OF NEW TRIAL.

In the absence of an exception to the denial of a new trial, such denial could not be re-

viewed, to determine whether it was an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1153, 1609, 1610, 1759, 1760, 1763; Dec. Dig. § 270.*]

3. LIMITATION OF ACTIONS (§ 127*)—OPERATION OF STATUTE—AMENDED COMPLAINT.

Where an action for wrongful death was instituted against a railroad company within the one-year limitation period prescribed by 20 Del. Laws, c. 594, by filing a præcipe, and the declaration filed alleged that deceased was an employé of the defendant company, the cause of action stated by an amended declaration, filed after the expiration of the year, alleging that he was an employé of the Pullman Company, and charging the defendant company with the duties owed to a stranger, was not barred by such statute; an action at law being commenced in this state, so as to stop the running of limitations, by præcipe, and not by the plaintiff's declaration, as in many states.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

4. PLEADING (§ 51*)—DECLARATION—COUNTS.

A declaration may contain any number of counts, providing it does not violate the rule against vexatious pleading, and each count presents a separate and distinct cause of action, which is appropriate to the form of action pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 112; Dec. Dig. § 51.*]

5. PLEADING (§ 94*)—ANSWER—SUFFICIENCY.

The defendant must make separate answer to each count, where the declaration contains several proper counts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 191, 192; Dec. Dig. § 94.*]

6. PLEADING (§ 236*)—AMENDMENT.

Under Const. 1897, art. 4, § 24, and Rev. Code 1852, c. 112, § 11, authorizing the Superior Court to allow amendments, the court in its discretion may allow an amendment at any time before judgment, whether limitations would have run against the cause stated in the amendment, if made the subject of a separate action, or not.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

7. TRIAL (§ 143*)—NEW TRIAL (§ 71*)—CONFLICTING EVIDENCE.

Where, in an action for the death of a Pullman car employé engaged in repairing cars, from a car being shifted without warning to him by the defendant railroad company, plaintiff's evidence, taken alone, showed that the accident was due to the defendant's negligence while deceased was exercising proper care, the trial court properly refused to direct a verdict for defendant, or to set aside a verdict for plaintiff, though defendant's evidence on the determining issue whether the deceased was warned conflicted with plaintiff's evidence and was of a more positive character.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.* New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

8. TRIAL (§ 143*)—INSTRUCTIONS—DIRECTION OF VERDICT.

The court should direct a verdict, when the evidence is not controverted, and the law as applied to that evidence produces but one legal result; but when a case involves an issue of fact, on which the evidence is conflicting and would support a verdict for either party, such issue should be left to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

9. NEW TRIAL (§ 72*)—GROUNDS—SUFFICIENCY OF EVIDENCE.

Where the evidence warrants the submission of issues of fact to the jury, the trial court will not, on motion for new trial, disturb the verdict because against the evidence, though the preponderance is against the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 148-149; Dec. Dig. § 72.*]

10. TRIAL (§ 143*)—WEIGHT OF EVIDENCE—POSITIVE AND NEGATIVE EVIDENCE—PROVINCE OF JURY.

The rule that positive testimony outweighs negative testimony does not conflict with the rule that the weight of conflicting testimony shall be left to the jury, but is merely a rule of measurement for use by the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

11. EVIDENCE (§ 586*)—NEGATIVE EVIDENCE.

Where, in an action against a railroad company for the wrongful death of a Pullman car employé engaged in repairing cars, due to the shifting of a car without warning to him, the witnesses who testified that no warning was given while deceased was where he could have heard it had special opportunities, by reason of their being engaged in the railroad yard in occupations similar in the matter of danger, to hear and remember such warning if it had been given, their testimony was not purely negative in character.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2432-2435; Dec. Dig. § 586.*]

Error to Superior Court, New Castle County.

Action by Frances T. Gatta against the Philadelphia, Baltimore & Washington Railroad Company for damages for death of her husband, alleged to have been occasioned through the negligence of the defendant company. Verdict for plaintiff. Defendant brings error. Affirmed.

See same case, 1 Boyce, 293, 76 Atl. 56. Argued before CURTIS, Ch., PENNEWILL, C. J., and WOOLLEY, J.

Ward, Gray & Neary, of Wilmington, for plaintiff in error. Horace G. Eastburn, of Wilmington (Anthony Higgins, of Wilmington, on the brief, for defendant in error.

The court stated the case as follows:

On the trial before the Superior Court for New Castle county, in which a verdict was rendered for the plaintiff, it appears from the testimony, as disclosed by the record, that Charles Gatta, the plaintiff's husband, was, on the day of the injury that caused his death, and for a considerable period theretofore had been, in the employ of the Pullman Company at its car works in the city of Wilmington; that the premises of the Pullman Company were located on the easterly side of and adjoining the elevated tracks of the main line of the defendant railroad company, its buildings and shops were situated some distance southerly therefrom, and between the elevated tracks of the railroad company and the shops of the Pullman Company there was an inclosed yard; that within this yard, placed parallel with the shops of the Pullman Company and the elevated structure of the railroad company,

were three railroad tracks, which were designated and known as tracks A, B and C, A being the one nearest the shops, C the one nearest the elevated road and furthest from the shops, and B the one between the other two; that these tracks were connected at or about the entrance to the yard with tracks and sidings belonging to the railroad company, which further on were connected with its main line of railway; that tracks A, B and C, as well as the yard within which they were located, were the private property of the Pullman Company, upon which Pullman cars stood while being repaired, and over which the railroad company shifted Pullman cars in delivering or receiving them in its business of transportation.

It appears that between the shops and track A there was a wooden platform or flooring and a like platform or wooden passageway between tracks A and B, and that the distance between the shops and track A was about eight or nine feet, and that a heavy wooden fence, six or seven feet high, divided the end of the yard from Twelfth street, somewhat obstructing the view beyond the yard. It is further shown that, on the morning of the accident, five Pullman coaches were standing on track A, at least three of which were uncoupled and stood at short distances apart from each other, that two or more were on track B and that at least one was on track C; that upon that day Gatta was working in what was known as the washstand and hopper gang, and a few minutes prior to his death had been making repairs to a hopper in a car on track B; that approximately five minutes before the injury he left this car for the purpose of seeing his foreman, Cooney, who was in a shop a short distance east of track A; that in going from the car on track B to see his foreman, it was necessary for Gatta to cross track A; that some time on the morning of the accident a shifter had worked on track C, after which it left track C and went out of the yard; that while Gatta was in the shop the shifter approached the yard upon or toward track A, preparatory to doing shifting on that track, and stopped either outside of the yard or partly without and partly within the yard; that while Gatta was still in the shop, the crew of the shifter, which was owned and operated by the defendant railroad company, caused notice to be given that shifting was about to be done on track A, by ringing the bell and by having one of its crew and one of the Pullman employes pass along each side of track A calling, "Look out on track A;" that this warning was given from two to four minutes before Gatta and Cooney came out of the shop on their way back to track B, but whether it was given before or after Gatta went into the shop is a matter of dispute. By some witnesses it was testified that the warning was repeated down to the time of the injury

in such a manner that Gatta could and should have heard it. By others it was testified that no warning was heard after that given at a time when Gatta was in the shops and out of hearing.

It further appears that from the time Gatta left the building until he started between the cars, the cars were still, and while passing between them, Gatta stopped to let some one pass above him from the platform of one of the cars to the platform of the other, and as he afterward proceeded, the shifter caused the cars to come together and he was crushed.

It was shown that upon several of the buildings of the Pullman Company the following notice was posted: "Notice. Employes must not work under cars or on scaffolds or ladders inside of cars or pass between cars while cars are being shifted in the yard. John Cannon, Manager." As to the observance of this rule, witnesses testified in substance that they knew of the existence of the rule, but never paid much attention to it, for while it was a general rule applying to all within the yard, it was likewise generally understood to apply only to those working on or about the track with respect to which warning had been given and that men working on cars on other tracks were expected to keep right on working, in a knowledge that the danger was not on their tracks.

WOOLLEY, J., after stating the case, delivered the opinion of the court.

The errors charged to have been committed in the trial of this case by the court below are 28 in number, of which errors assigned in specifications No. 21 to No. 28, inclusive, relate to the court's refusal to grant a motion for a new trial.

[1] In the practice and policy of the law of this state relative to new trials, a motion for a new trial is a matter addressed to the legal discretion of the court (*Fitzgibbon's Adm'r v. Kinney*, 3 Har. 72, 73; *State v. Layton*, 3 Har. 469, 480), and to the decision of the court upon such a motion, as to the decisions of the court generally upon rules to show cause, a writ of error will not lie. *Burton v. P. W. & B. R. R. Co.*, 4 Har. 252, 254; *Mitchell v. Woodward*, 2 Marv. 311, 313, 43 Atl. 165; *Valley Paper Co. v. Smalley*, 2 Marv. 289, 294, 295, 43 Atl. 176; *Ridings v. McMenamin*, 1 Pennewill, 15, 39 Atl. 463; *Whitaker v. Parker*, 2 Har. 413, 416.

[2] To the refusal of the court to grant a new trial, the record discloses no exception noted by the defendant below or allowed by the court below, nor does the defendant below, now the plaintiff in error, charge to the court below any abuse of its discretion or misconduct in rendering its decision against the motion, that might take the case out of the general rule against reviewing as error the decision of a trial court in a matter ad-

dressed purely to its legal discretion. Therefore, nothing that is assigned as error in the last 8 assignments of error, that is not also embraced in some preceding assignment of error, will be considered in this decision.

[3] Charles Gatta was killed on the 28th day of June, 1907. This action was instituted by his widow on the 9th day of August, 1907, the original declaration was filed on the 8th day of August, 1908, and the amended declaration on the 21st day of January, 1910.

In the original declaration, the plaintiff averred that the deceased was an employé of the defendant company, charged the defendant company with the duties of a master, alleged breaches thereof and sought to recover upon its liability therefor. In the amended declaration, the plaintiff averred that the deceased was an employé of the Pullman Company, charged the defendant company with the duties it owed a stranger, alleged breaches thereof and sought to recover upon its liability for a violation of its duties in that relation.

It thus appears that while each declaration states a cause of action growing out of the same circumstances from which the deceased met his death, the material averments of the two declarations differ, and it also appears that the difference in point of law, consists in the difference in the relations alleged by the two declarations to have existed between the deceased and the defendant, the corresponding difference in duty which the defendant is charged to have owed the deceased and the consequent difference of the defendant's liability for breaches of that duty.

The amended declaration being the one exclusively relied upon at the trial, the defendant moved that the jury be instructed to render a verdict in its favor, upon the ground that the amended declaration presented a cause of action wholly new and wholly different from the one presented by the original declaration, that the amended declaration thus presenting a new cause of action was filed after the expiration of one year from the date upon which the injuries to the deceased were sustained, or at a time when an original action upon the cause of action therein stated would have been barred by the statute of limitations, and therefore recovery upon the cause of action stated by the amended declaration was likewise barred.

The act limiting actions for personal injuries relied upon in support of this motion, provides, that "no action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of one year from the date upon which it is claimed that such alleged injuries were sustained." Chapter 594, volume 20, Laws of Delaware.

The refusal of the trial court to grant this motion is assigned as error and is here submitted for review.

The contention made by the defendant is

a novel one in this jurisdiction, and is based upon decisions of the courts of certain other jurisdictions, which plainly hold that where a cause of action set forth in an amended pleading in a pending litigation is new, different or distinct from that originally declared upon, the amended pleading is equivalent to the bringing of a new action, and the statute of limitations is not arrested by the institution of the suit but runs against the new cause of action down to the time it is disclosed by the amended pleading. *Central Georgia Ry. Co. v. Williams*, 105 Ga. 70, 31 S. E. 134; *Mahoney v. Park Steel Co.*, 217 Pa. 20, 66 Atl. 91; *Box v. Chicago Ry. Co.*, 107 Iowa, 660, 78 N. W. 694; *Union Pac. Ry. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983; *Wabash R. Co. v. Bhymer*, 214 Ill. 579, 73 N. E. 879; *Chicago City Ry. Co. v. Leach*, 182 Ill. 359, 55 N. E. 334; *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367; *Nelson v. First Nat. Bank*, 139 Ala. 578, 36 South. 707, 101 Am. St. Rep. 52; *Fleming v. City of Anderson*, 39 Ind. App. 343, 76 N. E. 267; *Illinois Ry. Co. v. Campbell*, 170 Ill. 163, 49 N. E. 315; *Dobbs v. Pearl* (Sup.) 113 N. Y. Supp. 485; *Wasson v. Boland*, 136 Mo. App. 622, 118 S. W. 663; *In re Spuyten Duyvil Road* (Sup.) 116 N. Y. Supp. 857; *Freeman v. Central Ry. of Ga.*, 154 Ala. 619, 45 South. 898; *Union Pacific R. Co. v. Sweet*, 78 Kan. 243, 96 Pac. 657; *Lane v. Water Co.*, 220 Pa. 599, 69 Atl. 1126; *Lane v. Foundry Co.*, 220 Pa. 603, 69 Atl. 1127; *Hess v. Bir. Ry., L. & P. Co.*, 149 Ala. 499, 42 South. 595.

The merit of these decisions and their value as authority for a like ruling in this jurisdiction, depend largely upon the statutes or policies of law of the jurisdictions in which they were rendered and the bearing which such statutes or policies has upon those that maintain in this jurisdiction.

The methods by which actions at law are instituted in those American jurisdictions that derive their jurisprudence from the common law, have as their original the method of commencing actions at common law. The common-law mode of commencing an action at law was originally by petition to the king, and later, to him, through his Court of Chancery, praying for leave to bring an action in one of his courts of law upon a cause of action specifically stated in the petition. When the prayer of the petition was allowed, there issued an original writ, which in form was a mandate issuing out of the Court of Chancery, in the king's name, directed to the sheriff of the county wherein the injury was committed or the wrong was done, containing a statement of the cause of complaint, and requiring him to demand the defendant either to satisfy the claim and do justice to the complainant, or else appear in one of the superior courts of law and answer the accusations made against him.

The principal object of the original writ

was to confer jurisdiction upon a court of law to hear the matter in controversy, for at common law no action could be maintained in any superior court without the sanction of the king's original writ. Its other object was to compel the appearance of the defendant. As this writ issued out of one court for the purpose of conferring jurisdiction upon another, obviously the writ could not be amended in the latter court. As the jurisdiction conferred by the writ upon the law court was limited to the trial of the specific cause of action stated in it, any subsequent statement of a cause of action different from the one stated in the writ was in excess of the jurisdiction conferred by the writ, and constituted a departure, and of course would not be allowed by amendment. Amendments of pleadings subsequent to the declaration at common law were liberally allowed both in point of character and time (2 Burr. 756), but an amendment to a declaration was restricted to one that did not depart from the action stated in the writ and then only when asked for before the end of the second term, for after that term the amendment was considered "a new declaration" and would not be allowed (1 Wilf. 149, 223; Say. R. 234).

In using the English method of commencing actions at law somewhat as a model, American jurisdictions rejected such of its features as were inconsistent with American institutions and accepted such of them as were considered adaptable to the particular schemes or policies of the law of the several jurisdictions of which they were made a part. Some jurisdictions were impressed with the feature of the original writ which gave the defendant notice not only of the form of action but of the particular cause of action to which he was summoned to respond and in such jurisdictions actions at law are almost invariably begun by petitions, complaints or notices upon which or after which process issues. In such jurisdictions the cause of action as well as the form of action is disclosed by the petition or complaint, and the process, whatever its form, commands the defendant to appear and respond to that particular cause of action. Such is the law in almost every jurisdiction from which authorities are cited by the defendant in support of its contention. These jurisdictions are Alabama, California, Georgia, Indiana, Iowa, Kansas, Kentucky, Missouri, Nebraska, New York and Pennsylvania.

There is an intimate relation between the law that provides methods of commencing actions and the law governing the amendment of actions, for upon the theory upon which actions are commenced depends largely the logic or policy of the theory upon which amendments are allowed. Thus in the states of Georgia, Iowa, Kansas, Kentucky, Missouri, Nebraska and New York, where the cause of action appears in the complaints, petitions or process, the policy of the law is

to restrict amendments to the very cause of action so stated, by providing by express statute for the allowance of such amendments only as "do not change substantially the claim or defense" or when they do not "add a new and distinct cause of action." Obviously then in these jurisdictions, any amendment that sets up a cause of action substantially different from the one to which the defendant was expressly summoned to respond, would present a new or a different cause of action from that first sued upon, and would either be refused, or if allowed, would hazard the operation of the statute of limitations.

The case of *Sicard v. Davis*, 6 Pet. (U. S.) 124, 8 L. Ed. 342, is seldom omitted in the citation of authorities in support of the contention that a new cause of action presented by amendment after the limitation of a statute is barred by the statute. This was an action in ejectment in which the plaintiff alleged a different demise and a new title by an amendment to the declaration, allowed at a time after the defendant had acquired a possessory title to the premises by operations of the statute of limitations. In that case, Chief Justice Marshall stated that "limitations might be pleaded to the second allegation (that is, to the amendment to the declaration), though not to the first, because the second count in the declaration, *being a demise from a different party asserting a different title*, was not distinguishable, so far as respects the bar of the act of limitations from a new action," and the court held that the case stated by the amendment was barred by the act of limitations intervening between the commencement of the action and the allowance of the amendment. This decision, however, when considered in connection with the particular form of action in which it was rendered, has little authoritative bearing upon the case under consideration, for an amended declaration in ejectment, setting up a different demise from a different party and therefore asserting a different title, might readily be held bad in Delaware, not simply because the cause of action stated by it would be new but because in our method of procedure in that form of action, the amendment would not be connected with or related to the parties to the suit without a corresponding amendment of parties, which is against the policy of our laws.

In Delaware an action of ejectment is commenced not by original or other writ, and in this respect it is an exception to the general rule, but by filing a declaration showing at large the premises of which the plaintiff alleges he was possessed by demise and from which he alleges to have been ejected. To this extent the commencement of the action resembles the mode generally pursued in some other jurisdictions. Service is made by delivering a copy of the declaration to the defendant and to the case as stated in the declaration the defendant is summoned

to respond. The common-law fiction of the action maintains in Delaware and therefore the common-law rule maintains that the lessor of the plaintiff must have had the right of possession at the time of the demise mentioned in the declaration, which means of necessity, at or before the commencement of the action. Obviously, then an amendment to the declaration that sets up a new demise from a different party asserting a different title from that declared upon in the original declaration, states much more than a new cause of action in that it states a cause of action between new persons who are not parties to that suit, the nominal plaintiff in an action of ejectment being a fictitious person and the real plaintiff in the action being a fictitious lessor, and of course cannot be maintained without an amendment of parties.

The case of *Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, was cited by the defendant as a controlling authority in support of its contention, because of the similarity of the defendant's liability under the pleadings in that case to the defendant's liability in the one under review, and the pronouncement of the law thereupon by the Supreme Court of the United States.

The plaintiff instituted in Missouri an action to recover for personal injuries sustained in Kansas, and after the removal of the case to a federal court, the question of law under consideration was taken to the Supreme Court of the United States for determination. In the original pleading, the plaintiff alleged that his injuries were occasioned by the negligent act of an incompetent fellow-servant of whose incompetence the defendant had knowledge, and charged the defendant with a violation of its duty as a master to supply him with competent servants with whom to work. After the removal of the case to the federal court, the plaintiff amended his petition, wholly omitting the charge of incompetence of his fellow-servant and the defendant's knowledge thereof, and based his cause of action simply upon the negligent act of the same fellow-servant, charging the defendant with liability therefor under a statute of Kansas, where the injury was inflicted, which gave a servant a right of action against a master for the negligence of a fellow-servant, without regard to the element of incompetence.

Between the time of filing the original and amended petitions the statute of limitations of Missouri intervened. There were really presented two questions, first, whether the case as stated in the amended petition constituted a new cause of action, and if so, was it barred by the statute of limitations.

This case is an authority in point upon the question whether the amended petition restated the original cause of action or presented one entirely new, as the amended pleading in that case deprived the defendant

as a master, of the defense of the servant's assumption of risk and charged it with a new liability under entirely different law, very much as was done by the amended declaration in the case under consideration. The court held that the amended petition stated a cause of action under the statute of Kansas that was in derogation of the general law of master and servant under which the plaintiff had declared in his original petition and therefore constituted a departure and set up a new cause of action. With this conclusion we take no exception. But the court further held that because it was a departure from the original petition and because it set up a new cause of action, the statute of limitations as applied to the new cause of action treated the action as commenced when the amendment was incorporated into the pleadings.

A careful reading of this case discloses that the Supreme Court reached this decision, if not by expressly construing the statutes of Missouri, then certainly by giving to them a consideration that is reflected in the decision, for the decision of the court in this case, like the decisions of the courts under like statutes in other jurisdictions, is in harmony with the policy of the law as declared in the jurisdiction in which the case arose.

In Missouri a civil action is begun by petition upon which a writ issues. Civil Procedure, c. 21, art. 4, § 1756. To the cause of action presented by the petition, the defendant is summoned to respond, and it appears that to that cause of action alone is he required to answer. The petition presenting the cause of action, however, is susceptible of amendment, but amendment of the original petition is restricted by statute to such things as do "not change substantially the claim or defense" (Civil Procedure, c. 21, art. 6, § 1848), which obviously means the claim as made by the original petition. The policy of the law of Missouri, therefore, and of a number of jurisdictions cited by the defendant where actions are begun by complaints or petitions, is to restrict the cause of action and the amendments thereof to the one stated in the original petition, and if another cause of action be stated by amendment, to subject the new cause of action to the operation of the statute of limitations.

Like other American jurisdictions, the state of Delaware in providing a method for commencing actions at law adopted some of the features of the original writ at common law and discarded others. When comparison is made with the methods adopted by other American jurisdictions, and particularly with the methods in the jurisdictions mentioned, it will be observed that many of the features of the common law proceeding which were rejected by this jurisdiction are the very ones which other jurisdictions have considered important enough

to accept, and upon further examination it will be disclosed that in this and in other jurisdictions the principle and effect of amendments in actions at law are consistent with and controlled by the particular policies of law which were adopted by the several jurisdictions in determining their different methods of instituting actions.

Except in certain summary proceedings, an action at law is commenced in this state, not by petition or complaint, but by *præcipe*, which for such a purpose, is a mandate to the prothonotary directing him to issue process or a writ of a particular character in the action thereby instituted, commanding the sheriff to summon the defendant to appear and answer the plaintiff in a particular form of action. The features of this proceeding that distinguish it from the proceeding at common law and from proceedings in some of the jurisdictions that have been adverted to, are that the action is thus begun upon the command of the plaintiff and not upon his petition, the process issues of course and not by leave, the form of action is stated in both the *præcipe* and the process while the cause of action is stated in neither, and the purposes of the writ are to disclose to the court its jurisdiction in an action of that form and to compel the appearance and answer of the defendant thereto.

As causes of action of many different characters may be embraced within one form of action, notably in the form of an action of trespass on the case, the defendant in an action at law instituted in Delaware is not informed of the nature of the plaintiff's complaint or of the character of his cause of action until in the course of the proceeding and pursuant to certain rules for pleading, the plaintiff files his declaration. Then and not until then does he know to what he is summoned to respond.

[4, 5] Under the practice of the courts of this state, a plaintiff has a right to insert in his declaration any number of counts, having regard of course to the rule against vexatious pleading, provided that each count presents a separate and distinct cause of action and that each cause of action so presented is appropriate to the form of action in which it is pleaded, and to each count, constituting as its name signifies, a separate "tale" or complaint, the defendant must make separate answer.

[6] In order to remove from the administration of justice the stigma that existed in early history of trying technical questions rather than merits and deciding causes apart from the objects of the suit, our laws relating to amendments pursued a policy of great liberality and placed a large discretion in the court. The Constitution provides that: "In civil causes, when pending, the Superior Court shall have the power, before judgment, of directing, upon such terms as it shall deem reasonable, amendments, im-

pleadings and legal proceedings so that by error in any of them, the determination of causes, according to their merits, shall not be hindered." Article 4, § 24, of the Constitution of 1897.

Supplementing this declaration of principle, it is provided by statute that: "In any civil cause pending before the Superior Court, the said court shall have power, at any time before judgment, to allow amendments either in form or substance, of any process, pleading or proceeding, in such action, on such terms as shall be just and reasonable." Revised Code, c. 112, § 11.

From this statement of the law, it appears that the only limitation in point of time that is placed upon an amendment in a pending action, within the discretion of the court, is judgment. Within that limitation, the court in its discretion may allow an amendment whenever it pleases. There is no suggestion of limitation of amendments such as may be imposed by a statute of limitations. In truth, the court in promulgating rules for pleading has wholly ignored the contemplation of such a limitation, by providing that the plaintiff shall file his declaration on the second rule day after the return day of the writ. In an action for personal injuries, instituted just before the expiration of the year limited by the statute for such actions, the rule day for the plaintiff's declaration occurs after the expiration of the year limited by the statute for the action. If the statute runs to the statement of the cause of action and is not arrested once and for all by the institution of the suit, then in such case the action is barred when the cause thereof is first stated by the original declaration just as effectually as by a subsequent statement in an amended declaration, and there would then be the anomaly of an action instituted within the year and therefore not affected by the statute of limitations and the cause of action thereof stated in an original pleading after the year being barred by the statute.

It is therefore held that, in view of the character and purpose of original process in actions at law in the state of Delaware, the operation of statutes limiting actions at law is arrested at the time when the action is brought and does not extend to the time when the cause of action is stated and that a cause of action that would have been good in law if stated in the original declaration will likewise be good if stated by amendment.

[7] The remaining errors assigned by the plaintiff in error may be considered in groups, and when classified relate to the errors charged to the court in defining and in failing properly to define to the jury the duty the defendant owed the deceased to warn him against danger and the duty the deceased owed himself to avoid danger, and in refusing to give the jury binding instructions

to render a verdict for the defendant, upon the grounds, first, that the deceased was guilty of contributory negligence; second, that no act of negligence on the part of the defendant was shown; third, that the preponderance of the evidence was with the defendant; and fourth, that the testimony produced for the defendant to disprove negligence was positive, while the testimony for the plaintiff, in proof of negligence, was merely negative.

At the trial of this case there was no dispute as to the character of the place in which the deceased met his death, nor of the lawfulness of the presence and character of work in which the defendant and the deceased were respectively engaged in that place. The deceased was a mechanic employed by the Pullman Company upon the repair of cars. The defendant was a railroad company engaged in moving and placing cars upon the tracks of the Pullman Company for repair. The place was the yard of the Pullman Company connected with and forming a part of its car works, which was covered by a platform upon which were its private lines of tracks running parallel with and adjacent to its shops. The tracks or lines of railway were not used for traffic or for the transportation of anything except the cars themselves, when being placed in position for the purpose of being altered, repaired or renovated or when being removed therefrom. In this respect the place was an open air workshop, and when considered with reference to the care and caution required of all persons moving about it, different in no substantial way from an inclosed shop in which the same kind of work is done.

In a preceding review of an earlier trial of this case by the Supreme Court of this state (2 Boyce, —, 80 Atl. 617), this court announced as law, that there was imposed upon a railroad company a duty to give warning of the approach and movement of its engines and trains to all persons put in danger thereby, and to give such a warning as under the varied conditions of their operation, shall be timely and sufficient. With a particular reference to the testimony produced at the first trial, which in the main is the same that was presented in the trial now under review, the court further held that it was the duty of the railroad company in giving a warning that there was about to be danger upon a particular track, to give a warning not only to those who were present when the warning was given, but to those who were present when the danger came. It contemplated a warning to all who were put in peril. It was not limited to those who were at work within, upon and under the cars upon the track, but extended to those who otherwise might lawfully come within the zone of the impending danger in ignorance of its existence and of their peril. Around this statement of the law revolved the controversy in the second trial below, the

plaintiff below offering testimony to prove that the deceased could not have heard the first warning, for at the time it was given he was within the shops and out of hearing, that no warning was given subsequent to the first warning, that in the progress of his work and in the exercise of all the care and caution required of him in view of the character and location of his occupation, the deceased came from the shops and walked a distance of about a dozen feet directly to the opening between the two cars by which he was crushed without being then or theretofore warned that shifting was about to be done upon the track he was crossing, and without knowledge thereof from anything in the situation which he could have seen or in law would have been required to see; that while the engine was at the other end of the line of cars it was outside of the yard across the street, and if the deceased had looked, his vision would have been obstructed to a greater or less extent by the presence of a gate or fence dividing the yard from the street, and that even if he had seen the shifter standing outside of the yard or heard its bell ring, there was nothing from such an observation to suggest it was about to do shifting in the yard and to put him on his guard and cause him to heed the instructions of a posted notice to employes not to "pass between the cars while cars are being shifted in the yard." As to the insufficiency of the warning, the plaintiff below produced witnesses who were working in, on or under cars located upon the track where the injury occurred, who testified that they heard and obeyed the warning given from two to four minutes before the accident, but that after that warning, they heard no further warning, although they remained relatively in the same positions in which they were when they heard the first warning.

The defendant below on the other hand produced testimony, that the first warning was given at a time from which it might be inferred that Gatta was in the yard and before he had gone into the shops, that the warning was given both by the call of trainmen and by ringing the bell of the shifter from the time it was first given down to the time that Gatta was killed, and that Gatta could or should have heard these warnings, that the shifter was not standing outside of the yard and beyond the street, as shown upon the defendant's own plot, but it was standing partly within the yard so that Gatta, by looking could have seen it and in law should have been required to see it and to have recognized the purpose and danger of its presence, and that he could have heard the bell and should have recognized it, without confusing it with the sound of other bells, and should have heeded the warning which it gave him.

In this state of the testimony, nearly all of which was conflicting and much of which was irreconcilable, the case was submitted

to the jury under the usual instruction by the court relative to conflicting testimony, and out of this testimony, which was considered, and in parts accepted and rejected we assume in the light of such an instruction, the jury evolved a verdict for the plaintiff.

Without reciting the testimony of the case to which the court has given consideration in reaching its conclusion, we consider it sufficient to state that when taken alone, the evidence produced on the part of the plaintiff was sufficient to justify the jury in finding that the injuries to the deceased were occasioned by the negligence of the defendant at a time when the deceased was in the exercise of a care and caution commensurate with the duties of his position and occupation, and that the charge of the court in those respects disclosed no errors either in what was included or omitted.

Opposed to the testimony for the plaintiff and to the inferences it justifies, however, is the testimony for the defendant, which is claimed to be of a weight so much greater and a quality so superior to that produced for the plaintiff, that in law the trial court was bound to instruct the jury to render a verdict for the defendant. From the refusal of the trial court either to grant a new trial or direct a verdict for the defendant, by assuming to determine for which party the testimony preponderated, spring the important errors charged to the court below, namely, that a new trial should have been ordered or a verdict for the defendant should have been directed on the grounds, "third, that the preponderance of the evidence was with the defendant; and fourth, that the testimony produced for the defendant to disprove negligence was positive, while the testimony for the plaintiff, in proof of negligence, was merely negative."

[8] In that branch of the administration of justice in which the courts are called upon to perform the delicate function of directing, sustaining and disturbing the verdicts of juries, without encroaching upon their separate function, courts have adopted for their governance, so far as practicable, certain well considered principles. In the policy of the law of this state, declared by the courts in numberless decisions, the jury is the sole judge of the facts of a case, and so jealous is the law of this policy that by express provision of the Constitution the court is forbidden to touch upon the facts of the case in its charge to the jury. While in jury trials the court may not determine issues of fact from the evidence, the court may, for certain purposes, determine the existence of evidence from which issues of fact may be determined by the jury. By inquiry into the evidence the court will not allow a verdict when the evidence is not sufficient in law to support it, nor will the court sustain a verdict when rendered against the evidence or upon insufficient evidence.

When the evidence in a case is admitted or not controverted and when the law as applied to that evidence is productive of but one legal result, it becomes the duty of the court in the administration of justice, to bind the jury to render a verdict accordingly. To do otherwise would simply entail a postponement of the proper decision of the case, by a retrial ordered on a motion for a new trial, in the event the jury found against the facts. Thus when it appears by a verdict that admitted facts were ignored by the jury, or the instructions upon the law were disregarded, or a clear error of calculation was made, the court will set aside the verdict, or to avoid this, when possible, the court will direct the jury to render the only verdict that could legally be sustained. *Prettyman v. Waples' Ex'r*, 4 Har. 299, 302; *State v. Layton*, 3 Har. 469, 480, 481; *Beeson v. Elliott*, 1 Del. Ch. 368; *Waples' Adm'r v. Waples*, 1 Har. 394, note a; *Allen v. Miles*, 4 Har. 234; *Bailey v. England*, 1 Pennewill, 12, 39 Atl. 455; *Kinney v. Adams*, 2 Har. 357; *Taylor v. Moore*, 3 Har. 6, 7.

[9] But when the case involves a controverted question of fact in which the evidence is conflicting and out of the conflict may be gathered sufficient evidence to support a verdict for either party, the issue of fact will be left severely to the jury, and the court will neither direct nor disturb the verdict upon the ground that it is against the evidence, though it would have drawn from the testimony a conclusion different from that drawn by the jury. *Burton v. P., W. & B. R. R. Co.*, 4 Har. 252, 254; *State v. Brelawski*, 2 Boyce, —, 84 Atl. 950. The absence or presence of conflicting testimony in a case is therefore a controlling consideration by which courts are governed in directing, sustaining, or overturning the verdicts of juries.

It is contended, however, that as the jury is instructed to find for the party with whom, in the maintenance of the issues, rests the preponderance of evidence, it is likewise the duty of the court, when that preponderance is disclosed at the trial, either to direct a verdict in accordance with it, or after trial, to set the verdict aside, if the verdict be found against it. This in the last analysis would make the court the judge of the facts, and if the judgment of the jury upon the issue of fact were to be anticipated or reviewed by the judgment of the court upon the facts, then the function of the jury in determining issues of fact would cease to be exclusive and would become merely preliminary.

It is the province of the jury in the trial of civil cases to consider the whole volume of testimony, estimate and weigh its value, accept, reject, reconcile and adjust its conflicting parts and be controlled in the result by that part of the testimony which it finds to be of greater weight. As the jury is the exclusive judge of the evidence, it must in reason be the exclusive judge of

what constitutes the preponderance of the evidence, and when that judgment is reached upon evidence sufficient to support a verdict, it should not be disturbed by the court. *Smithers v. W. C. Ry. Co.*, 6 Pennewill, 422, 425, 67 Atl. 167; *Simeone v. Lindsay*, 6 Pennewill, 224, 65 Atl. 778; *Waller v. W. C. Ry. Co.*, 5 Pennewill, 374, 61 Atl. 874; *Reed v. Continental Ins. Co.*, 6 Pennewill, 204, 65 Atl. 569; *Cecchi v. Lindsay*, 1 Boyce, 185, 75 Atl. 376; *Lenkewicz v. W. C. Ry. Co.*, 7 Pennewill, 64, 74 Atl. 11.

As in the trial of this case there was sufficient evidence to justify the verdict rendered, the court finds no error committed by the trial court either in refusing to direct a different verdict or in refusing to disturb the one rendered.

[10] Being required to estimate and weigh all the testimony in a case in order to determine where the preponderance lies, juries are frequently required to consider testimony known as positive and negative testimony, and to give to it the peculiar weight and value accorded it by the law. At the trial of this case the court instructed the jury that "the jury in determining the value of testimony may, and often should, give greater weight to positive than to negative testimony, but all the testimony should be considered by the jury, and given such weight as in their judgment it is entitled." To this instruction the defendant below excepted and for error contends, that in view of the negative character of the testimony in proof of negligence and the positive character of the testimony offered to disprove negligence, the trial court should either have directed a verdict in its favor or set aside the verdict rendered against it, and should not have submitted the case to the jury upon the instruction given.

In the case of *Queen Anne's R. R. Co. v. Reed*, 5 Pennewill, 226, 236, 59 Atl. 860, 119 Am. St. Rep. 301, this court recognized the general rule that positive or affirmative testimony is of greater weight than testimony merely negative, that is, the testimony of a credible witness that he saw or heard a particular thing at a particular time and place is more reliable than that of an equally credible witness who, with the same opportunities, testifies that he did not hear or see the same thing at the same time and place. 1 Whart. Ev. § 415; Stark. Ev. 867; Jones, Ev. § 901. The reason for the rule is that the witness who testifies to a negative may have forgotten what actually occurred, while it is impossible for the witness who testifies affirmatively to remember what never existed. *Stitt v. Huidakoper*, 17 Wall. 384, 21 L. Ed. 644. Negative testimony may be attributed to lack of attention, inert mental operations, imperfect senses as well as to the faulty recollection of the witness, while on the contrary, given under circumstances that disclose the witness to have been mentally alert, of perfect senses

and excellent memory, and showing the opportunities of the witness for knowing and the attention he had given the matter concerning which he testifies, negative testimony may lose its negligible quality and outweigh positive testimony. *Greany v. Long Island Ry. Co.*, 101 N. Y. 419, 5 N. E. 425; *Lighthouse v. C. & St. P. Ry. Co.*, 3 S. D. 518, 54 N. W. 320; *Kelley v. Schupp*, 60 Wis. 76, 18 N. W. 725; *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442; *Stoddard v. Kelly's Adm'r*, 50 Ala. 452; *State v. Gates*, 20 Mo. 400; *Van Salvellergh v. G. B. T. Co.*, 132 Wis. 166, 111 N. W. 1120; *Stotler v. Railway Co.*, 200 Mo. 107, 98 S. W. 509; *Pence v. C. & P. Ry. Co.*, 79 Iowa, 389, 44 N. W. 686; *Davis v. N. Y., N. H. & H. Ry. Co.*, 159 Mass. 532, 34 N. E. 1070; *Ellert v. G. B. & M. Ry. Co.*, 48 Wis. 606, 4 N. W. 769; *Elkins v. Kenyon*, 34 Wis. 93; *Purnell v. Railway Co.*, 122 N. C. 832, 29 S. E. 953; *C. & A. Ry. Co. v. Dillon*, 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559.

The courts in different jurisdictions have frequently recognized a qualification of the general rule that positive testimony is of greater weight than negative testimony. *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Innis v. State*, 42 Ga. 482; *M. D. M. Co. v. Harkenson*, 84 Iowa, 117, 50 N. W. 559; *Burnham v. Sherwood*, 56 Conn. 229, 14 Atl. 715; *Cotton v. Railway Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935; *People v. Sanders*, 114 Cal. 216, 46 Pac. 153; *LeCointe v. U. S.*, 7 App. D. C. 16; *McMahon v. McHabe*, 174 Mass. 320, 54 N. E. 854; *State v. Lattin*, 19 Wash. 57, 52 Pac. 314.

The varying qualities of negative testimony under different conditions were recognized by this court in the case of *Queen Anne's R. R. v. Reed*, in which the opinion of the court in *Menard v. B. & M. R. R. Co.*, 150 Mass. 386, 23 N. E. 214, was cited to illustrate its meaning. In that case the court said: "Ordinarily all that a witness can say, in such a case, when called to prove that a bell was rung, is that he did not hear it. Such a statement, with no accompanying facts, is merely negative, and of no value as evidence. But attending circumstances may be shown which make the statement strong affirmative evidence. It may appear that all the attention of which the witness was capable was concentrated on the effort to ascertain whether the bell was rung, and his failure to hear it could only have been because it made no sound. A witness may be in any conceivable attitude of attention or inattention, which will give his evidence value, or leave it with little or no weight."

The rule of law that positive testimony is of greater weight than negative testimony, considered, of course, in connection with its exceptions and qualifications, is undisputed. We are now asked, however, to enlarge the rule and hold in substance that because a

jury should ordinarily give to positive testimony greater weight than to negative testimony, the court, on motion for binding instructions or for a new trial, should see that the rule is enforced, and should examine into the character of the testimony of the two classes, judge their relative values, determine whether the positive testimony outweighs and destroys the probative force of the negative testimony, and direct or overturn a verdict accordingly. In support of this contention these authorities are cited: *Selbert v. Erie Ry. Co.*, 49 Barb. (N. Y.) 583; *Lomer v. Meeker*, 25 N. Y. 368; *Oulhane v. N. Y. C. & N. R. R. Co.*, 60 N. Y. 134; *Foley v. N. Y. C. & H. R. R. Co.*, 197 N. Y. 430, 90 N. E. 1116, 18 Ann. Cas. 681; *Kelser v. L. V. R. R. Co.*, 212 Pa. 409, 61 Atl. 908, 108 Am. St. Rep. 872; *Lonzer v. L. V. R. R. Co.*, 196 Pa. 610, 46 Atl. 937; *Horandt v. C. R. R. Co.*, 78 N. J. Law, 190, 73 Atl. 94; *Holmes v. P. R. R.*, 74 N. J. Law, 469, 66 Atl. 412, 12 Ann. Cas. 1081; *Hubbard v. B. & A. R. Co.*, 159 Mass. 320, 34 N. E. 459; *Menard v. R. R. Co.*, 150 Mass. 887, 23 N. E. 214; *Bohan v. Milwaukee Ry. Co.*, 61 Wis. 391, 21 N. E. 241; *Horn, v. B. & O. R. R. Co.*, 54 Fed. 801, 4 C. C. A. 346; *B. & O. R. R. Co. v. Baldwin*, 144 Fed. 53, 75 C. C. A. 211.

A close analysis of these authorities will disclose, that in those cases in which there was negative testimony and verdicts were either directed or set aside, it was done not because the testimony was negative in quality nor because the negative testimony was opposed by positive testimony, but because the negative testimony was in itself without probative force sufficient to support the verdicts.

Considering the rule in the light of these and other decisions, it is apparent that in a case where the issue on one side is supported solely by negative testimony, but by negative testimony of sufficient probative force, in the estimation of the court, to prove the issue, and there is opposed to it no testimony at all, no court would prevent or disturb a verdict based upon such testimony merely because of its negative character. And if the same negative testimony of the same probative force was opposed by positive testimony, a court would not take a case from the jury or overthrow its verdict simply because of the rule in favor of positive testimony, for the effect of that would be to deprive the rule of its recognized exceptions and to hold that positive testimony outweighs negative testimony in every case. But when negative testimony is opposed by positive testimony and the negative testimony, if unopposed, would in itself be insufficient to support the issue it is offered to prove, the court will direct or overturn a verdict, not by encroaching upon the exclusive function of the jury and weighing each class of testimony, one against the other, but by performing its own exclusive function of determining, as in all cases,

whether the evidence introduced in proof of the issue was sufficient to support a verdict.

Considered in this light, the rule that positive testimony outweighs negative testimony was not intended to come in conflict with the rule that the weight of the testimony, when conflicting, should be left to the jury (*Jones, Ev. 901*), but was designed as a rule of measurement for use by the jury, and when testimony, negative in quality, is submitted to the jury with the circumstances surrounding and corroborating it, to be weighed and valued according to this and other rules of evidence, and when in itself, it is of sufficient probative force to support a verdict, though opposed by positive testimony to which the jury may give a lesser weight, a verdict will neither be directed nor disturbed.

[11] The opportunities of the witnesses who gave negative testimony in this case, to hear, comprehend and remember a warning if one had been given when Gatta was within sound of such a warning, considered with relation to their positions, occupations, surroundings and knowledge of the character of the impending danger, were such as to take their testimony entirely out of the class that is purely negative and to justify the jury in giving it a weight upon which to predicate the verdict it rendered. The trial court therefore committed no error in refusing to direct a verdict or to disturb the verdict rendered because of the negative character of the testimony for the plaintiff.

The judgment and proceedings of the court below are in all respects affirmed.

EFFLER v. STATE.

(Superior Court of Delaware. New Castle. Jan. 22, 1913.)

1. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES—INTENT IN GENERAL.

Though as a general rule proof of distinct and independent offenses is not admissible, there are exceptions to rebut an inference of mistake, want of guilty knowledge, lawful purpose, or innocent intent that might otherwise spring from the evidence, and in some cases to meet a special defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES—INTENT—CONSPIRACY TO STEAL.

Defendant was prosecuted for conspiracy to steal, in that he induced the prosecuting witness to purchase a dry goods business, witness to put in \$3,600 cash, defendant and one of his associates \$5,000 each in cash, and that, while defendant was counting his money, men claiming to be detectives broke in, stated that it was counterfeit, took the money of witness, mixed it with that of defendant, and disappeared. The court admitted, to show defendant's intent and design, testimony of a witness that three months afterwards he had been robbed of money in the same way by defendant and those whom the evidence tended to identify as the same associates. *Held* that, as the testimony of the other offense had no di-

rect connection with the offense charged, its admission was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

3. CRIMINAL LAW (§ 369*) — EVIDENCE — FACTS IN ISSUE—IDENTITY.

To prove identity by defendant's participation in another offense, there must be some connection between the two offenses; and it is not sufficient that they be similar offenses committed by him. Almost, if not quite, the same stringency is required to prove identity of party by this kind of evidence as is required to show system or plan.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

Error to Court of General Sessions, New Castle County.

Samuel Effler, alias Charles Heffler, was convicted of conspiring with others to steal, and he brings error. Reversed.

See, also, 78 Atl. 411.

Argued before CURTIS, Ch., and CONRAD and RICE, JJ.

Reuben Satterthwaite, Jr., of Wilmington, for plaintiff in error. Andrew C. Gray, Atty. Gen., and Josiah O. Wolcott, Deputy Atty. Gen., for the State.

RICE, J. Samuel Effler, alias Charles Heffler, the plaintiff in error, upon his trial, was found guilty on an indictment charging him with conspiring, with other persons unknown, to steal \$3,600 from Louis Reches.

The assignments of error are 10 in number and cover alleged errors on two points, viz.: (1) That the court erred in admitting the testimony of a witness, Benjamin Silberman, concerning a similar transaction; (2) that the court erred in not directing the jury to find a verdict of "not guilty," on the ground that the misdemeanor charged in the indictment merged in the felony proved by the state.

Testimony, as disclosed by the record, was introduced to prove: That in Wilmington in March, 1909, Louis Reches, the prosecuting witness, upon the solicitation of one Needles and the defendant Samuel Effler, entered into an agreement with them to purchase a dry goods business in Philadelphia from a man known as Galor, who he some months later identified as one Goldstein in prison at Rochester, N. Y. Reches was to participate in the purchase to the extent of \$3,600 cash and Needles and Effler to the extent of \$5,000 cash. The three went to Philadelphia to complete the purchase, where, at the suggestion of the other two, Reches went with them to see a friend on Tasker street, to inquire about the stock of goods they had agreed to purchase. While at this house Effler took out his money and commenced to count it, when two men, claiming to be detectives, came in and stated that it was counterfeit money. They took the money of witness and mixed it with Effler's. The men then pretended to place Needles and Effler under

arrest and Effler directed witness to step outside a minute, which he did. Upon his return he found the room empty of people.

[1, 2] Benjamin Silberman, under objection, testified in effect: That in June, 1909, at his place of business in Philadelphia he purchased several diamonds of a man giving the name of Goldstein, afterwards identified in prison at Rochester as one Tiddlebaum, being the same person that Reches identified under the name of Galor or Goldstein. Later the witness at the solicitation of Goldstein agreed with one Charles Heffler (identified by the witness as the defendant) to buy \$15,000 worth of diamonds from Goldstein, the witness to put \$5,000 and Heffler \$10,000 in the transaction. After several postponements in making the purchase, witness went with Heffler to a house in Pierce street, Philadelphia, taking with him \$5,000 in cash. At the house they went into a room where was Goldstein and another man known as Fireman, whose description corresponded with the description of Needles. On the table in the room were pieces of tissue paper, wrapped as if they contained diamonds, which remained unopened. Upon request witness took out his money and gave it to Heffler, who placed it with his own money on the table, whereupon seven or eight men broke into the room and pretended to arrest all. One of the supposed detectives placed the money and tissue paper packages into a satchel, and two of them went out with Fireman, two with Goldstein, and two with Heffler, and two with the witness, who was released when they reached the street.

When the court below admitted as relevant and competent the testimony of the witness Silberman they stated that it was admitted for the purpose only of showing intent, design or plan of the defendant in the case on trial and so charged the jury.

It is a general rule of criminal evidence that on the trial of a person charged with a crime, proof of a distinct, independent offense cannot be admitted into evidence.

This rule is recognized in the courts of this state as elsewhere, and that there are certain exceptions to this rule is likewise recognized. *State v. Tindal*, 5 Har. 498; *State v. Freedman*, 3 Pennewill, 403, 53 Atl. 356.

The following reference to the exceptions is made in Underhill on Criminal Evidence, par. 87:

"To this general rule there are several distinct exceptions which have been permitted from absolute necessity, to aid in the detection and punishment of crime. These exceptions ought to be carefully limited and guarded by the courts and their number should not be increased. But it must be admitted that the modern tendency on the part of the courts is to be liberal in the admission of evidence of collateral crimes. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

exceptions to the general rule arise either from the necessity of the case, as, for example, where two or more crimes are constituent parts of one transaction, so that to prove either necessitates proof of the other, or when the intent is to be proved from circumstances, or in the third place where the identity of the accused is expressly in issue, that is to say, where the evidence conclusively shows a crime was committed by some one, but there is a sharp conflict as to the person who committed it."

It was upon the above exceptions that the court admitted the evidence of Silberman.

Decisions on the general rule are more frequent than upon the exceptions, and it will be observed in the preceding paragraph that the exceptions are permitted from absolute necessity to aid in the detection and punishment of crime and they should be carefully limited and guarded by the courts.

Decisions upon the exceptions to the rule are neither uniform nor reconcilable, either generally or in the different states, and any attempt to classify them would be to give the reasons assigned by the different judges in admitting or rejecting the particular testimony then under consideration.

Testimony of other similar offenses has been admitted in this state, as elsewhere, to show guilty knowledge or intent where there is or may be from the evidence an inference of mistake, accident, want of guilty knowledge, lawful purpose or innocent intent.

In the unreported case of *State v. Brown*, 85 Atl. 797 (Del. 1912), where the accused was on trial for abortion and the state offered testimony of a similar offense by the accused, to prove intent, the court in admitting the testimony said: "But, wherever the intent with which an alleged offense was committed is a material element of the charge, and such intent becomes an issue at the trial, proof of other similar offenses, within certain reasonable limits, is admissible, as tending to throw light upon the intention of the accused in doing the act complained of."

In *Meyer v. State*, 59 N. J. Law, 310, 36 Atl. 483, the Supreme Court held it error to admit proof of a similar offense to prove intent and said: "To the general rule that upon the trial of a person for one offense proof of his guilt of other offenses is irrelevant, there are, it is true, some exceptions in which the defendant's guilt of the extraneous crime tends to prove against him some particular element of the crime for which he is being tried. *Scienter* may thus be proved, so, in appropriate cases, may opportunity, motive, preparation, concealment or escape. Where, however, the proof can go no further than to show a propensity to commit the offense in question it is not relevant."

In *Luckey v. Roberts*, 25 Conn. 486, the court in admitting evidence of a similar transaction used very general language, but

it had particular application to the facts then on review, and upon an examination of the case it would seem that it was admitted to show guilty knowledge.

Chief Justice Paxson in the case of *Com. v. Saulsbury*, Appellant, 152 Pa. 554, 25 Atl. 610, said:

"Upon the trial in the court below the learned judge admitted the evidence of Zeloster Ross, under objection by the defendant, to prove that one William Serf was arrested, and in the custody of Jerome Saulsbury, the defendant, and that the witness and Simon Wagner paid money to secure his release. The admission of this evidence forms the subject of the first specification of error.

"We think the evidence should have been excluded. The indictment charged that the defendant had extorted money from John Bunke, Zeloster Ross and Simon Wagner, while they were under arrest, under a warrant issued by Esquire Nelson. There was no charge of having extorted money from Mr. Serf, and it was error to permit evidence in regard to him to go to the jury."

On this point Judge Werner in delivering the majority opinion in the case of *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, after mentioning various offenses in which proof of similar offenses is admitted to prove intent, said: "It will be seen that the crimes referred to under this head constitute distinct classes in which the intent is not to be inferred from the commission of the act, and in which proof of intent is often unobtainable except by evidence of successive repetitions of the act."

While we are of the opinion that in some cases it is necessary to prove intent by proof of similar offenses to rebut an inference that might otherwise obtain from the evidence in the case, or in some cases to meet a special defense on the part of the defendant, we are of the opinion that in the present case the proof of facts was of such a nature that it was not proper to admit evidence to prove guilty intent by circumstances not directly connected with the offense charged in the indictment.

Concerning the admissibility of this kind of testimony to prove plan or design, *Wigmore*, par. 304, says: "When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's design or plan to do it. This in turn may be evidenced by conduct of sundry sorts as well as by direct assertions of the design. But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than that mere similarity, which suffices for evidencing intent." And later in the same paragraph gives this illustration: "Thus, where the act of passing counterfeit money is conceded, and the intent alone is in issue, the fact of two previous utterings in the same month might well tend to negative in-

nocent intent; but where the very act of uttering is disputed—as, where the defendant claims that his identity has been mistaken—and the object is to show that he had a general system or plan of working off a quantity of counterfeit money and did carry it out in this instance, the fact of two previous utterings may be in itself of trifling and inadequate significance."

Upon this point many cases appear in the brief filed by the Attorney General, but a careful study of the cases will reveal the fact that in most of them the proof sought to be introduced was received by the different courts to prove intent or guilty knowledge and in many of the cases it is so stated, and upon this exception to the rule we have commented, or there was such an obvious and visible connection between the two offenses that proof of one would be proof of the other. However, in a few of the cases we cannot find that connection which we believe is necessary to admit of such proof, and believe they cannot be reconciled with the general trend of the decisions.

Upon this exception to the general rule it is said by Underhill in his work mentioned, par. 88: "No separate and isolated crime can be given in evidence under this exception to the rule. In order that a collateral crime may be relevant as evidence it must be connected with the crime under investigation as part of a general and composite transaction."

In *Shaffner v. Commonwealth*, 72 Pa. 60, 13 Am. Rep. 649, the court said: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish, or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. * * * From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the commission of one tends, by a visible connection, to prove the commission of the other by the prisoner."

[3] In the case before us, we are unable to find any connection between the offense for which the accused was being tried and the offense testified to by Silberman other than the mere similarity of the two offenses, unless it be the proof that the accused participated in both offenses. And whether this connection is sufficient to admit of the testimony of Silberman we will now consider.

Commonwealth v. Choate, 105 Mass. 451, and *Rex v. Fursey*, 6 Carr. & Payne, 293,

are the only cases cited by the Attorney General on this point.

In *Commonwealth v. Choate* the accused was charged with burning a building by means of a box peculiarly adapted to that purpose. Testimony was introduced to show that a similar box was used a short time before in an attempt to set fire to another building in the vicinity, also that a block of wood found in one box was originally part of a stick found in defendant's workshop. The defendant had sent an anonymous letter to the marshal of the town stating that he had burned several buildings in the town, but was now out of boxes and expected to get more, and expressed a motive for the fire.

The court in review in holding the evidence properly admitted said: "The defendant's counsel relies upon the expression of the court in *Commonwealth v. Williams*, 2 Cush. (Mass.) 582, that they do not sanction the admission of evidence merely tending to show that the defendant had in his possession instruments adapted to the commission of other crimes. But the evidence in this case did not merely tend to show this. It tended to show that the defendant possessed the requisite skill, materials, tools and opportunity to have made the box used to set the alleged fire; and in connection with the letter it tended to show that the defendant made both boxes with the single motive there stated. It tended to prove a use of his shop for the purpose of preparing boxes and materials for setting incendiary fires, including the fire alleged in the same place, and all instigated by one motive. In *Commonwealth v. Wilson*, 2 Cush. (Mass.) 590, the evidence respecting the key was held inadmissible, because it related to a distinct and independent transaction, not connected with the offense on trial. In *Hill's Case*, 20 Howell, St. Tr. 1317, 1355, evidence that the prisoner knew how to make the preparation of the combustibles that were used for setting the alleged fire was held to be material. It may also be shown that he possessed materials capable of being converted into instruments of the offense, including the means of their production, or that he made preparations for the commission of such a crime. *Burrill on Circ. Ev.* 290, 345."

In *Rex v. Fursey*, 6 Carr. & Payne, 293, the defendant was indicted for stabbing one Brook, who was attempting to arrest him in a large crowd. Evidence was introduced to show that he had at the same time stabbed another person and the nature of the wound of that person. A swordlike knife was found near the defendant and not on him. Evidence of the nature of the wound on the other man was admitted to identify the instrument. The question in that case seemed to be whether the defendant was justified in preparing such a dangerous weapon, having it in his possession, and using it under the circumstances.

In *Boyd v. U. S.*, 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077, where the defendant below had been tried on a charge of murder, the facts being that the defendant and two others had gone to the ferry of one Byrd and requested him to take them over the creek, and upon his consenting to do so, and while he was making preparations, one of the men with the defendant told Byrd to throw out his change, saying that it was money they were after. Several persons rushed to the defense of Byrd and in the general fight which ensued one of the men was killed. At the trial proof of other robberies committed on other days at about the same time, by the defendant with his associates, was admitted. The court in holding this error said: "We are constrained to hold that the evidence as to the Brinson, Mode and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge."

In *People v. Romano*, 84 App. Div. 318, 82 N. Y. Supp. 749 (Appellate Division, Supreme Court), where the facts were that the robbery for which the defendant was convicted was committed by throwing snuff in the eyes of the complainant at the time of the robbery, the prosecution, for the purpose of establishing identity of the defendant, offered proof to show that three weeks prior to the commission of the offense for which he was on trial, he committed another robbery at the same place upon another person by use of the same means. The court held its admission error and said: "The prosecution does not claim that it can support the ruling in the present case unless it be upon the ground that the prior crime tended to establish the identity of the defendant. Two facts are advanced in this regard in support of the theory that the testimony was admissible upon such question, i. e., that the prior crime was committed at the same place and in a similar manner. The defense was an alibi, consequently evidence tending to identify the defendant was vital to the case, as that was the issue litigated. It is persuasive to say that a robbery committed a short time before, at the same place, by similar means and by the same person, tends to identify the defendant as the person who committed the crime at the same place and by the same means for which he is being tried; * * * yet it has never been supposed that, where there was a separation as to time and no connection established, beyond that of place and similarity, the first crime was admissible to establish any of the elements which constituted the other."

From the above cases, and many others, it appears, to prove identity, that there must be some connection between the two offenses,

and it is not sufficient that they be similar offenses committed by the same person. Almost if not quite the same stringency of proof is required to prove identity of party by this kind of testimony as is required to show system or plan. We do not find the two offenses to be connected in such a manner as would make competent and relevant the proof of the similar offense to prove identity of the accused. Applying the law as we believe it to be, in respect to the general rule in relation to the admissibility of proof of other offenses and the exceptions to that rule, to the facts of the case now under consideration, we are of the opinion that the court below was in error in admitting the proof of a similar offense as testified to by Silberman, for any of the purposes for which it was admitted.

On the point raised on assignments of error 4, 5, 6, 7, 8, and 9, after a careful consideration of the same we are of the opinion that the learned court below, in a very comprehensive opinion, correctly announced the law, and that the court was not in error in refusing to direct the jury to find a verdict of "not guilty."

There being error in the proceedings below as specified by the first, second, third and tenth assignments of error, the court directs that the judgment below be reversed.

IN RE DUNCAN'S WILL

(Superior Court of Delaware. New Castle.
Jan. 29, 1918.)

WILLS (§ 269*)—PROBATE—NOTICE TO INTERESTED PARTIES—PERSONAL NOTICE—SUFFICIENCY.

Under Rev. Code 1852, amended to 1893, p. 668, c. 89, § 1, providing that, when a will is presented for probate, notice of the time of taking proof of the subscribing witnesses shall be given to interested parties, and as to parties not within the state the register of wills may order such service of notice "as he deems proper," it was sufficient for the register to personally notify an interested party of the time of probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 620-625; Dec. Dig. § 269.*]

In the matter of the proof of the paper writing purporting to be the last will and testament of Henry B. Duncan, deceased. From the decree of the register of wills, refusing a review of probate, an appeal was taken. Appeal dismissed.

Argued before CONRAD and WOOLLEY, JJ.

Cooper & Bradford and Alexander B. Cooper, all of Wilmington, for appellant. Herbert H. Ward, of Wilmington, for executrix.

CONRAD, J. The copy of the record of the proceedings before Francis M. Walker,

register of wills, discloses that the will was duly probated before said register of wills on the 18th day of February, A. D. 1912, and letters testamentary granted to Mary A. Duncan, the executrix named in said will; further it discloses that Henry B. Duncan, Jr., the petitioner for review in the proceedings now before the court, the only party in interest other than the executrix was personally notified of the time of probate by the register of wills.

Afterwards, to wit, on the 18th day of May, A. D. 1912, Henry B. Duncan, Jr., filed his petition with the register of wills for a review of the probate of the will and prayed that the allowance of the will be rejected and the letters revoked.

On this petition a hearing was had before the register on the 21st day of May, A. D. 1912, and after argument by counsel on both sides the register of wills ordered the petition for a review of the will dismissed, and refused the application of the petitioner for the setting of a day for the taking of depositions of witnesses as to the validity of the will, and for an issue *devisavit vel non*.

The proceeding before the court now is an appeal from the decision of the register of wills refusing a review of the probate of the will.

The petitioner, Henry B. Duncan, Jr., contends that he did not voluntarily appear before the register at the time of the taking of the proof of said will, and that he was not served with citation or notice of the time for taking proof thereof. The petitioner recites in his petition to the register that he was then (May 13, 1912) a resident of the city of Philadelphia, state of Pennsylvania, and the case was argued on the theory that the petitioner at the time of the taking the proof was not within the state. No direct proof was made as to the petitioner's residence, but both parties to the proceeding seemed to admit that he was a non-resident of the state at the time of the taking of the proof. The only evidence before us as to what notice, if any, was given to the petitioner as to the time of taking the proof is the averment made in the record as

sent up to this court by the register as follows:

"Henry B. Duncan, Jr., the only party in interest other than the executrix, was personally notified of the time of probate by the register of wills."

The fact that petitioner was personally notified was not denied or controverted, but it was claimed by his counsel that such a notice was not sufficient under our statute.

Section 1, chapter 89, Laws of Delaware, Revised Code (1893) page 668, provides that when a will is presented for probate, notice of the time of taking the proof of the subscribing witnesses shall be given to all parties interested, and "in respect to parties not within this state, the register of wills may order such service or publication of notice as he may deem proper."

It was clearly the design of that statute that all parties should have notice of the time when the probate of a will was to be made, in order, as is evident, that they might protect any interest they had in the matter; and the statute gives to the register much latitude as to notice that is to be given parties "not within the state." "He may order such service or publication of notice as he may deem proper." The register avers in his record that the petitioner "was personally notified of the time of probate by [himself] the register of wills." Was not that a reasonable notice, giving to petitioner full opportunity to appear and interpose any objections that he might have as to the validity of the will? Does it not meet fully the requirements of the statute—"such service or publication of notice as he [the register] may deem proper"? Surely a much more satisfactory and comprehensive notice, than a formal citation posted at the door of the court house or published in a newspaper.

The court are of the opinion that the register of wills acted fully within his authority in giving personal notice to Henry B. Duncan, Jr., and that such notice is sufficient under the statute. The court therefore affirms the finding of the register of wills and orders that the appeal of Henry B. Duncan, Jr., be dismissed with costs.

SWAYNE v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut. Feb. 7, 1913.)

Dissenting opinion.

For majority opinion, see 85 Atl. 634.

WHEELER, J. (dissenting). I have been unable to read the evidence as the opinion reads it. The facts, as stated in the opinion and the argument of the opinion, in my judgment, show such a conflict as to have made this, under our rule, a plain case for the jury.

There were two theories of the accident before the jury:

The plaintiff's theory: That he was driving, with a lantern on the side of his wagon, on the highway on a dark and stormy night in the wheel tracks of the traveled way, 12 to 14 inches from the east-bound track of the defendant, when he was warned by Shute, the driver of the wagon just ahead of him, of the approach of an east-bound car from his rear, and turned and saw it near him, and then turned out as quickly as he could, but his rear wagon wheel slipped, and the car hit the wheel, overturning the wagon and causing the injuries sued for. The ground of negligence alleged was the operation of the car by the defendant at a too rapid rate of speed, and its failure to stop the car and avoid running into the wagon.

The defendant's theory: That when its car got within 2 car lengths, or 80 feet, of the plaintiff's wagon its motorman saw the wagon proceeding south on the west-bound track, and at once the driver began to turn directly across the east-bound track in front of the approaching car, so that, although the motorman immediately on seeing the wagon did all he could to stop the car, it hit the wagon after it had proceeded 3 car lengths, or 120 feet, from the point where the motorman first saw the wagon.

If the defendant's theory were the only reasonable one to be drawn from the evidence, the plaintiff's own negligence was clear. But the trial judge did not direct the verdict on any such theory; nor did the defendant argue the case upon it; nor is the opinion written upon that theory.

There were three eyewitnesses to the accident: The plaintiff, Swayne, the driver of the wagon ahead, Shute, both testifying in behalf of the plaintiff, and the motorman of the car, testifying in behalf of the defendant.

Aside from the fact that there were two theories of the case, upon each of which evidence was offered, making the issue between them one for the jury, the evidence shows that it would be unreasonable to accept the motorman's theory of the accident.

This was a rear-end collision.

The motorman says he gave no warning of the approach of his car until after he saw the wagon about 80 feet ahead. The night was dark and stormy. The car was equipped

with air brakes and a big searchlight of the kind used on suburban lines. The motorman testified it threw its rays only 80 feet, or 2 car lengths. If this evidence stood uncontradicted, we should know from common knowledge that such a light threw its rays a much greater distance, and that with a proper lookout the motorman would have seen the wagon at a much greater distance, and so have had the opportunity to have stopped the car before hitting the wagon.

Shute testified when he turned in his wagon he saw the car several hundred feet back. The motorman had a better opportunity to see the plaintiff's wagon, which had a light on it, than Shute to see the car. It was open to the jury to have believed Shute, and to have found that the motorman was not keeping a proper lookout.

If the motorman's statement were found true, and he could not see the wagon until within 80 feet of it, it follows that he was operating at such speed the car could not be stopped by the exercise of reasonable care on his part, because the headlight did not disclose the wagon in time to have avoided hitting it. Such operation, under such conditions, was negligence.

We said, by Baldwin, J., in *Currie v. Conn. Ry. Co.*, 81 Conn. 383, 386, 71 Atl. 356, 357: "The owner of the car, in running it, is therefore governed by the same rules which apply to the management of any other vehicles. Being of greater size and weight than they commonly are, and capable of being moved at a very high rate of speed, the car must, at all times, be kept so well in hand as not to expose others to unreasonable hazard. *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379 [37 L. R. A. 533]. When running at night, it must be provided with such means of illumination as may be requisite, in connection with the light, if any, to be expected from other sources, to enable the motorman to see far enough ahead to do whatever ordinary care may demand, in order to avoid a rear-end collision with any other vehicle upon the railway track."

The opinion holds that there was no evidence to have gone to the jury of the speed of the car. Swayne, on his direct, said the car was going "like a chain of lightning." The opinion holds that this expression was entitled to little weight as a definite statement fixing the speed of the car. It was a colloquialism with which our language is filled, conveying to the average mind the information that the speaker was of opinion the car was going very fast. On cross-examination this witness perfectly explains this by saying the car was going "too fast for the motorman to observe the light on the side of his wagon." Shute also testified the car was going very fast. The motorman said the car was travelling 8 or 10 miles an hour, and, though doing all he could after he saw the wagon, he did not stop the car before hit-

ting the wagon at a point 120 feet distant, but did stop it in 160 feet. Other witnesses placed the point of collision further away. As to the distance the car ran after the collision, the witnesses differed from a car length to 500 feet. The car was a large, double-truck car equipped with air brakes in good condition.

From these circumstances the jury might have found the car was running at a rapid rate of speed and, under the conditions, at an unreasonable rate of speed, and had it not been so operated it could have been brought to a stop in the distance between the point where the motorman says he saw the wagon and the point of collision. Much sooner could it have been stopped if the motorman could have seen the wagon when several hundred feet away.

The jury might have relied on common knowledge, based on universal and daily experience, to have found that: A car equipped with an air brake and traveling at the rate of 8 or 10 miles an hour can, by the exercise of reasonable care, be stopped in a much shorter distance than 120 feet. A car so equipped and operated, which cannot be stopped in that distance, is being operated at a high rate of speed. A car so equipped and operated, which runs one or more hundred feet beyond the point of collision, must have been running at very high speed.

The opinion holds that the accident "would have occurred however slowly the car was moving." As the wagon was traveling rapidly, and could not have been overtaken by the car in passing from Huntington avenue crossing, if, as the opinion suggests, the car stopped there, to the point of collision, a distance between 150 and 200 feet, unless the car had been proceeding at a dangerously high rate of speed, we think this statement was an oversight.

The speed of the car and the failure to keep a reasonable lookout may fairly have been found by the jury to have been contributing causes of the accident. The plaintiff testified that Shute waved to him and warned him of the car's approach, and he turned, looked back, saw the car some 60 feet away, and at once began turning from the railway track. The opinion says: "If, on the other hand, the testimony of Shute were not credible [that when he warned Swayne the car was several hundred feet away], and we take the testimony of the plaintiff that the car was within 60 feet of him when he was notified by Shute, and saw it and attempted to turn out, there is no evidence upon which the jury could find that the defendant was negligent as alleged."

This conclusion accepts Swayne's testimony as the only evidence in the case. It ignores Shute's testimony that the car was several hundred feet away, the motorman's testimony that he saw the wagon when it was 80 feet away, the elements of the speed of the car, the distance the car ran after

the wagon was seen and before the collision, and the distance it ran after the collision. No conclusion is permissible which does not weigh all of this testimony.

If the conclusion of nonnegligence is not permissible, the opinion holds the conclusion of contributory negligence must be reached. "If the testimony of the plaintiff's witness Shute were true, it appears that the plaintiff was notified of the approach of the car when it was several hundred feet away. If that were true, he did not turn away from the track at once. * * * The plaintiff took his chances and remained upon the track, or in close proximity to it, when he had ample time and opportunity to get out of the way of the car, which he knew was approaching. He made a mistake in his calculations, because his wagon slued onto the track when the car collided with it."

I am unable to find any testimony which says, or from which an inference could reasonably be drawn, that the wagon slued "onto the track." The plaintiff's wagon was never on the railway track, but was hit by the overhang of the car while he was endeavoring to get out of danger.

This conclusion of the opinion accepts Swayne's estimate of the distance the car was away, and upon that alone concludes that the car could not have been stopped in that distance. It disregards both Swayne's and Shute's testimony that Swayne turned out at once on receiving Shute's warning. It likewise disregards the presumption of fact that the natural course for the traveler to have taken when warned of the approach of the car from the rear was at once to have tried to escape.

Shute testified that he turned, waved, and warned Swayne of the car's approach, and his testimony thus proceeds: "Q. Where was the car then? How far back, could you tell? A. I couldn't just tell how far back. We were going all the while. Q. You say you turned out? A. I turned out, and Mr. Swayne followed and turned right out from it. Q. Then what happened next, if anything? A. The next I heard was 'Bang!'"

Swayne testified as follows: "Q. Now, what happened when you came to the top of Beacon Hill and going down? A. We were driving along pretty lively. We wanted to get home on account of such stormy weather. I was right in the wheel tracks [of the road]. Both teams were. On the right side. I had a lantern in the wagon that shone front, and I could see my team and see John turn in the wagon ahead of me, and he hollered back, 'There comes a trolley,' and I looked around, and I saw a light, and I went to pull out of the way quick to give them more room; but it was so icy and slippery, you know, the wagon slued, and he was coming like a chain of lightning down that hill, which they always do, and he struck the corner of the wagon."

Whether the plaintiff, upon notice from

Shute, "went to pull out of the way quick," as he says, and, as Shute says, "turned right out from it," or not (the railway track), was for the jury to decide.

If Swayne and Shute gave a variant account of the accident, it was for the jury to pass upon the whole account. In fact, there was no substantial variance in the account of either. Their estimates of the distance of the car from them was a mere estimate, in the nature of things incapable of exact measurement. Shute fairly says: "I couldn't just tell how far back. We were going all the time."

Swayne had the right to drive in the road ahead of the car, in the wheel tracks, near the rails. There was no evidence to show how much of the traveled way was fit for travel. Swayne's duty was to have exercised reasonable care, and turned away from the railway track as soon as he was warned of the approach of the car. He says, and Shute says, he did this, and did it before the motorman rang his gong.

The motorman, who located Swayne on the west-bound track, testified: "Q. And he kept on, did he, for some time, driving about a car length ahead of you? A. Not for some time. When he heard the car, he turned right at once to the right; but he didn't drive out of the way quick enough to get clear. Q. So as to cross your track? A. Yes."

So that all of the witnesses who testified upon the subject agreed that the plaintiff tried to get out of danger immediately upon learning of it. And as this accords with what the average man similarly situated would have done it would seem to settle the issue of contributory negligence in favor of the plaintiff, and, if not that, at least to have compelled its submission to the jury.

The verdict was set aside because the negligence alleged had not been proven. In my judgment, both issues—negligence and contributory negligence—should have been submitted to the jury.

WALTER v. SPERRY.

(Supreme Court of Errors of Connecticut. Jan. 31, 1913.)

1. EVIDENCE (§ 355*)—PRIVATE WRITINGS—MEMORANDUM BY DECEASED.

In an action for the price of lumber used in the erection of buildings on the land of defendant's intestate, where defendant claimed that the buildings were erected and the lumber purchased by a tenant, a memorandum in the handwriting of the intestate, containing items of expenditures made on the premises, and of bills paid by the tenant and unpaid bills of the tenant, and the defendant's testimony as to what intestate told him about the items of lumber appearing therein as an unpaid bill of the tenant, should have been admitted, under Gen. St. 1902, § 705, providing that in actions by or against the representatives of deceased persons

relevant entries, memoranda, and declarations of the deceased may be received.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1444, 1484-1491; Dec. Dig. § 355.*]

2. EVIDENCE (§ 355*)—PRIVATE WRITINGS—MEMORANDUM BY DECEASED.

Under Gen. St. 1902, § 705, authorizing the receipt in evidence, in actions by or against representatives of deceased persons, of memoranda made by deceased, where a defendant dies, and an action is continued against his administrator, a memorandum which is relevant should be admitted, although made by deceased after the bringing of the suit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1444, 1484-1491; Dec. Dig. § 355.*]

3. EVIDENCE (§ 355*)—PRIVATE WRITINGS—MEMORANDUM BY DECEASED.

Under Gen. St. 1902, § 705, providing that in actions by or against the representatives of deceased persons memoranda by deceased, if relevant, may be admitted in evidence, such memoranda need not contain facts to which the deceased could testify, if living; there being no such limitation in the statute, and its object being to enable the representatives of deceased persons to sustain just and defeat unjust claims affecting the estate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1444, 1484-1491; Dec. Dig. § 355.*]

4. EVIDENCE (§ 471*)—FACTS OR CONCLUSIONS.

In an action for the price of lumber, against an administrator who claimed that the lumber was sold to a tenant, an item in a memorandum made by his intestate of the unpaid bills of the tenant, reading "W. [the plaintiff], bill for lumber, \$250," was improperly excluded as an expression of opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

5. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR.

The exclusion of a memorandum made by defendant's intestate, relevant to the matters in issue, was not rendered harmless because defendant was permitted to testify to the intestate's oral statements regarding the same matter, since he was entitled to the benefit of deceased's written declarations supplemented by appropriate explanation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

6. EVIDENCE (§ 355*)—PRIVATE WRITINGS—MEMORANDUM BY DECEASED.

Under Gen. St. 1902, § 705, providing that in actions by or against the representatives of deceased persons memoranda made by deceased, if relevant, may be admitted, no matter how many times deceased may have detailed a transaction in a book, on paper, or orally, all are admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1444, 1484-1491; Dec. Dig. § 355.*]

7. EVIDENCE (§ 355*)—PRIVATE WRITINGS—MEMORANDUM BY DECEASED.

Gen. St. 1902, § 705, providing that in actions by or against the representatives of deceased persons memoranda by deceased, if relevant, shall be admissible in evidence, should be given a liberal construction to uphold the legislative intent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1444, 1484-1491; Dec. Dig. § 355.*]

8. EVIDENCE (§ 130*)—PRIVATE WRITINGS—ADMISSIBILITY.

In an action for the price of lumber, against an administrator who claimed that the lumber was sold to a tenant, a bill of sale by the tenant to the intestate of the bathhouses erected with such lumber should have been admitted, being neither irrelevant, immaterial, incompetent, nor res inter alios, especially after proof that the consideration of the bill of sale was the accrued rental of the premises.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 403; Dec. Dig. § 130.*]

9. EVIDENCE (§ 129*)—RELEVANCY—SIMILAR TRANSACTIONS.

Where a defendant, sued for lumber, claimed that the lumber was furnished to a tenant, evidence that another lumber dealer also furnished material for the bathhouses erected with such lumber, on the order of the tenant, should have been admitted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 388-393, 395-398; Dec. Dig. § 129.*]

10. EVIDENCE (§ 115*)—RELEVANCY—EXPLANATION OF ACTS.

In an action for the price of lumber, which defendant claimed was sold to a tenant, where plaintiff proved that defendant's intestate showed him a sketch of the buildings to be erected and asked him to submit figures therefor, defendant should have been permitted to show that the sketch was made at the tenant's request.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 133; Dec. Dig. § 115.*]

11. EVIDENCE (§ 471*)—FACTS OR CONCLUSIONS.

A question asked plaintiff, as to whether he sold goods to defendant, did not call for a conclusion of the witness, where there was a dispute whether the goods were sold to the defendant or to a tenant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

12. APPEAL AND ERROR (§ 1052*)—REVIEW—HARMLESS ERROR.

The admission of a question asked plaintiff, as to whether he sold goods to defendant, if erroneous as calling for a conclusion, was harmless, where the witness subsequently related the entire transaction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

13. EVIDENCE (§ 110*)—RELEVANCY—ADMISSIBILITY.

In an action for the price of lumber, which defendant claimed was sold to a tenant, a question asked plaintiff's driver, as to what the tenant said when he delivered the lumber, was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 230-246; Dec. Dig. § 110.*]

14. BANKRUPTCY (§ 363*)—ALLOWANCE OF CLAIM—EFFECT.

In an action for the price of lumber, claimed by defendant to have been sold to a tenant, evidence that the claim for the price of the lumber was allowed against the bankrupt estate of the tenant was not admissible against plaintiff, where it did not appear that he had anything to do with listing the claim, or had attempted to profit thereby.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554; Dec. Dig. § 363.*]

15. DEPOSITIONS (§ 95*)—ADMISSIBILITY IN EVIDENCE—OFFERING PART OF DEPOSITION.

Where defendant introduced parts of a deposition taken in his behalf, plaintiff was entitled

to introduce other parts which were relevant and competent.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 276, 277; Dec. Dig. § 95.*]

16. DEPOSITIONS (§ 95*)—ADMISSIBILITY IN EVIDENCE—OFFERING PART OF DEPOSITION.

A party offering in evidence a deposition taken in his behalf must present the entire deposition, so far as competent and pertinent to the issues involved.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 276, 277; Dec. Dig. § 95.*]

Appeal from Court of Common Pleas Court, New Haven County; Earnest C. Simpson, Judge.

Action on the common counts to recover for goods sold by George F. Walter against Albert A. Sperry. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

In defendant's Exhibit No. 7, mentioned in the cause under "Unpaid Bills of N. A. Morris. Bathhouses, etc."—appeared the item: "G. F. Walter. Bill for lumber, \$250."

George E. Beers, of New Haven, for appellant. Charles A. Hamilton, of New Haven, for appellee.

WHEELER, J. The plaintiff brought his action against Albert A. Sperry, since deceased, to recover a balance for goods sold, and the action is continued against his administrator.

Rulings upon evidence comprise the chief assignments of error on the appeal.

The plaintiff, a grain and lumber dealer, delivered the lumber, being part of the goods sued for, upon certain premises used for hotel purposes and owned by the original defendant, Albert A. Sperry, and leased to one Morris, and the material so delivered was used in the erection upon said premises of some bathhouses.

The plaintiff claimed to have proved that these goods were ordered by the original defendant and delivered at his request, and duly entered as charges against him on the books of the plaintiff.

The defendant claimed to have proved that the original defendant leased said hotel premises to Morris for a fixed rental, and his agreement to make, at his own expense, certain improvements in the property, including the installment of a gas plant and the construction and erection of new bathhouses upon said premises, and that he merely introduced Morris as a prospective customer to the plaintiff, and neither ordered, received, nor used said material.

[1] 1. The defendant offered a written statement (Exhibit 7, for identification) in the handwriting of the original defendant, and it was excluded. It purported to contain items of expenditures made on said hotel, also items of bills paid by Morris on gas plant and bathhouses, and also items of unpaid bills of Morris on bathhouses and gas

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plant. Thereupon the defendant administrator, a son of the original defendant, was inquired of what his father had said about the items of lumber as they appeared on the second page of said Exhibit 7. In excluding this offer the court ruled that the witness might state anything said by his father in reference to his father's dealing with the plaintiff in regard to the purchase or ordering of the lumber. The witness was then permitted to testify that his father, while discussing the items on said exhibit, said he had had no dealings with the plaintiff. Thereupon said exhibit was again offered in evidence, and again excluded.

The paper was a memorandum made by a deceased; it contained matter presumptively relevant to the controversy. These are the conditions which, under G. S. § 705, make the entries and memoranda of a deceased evidence. If explanation were required to make its items clearer, the attempt to prove what the deceased said about the items of lumber would have supplied this. *Peck v. Pierce*, 63 Conn. 310, 312, 28 Atl. 524; *Setchel v. Keigwin*, 57 Conn. 473, 478, 18 Atl. 594.

The plaintiff's claim that this exhibit and the evidence offered supplementary to and explanatory of its items was irrelevant is untenable. *Douglas v. Chapin*, 26 Conn. 76, 91.

[2] A further objection is that it does not appear when the exhibit was made up, perhaps after suit brought. Even so, it was admissible, no matter when made. The fact that the deceased made it, and that it is relevant, are the controlling tests. *Craft's Appeal*, 42 Conn. 148, 153; *Allen v. Hartford Life Ins. Co.*, 72 Conn. 693, 45 Atl. 955.

[3] It is objected, too, that the exhibit must contain some fact or facts to which the deceased, if living, could testify. There is no such limitation in the statute. Its object was to "enable the representatives of deceased persons to sustain just and defeat unjust claims affecting the estate." With this end in view, we admitted the letters of a deceased woman to her counsel stating the facts of her case. *Bissell v. Beckwith*, 32 Conn. 509, 516.

[4] The objection that the exhibit contains, at most, only an expression of opinion fails to properly interpret its contents; its items are statements of fact and not opinion.

[5] The objection that the exclusion of this evidence was harmless, because the witness was allowed to testify to all the father said concerning the purchase and delivery of the lumber, is based upon reasoning whose facts are faulty; and, in addition, the defendant was entitled to the benefit of the written word supplemented by appropriate explanation.

For similar reasons the court excluded the

entries of the items in issue appearing upon a book of the deceased (Exhibit 9, for identification), and a paper (Exhibit 10, for identification) containing similar entries.

[6] Evidence of this character was important to the defendant's case. No matter how many times a deceased may have detailed the whole or a part of a transaction on book, paper, or by word of mouth, all are admissible in an action by or against a personal or legal representative of a deceased person, when they are relevant to the matter in suit.

[7] In its rulings the trial court placed a narrow and technical construction upon section 705, in direct conflict with the broad and liberal construction upholding the legislative intent which we have announced in numerous decisions. *Rowland v. P., W. & B. R. Co.*, 63 Conn. 417, 28 Atl. 102.

[8] 2. In order to prove that the original defendant had ordered the lumber in suit with which the bathhouses were built, the defendant offered in evidence a bill of sale of the bathhouses, made by Morris to the original defendant. This evidence bore upon Morris' relation to the premises as tenant, and tended to prove the defendant's contention. It was neither irrelevant, immaterial, nor incompetent; nor can it be said to be *res inter alios*, since it tended to prove an act or fact in the course of the tenancy. This evidence became doubly admissible after proof had been offered that the consideration for the bill of sale was the accrued rental under the lease to Morris.

[9] 3. The defendant offered to prove that another lumber dealer furnished some of the material for the bathhouses, upon the order of Morris. Any conduct of Morris in procuring the material for or causing the erection of these bathhouses, upon his own credit tended to prove the contention of the defendant that Morris ordered and built them, and was admissible as an act in relation to the subject-matter of the suit. Proof that a tenant ordered or constructed improvements upon the premises he leased would tend to prove that the landlord did not order or construct the improvements, and was not liable for their cost.

[10] 4. When testimony was offered by the plaintiff that the original defendant had asked him to submit figures for, and had shown him, in connection therewith, a sketch of, the bathhouses, the defendant should have been allowed to present evidence that the sketch had been made at the request of Morris.

[11, 12] 5. The question asked of the plaintiff in chief, "Did you, or not, sell him [the original defendant] goods in 1907?" did not ask for a mere conclusion, as the defendant claims. If it could be so held, no harm was done through its admission, as the witness subsequently related the entire transaction.

[13] 6. The question asked on cross-ex-

amination of the driver of the plaintiff, who had testified that he had delivered the lumber in suit upon the hotel premises of the original defendant, and then saw Morris, "Did he say anything about the lumber to you?" was properly excluded. It does not appear to have been legitimate cross-examination; and, further, the plaintiff could not be bound by a declaration of Morris unconnected with any act or fact of his tenancy, and made to one outside his agency.

[14] 7. The fact that the claim in suit was allowed among the claims against the bankrupt estate of Morris was not evidence against the plaintiff, since it did not appear that he had anything to do with listing the claim, or had attempted to profit thereby.

[15] 8. When the defendant introduced parts of a deposition taken in his behalf, the plaintiff was properly entitled to introduce other parts of the deposition which were relevant and competent evidence. The course taken by the defendant in culling out and offering parts of a deposition taken by him was wholly irregular.

[16] The party offering in evidence a deposition taken in his behalf must present the entire deposition competent and pertinent to the issues involved. *Logan v. McGinnis*, 12 Pa. 27, 32; *Lanahan v. Lawton*, 50 N. J. Eq. 276, 283, 23 Atl. 476; *Kilbourne J. & Co. v. Jennings & Co. et al.*, 40 Iowa, 473, 474; 13 Cyc. 983.

The other rulings on evidence and the parts of the charge excepted to furnish no sufficient ground for a new trial, and are not important enough to require discussion.

There is error, and a new trial is ordered. The other Judges concurred.

HALL, C. J., concurred in result, but died before opinion was written.

SMART v. BURGESS et al.

(Supreme Court of Rhode Island. Jan. 31, 1913.)

1. APPEAL AND ERROR (§ 1100*)—PARTIES—DEATH PENDING APPEAL—ADMINISTRATOR.

A bill alleged that attachment was issued against realty of defendant; that plaintiff recovered judgment; that, pending the action, the defendant had been adjudicated a lunatic, and a guardian appointed and made a party to the action; that the attached realty was sold before judgment at a mortgagee's sale; and that proceeds over and above the mortgage debt were in the hands of the mortgagee, a party defendant. The mortgagee was ordered to pay the plaintiff's judgment, and, subsequent to argument on their appeal, the lunatic died and an administrator was appointed. *Held*, that the question on appeal was whether the decree was erroneous, and that the administrator was not entitled to file answer in the Supreme Court, as the decision must be on the case as presented below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4405-4409; Dec. Dig. § 1109.*]

2. ATTACHMENT (§ 272*) — DISSOLUTION — DEATH OF DEFENDANT.

It is the death of a party against whom a suit is pending, and not the appointment of the executor or administrator which, by necessarily bringing about a complete distribution of his property and assets, dissolves an attachment against his real estate.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 960-963; Dec. Dig. § 272.*]

3. INSANE PERSONS (§ 59*)—PROPERTY—CUSTODIA LEGIS.

The property of a lunatic, after he has been adjudicated insane, is in custodia legis, to be thereafter managed and disposed of by the guardian under the direction of the court appointing him.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 91, 92; Dec. Dig. § 59.*]

4. INSANE PERSONS (§ 30*)—GUARDIAN'S APPOINTMENT—EFFECT TO DISSOLVE ATTACHMENT.

An attachment lien is not necessarily dissolved by the appointment of a guardian for an insane defendant, but the guardian takes the property subject to the lien; nor does Gen. Laws 1909, c. 318, § 5, which provides that the death of a party shall not abate a pending suit if the cause of action survives, and section 6 of which provides that where an executor, administrator, or guardian, on notice of suit pending, becomes a party thereto, judgment may go against the estate in the hands of such executor, etc., inferentially dissolve an attachment upon the appointment of a guardian for an insane defendant, the purpose of that section being to protect executors and guardians against personal liability by limiting the satisfaction of judgments against them to the property of their testators or wards in their possession; nor is there any statute in this state which deprives a plaintiff of his attachment lien upon the appointment of a guardian for an insane defendant.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 54, 55; Dec. Dig. § 36.*]

5. ATTACHMENT (§ 177*)—NATURE OF REMEDY—LIEN.

An attachment is a lien or incumbrance on the property attached, and becomes effective when judgment is rendered; the judgment relating back to the time when the attachment was made.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 825-827; Dec. Dig. § 177.*]

For other definitions, see Words and Phrases, vol. 1, pp. 616-620.]

6. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 336*)—EFFECT ON ATTACHMENT.

In the absence of statute, a general assignment for the benefit of creditors would not defeat a previous attachment.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 981-983; Dec. Dig. § 336.*]

7. MORTGAGES (§ 567*)—FORECLOSURE—SURPLUS—DISPOSAL—RIGHTS OF ATTACHING CREDITOR—SATISFACTION—MORTGAGEE'S SALE OF ATTACHED PROPERTY—JUDGMENT AGAINST EXCESS IN HANDS OF MORTGAGEE.

A plaintiff who has attached realty of the defendant, on which, before judgment, a prior mortgage has been foreclosed by the mortgagee, may have satisfaction of his judgment out of the balance in the hands of the mortgagee over the mortgage debt; such balance standing in the place of the property originally attached.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1632-1638; Dec. Dig. § 567.*]

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Bill by Charles H. Smart against Laura A. Burgess and John Nelson, a lunatic, represented by his guardian. Decree in the superior court for plaintiff against Laura A. Burgess, and defendants appeal. Appeal dismissed, decree affirmed, and case remanded.

Waterman & Greenlaw and Charles E. Tilley, all of Providence, for appellants. Charles R. Easton, of Providence, for appellee.

VINCENT, J. This is a bill in equity brought by the complainant against Laura A. Burgess, of the city and state of New York, and John Nelson, a lunatic, represented by Raphael Silverstein, his guardian, of the city and county of Providence, in the state of Rhode Island. The bill sets out that a writ of attachment was issued August 25, 1909, attaching the right, title, and interest of John and Fannie Nelson in and to certain real estate in Providence; that judgment at law was entered in such action on March 13, 1911, for \$1,061.20; that, pending the action, John Nelson was adjudged insane, and the said Raphael Silverstein was duly appointed his guardian and summoned in and made a party to the suit; that the real estate attached was subject to a mortgage, under which it was sold at a mortgagee's sale, and that the proceeds of the sale, over and above the amount of the mortgage, were in the hands and possession of the respondent Laura A. Burgess; that, at the time of the aforesaid judgment, there was none of the real estate attached standing in the name of John Nelson, and praying that the court would decree payment to the complainant of the whole or such portion of the balance remaining from the mortgagee's sale as might appear to be justly due to him in satisfaction of his judgment. The several respondents, by their answers, substantially admit the allegations of the bill, but claim that the appointment of the said Silverstein, as guardian of the person and estate of the said John Nelson, dissolved the attachment, and that the complainant, by virtue of said attachment, had no lien upon the balance in the hands of said mortgagee, Laura A. Burgess, but that the complainant's only remedy would be to obtain judgment and take out execution against the estate of John Nelson in the hands of his guardian. The case was heard in the superior court upon bill and answer, and a decree was entered ordering the respondent Laura A. Burgess to pay the complainant's judgment in case No. 26,395, Charles H. Smart v. John Nelson et al., amounting to \$1,061.20, together with interest and costs.

From this decree of the superior court, the respondents claimed an appeal, stating the following reasons therefor: (1) That said decree is against the evidence and the weight thereof; (2) that said decree is against the

law; (3) that said decree is against the rights of the respondents, as disclosed by the pleadings and proof; (4) that the court erred in finding that the attachment of real estate was not dissolved by the appointment of a guardian of the respondent John Nelson; (5) that the court erred in finding that the attachment of real estate, as aforesaid, was not dissolved, by implication, under the language of section 6, c. 318, of the General Laws of 1909; (6) that the court erred in finding that, independent of the statute, the plaintiff would be entitled to judgment and execution against the ward, and against the estate of the ward, by virtue of the attachment of real estate as aforesaid, when the said ward was under guardianship; (7) that the court erred in finding that it was not necessary to file claims with the guardian of said John Nelson according to the statute; (8) that the court erred in decreeing that the complainant was entitled to a decree in accordance with the prayer of his bill.

[1] Subsequent to the argument upon the appeal, John Nelson died. An administrator upon his estate was appointed, who entered his appearance and claimed the right to file an answer in this court. Under some misapprehension as to the status of the case, an order was entered allowing the administrator to answer; but later a notice was given to the parties to appear and show cause why such order should not be revoked, and, upon their appearance, the matter was continued two weeks to allow for the submission of briefs. The court has now further heard the parties as to the right of the administrator to appear and file an answer here. We do not think that such administrator is entitled to now appear and answer. It must be borne in mind that the question or questions now before us only involve the correctness of the finding of the superior court, as expressed in its decree, which has been appealed from. In other words, was the decree of the superior court, at the time it was entered, erroneous? The decree was based upon the pleadings as they then stood. We do not think that such pleadings, pending our decision upon the decree of the court below, can be changed, altered, or added to, to fit or adjust them to circumstances or conditions arising subsequent to the entry of such decree. The question before us is, Shall the decree be affirmed, or shall it be reversed? If the decree of the superior court was right, it should be affirmed; but on the other hand, if it was erroneous, it should be reversed, and our action in that regard can neither be controlled nor modified by subsequent events, which cannot now be properly presented for our consideration.

[2] The respondent contends that the court below erred in finding that the attachment of real estate was not dissolved by the appointment of a guardian of the respondent John Nelson, and argues that, inasmuch as

an attachment would be dissolved by the death of the defendant, it would also, by analogy, be dissolved by the appointment of a guardian; the situation being similar to that created by the appointment of an executor or administrator. It is not the appointment of an executor or administrator that dissolves the attachment, but the death of the party against whom the suit is pending, which necessarily and by operation of law brings about a complete and final appropriation and distribution of his property and assets, first in the liquidation of his debts, and second in the distribution of the remainder among his devisees or heirs at law. The two situations are so dissimilar that we cannot admit the analogy for which the respondents contend.

In the present case, a writ of attachment was issued against the defendant John Nelson on August 25, 1909, and on the same day service thereof was made by attaching all his right, title, and interest in and to certain real estate. The real estate attached was subject to a mortgage to the respondent Laura A. Burgess. Subsequent to the attachment, the attached property was sold out at a foreclosure sale under said mortgage. The amount obtained was more than sufficient to pay the mortgage, with interest and incidental expenses. The complainant prays in his bill that the respondent Laura A. Burgess may be decreed to pay over to him the balance remaining in her hands, or so much thereof as may be required to satisfy the judgment which he has obtained in his suit against Nelson.

While the attachment of property may be a summary and extraordinary remedy created by statute in derogation of the common law, it is nevertheless the established law of this state, as well as of many other states, that a party plaintiff may by attachment obtain a lien upon the property of the defendant, and hold the same subject to the satisfaction of such judgment as he may thereafter obtain in his suit. This right of the plaintiff being founded upon and acquired under the statute, it should not be taken away or nullified, except upon the clearest reasoning and authority. In some of the cases cited by the respondents, it is held that guardians are not liable as garnishees; and in others, the powers, duties, and obligations of guardians are defined and controlled by statutes which differ materially from the statutes of this state.

[3, 4] The general statement that the property of a lunatic, after he has been adjudicated insane, is in custodia legis, we assume to be correct, and that it must thereafter be managed and disposed of by the guardian, under the direction of the court appointing him. It does not follow, however, that a pre-existing lien, by way of attachment, is necessarily dissolved by the appointment of

a guardian. It seems to us to be the better reasoning that the guardian takes the property, subject to the lien which the plaintiff has already acquired under the statute. It might have been possible to have dissolved the attachment through proceedings in bankruptcy or insolvency; but, as such proceedings were not instituted, we need not discuss the possibilities in that direction. The respondent further contends that the necessities of the lunatic and his family must first be considered and provided for out of the estate which comes to his guardian. In view of the conclusion, which we have already reached, that the guardian takes the property of his ward, subject to the existing attachment lien, there is no necessity for the discussion of this question. The respondents also contend that it appears, inferentially, from the provisions of section 6, c. 318, that an attachment would, under the conditions of the case at bar, be dissolved by the appointment of a guardian. We do not think that the section referred to, considered in connection with the section preceding it, justifies such an inference. The purpose of that section seems to be to protect executors, administrators, and guardians by limiting the satisfaction of judgments against them to the property of their wards, which may be in their possession, and to insure them from any personal liability by extending to the court a permissive authority to enter judgment against the estate in their hands.

In the present case, the complainant is not seeking to satisfy his judgment out of any estate in the hands of the guardian or administrator. He asks that his judgment may be satisfied from a cash balance proceeding from the sale of the attached property under mortgage, and now in the hands of the respondent Laura A. Burgess, as mortgagee. We cannot find in section 6, c. 318, any intention on the part of the law-making power to deprive an attaching creditor of his lien under the circumstances of the present case. It is evidently contemplated by this section that, where an executor, administrator, or guardian comes into a suit already pending against the decedent or ward, the court may, in its discretion, limit the levy of the execution or the satisfaction of the judgment to the estate in his hands. We do not think that the only judgment and execution in a case of this kind must necessarily be against the estate of the ward in the hands of the guardian, and that therefore the attachment is impliedly dissolved.

[5] An attachment is a lien or incumbrance upon the property attached. When the judgment is rendered, it gives effect to the attachment, and relates back to the time when the attachment was made. There is no statute in this state which deprives a plaintiff of his attachment lien upon the appointment of a guardian over the defendant.

[6] A general assignment for the benefit of creditors would not be effectual to defeat a previous attachment without the aid of a statute to that effect. In the case of *Hubbard v. Hamilton*, 7 Metc. (Mass.) 340, it was held that an attachment of the property of a bank, made prior to application of the bank commissioners for an injunction, under the statute, to restrain the bank from further proceeding with its business, was not dissolved by the subsequent appointment of receivers pursuant to the provisions of such statute to take possession of the property and effects of the bank; the court saying, among other things, that there is nothing in the nature of the process by injunction and the appointment of receivers which necessarily dissolves an attachment previously made, that there is nothing, in the principle of equal distribution among all creditors pro rata, powerful enough to set aside the priority already acquired by a vigilant creditor, and that the lien acquired by attachment must continue, notwithstanding such proceedings, to be available, if the party prevails in his action and levies his execution within the time prescribed by law.

[7] So, in the case at bar, we see no reason, and find no satisfactory authority, for depriving the complainant of the lien which his attachment gave him. Having obtained such a lien, and being entitled to retain it, we see no reason why the complainant's judgment should not be satisfied out of the balance remaining in the hands of the respondent *Laura A. Burgess* after the sale of the attached property under mortgage; such balance standing in the place of or representing the property originally attached.

The respondents' appeal is dismissed, the decree of the superior court is affirmed, and the case is remanded to that court for further proceedings.

COHEN v. SUPERIOR LODGE, NO. 516,
I. O. B. A.

(Supreme Court of Rhode Island. Feb. 3,
1913.)

On rehearing. Former conclusion affirmed.
For former opinion, see 85 Atl. 653.

PER CURIAM. In the above-entitled case an opportunity was given to the plaintiff to appear before this court on January 22, 1913, at 10 a. m., and show cause why judgment for the defendant should not be entered. The plaintiff appeared, by counsel, at the time specified and was fully heard. After consideration of the argument presented, the court finds no reason for changing or modifying its former conclusion, and the case is therefore remitted to the superior court, with direction to enter judgment for the defendant as of nonsuit.

JOHNSON v. DILLABUR et al

(Supreme Court of Rhode Island. Feb. 7,
1913.)

Case certified from Superior Court, Providence and Bristol Counties.

Bill by Alice M. Johnson, guardian, against Helen S. Dillabur and others. Cause certified to the Supreme Court for determination. Remanded, with directions to dismiss.

Edward C. Stiness and Frederick W. O'Connell, both of Providence, for complainant. Arthur Cushing, William F. Carroll, and James F. McCartin, all of Providence, for respondents.

PER CURIAM. This bill is brought by Alice M. Johnson, as guardian of George A. Tanner, to procure the cancellation of a certain instrument in writing signed by him, bearing date October 17, 1909, whereby the said Tanner purports to convey to the respondents other than Frederick P. Johnson all of said Tanner's interest in all money on deposit in the name of his deceased wife, Elizabeth, in certain banks in the city of Providence, on the grounds that said Tanner was mentally incompetent to execute said instrument at the times when it was signed and acknowledged by him, and, further, that the execution of said instrument was obtained by said respondents other than said Johnson by their importunity, and by the abuse of the trust and confidence reposed in them by said Tanner. All the testimony was taken before a commissioner. After hearing for final decree the cause was certified by the superior court, under section 35 of chapter 289 of the General Laws, for its determination by this court.

Upon careful consideration of all the evidence the court finds that said George A. Tanner, at the times of the signing and acknowledging of the instrument in question, was mentally capable of executing the same; that the execution and delivery of the said instrument were neither procured by the importunity of the three sisters of said Tanner's deceased wife, Elizabeth, nor of either of them, nor by the abuse of trust and confidence reposed in them by said Tanner, nor by any undue influence exercised by them; and that the signing, delivery, and acknowledgment of said instrument were the free and voluntary acts of the said George A. Tanner. The relief asked for is therefore denied, and the bill is ordered to be dismissed, with costs taxed in favor of the respondents other than said Frederick P. Johnson.

The cause is remanded to the superior court for the entry of a decree in accordance herewith.

STEWART v. CENTRAL VERMONT
RY. CO.

(Supreme Court of Vermont. Rutland. Jan.
21, 1913.)

CARRIERS (§ 298*)—DUTY TO PASSENGERS—
EMERGENCY—NEGLIGENCE.

Where a train was just starting, and a man ran out of the station and stumbled and fell on the edge of the platform and was probably going under the wheels, the railroad was not negligent, in that the conductor applied the emergency air brake, and one who had not yet reached her seat and was thrown and injured could not recover; the conductor not knowing her position.

[Ed. Note.—For other cases, see *Carriers*. Cent. Dig. §§ 1192, 1205, 1206; Dec. Dig. § 298.*]

Exceptions from Rutland County Court; William H. Taylor, Judge.

Action by Bridget Stewart against the Central Vermont Railway Company. Judgment for plaintiff, and defendant brings exceptions. Reversed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

T. W. Moloney and B. L. Stafford, both of Rutland, for plaintiff. C. W. Witters, of St. Albans, and Clarke C. Fitts and Hermon E. Eddy, both of Brattleboro, for defendant.

HASELTON, J. This is an action on the case for personal injuries. Trial was by jury, and a general verdict for the plaintiff was returned. A special finding, hereinafter referred to, was made. Judgment was rendered pro forma for the plaintiff. The defendant excepted.

The defendant is a common carrier of passengers. The plaintiff, who was a passenger of the defendant, received the injuries complained of in a car of the defendant at its Montpelier station. She got aboard the car in question, and had not become seated, when the train to which the car belonged started up. She was thrown by the sudden stopping of the car, and in consequence received injuries.

In answer to a special question submitted to them, the jury found that "the train stopped in the manner and for the purpose and under the circumstances testified to by Conductor Powers." Mr. Powers was the conductor of the train, and under this finding we need not and cannot look beyond his testimony in reviewing the matters covered by the special finding. His testimony was to the following effect: About five minutes before the train started, he went into the waiting room of the station, and announced his train, saying: "This train for Montpelier Junction, north-bound train." Before giving the signal for starting, he looked the length of the platform, and when he had given the signal, he stepped onto the end of a car and the train began to move. Just then a man came out of the station, carrying a grip in his hand and a raincoat on one arm, and ran for the train. The raincoat dragged on the platform. The run across the platform was 12 or 15 feet. The man reached for the handle of the car, and, as he did so, he stumbled and fell lengthwise on the edge of the platform, where there were only eight or ten inches between the platform and the car wheels. The conductor in his testimony expressed his apprehension of the danger by saying: "I could see that man probably going under the car wheels." The train was equipped with air brakes, and a lever controlling the brakes was at the end of the car where he was, just inside the door. It was there to be used in case of emergency, and, upon seeing the situation of

the man and apprehending the danger which he was in, the conductor, as quickly as possible, stepped inside the car, and pulled down the emergency brake, and so stopped the train. The train had barely started, and, when it stopped, had not moved more than half a car's length. This narrative found by the jury to be true affirmatively shows as matter of law, because reasonable men cannot differ about it, that the conductor was free from negligence, that whether we regard the man who was attempting to board the train as a passenger, a licensee, or a trespasser the immediate stopping of the train in the circumstances narrated was a duty owed him after he was seen by the conductor in the perilous position already mentioned. It appears that the conductor did not warn the traveler as the latter was rushing to the train, and it is argued that this failure to warn tends to show negligence. But the train was starting gently and the distance across the platform which the man ran was so short that there is no force in the suggestion.

While it is argued that the man was in "extreme danger" while running to the train, it is further argued that he was in no danger at all after he had fallen on the edge of the platform, and that there was not the slightest need of stopping the train except for the purpose of taking the man on board. But this argument is not warranted. The conductor saw the man fall where he did, and, without waiting to observe further, acted on the spur of the moment, and stopped the train as he did. The need of stopping the train was the imminent danger that the man would be killed if the train was not stopped.

It is argued that the conductor might have stepped down and prevented the man "from doing himself injury," but the distance of the conductor from the man was such as to make this suggestion chimerical. It is argued that the conductor should have made a service application of the brake, and not an emergency application, since so the car would not have stopped so suddenly as it did. But in the circumstances there was no reason why the conductor should speculate as to how far the train could be allowed to run. It is true that a carrier of passengers owes to them a very high degree of care, but the train had moved but a few feet, and was moving gently, the conductor did not know of the plaintiff's position in the car, and in taking the steps which he did to avert peril to life he did not, in the circumstances found by the jury to be true, violate any duty to the passengers. There were many passengers on board the train, but the plaintiff's position in the car happened to be such that she was injured in consequence of the performance by the conductor of an imperative duty. In these circumstances negligence cannot be attributed to the defendant.

After a verdict, and before judgment, the defendant moved in arrest of judgment, that the general verdict be set aside, and that judgment be rendered for the defendant. These motions were overruled pro forma, and the defendant excepted. As has already been said, the judgment on the general verdict was pro forma. We think that the general verdict should have been set aside, and that the defendant's motion for judgment in its favor should have prevailed.

Accordingly, the pro forma judgment of the county court is reversed, and judgment is rendered for the defendant to recover its costs.

STUART v. OLIVER.

(Supreme Judicial Court of Maine. Jan. 28, 1913.)

1. BILLS AND NOTES (§ 396*)—ACCOMMODATION INDORSER OR SURETY—DEMAND AND NOTICE OF NONPAYMENT—NECESSITY.

One signing his name on the back of a note at its inception is a joint or joint and several maker, so far as concerns the necessity for demand and notice of nonpayment, though he is in fact an accommodation indorser or surety.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1022-1028; Dec. Dig. § 396.*]

2. PRINCIPAL AND SURETY (§ 108*)—DISCHARGE OF SURETY—EXTENSION OF TIME OF PAYMENT—CONSIDERATION.

The payment of interest in advance is a sufficient consideration for an agreement to extend the time of payment of the debt, within the rule that a surety is released from liability by an extension, for a valuable consideration, of the time of payment of the debt without his consent.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 213-218; Dec. Dig. § 108.*]

3. BILLS AND NOTES (§ 537*)—DISCHARGE OF INDORSER—EXTENSION OF TIME OF PAYMENT—QUESTION FOR JURY.

Whether the payee of a note knew, at the time of an extension of the time for payment, that one who signed his name on the back of the note at its inception was a surety, or accommodation maker only, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1894; Dec. Dig. § 537.*]

Exceptions from Supreme Judicial Court, Sagadahoc County, at Law.

Action by William H. Stuart against Wilbur C. Oliver. There was a directed verdict for plaintiff, and defendant brings exceptions. Sustained.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, KING, BIRD, and HANSON, JJ.

Charles D. Newell, of Richmond, for plaintiff. Frank L. Staples, of Bath, for defendant.

SAVAGE, J. This is an action of assumption, wherein the plaintiff, as liquidating agent of the Richmond National Bank, seeks to

recover of the defendant on a promissory note for \$200, made by F. B. Torrey and indorsed by the defendant on the back. The note was dated December 20, 1905, and the bank was payee.

Under the general issue the defendant pleaded, by way of brief statement, that he was merely an accommodation indorser or surety on the note, which fact was well known to the bank, and that the bank, for a valuable consideration, had extended the time of payment to the maker, Torrey, without the knowledge or assent of the defendant. Another defense set up was that no demand had been made upon the defendant, and no notice of nonpayment when due had been given to him. At the conclusion of the evidence the presiding justice directed the jury to return a verdict for the plaintiff, which was accordingly done. The defendant excepted to the direction.

[1] That the defendant was in fact an accommodation indorser or a surety is not now disputed. But it is well-settled law that one who signs on the back of a note at its inception is a joint or joint and several maker with one who signs on the face, so far as concerns the necessity for demand and notice of nonpayment. *Adams v. Hardy*, 32 Me. 339; *Merchants' Trust & Banking Company v. Jones*, 95 Me. 335, 50 Atl. 48, 85 Am. St. Rep. 412. Accordingly the defense of want of notice cannot avail him.

[2] But there is evidence that the bank, without the knowledge or assent of the defendant, on payment of interest in advance, extended the time of payment to Torrey, the principal, 19 times, for a period of 4 months each time. The payment of interest in advance was a sufficient consideration for an agreement to extend the time of payment. And it is not denied that such an extension, for a valuable consideration, had the effect of discharging the defendant from liability, if at the time of the agreement to extend the bank had notice that the defendant was an accommodation maker or surety. *Andrews v. Marrett*, 58 Me. 539.

[3] It follows that the only debatable question, under exceptions to the direction of a verdict for the plaintiff, is whether there was sufficient evidence to go to the jury that the bank did have such notice. We think there was, and that taking the case from the jury and directing a verdict for the plaintiff was error.

The evidence would warrant the jury in finding that Torrey alone made application for the loan; that the cashier asked him who was to sign with him, and that he gave the name of the defendant; that Torrey subsequently presented the note in his own handwriting, with defendant's name on the back; that the note was then discounted by the bank and the proceeds deposited to Torrey's account; that Torrey checked it out; that

when the note was about to become due Torrey was notified by the bank, and the defendant was not; and that the defendant was never notified until March, 1912, a period of over seven years after the inception of the note. In this connection we note that the manner of the defendant's signing, being upon the back of the note, instead of on its face, was held significant of notice in *Andrews v. Marrett*, *supra*.

Upon finding the foregoing facts, we think the jury would have been warranted in concluding that the bank had actual notice that the defendant was surety for Torrey, or at least that the circumstances were such as ought to have placed the officers of the bank upon their inquiry. And we think it is immaterial which they might find. See *Andrews v. Marrett*, *supra*; *Merchants' Trust & Banking Co. v. Jones*, *supra*. The case must go back for a jury trial.

Exceptions sustained.

BLUNT et al. v. McCOOMBS. SAME v. SAME.

(Supreme Judicial Court of Maine. Jan. 28, 1913.)

1. INDEMNITY (§ 9*)—LIABILITY OF INDEMNITOR.

An accommodation indorser of a number of notes whom another indorser had agreed to indemnify against loss on part of the notes by a mutual arrangement with the other accommodation indorser paid all the notes; the ones actually paid by him not being those covered by the indemnity agreement. *Held*, that the fact that he made no payment specifically on account of the notes covered by the agreement was immaterial, and did not relieve the indemnitor of liability; he having in effect made payments thereon under the mutual arrangement.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 16, 17; Dec. Dig. § 9.*]

2. CONTRACTS (§ 329*)—BREACH—ACCRUAL OF CAUSE OF ACTION.

A right of action for breach of a contract accrues when the contract is broken, although no injury results from the breach until afterwards.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1511, 1585-1588; Dec. Dig. § 329.*]

3. EXECUTORS AND ADMINISTRATORS (§ 437*)—LIMITATIONS—ACCRUAL OF CAUSE OF ACTION.

An accommodation indorser agreed to indemnify and save harmless another indorser, the agreement providing that, if the notes were paid by the maker or the indemnitor when due and payable, the agreement should become void, but otherwise should remain in force; nothing being said about renewals of the notes. Before the maturity of the notes, the indemnitor died, and the notes were renewed by new notes executed by all the parties to the first notes except by the deceased indemnitor. *Held*, that, when the indemnitor failed to take care of the notes at maturity, the cause of action for breach of the indemnity agreement accrued within the meaning of Rev. St. c. 89, § 17, extending the time to bring actions against executors or administrators where the cause does not accrue within 18 months after notice of the appointment, since, even if it was contemplated that the loan would

be permanent and the notes renewed, a renewal by the indemnitor as well as by the other parties must have been intended.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1729-1764; Dec. Dig. § 437.*]

4. INDEMNITY (§ 11*)—ACCRUAL OF CAUSE OF ACTION.

Plaintiffs became accommodation indorsers on notes made by a corporation of which they were stockholders in reliance on another stockholder's agreement to indemnify and save them harmless. They subsequently took assignments of the notes and participated in a reorganization of the corporation by which creditors became preferred stockholders to the amount of their claims. The corporation's affairs were subsequently liquidated, and nothing paid the preferred stockholders. *Held*, that plaintiffs' right of action for the breach of the indemnity agreement accrued when they took up the notes, and not when it was subsequently ascertained that there was nothing with which to pay the creditors.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 21-25; Dec. Dig. § 11.*]

5. EXECUTORS AND ADMINISTRATORS (§ 233*)—ACTIONS—DELAY—"CULPABLE NEGLECT."

In 1906 plaintiffs became accommodation indorsers on notes made by a corporation in which they were stockholders, payable in six months in reliance on the general manager's agreement to indemnify and save them harmless. Before the maturity of the notes, the general manager died, and the affairs of the corporation were thereafter controlled by plaintiffs, and a son of one of the plaintiffs. The notes were renewed from time to time. In 1908 a receiver of the corporation was appointed, and continued in control until 1910, when the corporation was reorganized by its creditors becoming preferred stockholders. Plaintiffs paid the notes, and received preferred stock under this arrangement in exchange therefor. The preferred stockholders operated the corporation's mill until February, 1912, when its affairs were liquidated without anything being available for distribution to the stockholders. When the first notes became due, the corporation was solvent. No claim against the general manager's estate was filed until after plaintiffs had operated the mill about 18 months, and no action was brought for nearly six years after the appointment of the administratrix. *Held*, that the facts did not justify a judgment for plaintiffs on the indemnity agreement under Rev. St. c. 89, § 21, authorizing the Supreme Judicial Court upon a bill in equity by a creditor whose claim has not been prosecuted within the time limited by that chapter to give judgment for the amount of the claim, if of the opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time limited, the facts showing "culpable neglect."

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 831; Dec. Dig. § 233.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1780.]

Report from Supreme Judicial Court, Somerset County.

Two actions, one at law and the other in equity, by Albert G. Blunt and another against Alice Gledhill McCoombs, administratrix. On report. Judgment for defendant in the action at law. Bill in equity dismissed.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, KING, BIRD, and HANSON, JJ.

Gould & Lawrence, of Skowhegan, for plaintiffs. Butler & Butler, of Skowhegan, for defendant.

SAVAGE, J. The first case is brought to recover damages for breach of a contract of indemnity made by the defendant's intestate, whereby he agreed to save the plaintiffs "harmless from all loss, cost and damage" resulting to them on account of their having signed certain notes. The defense is the special statute of limitations applicable to suits against executors and administrators. R. S. c. 89, §§ 14, 17.

The second case is a bill in equity brought by the same plaintiffs to recover judgment on the same cause of action. It is brought under section 21 of the same chapter, which provides that "if the Supreme Judicial Court, upon a bill in equity filed by a creditor whose claim has not been prosecuted within the time limited" by statute "is of opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person." The bill is brought only as an alternative remedy to avail the plaintiffs, in case it is held that the action at law is barred by the statute of limitations. The defense is that the plaintiffs are chargeable with culpable neglect, and are not entitled to equitable relief. Both cases come up on report.

Action at Law.

On January 26, 1906, the defendant's intestate, Edwin Gledhill, agreed in writing to save the plaintiffs harmless from all loss, cost, and expense which should result to them on account of their signing with him and J. Wallace Blunt, son of one of the plaintiffs, a note of even date with the agreement for \$5,000, and another note for the same amount to be signed afterwards. The latter note, dated February 12, 1906, was afterwards signed by all the parties. In both notes the Marston Worsted Mills, a corporation, was the principal maker, and all the other signers were accommodation indorsers. Both notes were made payable to the Second National Bank of Skowhegan, and each was made payable six months after date. The Second National Bank discounted the notes, and the Marston Woolen Mills had the proceeds. On May 31, 1906, before either of the notes had matured, Edwin Gledhill died. When the notes became due, they were renewed by the Worsted Mills and all the other signers, except Gledhill. And they were successively renewed in the same manner until 1910; the last notes maturing in January and February of that year. Beginning some time in 1907 or 1908, Roy L. Marston, representing a large stockholding interest in the corporation, vol-

untarily signed the renewal notes. During this entire period the Marston Woolen Mills was also indebted to the First National Bank of Skowhegan for \$10,000 on notes, renewed from time to time, on which the plaintiffs and J. Wallace Blunt voluntarily became accommodation indorsers in 1906, and Marston afterwards.

Soon after the death of Mr. Gledhill, the defendant was appointed administrator of his estate, gave notice thereof, and filed her affidavit of notice June 14, 1906. Within 18 months thereafter, the plaintiffs filed in the probate office, under the provisions of R. S. c. 89, § 16, their demand, arising under the contract of indemnity, alleging that the cause of action did not accrue within said 18 months. The date of the writ is March 4, 1912.

Under the provisions of Revised Statutes, c. 89, § 14, as amended by Laws of 1907, c. 186, "no action shall be maintained against an executor or administrator on a claim or demand against the estate," with certain exceptions stated, "unless commenced within twenty months" after the affidavit of notice has been filed in the probate court. Only one of the exceptions touches this case. By section 17 of chapter 89 the time for bringing action is extended in cases where a cause of action does not accrue within 18 months after affidavit of notice is filed. In such cases, when the claimant has filed his claim in the probate office within the 18 months, and the heirs or devisees have given no bond to pay the claim, the claimant may bring an action within 6 months after his demand becomes due.

It being conceded that a cause of action has accrued upon the contract of indemnity, the question now to be considered is, When did it accrue? If it accrued within the 18 months mentioned, then the action is barred by the general limitation of suits against administrators. If it accrued after the 18 months, but more than 6 months before suit was commenced, it is likewise barred under the exception. The plaintiffs claim that the cause of action accrued within 6 months before suit was commenced, and therefore that the action is not barred.

In order to understand the contentions of the parties, it is necessary to state the relations of the parties, and the history of the transactions subsequent to the giving of the contract for indemnity. Mr. Gledhill was the general manager of the Marston Worsted Mills. He was a large stockholder, holding 398 shares of the capital stock. He and his family and one Larzalaer, of Philadelphia, owned one-half of the capital stock. The other half belonged to the estate of Charles A. Marston, J. Wallace Blunt, and the plaintiffs, and perhaps others. At the time the original notes were given J. Wallace Blunt held the office of assistant treasurer. After the death of Mr. Gledhill, he

was made the general manager, and the plaintiffs and J. Wallace Blunt either constituted the whole board of directors, or were a majority of the board. They operated the mill until April, 1908, when, on a bill brought by creditors in the federal court, a receiver was appointed. The receiver continued the operation of the mill until a reorganization was effected in 1910. In accordance with the plan of reorganization, a new corporation was formed, called the Marston Worsted Company. The creditors assigned their respective demands to a committee of creditors as trustees. The committee purchased the property of the Marston Worsted Mills from the receiver, and conveyed it to the Marston Worsted Company. Preferred stock in the Marston Worsted Company was issued to the creditors on account of the claims so assigned by them, dollar for dollar. By the terms of the certificates, as well as by the plan of reorganization, the stock was preferred, both as to assets and dividends. The dividends were to be cumulative at 7 per cent. per annum. The preferred stock might be retired, in whole or in part upon any dividend date by payment of \$100 per share and accrued dividends to any holder thereof. The preferred stockholders were to have the sole voting power. Certain common stock was provided for, for the benefit of former stockholders of the Marston Worsted Mills, but it was not to be delivered to them until all the preferred stock was retired. And until that time the common stock was to have no voting power, nor be entitled to dividends. By this scheme the creditors came into possession and control of the mill. They were the owners, subject to the retirement or redemption of their shares as provided. Whenever their shares should be so retired, the old stockholders, by virtue of their common stock, would come into possession and control.

[1] The plaintiffs and J. Wallace Blunt and Roy L. Marston all became parties to the reorganization. The First National Bank and the Second National Bank had both proved their claims on the Marston Worsted Mills notes in the receivership proceedings. In January, 1910, the First National Bank assigned one-half of its proved claim to the plaintiff Blunt. Thereupon he assigned the same to the committee of creditors. And on October 5, 1910, he received the stipulated preferred stock in the Marston Worsted Company. Similarly like assignments were made and preferred stock issued with respect to the remainder of the indebtedness due to the banks. The First National Bank assigned the remainder of its claim to the plaintiff Young, and the Second National Bank assigned its claim, being renewals of notes on account of which the contract of indemnity was given, one-half to J. Wallace Blunt and one-half to Roy L. Marston. At the

time of the assignment the plaintiff Young and Roy L. Marston each paid the banks, respectively, the amount due on account of the claim assigned. The plaintiff Blunt paid the whole amount due the banks on account of the claims assigned to himself and to J. Wallace Blunt, his son. As already stated, these four gentlemen were all indorsers on all the notes held by both banks. And by mutual arrangement they took the assignments, and made the payments in the manner above described. So that the fact that it happened that neither of the plaintiffs made payments specifically on account of the notes in the Second National Bank, for which the contract of indemnity was given, must be deemed of no importance in this action. In effect, they made the payments.

To this statement of the case it is only necessary to add that the preferred stockholders operated the mill until February, 1912, when it became necessary to liquidate the affairs of the Marston Worsted Company. The mill was sold, and upon settling the business it was found that there were no proceeds whatever available for payment or distribution to the preferred stockholders. They had lost all.

The learned counsel for the plaintiffs suggests that four dates only are conceivable as those on some one of which this cause of action accrued, (a) the time the notes were first renewed; (b) the time of taking the assignments from the banks, and of the payments therefor; (c) the time of taking the preferred stock; and (d) the time of final liquidation of the new company without assets available for the preferred stock. It is conceded that, if the cause of action accrued at any of the first three named dates, this action is barred by limitation, but the plaintiffs contend that no cause of action accrued at any of these dates, but did at the time of final liquidation.

[2] As to the first date, that of the first renewals of the notes, counsel says that no cause of action accrued then, "because plaintiffs' only liability was a contingent one, and they had suffered no actual damage; that, in order to have a cause of action for substantial damages, they must either have paid or absolutely assumed the debt." We do not think this argument reaches the correct result. The rule is correctly stated in *Manning v. Perkins*, 86 Me. 419, 29 Atl. 1114, in these words: "If the action rests on a breach of contract, it accrues as soon as the contract is broken, although no injury results from the breach until afterwards."

[3] Now what was the contract, and how was it broken? The contract was to "save harmless" on account of the signing of the notes. It contained this clause: "If said notes are paid by the said Marston Worsted Mills, or said Edwin Gledhill, at the time the same may become due and payable, then this agreement shall become void, otherwise the said agreement shall remain in force."

Nothing is said about renewals. The contract looked to the plaintiffs' being saved harmless at the time the notes should become due. It was the contract duty of Mr. Gledhill to save them harmless then by paying or otherwise taking care of the notes. Did he do so? We think he did not. We do not need to decide what would have been the result if Mr. Gledhill had lived and had signed the renewal notes with the plaintiffs. There might be such circumstances as would indicate an intention to waive any cause of action which might have accrued by reason of his failure to take care of the notes then. And in such a case, as shown by the authorities cited by the plaintiffs, the indemnity contract would apply to notes given in renewal. *Pond v. Clarke*, 14 Conn. 339; *Boswell v. Greene*, 31 Conn. 74, 81 Am. Dec. 169. But even if, as claimed by the plaintiffs, despite the terms of the contract, the loan was intended as a permanent one, which necessarily contemplated renewals, it is quite clear that it must have contemplated also renewals by Mr. Gledhill as well as by the others. But, when the first notes became due, Mr. Gledhill was dead, and could not renew. The notes could not be renewed so to continue the same relative liability on the new notes as existed on the old ones. The notes became due. The plaintiffs might have paid them, in which case there is no doubt a cause of action on the indemnity contract would have accrued them. Instead, they signed new notes, without Gledhill, as cosurety. This changed the situation. They were then two sureties out of three, instead of two out of four. Their liabilities, as among themselves, were increased. Their proportionate rights as against one another as cosureties were changed. We think it hardly admits of question that under the terms of this contract, and under these circumstances, a cause of action accrued to the plaintiffs on the failure of Mr. Gledhill to save them harmless by taking care of the notes "at the time they became due." He had not saved them harmless.

[4] But, if this conclusion be not tenable, it is quite certain that a cause of action accrued in January, 1910, when the plaintiffs took up the notes by paying the banks the amounts due. The plaintiffs contend that the payment did not create a cause of action, because it was not the result of the liability against which they were indemnified. They claim that, instead of being money paid by reason of that liability, it was money spent in an effort to rehabilitate the principal debtor, so that it could pay its own debts, and thus prevent ultimate damage to indorser and indemnitor both, that the obligations of the notes were kept alive, in changed forms, finally in preferred stock, that they were and continued to be creditors even after taking the stock, that the original debt was not paid or discharged by them,

and therefore that no cause of action then accrued. The plaintiffs cite *Norton v. Soule*, 2 Me. (2 Greenl.) 345; *Howe v. Ward*, 4 Me. (4 Greenl.) 202; *McLellan v. Crofton*, 6 Me. (6 Greenl.) 334; *Young v. Jones*, 64 Me. 563, 18 Am. Rep. 279. *Ticonic Bank v. Bagley*, 68 Me. 249; 32 Cyc. 280, and other authorities. We think none are in point. Some of them concern the reciprocal rights and liabilities of cosureties, and some the question what is to be regarded as a discharge or payment of a debt, or the effect of payment by surety upon his right of subrogation to security held by the creditor, but none to an express contract of indemnity. We find none that sustains plaintiffs' position.

We think the renewal notes were paid or discharged by the plaintiffs in such sense as to be a breach of the contract to save harmless, for it is not denied that payment of the renewal notes would create a cause of action upon the contract of indemnity. This was the situation. The principal maker was unable to pay. Its property was in custodia legis. The plaintiffs were compellable to pay. They did pay. They took up the notes. The obligation to the bank was paid and discharged. They thereby became creditors of the *Worsted Mills*. True, they took assignments from the bank, and themselves assigned to the committee of creditors. These were steps in the proposed plan to establish their status as creditors, and entitle them to preferred stock. It may be conceded that from that time to the end they continued to be creditors of the principal maker. So would they have been if they had simply paid the notes, and taken no further steps. The preferred stock may be regarded as simply representing the obligation in another form. No doubt the steps taken by them were proper ones. Though the liability of the indemnity had become fixed, they might properly seek to save themselves, and to save the Gledhill estate by such steps as might in the end enable them to reimburse themselves out of the assets of the *Worsted Mills*.

And it must be remembered that the question now is not what amount of damages they might have recovered, if they had sued seasonably. That question, and the further question whether, if the estate of the indemnitor had paid them, it would have been entitled to subrogation to their rights in the preferred stock, have not arisen. The question now is, Did a cause of action accrue to them upon payment of the money to the bank? We think it did. We think that when the indemnitor, or rather his estate, instead of taking care of the notes, left the plaintiffs to pay them, and seek to retrieve themselves out of the uncertain fortunes of the *Worsted Mills* business, it did not "save them harmless from all loss, cost and damage," as Mr. Gledhill had agreed to do. We

hold accordingly that the action is barred by limitation.

Judgment for defendant.

Bill in Equity.

Necessarily many of the facts which are pertinent to a determination of the bill in equity have already been stated and discussed in our consideration of the action at law, and need not be repeated.

To sustain the bill, it is incumbent on the plaintiffs to show two things: First, that justice and equity require it; and, secondly, that they are not chargeable with culpable neglect. We think they have failed on both points.

[5] When Mr. Gledhill died, and when the first notes became due, the Marston Worsted Mills was a going concern. So far as the case shows, though short of cash, it was solvent as to creditors. That year J. Wallace Blunt purchased the Larzalaer stock at par. It is in evidence that the plaintiffs considered the stock worth 75 cents on the dollar. They held as security for their indorsement 78 shares of Maine Spinning Company stock, admittedly good, which security was exchanged by them for Marston Worsted Mills stock, at the request of the defendant. This tends to show that the latter stock was regarded by them as having value. This is further shown by their voluntarily indorsing the notes in the First National Bank without security, or promise of indemnity. In this situation, when the first notes became due, they might have paid them. If they had paid them, they would have become creditors of the corporation for the full amount, and at the same time have fixed the liability of the Gledhill estate for the same amount. And the Gledhill estate on payment would have had its remedy against the corporation in its then condition. Instead of doing so, they elected to give new notes, and to take charge of and operate the mill, with the results already described. We do not impute the results to mismanagement. They may have been due to changed conditions. The case does not disclose the cause. But the property, all that the Gledhill estate could look to for reimbursement, is gone. We think it is not a sufficient answer to say that the Gledhill estate could have paid voluntarily, and saved the situation so far as the plaintiffs were concerned. The plaintiffs were, or might have been, the movers. It does not appear that they made any claim, even by filing it in the probate office, until after they had operated the mill about 18 months, and within about 4 months of the receivership proceedings. And certainly an estate is not blamable for not paying before demand is made.

Under all the circumstances, we think it would be unjust and inequitable now to ex-

tend the statute limitation and award judgment against the estate.

Besides, and as more especially bearing upon the question of "culpable neglect," the evidence leads us to believe that the plaintiffs had no real intention of pursuing the estate until the final failure of the Worsted Company. They allowed nearly six years to elapse after the appointment of the administratrix before commencing any action. Whether they had too little confidence in the ability of the estate to pay, or too much confidence in the ability of the company, is immaterial. They appear to have relied upon their own ability and the ability of their fellow creditors to work out their own indemnity. They were not trapped, misled, or defrauded. Nothing but their own choice prevented them from commencing suit within the period of limitation.

What is "culpable neglect" has been discussed by this court, and defined, so far as it is capable of exact definition, in the recent cases of *Bennett v. Bennett*, 93 Me. 241, 44 Atl. 894, *Holway v. Ames*, 100 Me. 208, 60 Atl. 897, and *Beale v. Swasey*, 106 Me. 35, 75 Atl. 134, 20 Ann. Cas. 396. It is unnecessary to repeat the discussion. The facts before us bring this case, we think, well within the rules laid down in those cases. The plaintiffs have slumbered upon their rights, and that is "culpable neglect."

The certificate in this case, therefore, must be:

Bill dismissed, with costs.

SPILLER v. BECHARD.

(Supreme Judicial Court of Maine. Feb. 3, 1913.)

1. SHERIFFS AND CONSTABLES (§ 120*)—FRAUD—PENALTY.

A debtor must prove fraud by the officer and not merely neglect, in order to recover under Rev. St. c. 83, § 9, providing that an officer levying execution, who commits any fraud in the sale or return, shall forfeit to the debtor five times the sum of which he defrauds him.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 205-218; Dec. Dig. § 120.*]

2. SHERIFFS AND CONSTABLES (§ 138*)—ACTIONS AGAINST OFFICERS—SUFFICIENCY OF EVIDENCE—FRAUD.

Evidence, in an action against a deputy sheriff to recover five times the sum of which plaintiff was defrauded by defendant's fraud in making a sale, *held* not to show fraud as claimed.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 290-296; Dec. Dig. § 138.*]

3. FRAUD (§ 50*)—PROOF—PRESUMPTIONS.

Fraud must be proved, and not merely surmised.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.*]

Report from Supreme Judicial Court, Cumberland County, at Law.

Action by Clarence E. Spiller against Er-

nest E. Bechard. On report. Judgment for defendant.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, KING, BIRD, and HANSON, JJ.

Oakes, Pulsifer & Ludden and F. O. Watson, all of Auburn, and Charles G. Keene, of Portland, for plaintiff. McGillicuddy & Morey, of Lewiston, for defendant.

SAVAGE, J. This action is brought against the defendant, a deputy sheriff, under R. S. c. 86, § 9. Chapter 86 relates to levies of executions on personal property, and section 9 provides that, if an officer so levying an execution "commits any fraud in the sale or return, he forfeits to the debtor five times the sum of which he defrauds him, to be recovered in an action on the case." The case comes up on report.

[1] The plaintiff's right to recover depends upon the proof of the defendant's fraud, and not the proof merely of other faults or neglects. These are the facts:

[2] The plaintiff was judgment debtor in an execution on which the defendant seized two automobiles, the property of the plaintiff. When seized, the machines were in a garage occupied and controlled by the judgment creditors, one of whom was the defendant's brother, a lawyer, who had brought the action in which the execution issued. The manager of the garage also was a judgment creditor. The machines had been left in the garage by this plaintiff, but at a time prior to the possession by the judgment creditors.

The plaintiff claims that the defendant sold both machines to employés of the judgment creditors, presumably for the creditors; that they were sold for prices which in the aggregate largely exceeded the amount due on the execution; that the defendant has made no return on the execution, and has not accounted to the plaintiff for the surplus; that he has concealed from the plaintiff what he now claims to be the true history of the sale; and that upon a view of all the evidence it should be found that he was acting in fraudulent collusion with the judgment creditors, to the plaintiff's damage.

The defendant, being called as a witness by the plaintiff, testified, in effect, that after due notice he sold at the garage one of the machines at auction to an employé of the judgment creditors for \$50; that he understood it was bid in for the creditors, and made a memorandum to that effect on the execution; that he then offered the other machine for sale; that it was bid off by one Whitney, a brother of the manager of the garage, for \$395; that he told the purchaser he must pay for it then; that Whitney said he had no money and could not pay for it; that thereupon he gave notice of a second sale, as provided in section 8 of chapter 86 of the Revised Statutes; that at the time appointed

for the second sale he offered the machine for sale, but could get no bids; that he then left the machine where it was, it being the place where the plaintiff had put it, and where he had seized it, and took no further steps towards a sale; that he received no money for either machine; that he took the execution to the office of his brother, the lawyer, that the latter might write out a return for him to sign; that his brother was then ill, and some months later died; and that he never saw the execution again until after it had been found among his brother's papers after the latter's death. It is a fact that no return has ever been made on the execution, and the execution has never been returned to court.

The defendant's testimony—and there is really little in the case which rebuts it—not only fails to show fraud, but it tends to show the contrary. One or two witnesses who were employed about the garage, including the manager, testify that they did not know of the attempted second sale. This may be true, and yet the sale may have been attempted as the defendant claims. So much for the history of the sale, of which we have given all the salient features that appear in the case.

The plaintiff relies in part upon the subsequent conduct of the defendant, first with respect to the return of the execution, and again because he failed, in various interviews with plaintiff's counsel, to disclose the fact that there had been an attempted second sale, and the reason for it. Under the circumstances of this case, we do not think that great significance can be attributed to these circumstances.

[3] As has been said many times, fraud must be proved. It is not to be merely surmised. And the observance of this rule is especially important when recovery is sought under a statute so highly penal as is the one under which this suit is brought. We are unable to discover sufficient badges of fraud on the part of the defendant to warrant a judgment for the plaintiff on that ground. If there was fraud, it has not been proved.

Judgment for defendant.

WOODBURY v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine. Feb. 3, 1913.)

1. CARRIERS (§ 286*)—PASSENGERS—OBLIGATION OF CARRIER.

A person in a passageway maintained by a railroad company from a street to trainshed at its station, intending to take a train, is entitled to the protection of a passenger; and the company must exercise ordinary care to maintain the way in a reasonably safe condition, so that passengers, with ordinary care, may pass safely.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142–1152; Dec. Dig. § 286.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. CARRIERS (§ 327*)—PASSENGERS—CARE REQUIRED.

A person in a passageway maintained by a railroad company from a street to a trainshed at its station, intending to take a train, must exercise ordinary care, and he must avoid danger in the way, if existing, and must pay attention to protect himself; and where he fails to do so he is guilty of contributory negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1363-1366; Dec. Dig. § 327.*]

3. CARRIERS (§ 286*)—PASSENGERS—OBLIGATION OF CARRIERS—NEGLIGENCE.

A carrier maintained a passageway from a street to its trainshed at a station. The floor of the way was of concrete blocks, about five feet square. A tier of the blocks across the way was out of repair, and workmen removed blocks 1 and 2 and filled the empty space with concrete for new blocks, erected a fence surrounding blocks 3, 4, and 5, and engaged in removing them, and placed boards over blocks 1 and 2. *Held*, that the company exercised reasonable care in maintaining the way reasonably safe as to a passenger walking alone on the way, or with only one companion, in broad daylight, with opportunity for observation; and it was not liable for injuries to the passenger, caused by the end of one of the boards springing up and tripping and throwing him down.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1152; Dec. Dig. § 286.*]

On Motion from Supreme Judicial Court, Hancock County, at Law.

Action by Webster Woodbury against the Maine Central Railroad Company. There was a verdict for plaintiff, and defendant moved for a new trial. Motion sustained.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, KING, BIRD, and HANSON, JJ.

Daniel E. Hurley, of Ellsworth, for plaintiff. Hale & Hamlin, of Ellsworth, for defendant.

SAVAGE, J. Action on the case for negligence. The verdict was for the plaintiff, and the case comes up on the defendant's motion for a new trial.

As to most of the facts there is little dispute. The accident occurred June 6, 1912, in the concourse or passageway leading from the trainshed to the street in the Bangor Union Station. The passageway runs northerly and southerly. It is about 100 feet long and 25 feet wide. A permanent fence is on the easterly side, and the station building on the westerly. The flooring of the passageway consists of concrete blocks, practically 5 feet square. One tier of these blocks, five in number, from the fence to the station building had become out of repair. This tier was about 20 or 25 feet from the street curb. At the trial, for convenience, the blocks were spoken of by numbers, No. 1 being on the east, or next to the fence, No. 2 next westerly, and so on to No. 5, which was next to the station building on the west. On the day preceding the accident, workmen dug out blocks 1 and 2, and filled the empty space with fresh concrete for new blocks. During

the progress of the work, and during the night following, the area of blocks 1 and 2 was surrounded by a fence 3 or 4 feet high, with two boards on each, and board uprights at the corners. On the morning of the day of the accident the fence was removed and its length extended, and it was placed so as to entirely surround blocks 3, 4, and 5, and the workmen proceeded to repair blocks 3 and 4 in the same manner that blocks 1 and 2 had been repaired the day before. Thus the passageway was closed, except over blocks 1 and 2. It was found that the concrete of those blocks was still too soft to permit traveling over them. Therefore the workmen placed boards over blocks 1 and 2, so as to allow a passage over them. The defendant's witnesses say they were placed lengthwise of the passageway. The boards were five or six feet long. They were matched sheathing boards, planed on one side, laid close together, and flat upon the concrete. The plaintiff estimated their thickness to be about one inch. The men who laid them said they were seven-eighths of an inch thick. The passageway remained in the same condition all day long; and all passengers to and from trains, going through the passageway, walked over these boards.

The plaintiff arrived that forenoon on a train that was due in Bangor at 12:05 p. m. Arriving at the Bangor Station, he walked out through the passageway, over the boards on blocks 1 and 2, to the street; but he says that he did not notice either the boards or the fence around blocks 3, 4, and 5. Later, about 1 o'clock, as he says, he returned to the station to take a train to Veazie. He says that while going along the passageway a companion called his attention to the Veazie train, then standing in the trainshed, and that while he was looking at the train for a moment he stepped with his right foot onto one, or perhaps two, of the boards, and the end of one of the boards sprung up, so that he caught the toe of the left foot on it, and was tripped and thrown down. His view was unobstructed; but he says he did not see the boards nor the fence around blocks 3, 4, and 5, and that he was not paying attention to where he was stepping. It is not claimed that, at the time of the accident, any workmen were at work on blocks 3 and 4.

The defendant claims that the accident occurred at about 5 o'clock in the afternoon, instead of 1 o'clock; and it has introduced so much testimony to that effect, documentary and otherwise, as to make it almost conclusive that the plaintiff's recollection on this point, at least, is faulty. Four witnesses employes of the defendant, testified that the plaintiff's gait before the accident was unsteady, and that his breath had the odor of liquor afterwards. The plaintiff denied that he had drunk any liquor that day. The plaintiff testified that the boards across blocks 1

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and 2 were laid "sort of diagonally." This is the whole case, so far as material.

[1] The plaintiff was in the passageway for the purpose of taking one of the defendant's trains. The defendant owed him the duty of exercising the care for his safety which a railroad company owes its passengers, while they are upon its platforms or grounds, either going to or coming from trains. Care in the highest degree was not required. The care owed to a passenger in a moving train was not required. It was not required to keep the passageway absolutely safe. Its only duty was to exercise ordinary care to maintain the passageway in question in such a reasonably safe and suitable condition that passengers, who were themselves in the exercise of ordinary care, could walk over it safely. *Maxfield v. Maine Central R. R. Co.*, 100 Me. 79, 60 Atl. 710.

[2] The plaintiff himself was bound to exercise ordinary care. All passengers are. But, unlike the passenger on a moving train, he was in a position to use his eyes and guide his steps. He could see and avert danger, if it existed. He could, by attention, protect himself.

[3] Now as touching the alleged negligence of the defendant. It was making necessary repairs. If it chose to work on blocks 3 and 4 before the cement hardened on blocks 1 and 2, so that the plaintiff was obliged to travel over these blocks, the defendant's duty to the plaintiff was to have that passage reasonably safe and convenient for the plaintiff at the time, and under the conditions, when he attempted to cross. What might have been its duty had the plaintiff been one of a crowd passing over the boards, without reasonable opportunity for observation, is not the question. It is rather: What was its duty to him walking alone, or with only one companion, in broad daylight, with a perfect opportunity for observation? Applying this test, we think it cannot reasonably be said that the defendant was negligent towards the plaintiff. The placing of the boards where they were seems unquestionably to have been a proper act. The defendant had a right to assume that the defendant would himself be in the exercise of ordinary care. The barrier around blocks 3, 4, and 5 was a notice to all that repairs were being made, or that something out of the ordinary was being done. That should have attracted the attention of the plaintiff, and had he been attentive and careful it is hardly possible that he would have failed to notice the boards. All this the defendant had a right to assume. And under the circumstances we are of opinion that the defendant used reasonable care, so far as the plaintiff was concerned.

Moreover, as already indicated, we think the plaintiff was guilty of contributory negligence. We need not repeat the reasons. It may be said, too, that there is much rea-

son for thinking that the plaintiff did notice the barrier around blocks 3, 4, and 5, because to reach the passageway over the boards he had swerved several feet to the left from the direct course from the point where he left the street to the gate to the trainshed.

We are of opinion that the verdict is unmistakably wrong, and should not be allowed to stand.

Motion sustained.

SHERMAN v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine. Feb. 4, 1913.)

RAILROADS (§ 274*)—LIGHTED STATIONS—LICENSEES—NEGLIGENCE.

In a town where the last passenger train for the night has gone, the turning out of all the lights is notice to all that the station is closed, and the railroad owes no duty to have the approaches lighted, and is not liable for injuries to one stepping off the platform; such person being but a mere licensee, to whom its duty was only negative.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 868-872; Dec. Dig. § 274.*]

Exceptions from Supreme Judicial Court, Lincoln County, at Law.

Action by Franklin W. Sherman against the Maine Central Railroad Company. To an order of nonsuit, the plaintiff excepts. Exceptions overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, and HALEY, JJ.

C. L. Macurda, of Wiscasset, and A. S. Littlefield, of Rockland, for plaintiff. White & Carter, of Lewiston, for defendant.

HALEY, J. This is an action on the case, in which the plaintiff seeks to recover damages for injuries sustained by him, at defendant's station at Wiscasset, by reason of the alleged negligence of the defendant. At the close of the testimony the presiding justice ordered a nonsuit, and the case comes before this court on exceptions to that ruling.

October 29, 1907, the plaintiff, who had recently moved to Wiscasset, attended an evening session of the court at that place. The court adjourned before the arrival of the evening train, which was due to arrive at 7:15 p. m., and which was the last passenger train that night. The plaintiff, after leaving the courtroom, heard the train whistle, and thought he would go to the railroad station, and ascertain if certain goods that the lady who employed him was expecting by freight had arrived. It was a dark, misty night. The plaintiff saw the train pass over the Main street crossing when he was from a third to a quarter of a mile, the way he was traveling, from the railroad station. At that time the train was 834 feet from the station. The plaintiff passed down the sidewalk on Main street, turned and walked up

Water street toward the station to a cross-street leading to the station, then down the cross-street to the railroad station. While on the cross-street he was on the side of a hill, and the railroad buildings were directly in front of him. There were no lights in the station. The plaintiff testified that the station was in utter darkness, and the freight office was closed, and that he met no teams or people coming from the station. He approached the station on the side farthest from the railroad track; that is, on the back side of the station. The platform or walk around the station at the point where he approached it was three feet above the ground. At the point where the plaintiff reached the platform there were stairs from the ground to the platform, and he went up the stairs onto the platform, walked nearly the length of the building, on the back side, then went through the passageway between the waiting room and the baggage room, then down in front of the buildings to the baggage room door, which was locked, as were the other doors of the buildings. He then turned and walked back the same way he came, and, when he arrived at the point where he thought the stairs were, he stepped off the platform and fell to the ground, and fractured the fibula and the internal malleolus of his left leg, which are the injuries for which he claims damages in this case.

It is the claim of the plaintiff that it was the duty of the defendant to have its platform from which he stepped railed or lighted, and that, if it had done either, he would not have stepped off the platform, and sustained the injuries complained of.

It is not questioned but that there was an implied invitation by the defendant to so much of the public as wished to take its trains, and to passengers leaving its trains, to use the station and its approaches, and that it was its duty to keep its stations and approaches safe for its passengers, and this implied invitation was extended to friends who wished to visit the station to see their friends off, or to welcome them upon their arrival, and to persons having business to transact with the defendant at its stations. The defendant owed a duty to all such persons by reason of this implied invitation. But while it was the duty of the defendant to furnish a reasonably safe platform and approaches to its station, and to maintain them in a suitable condition for the use of people having business at the station, and for the use of passengers, going to and coming from the station, it was not bound to maintain the station, and its approaches, so that they would be safe after business hours for people who might go upon them in the expectation of seeing some one connected with the railroad, after business hours and after the station was closed, if they had knowledge that the station was closed for business. The putting out of the lights after

the departure of the last train for the day, at the time of night shown by the evidence in this case, and the closing of the station, was notice to every one that business for the day had ceased, and, when that notice was given, the implied invitation to people having business with the defendant, or at the station, was withdrawn, and it was not the duty of the defendant to keep its platform and the approaches thereto safe for those who chose to go upon them. The plaintiff knew the conditions, for, after seeing the last train of the evening cross Main street, he walked in the dark from one-quarter to a third of a mile to the station, which must have taken him at least 15 minutes, when the train would ordinarily have left the station in five minutes from the time he saw it, and he knew it was the last train for that day, and before he got to the cross-street leading to the station all passengers and teams had left the station, and he testified that the station was in utter darkness, but that he thought he might find the station agent in his private room. But, with the station in utter darkness, he should have known that business for the day was over, and the invitation to use the platform and its approaches was withdrawn. When he went upon the platform under those conditions, it was without invitation, and he had, at the most, no more than the rights of a mere licensee, and the defendant was not obliged to furnish lights and railings to guide and protect him; for the defendant owed him no duty except the negative one of not doing anything to injure him, if it knew of his presence there, for a bare licensee must take the premises as he finds them, and the owner is not liable for a danger that is only concealed by the darkness of night. *Reardon v. Thompson*, 149 Mass. 267, 21 N. H. 369.

Exceptions overruled.

BARTLETT v. MANSFIELD.

(Supreme Court of New Hampshire.
Hillsborough. Jan. 7, 1913.)

PENALTIES (§ 7*)—PRIVATE ACTIONS.

Under the direct provisions of Laws 1899, c. 31, a private action for a penalty is abolished, and no private action can be brought under Pub. St. 1901, c. 57, § 16, allowing a recovery of penalty for failure of selectmen or assessors to perform duties in relation to taxation.

[Ed. Note.—For other cases, see *Penalties*, Cent. Dig. § 6; Dec. Dig. § 7.*]

Transferred from Superior Court, Hillsborough County; Mitchell, Judge.

Action by Eben L. Bartlett against George H. Mansfield to recover the penalty imposed by section 16, c. 57, Public Statutes. Trial by jury, and verdict for the defendant. Transferred from the superior court on exceptions taken by the plaintiff. On the ground that the private action for a penalty was abolished by chapter 31, Laws 1899,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment was ordered for the defendant, without considering the exceptions. *State v. McConnell*, 70 N. H. 158, 161, 46 Atl. 458; *Noyes v. Edgerly*, 71 N. H. 500, 503, 505, 53 Atl. 311.

David W. Perkins, of Manchester, for plaintiff. Wason & Moran, of Nashua, for defendant.

PER CURIAM. Judgment for defendant.

IN RE OPINION OF THE JUSTICES.

(Supreme Court of New Hampshire. Jan. 24, 1913.)

1. TAXATION (§ 193*)—VALUATION—UNIFORMITY.

The Constitution requires that all property be assessed for taxation upon the same percentage of its value; and hence the Legislature cannot exempt from taxation standing wood and timber to the extent of 25 per cent. of its true value, and at the same time leave other property to be taxed at its true value.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 309; Dec. Dig. § 193.*]

2. TAXATION (§ 193*)—EXEMPTIONS—MONEY AT INTEREST.

Laws 1911, c. 83, relating to taxation of money on hand or at interest, and exempting from taxation a loan on New Hampshire realty at 5 per cent. interest or less, is not unconstitutional, though it classifies money at interest so as to exempt one class and tax another.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 309; Dec. Dig. 193.*]

Opinion of the Justices on questions submitted to them by Hon. William J. Britton, Speaker of the House of Representatives.

January 20, 1913, the following communication was addressed to the Justices of the Supreme Court by Hon. William J. Britton, Speaker of the House of Representatives:

"Whereas, the question was raised during the constitutional convention of 1912 as to the validity, under the Constitution, of chapter 108 of the Laws of 1895, relating to the taxation of savings banks; and whereas, a like question was raised in regard to chapter 83 of the Laws of 1911, relating to the taxation of money on hand or at interest; and whereas, the House of Representatives has under consideration a proposed bill to exempt from taxation standing wood and timber to the extent of 25 per cent. of its just and true value:

"Now, therefore, pursuant to a resolution adopted by the House of Representatives on Tuesday, January 14, 1913, I respectfully ask that you render an opinion as soon as possible as to whether the above-mentioned laws or proposed law violate any portion of the Constitution of the state of New Hampshire."

To Hon. William J. Britton, Speaker of the House of Representatives:

The undersigned, the Justices of the Supreme Court, in reply to your request of the

20th instant, made by direction of the House, for our opinions as to the constitutional validity of two chapters of the Session Laws and of a proposed enactment of the Legislature, respectfully submit the following:

Chapter 108 of the Laws of 1895, the first enactment to which the inquiry relates, together with section 5, c. 65, of the Public Statutes, was repealed in terms by chapter 194 of the Laws of 1911. The act of 1895 amended the Public Statutes by excluding from consideration, in determining the savings bank tax, loans secured by mortgage upon real estate situated in the state, made at a rate not exceeding 5 per cent. per annum. The chapter of the Laws of 1911 relating to the taxation of money on hand or at interest (chapter 83) makes the same exemption in the taxation of the property of individuals.

[1] We understand, therefore, the first question upon which our opinion is desired to be whether the Constitution requires all property to be taxed. The second inquiry is as to the validity of the proposed act providing for the taxation of a class of property at only 75 per cent. of its true value. Assuming the legislative intention to be that other property taxed should be assessed for taxation at its true value, the inquiry presents the question whether the Constitution requires the proportional appraisal for assessment of all property taxed. The two questions, whether all property must be taxed, and whether all property that is taxed must be taxed alike, have been so thoroughly considered in the past that they cannot now be regarded as open ones.

Two years ago, in answer to an inquiry from the honorable House of Representatives as to the validity of certain proposed legislation authorizing the taxation of certain classes of property at a less rate than that imposed upon property in general, we expressed the opinion that such legislation was forbidden by the Constitution. We said: "Taxing property at a lower rate, as proposed, upon its value produces the same result as rating it for taxation at a lower percentage of that value. The universal understanding has been that all property must be assessed upon the same percentage of its value." House Jour. 1911, p. 532. A change in either factor—the rate or the valuation—affects the product, which is the tax, in the same way; and in order that the tax may be equal and proportional all property must be valued alike and taxed at the same rate. Our views on this question were expressed at length two years ago, and are printed in the Journal of the House (pages 527-537). Since then the question whether the Constitution should be changed so as to allow the taxation of certain property at a rate different from the general rate has been submitted to the people. The failure of the people to

adopt the proposed change does not persuade us that the views expressed two years ago are erroneous. Our answer to the second question is that special taxation of standing wood and timber in the manner proposed would not comply with the rule of the Constitution.

[2] That it is within the power of the Legislature to exempt certain classes of property from taxation by omitting them from the list of taxable estate or specially exempting them is equally well settled. "By the Constitution (Bill of Rights, arts. 12, 28, pt. 2, arts. 5, 6) and the uniform practice under it for more than a hundred years, no property can be taxed, except such as is declared taxable by the Legislature. * * * Much property always has been and still is untaxed." *Carpenter, J., in Boody v. Watson*, 64 N. H. 162, 195, 9 Atl. 794, 819. "There is no doubt that the Legislature may provide by general laws for the exemption of certain classes of property from taxation, as well as exempt it * * * by omitting it in the description of property to be taxed." *Brewster v. Hough*, 10 N. H. 138, 142. We are not aware that this statement by Chief Justice Parker, in 1839, has ever been questioned. It has been followed in many cases (see *Canaan v. District*, 74 N. H. 517, 538-541, 70 Atl. 250, where the cases are collected) and otherwise approved. *Report Tax Com'n*, 1876, p. 8; *Id.* 1908, p. 206.

We are therefore of opinion that the Legislature may classify money at interest as in chapter 83, Laws of 1911, and exempt one class and tax the other.

FRANK N. PARSONS.
REUBEN E. WALKER.
GEORGE H. BINGHAM.
JOHN E. YOUNG.
ROBERT J. PEASLEE.

76 N. H. 551
OLARK v. OLARK et al.

(Supreme Court of New Hampshire. Hillsborough. Jan. 7, 1913.)

1. ADOPTION (§ 24*)—EFFECT ON RIGHTS OF SURVIVING SPOUSE.

The adoption of a child is not equivalent to the birth of issue in determining the rights of a surviving husband or wife.

[Ed. Note.—For other cases, see *Adoption*, Cent. Dig. §§ 43, 44; Dec. Dig. § 24.*]

2. ADOPTION (§ 21*)—INHERITANCE BY ADOPTED CHILD—STATUTES—"HEIR IN DESCENDING LINE."

Laws 1862, c. 2603 (Pub. St. 1901, c. 181, § 5), provides that a child adopted shall bear the same relation to his adopted parents in respect to inheritance and all other incidents of the relation of parent and child as if a natural child, except as to property expressly limited to the heirs of the body of the adopting parents. Pub. St. 1901, c. 186, § 12, provides that the heirs in the descending line of a legatee, deceased before testator, shall take the estate in the same manner the legatee would have taken it had he survived. *Heid*, that an adopted child

was "an heir in the descending line," within section 12.

[Ed. Note.—For other cases, see *Adoption*, Cent. Dig. §§ 35-40; Dec. Dig. § 21.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3241-3265; vol. 8, pp. 7677, 7678.]

3. ADOPTION (§ 20*)—CIVIL AND COMMON LAW—DISTINCTION.

Since the common law did not recognize adoption of a child as creating any legal rights, as did the civil law, in determining the nature of such rights the civil law may properly be looked to.

[Ed. Note.—For other cases, see *Adoption*, Cent. Dig. §§ 29-32; Dec. Dig. § 20.*]

Transferred from Superior Court, Hillsborough County; Pike, Judge.

Petition by Gertrude A. Clark, guardian, against Hazel M. Clark and another for advice as to the rights of petitioner's wards. Facts found, and case transferred from superior court. Case discharged.

Jones, Warren, Wilson & Manning, of Manchester, for petitioner. George I. Haselton, of Manchester, for defendant Hazel M. Clark. Harry W. Spaulding, of Manchester, for defendant Leola M. Clark.

PEASLEE, J. The legatee, Charles C. Clark, died during the lifetime of the testator, leaving a natural daughter and an adopted one. The guardian of the two daughters seeks advice as to the rights of her wards in respect to the legacy.

The statute of adoption was enacted in 1862 (Laws 1862, c. 2603), and contained, in substance, the provision here relied upon: "The child so adopted shall bear the same relation to his adopting parents and their kindred in respect to the inheritance of property and all other incidents of the relation of parent and child as he would if he were the natural child of such parents, except he shall not take property expressly limited to the heirs of the body or bodies of the adopting parents." P. S. c. 181, § 5.

At the time this statute was enacted, the statute of wills contained its present provision touching lapsed legacies: "The heirs in the descending line of a legatee or devisee, deceased before the testator, shall take the estate bequeathed or devised in the same manner the legatee or devisee would have taken it if he had survived." P. S. c. 186, § 12. The question is whether the adopted daughter is an heir in the descending line, within the meaning of this act.

[1] While it is true that in the present instance the claimed right of the adopted child is not an inheritance, but rather a statutory extension of the law as to who are beneficiaries under a will, enacted for the better carrying out of the testator's intention (*Campbell v. Clark*, 64 N. H. 328, 10 Atl. 702), yet the statutory test for the right to so take is the quality of heirship in the descending line. It is settled that in this state the adoption of a child is not an equivalent

for the birth of issue in determining the rights of a surviving husband or wife. *Murdock v. Murdock*, 74 N. H. 77, 65 Atl. 392; *Morse v. Osborne*, 75 N. H. 487, 77 Atl. 403, 30 L. R. A. (N. S.) 914, Ann. Cas. 1912A, 324. But these cases are not determinative of the present question.

[2] The statute giving the right here claimed being in force when that governing adoption of children was enacted, the question is whether the Legislature used language broad enough to manifest an intent that adopted children should become heirs in the descending line, within the meaning of the earlier statute. This precise question has been considered in another jurisdiction, and the conclusion was in favor of the adopted child: "He takes as a lineal descendant of the legatee by force of the statute. * * * Not as a lineal descendant by birth, but as a statutory lineal descendant, and as lawfully in the line of descent as if he were placed there by birth." *Warren v. Prescott*, 84 Me. 483, 487, 24 Atl. 948, 949 (17 L. R. A. 435, 30 Am. St. Rep. 370). It seems more probable that this was the legislative intent. While it was not the purpose to make adoption in all respects equivalent to the birth of a natural child, it was to have that effect in regard to certain rights and duties. The provision that he "shall bear the same relation to his adopting parents and their kindred in respect to the inheritance of property and all other incidents pertaining to the relation of parent and child" as a natural child is not given its full effect if its application in the present case is denied. The declared intent was that, as to the inheritance of property and all other incidents of the relation created, the adopted child should have all the rights of a natural child. The right to this legacy being one of the incidents of the natural relation, it belongs also to that created by act of the parties pursuant to the statute.

Whatever view is taken of the collateral effect of an adoption, it is evident that, so far as the capacity of the child to take as heir or statutory successor in right of the parent is concerned, there is no difference between the natural and the adopted child, save only in the specifically excepted case of an estate tail.

[3] The common law did not recognize adoption as creating any legal rights, while the civil law did. It therefore seems reasonable to look to the civil law for light upon the subject. Under that system the adopted child had all the rights of a natural one; and such has been the holding under the various American statutes, excepting only such rights as the statute in question by its terms excludes. *Power v. Hailey*, 85 Ky. 671, 4 S. W. 683, and cases cited.

The provision as to "property expressly limited to the heirs of the body or bodies of the adopting parents" has no application.

There was no limitation upon the bequest here involved; and if Charles C. Clark had outlived the testator the adopted daughter would have inherited equally with her foster sister.

The guardian is advised that her wards share equally in the property bequeathed to Charles C. Clark.

Case discharged. All concurred.

GRIER v. SAMUEL

(Superior Court of Delaware. New Castle Jan. 29, 1913.)

1. MUNICIPAL CORPORATIONS (§ 705*) — STREETS — INJURY TO PEDESTRIAN — LAW OF THE ROAD.

A pedestrian, injured by an automobile which is being driven on the left-hand side of a public highway, is prima facie entitled to recover.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

2. PLEADING (§ 67*) — ANTICIPATING DEFENSES.

The declaration in a pedestrian's action for injuries from being struck by an automobile driven on the left-hand side of a public road was not demurrable for failure to allege that the presence of the automobile on the wrong side was not due to circumstances consistent with proper caution on the part of defendant's servant who was driving; this being a matter of defense.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 139; Dec. Dig. § 67.*]

Action on the case by Thomas E. Grier, Jr., against Meredith I. Samuel. Defendant filed special demurrer to the sixth count of plaintiff's declaration. Demurrer overruled, and upon election of defendant judgment of respondeat ouster is entered.

Argued before CONRAD and WOOLLEY, JJ.

Henry R. Isaacs, of Wilmington, for plaintiff. Charles F. Curley, of Wilmington, for defendant.

WOOLLEY, J. (delivering the opinion of the court). The substance of the negligence charged to the defendant by the sixth count of the plaintiff's declaration is that the servant of the defendant in driving his automobile eastwardly upon one street turned southwardly by a broad curve into an intersecting street upon what was the left-hand side thereof for vehicles going in that direction, and while upon that side ran into and injured the plaintiff, who was a pedestrian in the exercise of proper care. To this count the defendant filed a general demurrer, contending that the acts imputed to the defendant's servant did not of necessity constitute negligence, but on the contrary were consistent with diligence of the servant and with the lawfulness of his presence on that side of the street.

The rule that negligence in driving a ve-

hicle, whereby one is injured, is actionable, is as ancient as the common law, and the rule that driving a vehicle upon the wrong side of the road; whereby injury is done, constitutes such negligence, is of almost equal antiquity. Following the common law the courts of this state early declared as "the law of the road" that "travelers are bound to take the right-hand side of the road; and if a person is found on the left or wrong side of the road when an accident occurs, he is liable for the consequences unless its cause be wholly attributable to the other party, and he does all that prudence can do to avoid danger." *Reynolds v. Naudain*, 2 Har. 317, 318.

[1, 2] If the defendant's servant drove his automobile on the left or wrong side of a public highway, as alleged in the count demurred to, then the defendant through his servant violated the law, and if that violation of the law had a causal relation to the injury inflicted upon the plaintiff, as is likewise alleged, then the plaintiff has a prima facie case upon which he may maintain an action (*Lindsay v. Cecchi*, 2 Boyce, —, 80 Atl. 523, 35 L. R. A. [N. S.] 699), but the presence of the defendant's servant upon the wrong side of the highway and the consequent injury to the plaintiff may have been due to circumstances that were consistent with proper caution on the part of the servant and that discharged his master from the imputation of negligence. This, however, is a matter of defense to be pleaded and proven.

The demurrer is overruled, and upon the election of the defendant judgment of respondeat ouster is entered.

PFROMMER v. TAYLOR.

(Superior Court of Delaware. New Castle. Jan. 29, 1913.)

1. PLEADING (§ 144*)—SET-OFF—SUFFICIENCY.

In an action under Wilmington City Charter (Laws 1883, c. 207) § 131, for compensation for the use of a party wall, a plea of set-off, alleging that plaintiff owed defendant certain sums for rents due upon a demise, for use and occupation, for work and labor done, for goods sold and delivered, for money lent and advanced, for money had and received, and for sundry other matters, properly subjects of an action in indebitatus assumpsit, and pleaded in such language as defendant would have used, were he declaring thereon by the common counts in an action brought by him, was demurrable, in that it embodied plural defenses in one plea and lacked particularity in their statement.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 293; Dec. Dig. § 144.*]

2. PLEADING (§ 144*)—SET-OFF — RULE OF COURT.

Superior Court rule 8, § 4, providing that a plea of set-off shall, if required, be drawn out and shall state matters of set-off with reasonable certainty, means that a set-off may be pleaded by a memorandum plea, which, when required, shall be drawn out and state the mat-

ters of set-off severally and with all the certainty of a bill of particulars.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 293; Dec. Dig. § 144.*]

3. PARTY WALLS (§ 10*)—COMPENSATION FOR USE—PLEAS.

In an action for compensation for the use of party walls, brought under Wilmington City Charter (Laws 1883, c. 207) § 131, providing for such compensation, pleas by which defendant invoked an interpretation of such statute, based on usage and understanding of it, were not demurrable, though such method of interpretation could not be applied until the facts relied upon were disclosed at the trial; they being sufficient to apprise plaintiff of the defense relied upon.

[Ed. Note.—For other cases, see Party Walls, Cent. Dig. §§ 54-64; Dec. Dig. § 10.*]

Appeal from a Justice of the Peace.

Action by George W. Taylor, for the use of Eliza Coburn, against Christopher F. Pfrommer, under Wilmington City Charter, § 131, relative to compensation for the use of party walls. From a judgment of the justice of the peace, defendant appeals, and a special demurrer to eight pleas is considered. Demurrers sustained as to first plea, and overruled as to remaining seven pleas. Argued before CONRAD and WOOLLEY, JJ.

William F. Kurtz, of Wilmington, for appellant. Walter J. Willis, of Wilmington, for respondent.

WOOLLEY, J. The pro-narr. in this case contains but one count, which is the common count for money had and received. To this count the defendant replied by eight pleas, to each of which the plaintiff demurred specially.

[1] The first plea purports to be a plea of set-off in which the defendant maintains that, as against the debt he owes the plaintiff, the plaintiff is indebted to him in a certain sum for rents due upon a demise, for use and occupation, for work and labor done, for goods sold and delivered, for money lent and advanced, for money had and received, and for sundry other matters, properly subjects of an action in indebitatus assumpsit, which are pleaded in the precise language, though somewhat in narrative form, that would be employed by the defendant were he declaring thereon by the common counts in an action brought by him against the plaintiff.

The causes for demurrer to this plea are in substance the plural defenses embodied in one plea and the lack of particularity in their statement. The defendant admits that he joined in one plea as many separate matters of defense as he could have joined, were he plaintiff, in separate common counts in one declaration, but maintains that the plea is neither double in form nor insufficient in statement, and for authority cites a form in 3 Chitty, Pl. 936, 938, of which the plea under consideration is an exact copy.

At common law mutual debts were dis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ting, and were extinguishable only by payment or release. A creditor might sue and recover from a debtor while the creditor himself was indebted to his debtor, and the redress of the defendant for the recovery of his debt against the plaintiff was limited to a counter-action. This was an inconvenience in any case and a hardship in the particular case where the debtor in the counter-action was insolvent or bankrupt. To remedy this evil the statute of 4 Anne, c. 17, § 17, was enacted, the salutary effect of which occasioned Parliament to borrow to some extent the doctrine of compensation from the civil law, and to enact the statute of 2 Geo. II, c. 22, by virtue of which in actions where there are mutual debts, a defendant might set off the debt due to himself against that for which he is sued, either by pleading it in bar or by giving it in evidence under the general issue, upon proper notice. The general provisions of these statutes constitute the bases of the statute upon this subject in this state (Rev. Code, c. 106, § 21).

As the subject-matter of a plea of set-off, from the very theory of the defense, is the same subject-matter upon which an original action might have been brought by the defendant, the plea of set-off under the English statute was required not only to contain all the essentials to the validity of other pleas in bar, but was required to describe the debt intended to be set off with the same certainty as in a declaration for a like demand (1 Chitty, Pl. 575), and holding in mind the analogy of a plea of set-off to a declaration in a counter-action, the English courts further considered that where a claim or demand if asserted in an original action could have been recovered under the common counts, such claim or demand could likewise be pleaded in set-off under the same general description in which it could be pleaded in common counts, however particular the circumstances may have been (2 Esp. Rep. 560, 569). This is the reason for the form in 3 Chitty, Pl. 936, 938, followed by the defendant in this case.

There remains, however, the question, whether a plea of set-off, following the form in Chitty and stating matters of set-off in the general language of common counts, is in harmony with the practice and rules of this court.

[2] Under the rule of this court if a plaintiff declares upon the common counts the defendant is not required to plead until the plaintiff shall have filed a bill of particulars under each count. Superior Court Rules, rule 8, § 7, cl. 6. The purpose and justice of this rule are obvious. As under the English practice, a plea of set-off so closely resembles a declaration that the English courts have held that matters of set-off that in an original action may be declared upon under the common counts may likewise be pleaded in a plea of set-off in the same general

language and in substantially the same form, it would seem that if this court were to follow that practice it would with equal justice be compelled to allow a bill of particulars to a plea of set-off as well as to common counts. While we have no rule directing the allowance of a bill of particulars to a plea of set-off, we have, however, a rule of court that meets the situation and dispenses with the necessity of a bill of particulars to such a plea. This rule provides that "A plea of set-off shall, if required, be drawn out, and shall state the matters of set-off with reasonable certainty." Superior Court Rules, rule 8, § 4.

The meaning of this rule is that set-off may be pleaded by a memorandum plea, which, when required, shall be drawn out and that a plea of set-off when drawn out, either upon the order of the court or by the party in the first instance, "shall state the matters of set-off with reasonable certainty," that is, with all the certainty of a bill of particulars, and if there be several matters of set-off they shall be severally pleaded by as many pleas.

The demurrer to the first plea is sustained.

[3] It is apparent that this action was instituted under the provisions of section 131 of the Charter of the City of Wilmington relating to party walls (Laws 1883, c. 207), and that the defendant, by his seven succeeding pleas will invoke an interpretation of that statute by giving to what he conceives to be its uncertain and ambiguous language, a contemporaneous exposition, shown by common usage or practice under the statute, and by what is understood by those whom it affects and what was intended by those who enacted it. Under these pleas it is impossible to apply this principle of statutory construction, which is recognized and followed in some cases, until the facts relied upon are disclosed at the trial. We therefore hold that the pleas are sufficient to apprise the opposing party of the defense relied upon and overrule the demurrer to the last seven pleas.

JOHNSON v. MARSH et al.

(Supreme Court of New Jersey. Jan. 12, 1912.)

(Syllabus by the Court.)

1. OFFICERS (§ 114*)—MEMBERS OF PUBLIC BOARD—LIABILITY FOR OFFICIAL ACTS.

The members of a public board, acting in the performance of a public duty, are not personally liable in a civil suit for their acts, providing what they do is done in good faith.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 187–192; Dec. Dig. § 114.*]

2. LIBEL AND SLANDER (§ 50*)—OFFICERS OF PUBLIC BOARD — LIABILITY TO ACTION — PRIVILEGE.

The fact that members of a public board, which is without authority to swear and examine witnesses, base their official action upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the unsworn statement of a person in whose truthfulness they have confidence, affords no ground for concluding that such action was not taken in good faith.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 149, 150; Dec. Dig. § 50.*]

Error to Circuit Court, Gloucester County.

Action by James Arthur Johnson against William F. Marsh and others. From a judgment of nonsuit, plaintiff brings error. Affirmed.

Argued before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

Wilson & Carr, of Camden, for plaintiff in error. David O. Watkins, of Woodbury, for defendants in error.

GUMMERE, C. J. This was an action for libel brought against the defendants, who composed "the Board of Protectors of Franklin Township in the County of Gloucester," and who are appointed under the act of April 20th, 1909 (P. L. p. 306), entitled, "An act for the prevention of drunkenness." This act, after providing that the governing body of every municipality in this state may appoint three citizens to be known as a board of protectors, then imposes upon that board the duty of investigating cases of drunkenness in the municipality for which they are appointed, and requires them, whenever it is satisfactorily made to appear to them that any person residing in, or who frequents, the municipality from which the board was appointed is an habitual drunkard, or is likely to become a drunkard by the use of intoxicating liquors, to give notice in writing to every person licensed to sell liquors in the municipality, directing such persons to desist from either selling or giving intoxicating liquors to any such person so determined to be an habitual drunkard, or likely to become a drunkard.

In the present case the board caused a notice to be mailed to one Henry Finger, a licensed saloonkeeper in Franklin township, instructing him "to desist and refrain from either selling or giving directly or indirectly any intoxicating liquors to the following list of names under the penalty of the law." To this notice was attached a list of names in which that of the plaintiff was included. The sending of this notice is the alleged libel upon which the present suit is rested.

It appeared upon the trial of the cause that the names contained in the list were furnished to the defendant Marsh, who was the president of the board of protectors, by persons in whose truthfulness the board had confidence, and who were acquainted with the habits of the men in that locality, and who represented the men whose names were on the list as being either habitual drunkards or persons who were likely to become drunkards. The board of protectors made no independent investigation of the habits

of the plaintiff with relation to the use of intoxicating liquors, but accepted as accurate the statement above referred to which was made to the president.

[1.] It is settled in this state that the members of a public board, acting in the performance of a public duty, and under a public statute, are not personally liable in a civil action for damages arising out of their acts, providing what they do is done in good faith. *Valentine v. Englewood*, 76 N. J. Law, 509, 71 Atl. 344, 19 L. R. A. (N. S.) 262, 16 Ann. Cas. 731. The board of protectors of Franklin township is a public board. The duties imposed upon it by the act of April 20, 1909, are public duties. The action which is made the subject of the present suit was done in the performance of that duty. Consequently they are not liable to the plaintiff for any injury resulting to him from the notice sent by the board to the saloonkeeper, notwithstanding the fact that he (the plaintiff) was not addicted to the excessive use of intoxicating liquor—as appeared from the proofs in the cause—unless it appeared that in sending the notice the board did not act in good faith.

The statute referred to under which the board was appointed provides no method by which such boards shall pursue their investigations with relation to the cases of drunkenness in the municipalities for which they are respectively appointed. No power is given to them to subpoena witnesses, to swear them, or to examine them. This being so, it is evident that the board must rely very largely in conducting its investigations upon unsworn statements made to them by third persons. The fact that they rely upon the statement of a single person in whose truthfulness they have confidence, and who apparently speaks of what he knows, without attempting to verify the statement by further inquiry of other parties, affords no ground for concluding that such action is not taken in good faith. This was the view taken by the trial court, and its logical result was the direction of a nonsuit.

We think that direction was entirely proper, and therefore affirm the judgment under review.

BAUSBACH v. REIFF et al.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

1. CONSPIRACY (§ 18*)—COMBINATION TO DEPRIVE A PERSON OF WORK—RIGHT OF ACTION.

In trespass against 28 men, the declaration states a good cause of action, when it charges that defendants entered into a conspiracy under which they wrote a demand on their common employer amounting to threat that, unless plaintiff was discharged, defendants would quit work in a body.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 18-24; Dec. Dig. § 18.*]

2. TRIAL (§ 85*)—RULINGS ON EVIDENCE—MATTER PARTLY IRRELEVANT.

Where offers of evidence supported plaintiff's cause of action, and are objected to on the ground that as a whole they are immaterial, the court commits reversible error if it rejects the offers, though they may have contained irrelevant matter.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

3. APPEAL AND ERROR (§ 105*)—APPEALABLE ORDER—COMPULSORY NONSUIT.

An appeal does not lie from the entry of a compulsory nonsuit, but only upon refusal to take off the nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 717-723; Dec. Dig. § 105.*]

Moschizsker, J., dissenting.

Appeal from Court of Common Pleas, Schuylkill County.

Action by George Bausbach against Frank G. Reiff and others. From an order entering a compulsory nonsuit, plaintiff appeals. Reversed.

From the pleadings it appeared that plaintiff was employed as an engineer by the Rettig Brewing Company of Pottsville, and that he was discharged because the defendants, 28 in number, joined in a paper addressed to the brewing company requesting his discharge, and threatening to stop work in a body if he was not discharged.

When plaintiff was on the stand, he was asked this question:

"Q. Prior to the time this paper was exhibited to you by Mr. Shugars in which the men said they would not any longer work at the same plant if you were kept on there and employed, did these men do anything whereby they showed feeling against you?"

"Mr. Snyder: Objected to, prior to the presenting of the paper, because there is no testimony here that prior to that time there was any refusal to work with him. It is incompetent, irrelevant.

"The Court: Better have an offer on the record.

"Mr. Wilhelm: I propose to prove by Mr. Bausbach that prior to the time these defendants signed the paper in which they said they would refuse to work after 24 hours' notice if their employers, the Rettig Brewing Company, would continue George Bausbach in their employ, there had been trouble between Mr. Bausbach and these men growing out of the fact that the brewing company had found that somebody during the night was rummaging the office, disturbing their papers; that, when Mr. Bausbach was inquired of as to what was going wrong, if he knew anything, he did tell the Rettig Brewing Company people that one Tobias was stealing; that, because he reported this theft, this matter was taken up by these defendants and laid before the union; that the union then fined him \$10 because he reported these thefts; that he then appealed to the interna-

tional body as against that fine; that subsequently the union expelled him and he appealed from the expulsion; that the international body in August, 1910, sustained both of his appeals; that while these appeals were pending, and he was resisting their efforts to have him put out of the union, they, on July 17th, evidenced their ill will and this conspiracy against him by signing this paper demanding his discharge. This for the purpose of proving the allegations in the declaration, that they maliciously, wantonly, and oppressively pursued him. This for the purpose of showing that he lost his employment and lost a large sum of money, because he has not been as well employed since, and for a time was out of employment, and for the further purpose of showing malice and oppression, in order that he may have exemplary or punitive damages for the act of conspiracy they committed against him.

"Mr. Snyder: Objected to as immaterial, irrelevant, and incompetent, first, because this conspiracy is based upon the letter or rather the paper which was identified; second, because the malice proposed to be shown by the defendants is being transferred to an incorporated lodge of which these men, together with many other men in the brewery workers' line, are members, and that, therefore, it is not such a personal matter from which malice could be inferred; third, because Mr. Bausbach is not competent to testify to anything that happened in that lodge for the reason that the lodge is not composed alone of these men, but many other men who are not interested here, and who surely could not have had any feeling, and the court having ruled on it virtually before when the offer was made when Mr. Shugars was upon the stand.

"The Court: We sustain the objection for the reasons given, and for the further reason that we do not consider the evidence would be sufficient to base a verdict on in this case, even if proved. (Plaintiff excepts. Bill sealed.)

"Q. Do you recall the circumstances that the Rettig Brewing Company men made complaint in the union, and asked that Bausbach be fined because he had reported the fact that Tobias had been stealing?"

"Mr. Snyder: Objected to as incompetent, irrelevant, and immaterial; the union having been composed of workers of many breweries.

"Mr. Wilhelm: I propose to prove under cross-examination by one of the defendants now on the stand, Frederick Wolfe, that, because Bausbach had reported that William Tobias had been stealing, they, the employees of the Rettig Brewing Company people, entered charges against him before the union; that because of those charges they, the defendants, managed to have Bausbach fined \$10; that Bausbach then paid the \$10,

but appealed to the international body; that subsequently they proceeded to expel him; that Bausbach again appealed to the international body, but, while these two appeals were pending, he and 27 other defendants then took this action as represented by the paper of July 17, 1910, to have Bausbach lose his employment with the Rettig Brewing Company, they putting it up to the Rettig Brewing Company that they would quit work in the event that Bausbach did not quit work. This for the purpose of showing malice on the part of this defendant and the other 27 in their effort to injure Bausbach.

"Mr. Snyder: Objected to as incompetent, irrelevant, and immaterial, and has been ruled upon before in the proposition as to Mr. Shugars.

"The Court: We think that is simply part of the original offer that we ruled on at 2 o'clock. We make the same ruling. (Offer rejected. Plaintiff excepts. Bill sealed.)

"Mr. Snyder: I move for a nonsuit at this time for the reason that the plaintiff has failed to show a lawful reason to recover in this case, involving virtually the same proposition that was argued in the offer of Mr. Wilhelm before recess.

"The Court: I have not been able to give the authorities a careful enough examination to place upon the record entirely the reason for the action that I am about to take or the authorities which I feel compel me to take that action. But from the examination that I have made I do not believe that there is any evidence here to permit a recovery. Some of the evidence offered was not produced by reason of objection being made to the offers of the plaintiff, and I felt compelled to sustain those objections by the authorities that were handed to me in the short time that was given me to examine them. I will, therefore, direct that a compulsory nonsuit be entered, and enter a rule to strike that nonsuit off, which will permit you to argue that matter, and also give me an opportunity of filing an opinion either sustaining the action I take or reversing it and striking off the nonsuit.

"Mr. Wilhelm: I would just as soon have it rest with your honor directing a compulsory nonsuit, because we would be in time to take it to the higher court and determine some questions of doubt that seem to be in your honor's mind regarding these acts of Assembly, if the matter is finally determined now.

"The Court: I will direct a nonsuit to be entered, and I will reserve the right to file an opinion setting forth the reasons why I do so.

"Mr. Wilhelm: Yes. Then I ask that your honor direct this testimony to be written out, and grant us an exception.

"The Court: We grant an exception, and let the minutes show that the testimony is directed to be reduced to writing, and also

show that I reserve the right to file an opinion in support of the action I have taken."

Argued before MESTREZAT, POTTER, ELKIN, and MOSCHZISKEK, JJ.

William Wilhelm and R. S. Bashore, both of Pottsville, for appellant. Charles A. Snyder, of Pottsville, for appellees.

POTTER, J. The record in this case is unsatisfactory. Upon the conclusion of the plaintiff's testimony, the defendant's counsel moved for a nonsuit. The trial judge directed that a compulsory nonsuit be entered, and at the same time, without motion by plaintiff, entered a rule to strike the nonsuit off. Plaintiff's counsel then suggested that the case might rest with the direction for a compulsory nonsuit, because an appeal might then be taken at once and an early hearing had in the Supreme Court. Thereupon the trial judge said: "I will direct a nonsuit to be entered, and I will reserve the right to file an opinion setting forth the reasons why I do so." To this ruling an exception was granted.

In so far as the record shows, no disposition was made of the rule to strike off the nonsuit. The last entry upon the docket prior to the appeal is: "Compulsory nonsuit directed by court." Under Act March 11, 1875 (P. L. 6), it has frequently been held that an appeal does not lie from the entry of a compulsory nonsuit, but only from the refusal to take the nonsuit off. *Haverly v. Mercur*, 78 Pa. 257; *Scanlon v. Suter*, 158 Pa. 275, 27 Atl. 963; *Reed v. Casualty Co.*, 189 Pa. 596, 42 Atl. 294; *Hallock v. Lebanon*, 215 Pa. 1, 64 Atl. 362. The stenographer's notes of testimony at the trial show the entry of a compulsory nonsuit, the entry of a rule to take off such nonsuit, which remains undisposed of, and then the entry of a nonsuit a second time. It may be that the trial judge intended the second nonsuit to operate as a discharge of the rule to take off the first; but he did not say so, and the act of 1875, above referred to, provides expressly that such rule shall be considered and disposed of by the court in banc, not by the trial judge alone. The act contemplates consideration of the questions involved by the court in banc. This they did not receive in the present case. The judge reserved the right to file an opinion setting forth his reasons for entering the nonsuit, but it does not appear that any opinion has been filed. None is printed in the paper book.

There are nine assignments of error; eight of them being to the rejection of offers of testimony by the plaintiff, or the sustaining of objections to questions. The fifth and eighth assignments allege error in the rejection of offers to prove by the plaintiff and by the defendant Frederick Wolfe, who was called for cross-examination, the allegations in plaintiff's statement upon which he bases

his right of action. The offers were excluded as incompetent, irrelevant, and immaterial, and for the further reason, as stated by the trial judge, that he did not consider the evidence, if admitted, sufficient to sustain a verdict. While the offers were too broad in some respects, yet they set out substantially the allegations of plaintiff's statement, and raised the question of the sufficiency of his cause of action. The trial judge clearly intended by his ruling to pass upon plaintiff's right to recover at all upon the facts shown in his statement. In *Mundis v. Emig*, 171 Pa. 417, 424, 32 Atl. 1135, Mr. Justice Mitchell said: "Undoubtedly the general rule is that, where an offer is made as a whole of evidence partly admissible and partly not, the judge may reject it all, and is not bound to separate the good from the bad. *Wharton v. Douglass*, 76 Pa. 273; *Smith v. Arsenal Bank*, 104 Pa. 518; *Evans v. Evans*, 155 Pa. 572 [26 Atl. 755]. But he may always do so, and we are not prepared to say that in some cases where the offer is clearly competent in substance and the objection is to a small or unimportant part it may not become the duty of a judge to point out, or at least to call upon the party objecting to specify the parts objected to."

"In the present case the offers were not objected to or rejected because any specified portions were inadmissible, but on the ground that, as a whole, they were immaterial and irrelevant, and did not make out a case sufficient to go to the jury. The question ruled on by the court below and raised by these assignments is then whether the facts alleged by plaintiff, if proved, would constitute a cause of action. In his statement plaintiff averred that prior to July 18, 1910, for a period of four years and ten months, he had been employed by the Rettig Brewing Company of Pottsville in the capacity of chief engineer receiving for his services \$27 per week, and that during the term of his employment he had endeavored to render faithful service to the company, and the relations between the company and himself were at all times satisfactory to both parties; that prior to the above date he had reported to the foreman of the brewery that a night watchman in the employ of the company was stealing bottled goods from the brewery, and that he and another engineer had seen the watchman carrying away stolen goods on different mornings, whereupon the watchman was discharged from the service of the company; that by reason of his action in reporting the dishonesty of the watchman he incurred the enmity of the defendants, who thereupon, intending to injure the plaintiff, conspired and combined in a malicious and unlawful manner to deprive him of the opportunity to earn his livelihood and support those dependent upon him, and presented the company with a paper containing their signatures, setting forth that if, after 24 hours,

it kept the plaintiff any longer in its employ, they would no longer work for it, they knowing well at the time that it would be left helpless if they carried out their threat, and would be forced to comply with their demand in order to protect its business interests, and that their combination and threat would cause the discharge of plaintiff from its employ; that because of the combination and conspiracy of the defendants plaintiff was discharged from the service of the company, and suffered damages, for the recovery of which he brought this suit.

[1, 2] This statement sets forth a good cause of action. If the plaintiff could prove the averments in the statement, he was entitled to recover. The offers of proof contained matter which was irrelevant, in so far as it included any reference to what took place in the labor union, whether it resulted favorably to plaintiff or not; but that portion of the offers might well have been rejected, while leaving plaintiff to make proof of the substantial wrong which, as was alleged, had been done to him through the conspiracy to bring about his discharge. Any such purpose was unlawful. In *Erdman v. Mitchell*, 207 Pa. 79, 91, 56 Atl. 327, 331 (63 L. R. A. 534, 90 Am. St. Rep. 783), Mr. Justice Dean said: "A conspiracy is the combination of two or more persons by some concerted action to accomplish an unlawful purpose. It is unlawful to deprive a mechanic or workman of work by force, threats, or intimidation of any kind, a combination of two or more to do the same thing by the same means is a conspiracy. That by the legislation referred to such conspiracy is no longer criminal does not render it lawful. At common law the courts held that such combination was so prejudicial to the public interests and so opposed to public policy as rendered it punishable criminally; but the Legislature, which generally determines what is and what is not public policy, has declared that it is no longer a crime or misdemeanor. But this is as far as it has gone. It is as far as it could go without abolishing the Declaration of Rights. To do that the whole people of the commonwealth must be directly consulted and they must give assent. * * * So the same courts are still bound to protect the humblest mechanic or laborer in his right to acquire property." In the case just cited the question of damages did not arise, but under the decision in *O'Neil v. Behanna*, 182 Pa. 236, 37 Atl. 843, 38 L. R. A. 382, 61 Am. St. Rep. 702, if the plaintiffs were entitled to an injunction for their protection, they were also entitled to recover such damages as were shown to have been suffered. In *Morris Run Coal Co. v. Coal Co.*, 68 Pa. 173, 187 (8 Am. Rep. 159), Mr. Justice Agnew said: "There is a potency in numbers when combined which the law cannot overlook, where injury is the consequence. If the conspiracy be to commit a crime or an unlawful act, it is easy to determine its indictable

character. It is more difficult when the act to be done or purpose to be accomplished is innocent in itself. Then the offense takes its rule from the motives, the means, or the consequences. If the motives of the confederates be to oppress, the means they use unlawful, or the consequences to others injurious, their confederation will become a conspiracy."

[3] In the present case, while the record is confused, it is apparent that a fundamental principle of justice is involved. If the plaintiff can prove the averments in his statement, he will be entitled to recover such damages as he can show that he has sustained by reason of the wrongful acts of the defendants. In order to avoid the delay which would result from remitting the record to the court below for formal amendment, to show that the rule to strike off the judgment of compulsory nonsuit was duly discharged, we will treat the record as though it had been thus amended. So regarded, the fifth, eighth, and ninth assignments of error are sustained; and the judgment of the court below refusing to take off the compulsory nonsuit is reversed with a *procedendo*.

MOSCHZISKER, J. (dissenting). The plaintiff alleged that the defendants had entered into a conspiracy the effect of which was to cause him to lose the situation by which he earned his living; that the conspiracy culminated in a written demand made by these defendants on their common employer which amounted to a threat that, unless the plaintiff was discharged, the defendants would embarrass the employer's business by quitting work in a body. After the trial judge had refused several offers, he entered a nonsuit for want of sufficient evidence to prove the plaintiff's case.

None of the offers contains any direct tender of proof that the 28 men named as defendants did in point of fact sign the paper which caused the plaintiff to lose his situation, although they inferentially suggest a proffer of evidence to that effect. But, conceding that such proofs were tendered, the offers are faulty, in that they contain a proffer of testimony to show that the charges against the plaintiff were determined by the central labor body in his favor on August 10th, whereas the demand which is claimed to have caused the loss of his position and which marked the culmination of the alleged conspiracy took place almost a month prior to that time. These offers were objected to not only as "immaterial and irrelevant," but also expressly upon the ground that they were "incompetent," counsel adding "anything that the lodge did in its representative capacity cannot be objected to in court." The fact that the charges were determined in favor of the plaintiff would undoubtedly have prejudiced the defendants, and therefore, if such evidence was not part of the former's

case, its acceptance would have been reversible error. The evidence offered on this point did not tend to prove any part of the plaintiff's case. It merely went to establish a fact collateral to all of the issues involved which occurred after the alleged conspiracy had attained its end. Yet without certain evidence contained in these faulty offers there was no sufficient proof of a conspiracy by the defendants against the plaintiff; furthermore, there was no proof that the defendants signed the paper which the plaintiff claimed caused the loss of his position or proper evidence that they authorized the three men who called upon the employer, and are alleged to have said that they were a committee representing the other defendants, to act as their agents in presenting that paper. An agent's authority cannot be proved by testimony given by a third party of the declarations of the alleged agent concerning his power to act. *Kaufman v. National Transit Co.*, 2 Monag. 36; *Chambers v. Davis*, 3 Whart. 40; *Plumsted v. Rudebagh*, 1 Yeates, 502; *Evans v. Owens*, 3 Penny. 228; *Vanhorn v. Frick*, 3 Serg. & R. 278; *Hannay v. Stewart*, 6 Watts, 487; *Whiting v. Lake*, 91 Pa. 349; *Central Penna. Tel. & Supply Co. v. Thompson*, 112 Pa. 118, 3 Atl. 439; *Pepper v. Cairns*, 133 Pa. 114, 121, 19 Atl. 336, 7 L. R. A. 750, 19 Am. St. Rep. 625; *Bible v. Centre Hall Borough*, 19 Pa. Super. Ct. 136. This is the only character of evidence upon that subject which appears upon the present record. When an offer containing relevant and irrelevant matter is made as a whole, the judge is not bound to separate the good from the bad, but may reject it all. 2 *Pepper & Lewis C. R. A. col.* 2237, and cases there cited. As already stated, the offers in question contained irrelevant matter, which was sufficiently pointed out by counsel in stating his objection, and hence the trial judge was justified in rejecting them as a whole and in entering the nonsuit. Moreover, there was no proper disposition of the rule to take off the nonsuit, and for that reason the appeal was premature and should be dismissed.

After a review of the whole record, I cannot see how, without a disregard of the settled rules of evidence and practice, it can be said that the learned court below fell into error. These rules have been established out of abundance of experience to insure a proper trial and to work out exact justice in the greatest number of cases, and I see nothing in the plaintiff's case which differentiates it from others or justifies the establishment of a precedent that may well cause confusion to the profession and give rise to many futile appeals in the years to come. The plaintiff had the assistance of able counsel, he had every opportunity to which a litigant is entitled, and, even though "a fundamental principle of justice" may be involved, it seems to me that in this age of clogged courts and delayed litigation we

should not lose sight of the fact that there are a multitude of other cases pressing for adjudication, and new trials should not be granted unless reversible error plainly appears upon the record. I find none here, and therefore I enter my dissent.

SALBERG et al. v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

CARRIERS (§ 94*)—BILL OF LADING—DELIVERY TO CONSIGNEE WITHOUT SURRENDER—WAIVER.

In an action by consignor against a railroad company for delivery of goods to the consignee without requiring surrender of bill of lading, evidence that there was no course of dealing between the parties waiving a provision of the bill of lading requiring its surrender before the delivery of the goods, and that plaintiff did not with knowledge of such delivery in many instances ratify such course of dealing between the consignee of the goods and the agent of the railroad company, *held* to sustain a verdict.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.*]

Appeal from Court of Common Pleas, Elk County.

Action by Charles O. Salberg and Herbert T. Morey, doing business under the name of the Ridgway Grain Company, against the Pennsylvania Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Trespass to recover the value of 17 car loads of grain and hay delivered by the defendant to one Duke Copelin without production of the bills of lading or payment of the drafts attached thereto.

At the trial it appeared that the bills were known as "order" bills of lading, and that they contained this provision: "(9) If the word 'order' is written hereon immediately before or after the name of the party to whose order the property is consigned, without any condition or limitation other than the name of the party to be notified of the arrival of the property the surrender of this bill of lading properly indorsed shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading." It was admitted that the shipments in question were delivered to Copelin without the production of the bills of lading, but the railroad company contended that there was a course of dealing with regard to previous shipments over the same route and to the same party which justified the defendant in concluding that the plaintiffs had waived the provisions of the written agreement.

The court charged in part as follows:

"Does the fact that the plaintiff company knew of it, and made no complaint, constitute a course of dealing which would amount to a waiver of their rights against the railroad company under their contracts, or, if there was no course of dealing between the grain company and the railroad company, has the grain company by its silence as to the course of dealing between the company's agent and Copelin adopted it and waived its rights against the defendant company? These, gentlemen, are the pertinent questions which you must determine."

"If you find under all the evidence in the case that there was a course of dealing between the plaintiff and defendant companies such as I have described, which would waive the provisions of the bills of lading, or, if you should find that the plaintiff company consented to and ratified any such course of dealing between Copelin and the railroad company, your verdict should be for the defendant; but, on the other hand, if you find that there was no such course of dealing between the plaintiffs and the defendant company, or if you find that there was no such course of dealing between Copelin and the railroad company, or its agent, which was ratified and consented to by the conduct of the plaintiff company, then your verdict should be for the plaintiffs for the value of the goods wrongfully delivered, with interest from the date of delivery."

Verdict and judgment for plaintiff for \$8,907.01.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Seth T. McCormick, of Williamsport, and John G. Whitmore, of Ridgway, for appellant. Max L. Mitchell, of Williamsport, and Eugene H. Baird, of Ridgway, for appellees.

POTTER, J. The question involved in this appeal, which is that of the liability of the defendant company for the value of 17 car loads of grain and feed delivered by the agent of the defendant to the consignee, without requiring the production and surrender of the bills of lading, was under consideration here before, and the case is reported in 228 Pa. 641, 77 Atl. 1007, 31 L. R. A. (N. S.) 1178. It is due to the court below to say that the writer of this opinion, in formulating the decision of the court upon the former appeal, failed to note accurately the distinction in the testimony on behalf of the plaintiffs between that as to their knowledge of the surrender of the bills of lading attached to sight drafts and that bearing upon the fact of the nonpayment of the drafts themselves. As the record stood upon the former appeal, the testimony, both oral

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and documentary, showed beyond question knowledge upon the part of plaintiffs that the drafts to which the bills of lading were attached were unpaid, and that they knew that notwithstanding this fact the grain had been delivered to Copelin, the consignee. We assumed that nonpayment of the drafts meant, as an unquestioned consequence, the retaining by the bank of the bills of lading attached to the drafts, and that knowledge of the delivery of the grain under these circumstances necessarily involved knowledge that the cars were being delivered by the agent of the defendant company without requiring the surrender of the bills of lading. But a re-examination of the testimony, as shown by the record in the former appeal, and a careful comparison of it with the evidence presented upon this appeal, shows that the plaintiffs while admitting knowledge of the delivery of the shipments without payment of the drafts said that they did not know whether the railroad company was delivering them without the production of the bills of lading, or whether the bank was surrendering the bills of lading without the payment of the drafts. Overlooking this distinction, we were led to the conclusion, as stated in the former opinion, that there was no room to doubt the fact of plaintiffs' absolute knowledge of the deliveries of the cars without the surrender of the bills of lading. The testimony does, however, in this respect raise a disputed question of fact, which was for the determination of the jury. It was the duty of the carrier to heed the provision of the bill of lading requiring its surrender before making delivery of a car, and it can only escape the consequences of its failure to discharge that duty by showing that the plaintiffs, the consignors, had been guilty of laches, or that their conduct was such as to estop them from setting up title to the goods under the circumstances. The trial judge submitted to the jury the question whether the plaintiffs ratified or approved the action of the defendant company in delivering cars without the surrender of the bills of lading, and the verdict was in favor of plaintiffs. As the court below said, there was no evidence that the plaintiffs ever waived directly their rights under the bills of lading, nor did it appear that there were any communications concerning the matter of delivery between the plaintiffs and the defendant company. The action of the local agent was in disregard of the rules of the railroad. The course of dealing, whatever it was, can

hardly be said to have been between the plaintiffs and the railroad. It was between the plaintiffs as grain dealers and their customer, who purchased the grain and feed in question. Nor do we see that the attempts made by plaintiffs to collect the price of the goods from the person to whom they had been improperly delivered, without requiring him to obtain and surrender the bills of lading, is to be necessarily regarded as a waiver of the rights of the shippers against the carrier to recover for the wrongful delivery. The basis upon which the claim that plaintiffs ratified and acquiesced in the delivery of the cars without requiring the surrender of the bills of lading lies in and depends upon the proof that plaintiffs had knowledge of the fact that such deliveries had actually been made. As opposed to the conditions shown to have existed, and from which such knowledge was fairly to have been inferred, Mr. Morey, one of the members of plaintiffs' firm, who seemed to have been in active charge, testified positively that, while he did know the goods were delivered, yet he did not know that it was without the surrender of the bills of lading. He offered as an explanation of this statement the suggestion that the bank might have violated its instructions, and have given up the bills of lading to the consignee without first requiring the payment of the sight drafts to which they were attached. He said, in substance, that he knew that either the bank or the railroad agent was at fault, but he did not know which, and made no effort to find out. His credibility was, however, for the jury; and, in the face of this testimony, the court below would not have been justified in giving binding instructions upon this point in favor of the defendant.

The verdict must, under the charge of the court, be accepted as establishing first, the fact that no course of dealing was shown to have existed between the plaintiffs and the defendant company, which can be regarded as a waiver of the provision of the bills of lading which required their production and surrender before delivery of the goods; and, secondly, the fact that the plaintiffs did not, with knowledge of the delivery of the goods without the surrender of bills of lading therefor in many instances, consent to, approve, or ratify such a course of dealing between the consignee of the goods and the agent of the railroad company.

The assignments of error are overruled, and the judgment is affirmed.

STATE v. NEIBURG.

(Supreme Court of Vermont. Chittenden.
Jan. 21, 1913.)

1. ADULTERY (§ 12*)—EVIDENCE OF MARRIAGE—TESTIMONY OF WIFE.

In a prosecution for adultery, the testimony of the wife, if she is a competent witness, is sufficient proof of the marriage of the husband.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 24-27; Dec. Dig. § 12.*]

2. WITNESSES (§ 188*)—ADULTERY—HUSBAND AND WIFE—MARRIAGE—"MARITAL CONFIDENCE."

In a prosecution for adultery, the wife of accused may testify as to his marriage, since such testimony would not lead to a violation of "marital confidence," within P. S. 1592, providing that husbands and wives shall not be competent witnesses for or against each other, as to any matter which would lead to a violation of marital confidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 734, 736; Dec. Dig. § 188.*]

3. ADULTERY (§ 11*)—EVIDENCE—REPUTATION.

The state may show, in a prosecution for adultery, that the woman with whom accused was charged with having committed the act had a bad reputation for chastity.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 20, 23; Dec. Dig. § 11.*]

4. CRIMINAL LAW (§ 729*)—HARMLESS ERROR—COMMENTS OF COUNSEL.

In a prosecution for adultery, where the accused did not testify, but the woman did, a statement of the state's attorney, "In the terrible disaster of the Titanic * * * the cry was 'The woman first,' and in this case a like fact stands out in favor of the respondent; the cry was, 'Woman first,' and the woman took the stand"—was susceptible of the construction that it was a comment on defendant's failure to take the stand; but such intent was disclaimed by the state's attorney. *Held* that, being ambiguous, it would not be deemed reversible error, in view of the disclaimer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1692; Dec. Dig. § 729.*]

5. JURY (§ 53*)—QUALIFICATIONS—TALESMAN—SERVING TWICE IN TWO YEARS.

Previous service as a juror does not disqualify one from serving as a talesman, under the statute providing that a juror, drawn from a town of more than 200, shall be disqualified from again serving for two years.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 259; Dec. Dig. § 53.*]

Exceptions from Chittenden County Court; Willard W. Miles, Judge.

Louis Neiburg was convicted of crime, and he brings exceptions. Affirmed.

John G. Sargent, Atty. Gen., and Henry B. Shaw, State's Atty., of Burlington, for the State. John G. Keenan and M. H. Alexander, both of St. Albans, for respondent.

MUNSON, J. [1] The charge is adultery. The marriage was shown by the testimony of Lena Neiburg, who testified that she was married to the respondent in Russia 23 years ago. It was objected that this was not the

proper way to show a marriage in cases of this class. The testimony of the respondent's wife was direct evidence of the fact of his marriage, although she was not an eyewitness of the ceremony, strictly speaking; and, if she was a competent witness, her testimony was sufficient proof of the marriage. Direct proof may consist either of the testimony of a witness present at the ceremony, or of either of the parties to the ceremony, if competent to testify. 2 Green. § 471.

[2] This testimony was objected to on the further ground that the matter was one which would lead to a violation of the marital confidence. The objection is based upon certain phraseology of P. S. 1592, which was first enacted in 1904, and reads as follows: "Husband and wife shall be competent witnesses for or against each other in all causes, civil or criminal, except that neither shall be allowed to testify against the other as to a statement, conversation, letter or other communication made to the other or to another person; nor shall either be allowed in any case to testify as to a matter which, in the opinion of the court, would lead to a violation of marital confidence. * * *" It is difficult to see how this objection can avail the respondent. The court referred to is obviously the trial court, and the exercise of its judgment in determining what the testimony may lead to cannot be reviewable in ordinary circumstances. But the question here is merely what the evidence was; and it is clear that the fact of marriage is not a matter of marital confidence, but one of public notoriety. The views urged by counsel are mainly those which governed the question at common law; and these can have no force against a statute, which expressly makes the wife a competent witness against her husband in criminal cases.

[3] The state was permitted to show that the woman involved in the charge had a bad reputation for chastity, against the objection that there was no evidence that this reputation was known to the respondent. Upon a charge of adultery, whether in civil or criminal proceedings, where there is evidence of conduct tending to establish the charge, the bad reputation for chastity of the person with whom the offense is alleged to have been committed may be shown, as tending to render the occurrence of the adulterous act more probable. Wig. Ev. § 68; Commonwealth v. Gray, 129 Mass. 476, 37 Am. Rep. 378; Sutton v. State, 124 Ga. 815, 53 S. E. 381; Blackman v. State, 36 Ala. 295; State v. Eggleston, 45 Or. 346, 77 Pac. 738. See Clement v. Kimball, 98 Mass. 535. The nature of the offense and the bearing of the probative fact preclude the idea that the admissibility of the evidence depends upon proof that the party charged had previous knowledge of the fact. If the respondent relied upon his ignorance of the woman's reputation

as explanatory of conduct capable of an innocent construction, the fact was for him to show.

[4] This woman was called for the defense; but the respondent did not take the stand. In the course of his argument, the state's attorney said: "In the terrible disaster to the *Titanic* * * * the cry was, 'The woman first.' In this case a like fact stands out in favor of the respondent; the cry was, 'The woman first,' and Hattie Cushing was put on the stand." Respondent's counsel objected to this as a comment on the respondent's failure to take the stand, and the state's attorney disclaimed any intention to suggest this; but the court allowed an exception. The remark was susceptible of the construction given it by respondent's counsel, and had better have been omitted; but, in view of its ambiguity and the complete disclaimer, we do not feel called upon to treat it as reversible error.

[5] A motion to set aside the verdict was filed on the ground that one of the jurors, who was called as a talesman, had, within two years previous to the trial, been regularly drawn as a petit juror in Franklin county, from a town containing over 200 inhabitants, and had served as such. The statute upon which this motion is based reads as follows: "Each person drawn by the sheriff or his deputy to serve as grand or petit juror from a town containing more than two hundred inhabitants shall be disqualified from again serving as juror for two years from such drawing." It has been held, under this statute, that a previous service as talesman does not disqualify the person from serving as a juror, regularly drawn, within two years thereafter. *First Nat. Bank v. Post*, 66 Vt. 1 237, 28 Atl. 989. The question here is whether one who has served as a juror, regularly drawn, is disqualified from afterwards serving as a talesman within the time limited. It was said, in the case cited, that this provision does not apply to a person drawn as a talesman; and we think this must be said, whether the service as talesman follows or precedes the regular drawing.

Judgment that there is no error, and that the respondent take nothing by his exceptions.

STATE v. CUSHING.

(Supreme Court of Vermont. Chittenden.
Jan. 21, 1913.)

1. ADULTERY (§ 13*)—EVIDENCE—CHARACTER OF HOUSE.

In a prosecution for adultery, the state can properly show that the house, in a bedroom of which defendant, a female, was found late at night with a man, was a place of assignation, resorted to by men and women for immoral purposes.

[Ed. Note.—For other cases, see *Adultery*, Cent. Dig. §§ 28-30; Dec. Dig. § 13.*]

2. CRIMINAL LAW (§ 670*)—TRIAL—OFFER OF PROOF—NECESSITY.

The exclusion of questions for want of materiality was proper, where no statement was made of what was expected of the witness, and nothing appeared to indicate materiality.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 757, 1593-1596; Dec. Dig. § 670.*]

3. ADULTERY (§ 13*)—EVIDENCE—PHYSICAL ABILITIES.

In a prosecution of a female for adultery, evidence that the male was doped or drunk to such an extent as to be physically unable to copulate at the time of the alleged offense should have been admitted, since it would have been a complete defense.

[Ed. Note.—For other cases, see *Adultery*, Cent. Dig. §§ 28-30; Dec. Dig. § 13.*]

Exceptions from Chittenden County Court; Willard W. Miles, Judge.

Hattie Cushing was convicted of adultery, and she brings exceptions. Reversed.

John G. Sargent, Atty. Gen., and Henry B. Shaw, State's Atty., of Burlington, for the State. Martin S. Vilas and Clarence P. Cowles, both of Burlington, for respondent.

ROWELL, C. J. This is an information for adultery with one Nieburg, claimed by the state to have been committed at the "Allen House," a hotel in Winooksi.

[1] The state was permitted to show that the "Allen House" was reputed to be a place of assignation, resorted to by men and women for immoral purposes. The prisoner objected that the testimony was inadmissible, unless knowledge of the character and reputation of the place was brought home to her, and also objected that the testimony was immaterial and irrelevant. In support of her objections, the prisoner relies upon *State v. Plant*, 67 Vt. 454, 32 Atl. 237, 48 Am. St. Rep. 821, where it is held that, in a prosecution for keeping a house of ill fame, evidence of its reputation as such is not admissible. But there the thing in issue was, not the reputation of the house, for that was not an element of the offense, but the character of the house, regardless of its reputation; and this because the statute made it so. But here, though the character of the house is involved, yet, there being no statute controlling the matter, but general principles are to govern, that character can be shown to be bad by reputation, the same as the character of a witness for truth can be shown to be bad in that way; and it makes no difference that the prisoner did not know the reputation of the house, for going there, as she did, with Nieburg, and being found there with him in a bedroom late at night, incriminated her, and tended to show adultery, for, according to the old saying somewhere referred to by Lord Stowell, people do not go to such places to say their paternosters. These incriminatory circumstances were, however, open to explanation; but the burden of explaining was on the prisoner. This doctrine is abun-

dantly sustained. 2 Bush. Mar. Div. & Sep. §§ 1384, 1385; Cane v. Cane, 39 N. J. Eq. 148; Latham v. Latham, 30 Grat. (Va.) 307; Evans v. Evans, 41 Cal. 103; Astley v. Astley, 1 Hag. Ec. 714; Loveden v. Loveden, 2 Hag. Ec. 1, 24; Kenrick v. Kenrick, 4 Hag. Ec. 114, 138, 139. As to the burden of explaining, see State v. Nieburg, 86 Vt. —, 85 Atl. 769.

[2] Exclusion of the questions put by the prisoner to her witnesses Marcus and Cohen, for want of materiality, was proper, for no statement was made of what was expected of the witnesses, and nothing appeared to indicate materiality on any issue involved.

[3] We gather from the prisoner's brief, which is our principal source of information on the subject, that Nieburg was taken in a hack from Dorn's saloon in Burlington, up Winoski avenue, when the prisoner was taken in, and both driven to the "Allen House." The prisoner testified that she did not arrange for that ride. She was then asked who did. This was objected to as immaterial and excluded, to which she excepted. She then offered to show, and said she expected to be able to show, that she made that trip with Nieburg, and that he was at the time involuntarily doped or drunk to such a degree that he was physically incapable of having sexual intercourse with her, as charged. The court asked how the pending question tended to show what was offered. Counsel said it tended to show that one Max Agel, in connection with Marcus, the hackman, made Nieburg drunk or doped. Although the question was excluded, and an exception there-to taken before the offer was made, yet the court at first seemed to treat it as still pending, and to think that counsel intended the offer to come in as an answer thereto, and counsel seemed to have that idea. But the matter went along in colloquy between court and counsel, until finally the court ruled upon the offer as an independent proposition, and said it would exclude it until some other evidence connected it; that, when there was evidence in the case that might make it admissible, it would pass upon it, but that, in the then present state of the evidence, it did not think it admissible. To this the prisoner excepted. If it was admissible when offered, it was error to exclude it, for it was material, and would acquit, if sustained.

It is difficult to tell, as the case is presented, what connecting evidence the court had in mind as a prerequisite to the admission of the offer, or what other evidence it thought might make the offer admissible. But the attorneys for the state, as they paraphrase the ruling in their brief, take the court to have meant "other evidence introduced as to Nieburg's condition." We are inclined to adopt their view of the matter, for, having participated in the trial below and heard the ruling, they can divine the

spirit and meaning of it better than we can. But that was the very thing the prisoner offered to show, and the case was ripe for that showing when the offer was made, and therefore it was error to exclude it.

Judgment and sentence reversed, and cause remanded.

LOVE v. ROGERS et al.

(Court of Appeals of Maryland. Nov. 13, 1912.)

TRUSTS (§ 365*)—ACCOUNTING—LACHES.

Where plaintiff, without assigning any reason after one, who had charge of her property, allowed it to be sold for taxes, and bought it in himself and mortgaged it to secure his own debts, and refused to account at any time, waited 17 years without bringing action, and then not until his death, she was guilty of gross laches, and could not recover in equity.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

Appeal from Circuit Court, Baltimore County, in Equity; N. Charles Burke, Judge.

Bill by Anna I. Love against Eleanor T. Rogers and others. There was a decree sustaining a demurrer to the bill, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Robert H. Carr and Richard B. Tippet, both of Baltimore, for appellant. Wm. Pinkney Whyte, Jr., of Baltimore, and John S. Ensor, of Towson, for appellees.

THOMAS, J. It appears from the original bill of complaint in this case, which was filed by the appellant against George C. Worthington on the 27th of November, 1908, that Rezin H. Worthington died in 1884, leaving a will by which he devised to each of his three grandchildren, Anna I. Love, the appellant, her sister, Maggie Love, and Grace Worthington, an undivided one-third interest for life in a farm in Baltimore county, containing about 467 acres. The will provided that, in the event of any one of said devisees "dying without issue," etc., her share of said farm was to become a part of the residue of the testator's estate, which was devised and bequeathed to his son, Thomas Chew Worthington. There was a partition of the farm, and the share allotted to the plaintiff contained about 123 acres. The bill further charges that, at the time the partition was made, the plaintiff was an infant, and that "her estate was in the hands of her mother, who was her guardian until about the time" she became of age; that her said guardian paid to the defendant, from the proceeds of the crops raised on plaintiff's property, sums of money with which he was to pay state and county taxes for the years 1887, 1888, and 1889; that, notwithstanding said payments to him, the defend-

ant allowed two parcels of her land, one containing 8 and the other 10 acres, to be sold for taxes in 1880, and that the same were purchased by Thomas Chew Worthington who, in 1892, conveyed them to the defendant; that the plaintiff was kept in ignorance of her rights, and was deprived of the income from and possession of her property by deceit and misrepresentation; that, notwithstanding the defendant, who professed to be acting in her interest, took possession of said farm and the crops raised thereon in the year 1892, he allowed another parcel of her land, containing $9\frac{1}{4}$ acres, to be sold for taxes in December, 1892, and he became the purchaser thereof; that on or about July 25, 1893, the defendant represented to the plaintiff that it was necessary for her to sign a paper in order that he might take care of and protect her property, and that she was thereby induced to sign the paper without knowing its contents, and that she afterwards learned that it was a general power of attorney; that, after the execution of said paper, the defendant continued in the management and control of her estate, claiming that said paper conferred upon him rights of a trustee, and that his authority had been recognized by the court; that he always refused to account to her for the proceeds of her property, and in 1895 allowed another parcel of her land, containing $22\frac{1}{4}$ acres, to be sold for taxes, and that said parcel was also purchased by him; that the plaintiff has never received any part of the income from her said property, which was largely in excess of the amount required to pay the taxes thereon, and that she was not notified that her property was to be sold for taxes, except in one instance, when she was powerless to prevent it by reason of the acts of the defendant; that in 1905 the defendant, without her knowledge, executed a mortgage to John M. Gittings, covering the several parcels of her land which had been sold for taxes and purchased by him, to secure the payment of \$3,000; that, being informed, shortly before November 25, 1908, that the defendant was about to further encumber her said property by an additional mortgage for \$600, the plaintiff caused to be prepared a bill of complaint to be filed in the circuit court for Baltimore county to protect her estate, but was induced by counsel for the defendant not to file it, pending arrangements to secure said sum by a mortgage on other property of defendant; that, while the means of securing said sum was being discussed by counsel for the persons interested, a mortgage for said amount, and covering the property of the plaintiff purchased by the defendant, was, by the connivance of the mortgagee, secretly executed by the defendant and his wife; that the defendant was about to dispose of his interest in the property covered by said mortgages, and that in August, 1908, the plaintiff sent to

the defendant, who was serving a sentence in the Maryland penitentiary, the following letter and notice: "Dr. George C. Worthington, Maryland Penitentiary, City—Dear Sir: I am informed that a few days ago you made an attempt to lease my property for a long term. Do you know that you had neither right nor authority to do so. In order that I may have additional written evidence I am sending notice to you herewith. Very respectfully, Anna I. Love." "Dr. George C. Worthington, Maryland Penitentiary, City: You are hereby notified that I, the undersigned, do hereby revoke, annul and cancel any and all authority, whether verbal or in writing, heretofore given to you or procured by you from me pertaining to my property and property rights of every kind. It being my intention and desire to terminate any authority you may have had to act for me in reference to the same. Witness my hand and seal this 10th day of August 1908. Anna I. Love. [Seal.]"

The prayer of the bill was that the several parcels of land sold for taxes be decreed to be the property of the plaintiff and those interested in remainder, according to the terms of said will; that the defendant be enjoined from conveying, etc., any part of said property; that he be required to account to the plaintiff for the rents and profits received by him from the property of the plaintiff, while he was in possession thereof under said power of attorney, and for general relief.

No exhibits were filed with the bill, and no subpoena was issued against George C. Worthington, the only defendant in the case. The plaintiff did not obtain an order for the injunction prayed for, and nothing further was done until December 22, 1910, when the plaintiff filed a petition alleging that the defendant had died since the filing of the original bill, and praying that his heirs at law and the mortgagee in said mortgages be made parties, and that she be allowed to file an amended bill. On the same day an amended bill and exhibits were filed, the bill was demurred to by the defendant Eleanor T. Rogers, one of the heirs at law of George C. Worthington, and the demurrer was sustained, with leave to the plaintiff to file an amended bill.

On the 29th of April, 1911, the plaintiff filed her second amended bill against the heirs at law of George C. Worthington and Thomas Chew Worthington and the mortgagee, in which, in addition to the averments of the original bill, she alleged that she was born on the 19th of September, 1872; that the first two tax sales were made during her infancy, and that she did not know of the other sales; that the parcels of land purchased by Thomas Chew Worthington were conveyed by him to George C. Worthington in order that he might better discharge the trust assumed by him; that George C. Worth-

ington and Thomas Chew Worthington were both dead, and that George C. Worthington died in 1910; that the plaintiff "lived for many years a member of the household of said Dr. George C. Worthington, during all of which time he represented to her that he was trustee of her estate and managing it to her advantage"; that she "had no knowledge that the legal title to parts of her estate was claimed individually by the said George C. Worthington; on the contrary, she had been told by" him "that what had been sold during the guardianship of her mother had been bought in for her, and not until after" he "had been confined in the Maryland penitentiary several years did" she "have knowledge of the deceit and fraudulent acts and conveyances of which George C. Worthington was guilty in endeavoring to obtain the legal title to her estate." This bill, which seeks the same relief prayed for in the original bill, was demurred to by the defendants Eleanor T. Rogers and Margaret Russell Worthington, heirs at law of George C. Worthington, and the appeal in this case is from a decree of the circuit court for Baltimore county sustaining the demurrer and dismissing the bill.

At the time George C. Worthington became the purchaser of the two parcels of land conveyed to him by Thomas Chew Worthington, and the parcel sold for taxes in 1892, the plaintiff was about 20 years of age, and she was 23 years of age at the time of the alleged sale and purchase of the fourth parcel in 1895. She alleges in her amended bill that George C. Worthington represented to her that he had purchased the two parcels of land from Thomas Chew Worthington for her use and for the protection of her estate, and that she did not know, until several years after his confinement in the Maryland penitentiary, that he claimed them as his property; but it does not appear, from the record in this case, when his confinement in the penitentiary began, and she does not state when she first learned of the sale and purchase of the other parcels, or when she became aware of the mortgage of 1905. The bill charges that, after she signed the power of attorney in 1893, George C. Worthington always refused to account to her for the rents and profits received by him from her property. It therefore appears that all of the alleged breaches of trust of which the plaintiff now complains, except the execution of the mortgages of 1905 and 1908, occurred more than 15 years before the filing of her amended bill of complaint; and that, even after her failure to prevent the execution of the second mortgage on her property, she waited for more than two years, and until after the death of George C. Worthington, before making any effort to correct the wrongs for which she now seeks redress. It is true the original bill was filed in 1908; but, as we have said, no subpoena was issued against the defendant, and it does not ap-

pear that he had any notice of the bill, or that he was required to answer the charges it contained. The plaintiff has assigned no reason for her failure, for more than 17 years, to require George C. Worthington to account for the rents and profits received from her property, and has failed to satisfactorily account for the great delay in asserting her claim to the property purchased by him. After such a lapse of time, and after other interests have been acquired in the property sought to be recovered, and death has closed the lips of the one charged with the fraud, in the absence of a satisfactory explanation of the delay, the plaintiff can have no standing in a court of equity, where conscience, good faith, and reasonable diligence are required.

In the case of *Stearns v. Page*, 7 How. 819, 12 L. Ed. 928, Mr. Justice Grier said that a complainant, seeking the aid of a court of chancery under such circumstances of lapse of time as there existed, "must state, in his bill, distinctly the particular act of fraud, misrepresentation, or concealment, must specify how, when, and in what manner, it was perpetrated, * * * and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made"; and in the case of *Badger v. Badger*, 2 Wall. 95 (17 L. Ed. 836), the court said that a party, seeking to avoid laches, "should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing." In the case of *Williams v. Marshall*, 4 Gill & J. 376, Chief Judge Buchanan said: "A trustee, who purchases at his own sale, may be treated in chancery, according to circumstances, as a purchaser for the benefit of the cestui que trust, and not be permitted to make profit by speculating in the purchase of the trust property; and he may be directed to sell it again for the benefit of the cestui que trust, provided it will bring more on a resale than the amount at which he bought it; and, if not, he may be kept to his purchase, and held responsible for the stipulated price. But he will in some cases be protected in his purchase, as, if the cestui que trust be of full age at the time of sale, and under no disability, and, with full knowledge of the transaction, lies by for an unreasonable time, or, being under age, or other disability, does not, in a reasonable time after coming of age, or the disability is removed, seek to set aside the sale, or treat the trustee as a purchaser for his benefit, it

will be considered as an acquiescence in the sale, and the trustee will not be disturbed in his purchase." Our predecessors have repeatedly stated that "in matters of account, more especially, courts of equity refuse to interfere, after a considerable lapse of time, from considerations of public policy, from the difficulty of doing entire justice between the parties (as a court of conscience is bound to do), where the transactions have become obscure and the evidence may be lost." *Hawkins v. Chapman*, 36 Md. 83; *Hall v. Clagett*, 48 Md. 223. In the case of *Preston v. Horwitz*, 85 Md. 164, 36 Atl. 710, Judge Fowler adopts the statement of Mr. Beach in his *Modern Equity* that the principal foundations of the doctrine of laches "are acquiescence and lapse of time; but other circumstances will be taken into consideration. Thus it is a material circumstance that the claim is not made until after the death of those who could have explained the transaction." And in the case of *Ripple v. Kuehne*, 100 Md. 672, 60 Atl. 464, the court said: "The bill was not filed until more than eight years after the alleged fraud was committed, and almost a year after the death of the party charged with the fraud, and the attorney who transacted the business. This court has repeatedly held that there must be 'conscience, good faith, and reasonable diligence to call into action the powers of a court of equity,'" and that "there are cases where parties are in such position of interest that they ought to assert their right, if they do not acquiesce, and from great lapse of time they are presumed to have acquiesced." In the case of *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 184, the court held that: "A purchase by a trustee of trust property, for his own benefit, is not absolutely void, but voidable; and it may be confirmed by the parties interested, either directly, or by long acquiescence, or by the absence of an election to avoid the conveyance within a reasonable time after the facts come to the knowledge of the cestui que trust"—and Mr. Chief Justice Fuller said: "In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and the lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands a rigid enforcement of the rule of diligence."

It is urged by counsel for the appellant that, as between trustee and cestui que trust, the doctrine of laches does not apply to "an express subsisting and recognized trust, except in cases where the trustee sets up an open, public, and adverse claim against" the cestui que trust, etc. But even if the case at bar could be treated as one between a trustee and his cestui que trust, and the contention of counsel was admitted to be sound, it would afford the appellant no avenue of escape from

the consequences of her own neglect, for her bill charges that the trustee not only refused to account for the rents and profits received from her property, including the lots he purchased, but that he asserted title to it and conveyed it as security for the payment of his debts. In the case of *Preston v. Horwitz*, supra, the court held that the rule that laches is a good defense to charges of violations of an express trust was well established in this state.

After carefully examining the many cases cited by the appellant, we do not find in them any warrant for granting the relief prayed by the appellant, and we must, under all the circumstances of this case, hold that she has been guilty of gross laches, and affirm the decree of the court below.

Decree affirmed, with costs.

RUPP v. ROGERS et al.

(Court of Appeals of Maryland. Nov. 13, 1912.)

EQUITY (§ 82*)—LACHES—DILIGENCE.

The mere institution of a suit does not of itself relieve a person of the charge of laches; and, if he fail in the diligent prosecution of the action, the consequences are as though no action had been begun.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 236; *Dec. Dig.* § 82.*]

Appeal from Circuit Court, Baltimore County, in Equity; N. Charles Burke, Judge. Action by Maggie Rupp against Eleanor T. Rogers and others. Decree for defendants, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Robert H. Carr and Richard B. Tippet, both of Baltimore, for appellant. Wm. Pinkney Whyte, Jr., of Baltimore, and John S. Ensor, of Towson, for appellees.

THOMAS, J. This case and the case of *Anna I. Love v. Eleanor T. Rogers et al.* (No. 4, appeals of this term) 85 Atl. 771, were argued together in this court. The allegations and prayer of the bill are practically the same as the averments and prayer of the bill in No. 4 appeals, except that it appears that the appellant in this case became 21 years of age in 1897, and that George C. Worthington, in addition to the breaches of trust complained in No. 4 appeals, used the timber on the land of the appellant in the erection of a house on one of the parcels of land belonging to her sister, Anna I. Love, which had been sold for taxes and purchased by him.

The original bill in this case was filed November 25, 1908, against George C. Worthington alone, and he was summoned and filed his answer on January 6, 1909, denying the charges made against him. Nothing further

was done in the case for nearly two years, and until after the death of the defendant.

What we have said in the opinion in No. 4 appeals applies with equal force to this case; and, in addition to the authorities there cited, we will refer to the case of Taylor v. Carroll, 89 Md. 32, 42 Atl. 920, 44 L. R. A. 479, where it is said that "the mere institution of a suit does not of itself relieve a person of the charge of laches, and that, if he fall in the diligent prosecution of the action, the consequences are the same as though no action had been begun," and to the case of Hadaway v. Hynson, 89 Md. 305, 43 Atl. 806.

For the reasons stated in the opinion referred to, the decree of the court below must be affirmed.

Decree affirmed, with costs.

KNECHT et al. v. MOONEY.

(Court of Appeals of Maryland. Nov. 13, 1912.

1. TRIAL (§ 420*)—WITHDRAWAL OF CASE FROM JURY—DENIAL—WAIVER.

Error, if any, in denial of a motion to withdraw the case from the jury at the conclusion of plaintiff's testimony, is waived by defendant subsequently offering evidence in support of his defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. § 420.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—LAW OF THE ROAD—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to plaintiff by a collision with a vehicle driven by defendant's servant in a city street, evidence held to require submission of the questions of defendant's negligence and plaintiff's contributory negligence to the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

3. TRIAL (§ 260*)—INSTRUCTIONS—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

It is not error to refuse requests to charge which so far as correct are covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

4. TRIAL (§ 261*)—MISLEADING INSTRUCTIONS.

Requests to charge, though containing a correct proposition of law, may be properly refused, where they also contain much foreign and immaterial matter calculated to confuse and mislead the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.*]

5. APPEAL AND ERROR (§ 1064*)—REVIEW—MODIFICATION OF INSTRUCTIONS—PREJUDICE.

In an action for injuries to plaintiff by a collision in a highway, defendant requested an instruction that if the driver of defendant's cart was negligent in driving the same on or over the car tracks in a street, and the jury found that plaintiff's injury was caused by any negligence or want of care on plaintiff's part at the time of the accident directly contribut-

ing thereto, "and except for the want of such care and caution the injury would not have been sustained," then plaintiff could not recover. Held, that the modification of the instruction by inserting the language quoted, and giving the same as modified, was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

Appeal from Baltimore City Court; Walter I. Dawkins, Judge.

Action by Samuel Mooney against John A. Knecht, Jr., and another, partners trading as the Excelsior Brick & Pottery Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before BOYD, C. J., and PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

J. Royall Tippet and Richard B. Tippet, both of Baltimore, for appellants. Charles C. Fears and C. Arthur Eby, both of Baltimore, for appellee.

THOMAS, J. This appeal is from a judgment of the Baltimore city court in a suit brought to recover for injuries alleged to have been caused by the negligence of the appellants' servant while driving a cart on one of the streets of said city.

There are but two exceptions in the record. The first is to the refusal of the lower court to grant the three prayers of the defendants, offered at the conclusion of the plaintiff's testimony, to withdraw the case from the jury on the ground of contributory negligence, and because the plaintiff had offered no evidence legally sufficient to show negligence on the part of the defendants, and the second is to the action of the court on the prayers offered by the defendants at the close of the case.

[1] In regard to the first exception, it is only necessary to say that since the case of Barabasz v. Kabat, 91 Md. 53, 46 Atl. 337, it has been the established rule in this state that where, after the refusal of the court to grant a prayer at the conclusion of plaintiff's testimony to take the case from the jury, the defendant offers evidence in support of his defense, he thereby waives any error in the rejection of said prayer, and the ruling of the court cannot be reviewed on appeal. United Rys. Co. v. Deane, 93 Md. 619, 49 Atl. 923, 54 L. R. A. 942, 86 Am. St. Rep. 453; New York, etc., v. Jones, 94 Md. 24, 50 Atl. 423. As the defendants by their first three prayers offered at the close of the case renewed their effort to withdraw the case from the jury on the grounds already stated, it will be necessary to examine the evidence in the case.

The plaintiff offered in evidence the ordinance of the mayor and city council of Baltimore, which provides, "The drivers of all carriages of burden or pleasure, and the riders of all bicycles of every kind whatsoever,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

driving, riding or passing through the streets, lanes or alleys of the city (where there is room sufficient for two to pass), shall keep on that side of the street, lane or alley on their right hands, respectively, etc.," and also the ordinance of the mayor and city council of Baltimore which provides that "vehicles shall keep to the right of the center of all streets," and "vehicles meeting shall pass each other to the right," and then offered evidence tending to show that the plaintiff on the 8th of August, 1911, was driving a one-horse wagon along the north or right-hand side of Pratt street and going west, that there was a horse and wagon standing on the north side of Pratt street, close to the curb stone in front of 326 West Pratt street, facing west, with the wheels of the wagon in the gutter; that a cart, driven by the servant of the defendants and loaded with bricks, was coming east on Pratt street; that the Baltimore & Ohio Railroad Company has a single track in the center of the street, and that the left-hand wheel of the cart was about six inches north of the north rail of the track, and that the right-hand wheel was between the rails of the track; that the distance between the north curb of Pratt street and the north rail of the railroad track is 17 feet; that the plaintiff's wagon was 6 feet wide, and that the width of the wagon standing in front of 326 West Pratt street was about the same; that the space between the wagon in front of 326 West Pratt street and the cart was about 10 feet, and that as the plaintiff attempted to drive around the said wagon and between it and the approaching cart, just as he was passing between the cart and wagon, the cart suddenly turned towards him, and towards the north side of the track, and the wheel of the cart struck the hub of the front wheel of his wagon, throwing his horse around towards the track, and the plaintiff was thrown out of his wagon and injured; that in driving between the wagon and cart the plaintiff drove as close to the wagon as he could; that the driver of the cart was whipping his horse or mule and driving as fast as his horse could walk, and that the plaintiff was driving in a walk; that there was no obstruction on the south side of the track at the place where the accident occurred; and that there was nothing there to prevent the man driving the cart from turning to the right.

The defendants offered evidence tending to show that the driver of the cart was going east on Pratt street, and, before he reached the point of the accident, he drove on the railroad track to avoid some piles of dirt and holes in the street on the south side of the track; that the left wheel of the cart was on or south of the north rail of the track, and the right-hand wheel was south of the south rail; that the driver of the cart saw the plaintiff coming west on Pratt street, and that there was plenty of room for him

to pass between the wagon in front of 326 West Pratt street and the cart; and that as the plaintiff turned to go around the wagon he drove too far to the south, and the wheel of his wagon struck the hub of the cart wheel. The defendants also offered evidence tending to show that by reason of the holes and dirt and other obstructions on the south side of the track it was impossible for the defendants' servant to have driven to the south side of the street.

[2] It is urged by counsel for the appellants that there is no evidence of negligence on the part of the driver of the cart, and that the accident was caused by the negligence of the plaintiff in attempting to drive between the wagon and cart, instead of waiting until the cart had passed the point of the collision. But it is apparent from this brief review of the evidence that, according to the evidence adduced by the plaintiff, the accident was caused by the sudden turning of the cart towards the plaintiff as he was driving between it and the wagon, while the evidence offered by the defendants tends to show that the collision was the direct result of the plaintiff's own carelessness. If we accept the plaintiff's version of how the accident occurred, then the defendants' servant was guilty of negligence in suddenly turning the cart in the direction of the plaintiff, as he was passing between the cart and wagon. On the other hand, if the statement of the defendants' servant is true the plaintiff was the victim of his own recklessness. Under such circumstances the questions of negligence and contributory negligence are matters for the jury to determine.

It is said in *United Railways v. Seymour*, 92 Md. 425, 48 Atl. 850: "Negligence is usually a question for the jury to decide upon all the facts of the case (*Shipley's Case*, 31 Md. 368; *B. & O. R. R. v. Miller*, 29 Md. 252 [96 Am. Dec. 528]), and when, 'it can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it.'" In the same case Judge Page said that: "Unless the uncontradicted evidence in the case proves such a glaring act of carelessness on the part of the appellee as to amount in law to contributory negligence, it is the duty of the court to submit the matter to the jury." In the case of *Cooke v. Baltimore Traction Co.*, 80 Md. 551, 31 Atl. 327, this court held that the uncontradicted evidence in the case must establish some distinct, prominent and decisive fact, about which ordinary minds would not differ, in order to justify the court in pronouncing the plaintiff's conduct such contributing negligence in law as prevents a recovery. In the case at bar there is no such decisive act of negligence on the part of the plaintiff. According to the evidence, there was ample space between the wagon standing in front of 326 West Pratt street

and the cart through which he could have passed in safety, and the court cannot say as a matter of law that he was negligent in attempting to do so.

The defendants' fourth, fifth, and sixth prayers are as follows:

"Fourth. The court instructs the jury if they find from the evidence that on the morning of August 8, 1911, Edward Adams, the employé of the defendants, hauled a load of 500 arch bricks, weighing more than a ton, loaded on a cart, pulled by a horse of the defendants from the brickyard of the defendants on Benson avenue, near St. Agnes Hospital, intending to deliver the same at the Fidelity Building on North Charles street, that said driver drove said horse and loaded cart on Wilkens avenue to Gilmor street, and thence to Pratt street, and then drove easterly on the south side of Pratt street, that after passing Eutaw street, in the exercise of reasonable and ordinary care, and believing the condition of the south side of Pratt street between Howard and Eutaw streets at that time to be unsafe for driving said horse and loaded cart over the same, if the jury so find, drove said horse and loaded cart eastwardly on or over the car tracks in or near the center of Pratt street, that the plaintiff was driving his horse and wagon west on Pratt street south of No. 324 or 326 West Pratt street between a wagon standing near the front of No. 324 or 326 West Pratt street and said loaded cart, and that in so doing the hub of the left hind wheel of the plaintiff's wagon collided with the left hub of defendants' cart, and the plaintiff was thereby thrown out of his wagon and injured, and that the said injury to the plaintiff was not caused by the negligence or want of ordinary care on the part of the driver of the horse and loaded cart of the defendants, then they will find their verdict for the defendants.

"Fifth. Even if the jury find from the evidence that, under the circumstances of the case, the driver of the cart in question was negligent in driving the said cart eastwardly between Eutaw and Howard streets on or over the car tracks near the center of Pratt street, yet, if they further find that the injury to the plaintiff complained of was caused by any negligence or want of reasonable care on the part of the plaintiff at the time of the accident directly contributing thereto, and except for the want of such care and caution the injury would not have been sustained, then the plaintiff cannot recover.

"Sixth. If the jury find from the evidence that there is a single car track, two rails, in the bed of Pratt street between Eutaw and Howard streets about the center of Pratt street, that the accident to the plaintiff occurred on Pratt street south of a wagon standing in front of No. 324 or 326 West Pratt street, that at the time of the accident

the defendants' cart was loaded with brick, weighing more than a ton, going east, drawn by a horse of the defendants, that before and at the time of the accident the said horse and cart were driven easterly, in a straight course on Pratt street, on or over said car tracks, that the plaintiff, before the accident, had a clear view of said horse and cart, that the plaintiff, driving westerly on Pratt street, did not use reasonable care to avoid injury to himself, and undertook to drive his horse and wagon through the space between said wagon in front of No. 324 or 326 West Pratt street, and the left hub of the defendants' cart, and that in attempting so to do the hub of the left hind wheel of the plaintiff's wagon collided with the hub of the left wheel of the defendants' cart, and thereby the plaintiff was thrown out of his wagon and injured, and shall further find that such failure of the plaintiff to use reasonable care on his part to avoid injury to himself, under the circumstances, contributed directly to his injury, then the plaintiff cannot recover."

[3, 4] There was no error in the rejection of defendants' fourth and sixth prayers. In so far as they could be said to properly present the law of the case, they were covered by defendants' fifth prayer. Of course, the plaintiff could not recover if the accident was not caused by the negligence of the defendants' servant, or if the plaintiff's negligence directly contributed to his injury, but these prayers contain much matter foreign and immaterial to the real issue in the case which was calculated to confuse and mislead the jury. The route defendants' servant took to reach Pratt street, or what he thought was the condition of the south side of Pratt street, as distinguished from its real condition, were matters that could not possibly aid the jury in reaching a proper conclusion, and could only tend to confuse and mislead them. Moreover, defendants' sixth prayer practically told the jury that the plaintiff was guilty of negligence in attempting to drive through the space between the cart and the wagon standing on the north side of Pratt street.

[5] The court below granted defendants' fifth prayer after adding thereto the words, "and except for the want of such care and caution the injury would not have been sustained." Assuming that the prayer was good without the modification, the plaintiff was not prejudiced by it. The court below merely adopted the language of the court in *Lewis v. B. & O. R. R. Co.*, 38 Md. 583, 17 Am. Rep. 521; *B. & O. R. R. Co. v. Kean*, 65 Md. 394, 5 Atl. 325; and *Meister v. Alber*, 85 Md. 72, 36 Atl. 360; and in the case of *Baltimore City v. Lobe*, 90 Md. at page 314, 45 Atl. at page 193, the court said: "The modification of the court in the defendant's third prayer was a change of form only, and did not modify the law. As offered, the jury

were told that, 'if the plaintiff did not use reasonable care and diligence, and the injury complained of could have been avoided had he done so, then he is not entitled to recover.' As modified by the court, they were told that 'if the plaintiff did not use reasonable care and diligence, and the injury complained of *was directly due to such failure*, then he is not entitled to recover.' There is no material difference in saying that if the plaintiff was guilty of negligence which *directly* contributed to cause the accident, and that he was guilty of negligence but for which the injury would have been avoided; for, if the accident would have been avoided by the use of care and diligence, it follows that the want of such care and diligence directly contributed to cause it."

Finding no reversible error in the rulings of the court below, the judgment must be affirmed.

Judgment affirmed, with costs.

WILMER v. PICKA.

(Court of Appeals of Maryland. Nov. 18, 1912.)

1. JUSTICES OF THE PEACE (§ 128*)—ENJOINING JUDGMENT—SERVICE OF PROCESS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to enjoin the enforcement of a justice's judgment taken against a garnishee in her absence, *held* inadequate to prove either personal service or a voluntary appearance.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. § 128.*]

2. JUSTICES OF THE PEACE (§ 128*)—ENJOINING ENFORCEMENT OF JUDGMENT—QUESTION FOR COURT—SERVICE OF PROCESS.

A question of the sufficiency of the evidence to show whether a justice of the peace obtained jurisdiction, either by legal service or by a voluntary appearance, was for the court, in an action to enjoin the enforcement of the justice's judgment rendered against plaintiff as a garnishee.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. § 128.*]

3. JUSTICES OF THE PEACE (§ 128*)—ENJOINING ENFORCEMENT OF JUDGMENT—COMPLAINT—ADMISSION OF PERSONAL SERVICE.

A statement in a bill of complaint, in an action to enjoin the enforcement of a justice's judgment rendered against plaintiff as a garnishee, that when plaintiff "was notified to appear" before the justice she was ill in bed was not necessarily an admission of personal service.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. § 128.*]

4. JUSTICES OF THE PEACE (§ 87*)—GARNISHMENT—SERVICE—SUFFICIENCY.

Service of process upon the daughter of a garnishee did not confer jurisdiction over the garnishee, though she had actual knowledge of the proceedings.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 295-305; Dec. Dig. § 87.*]

5. INJUNCTION (§ 176*)—MOTION TO DISSOLVE—DECREE.

On denial of a motion to dissolve a preliminary injunction, the court will not render a final decree, but will merely continue the injunction until final hearing.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 389, 395; Dec. Dig. § 176.*]

Appeal from Circuit Court of Baltimore City; Chas. W. Heulsler, Judge.

Bill by Anna Picka against Edwin M. Wilmer. From decree overruling motion for the dissolution of preliminary injunction and making same perpetual, defendant appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

David Ash, of Baltimore, for appellant. Morrill N. Packard, of Baltimore, for appellee.

PEARCE, J. This is an appeal from a decree of the circuit court of Baltimore city, overruling a motion for the dissolution of a preliminary injunction and making the same perpetual.

On April 24, 1894, the appellant, Edwin M. Wilmer, obtained a judgment for \$63.18 against Christopher C. Dunn before a justice of the peace of Baltimore city, and on December 20, 1909, he caused an attachment to be issued thereon for the purpose of reaching assets of Dunn, alleged to be in the hands of Anna Picka, the appellee, and the garnishee in the attachment case.

The bill of complaint of the appellee set out the docket entries in the attachment case as follows:

"Edwin M. Wilmer v. Anna and Anton Picka, Garnishee of Christopher C. Dunn.

"Attachment on judgment, \$63.18, with interest from 4/24/94 and costs. Writ issued Dec. 20, 1909, directed to Slunt, constable. Returnable January 17, 1910, 10 a. m. sharp. Returned summoned. Ruled to January 17, 1910, sharp. January 17, 1910, plaintiff appeared; garnishee failed to appear; writ heard ex parte. Judgment of condemnation for \$63.18, with interest from 4/24/1894, and \$4.69 costs to Anna Picka, garnishee.

"Witness my hand and seal. James W. Clay. [Seal.]"

There was also filed with the bill, as Exhibit No. 1, the following paper:

"Certified Copy. Magistrate's Docket.

"In the Superior Court of Baltimore City.

"Edwin M. Wilmer v. Anna Picka.

"Baltimore, Jan. 17, 1910.

"Plaintiff appeared. Garnishee failed to appear. Trial ex parte.

"Judgment of condemnation in favor of plaintiff for sixty-three dollars and eighteen cents, debt, current money, with interest from April 24, 1894, until paid, and four

dollars and sixty-nine cents costs. Costs paid by plaintiff.

"Witness my hand and seal. James W. Clay, Jr. [Seal.]

"True copy. Teste: James W. Clay, Justice of the Peace. [Seal.]

"Rec'd. for record Feby. 6, 1911, at 3.15 o'clock p. m.; same day recorded, exd. per Stephen C. Little, clerk, 18 Feby., 1911, f. fa. issued to March R. D. (No. 78)"—to which is attached the proper certificate of the clerk of the superior court.

The bill then alleges that under said f. fa. the sheriff of Baltimore city had levied on the plaintiff's interest in certain leasehold property in Baltimore city, known as No. 906 Collington avenue, and was about to advertise and sell the same to satisfy said judgment of condemnation; that the appellee was not then, and never had been, indebted to said Dunn in any amount whatever, and never had in her hands any money, credits, or property belonging to said Dunn. It further alleged, using here the exact language of the bill, "that when your oratrix was notified to appear before Justice Clay she was ill in bed, and sent her daughter, Mary Picka, to the said Clay's office, and who related to him her mother's indisposition, and when informed as to the nature of the suit informed the said Clay that her mother, your oratrix, did not know Christopher C. Dunn, had never known him, did not owe him anything, and did not have in her possession any property of any kind belonging to him; whereupon she was assured by said Clay that her mother would have no more trouble about the matter, and that nothing would be done further with the case against her mother;" that, relying upon the assurances of said Clay, she believed the suit had been withdrawn, until more than a year later, when the said levy was made on her property; that there was no proof of assets made to warrant said judgment of condemnation, and that the same was rendered by fraud and collusion between said Wilmer and said Clay; and that the judgment against said Dunn was barred by limitations when the attachment was issued thereon, December 20, 1909.

The appellant answered, alleging that the original judgment against Dunn had been renewed by scire facias July 27, 1906, of which the appellee's solicitor was informed by the appellant March 11, 1911; that the appellee, in that paragraph of her bill of complaint which we have transcribed, had admitted that she had been regularly and duly summoned; that her failure to plead to the attachment was an admission of assets; and that she had a full and complete remedy at law, which she had waived by her failure to appeal from the judgment of condemnation. He denied that there was any such assurance given by Justice Clay to the appellee's daughter as was alleged in

the bill of complaint, and averred that the justice only told her it was the appellee's duty to personally appear and defend; and he denied all and any fraud or collusion in obtaining the judgment of condemnation. The general replication was filed, and testimony was taken in open court.

[1] Dunn testified that he knew Edwin M. Wilmer, and said he was the defendant in the judgment upon which the attachment issued; that he had seen Anna Picka, but did not know her, had never spoken to her, had never had any dealings with her, and she had never owed him anything, nor had any money or property belonging to him.

Mary Picka testified that she lived with her mother, Anna Picka; that when the constable came to the house her mother was ill in bed, and the constable did not see her; that he only saw the daughter; that he gave witness a slip of paper and told her to go up to Wilmer's office on Courtland street; that when the time came she went up, as her mother was sick and could not go; that she there saw Justice Clay, and gave him the slip of paper and told him her mother was sick in bed, and he said to her: "All right, don't bother; nothing won't be the matter. Don't worry about it"—and she went home and told her mother what he said, and they heard no more about it until the next February, when the record shows the f. fa. was issued.

Anna Picka, the appellee, was unable to speak a word of English, and testified through an interpreter. She said that about a year before she was sick, and then received "a notice from a certain Mr. Dunn, whom she did not know." She was asked, "Were you ever summoned by a constable to appear in the case of Edwin M. Wilmer v. Anna Picka, and was that summons given to you personally?" but, upon objection by the appellant, she was not allowed to answer that question. She said she never knew him, never owed him anything, and never had in her possession any money or property belonging to him.

James W. Clay, for the appellant, testified that he was the justice who issued the writ; that he had "a branch office" in a back room of Mr. Wilmer's office at a very low rent; that about half an hour after the usual time was set Mary Picka came in and said her mother had sent her, but did not say her mother was ill in bed, but only that she could not come. "I told her not to worry, but to go home and send her mother to me; but she did not come, and I never saw the mother. I held the case sub curia three days. Did not issue any judgment for three days, thinking she might come; but she didn't." He said no one gave him any information or testimony that there was anything owing by Mrs. Picka to Dunn, and that it was not his place to know where the money was coming from.

Edwin M. Wilmer testified that on Jan-

uary 17, 1910, "he waited quite a while at the justice's office, and finally a young girl came in and handed to the justice *the notice which had been sent out for delivery to the garnishee*;" and she said her mother had sent that notice up to the justice, and to say that she could not come. The justice told her the garnishee must appear to the writ. "She then left *and the justice decided to call the case*, and the plaintiff (myself) in that case filed the judgment against Dunn and read the writ." He said that was substantially all that was said, and that there was no fraud or collusion in obtaining the judgment of condemnation, and no inducement held out by him to procure it.

[2] It is obvious from this summary of the testimony that the primary and vital question for determination is whether the justice ever obtained jurisdiction over the person of the appellee, either by *legal service* of the summons to appear, or by a voluntary appearance on her part; and that this is a question of fact, determinable in an equity case by the court.

In *Wilmer v. Epstein*, 116 Md. 140, 81 Atl. 379, the object of the suit was to restrain the enforcement of a judgment obtained before a justice of the peace, and alleged to be void for want of jurisdiction. The appellant in that case was the same person who is appellant here, and there the appellees were made garnishees of one O'Grady in an attachment issued by Wilmer on a judgment previously obtained by him against O'Grady, and a judgment of condemnation was rendered against the garnishees. Their bill alleged they were never summoned in the case in which judgment of condemnation was rendered, and that the judgment was not recorded and notice given of its entry until the time for appeal had expired, and that the judgment of condemnation was consequently void.

In that case, in declaring the judgment of condemnation to be void for want of proper service of process upon the garnishee, the court said: "It is elementary law that before a valid judgment in personam can be rendered jurisdiction of the person of the defendant must be acquired, either by personal service or process upon him, or by his voluntary appearance. 2 Poe on Pleading and Practice (3d Ed.) § 62. The service of the summons must be a personal one; and the officer charged with the duty of serving it is not authorized to leave a copy of it at the office, residence, or place of business of the defendant and return him as summoned, nor to serve it upon his wife, agent, or partner." In *Hanley v. Donoghue*, 59 Md. 243, 43 Am. Rep. 554, the court said: "It is essential to the validity of a judgment in personam that the court should have jurisdiction over the parties, and, if rendered without such jurisdiction, it is a mere nullity,

* * * and may be assailed at all times and in all proceedings by which it is sought to be enforced."

In *Wilmer v. Epstein*, supra, it affirmatively appeared from the return of the constable that the only service was upon an individual, not a member of the firm intended to be made garnishees; but the failure to make personal service, even when a prima facie case is made by a return of summoned, may be established otherwise.

It is true that the mere denial of personal service *by the party returned summoned* will not avail to defeat or rebut the sworn return of the officer; but we are of opinion that it sufficiently appears from all the evidence in this record that the process was not personally served upon the garnishee, and that she did not voluntarily appear to the attachment.

[3] Mary Picka, a competent witness, swears that the officer never saw her mother; and the mother was not allowed to answer whether the process was personally served upon her. The language used in the bill, "that when she was notified to appear before Justice Clay she was ill in bed," does not necessarily import personal service, and in the light of the positive testimony of the daughter that it was not so served, and in the light of the denial to Anna Picka of the right to testify upon that point, cannot be properly or fairly held to be an admission of personal service. He was not produced to support the docket entry of "summoned"; nor was any evidence offered of his death, or of any other inability to produce him to support the docket entry, and to contradict the positive testimony of the daughter. Not only so, but Mr. Wilmer's testimony is positive that the daughter, on January 17, 1910, herself "handed the justice the notice which had been sent out for delivery to the garnishee"; that is, the process to be served. The constable could not, therefore, have previously made any return of the process, and the docket entries set out in the bill of complaint show the writ was returnable January 17, 1910. It was not returned previously, and was only then returned by the daughter to the justice and immediately ruled to January 17, 1910, and the matter heard *ex parte*. It would be a mockery of justice, in the face of the testimony in this case, to hold, either that there is adequate proof of personal service of process, or of a voluntary appearance, in lieu of personal service, by this woman, who could not speak or understand the English language.

[4] It does not matter that she may have been informed by her daughter of the nature of the proceeding. This was expressly held in the *Epstein Case*, supra, and sustained by a Michigan decision, *Wilcke v. Duross*, 144 Mich. 243, 107 N. W. 907, 115 Am. St. Rep. 394, where process was served upon the

daughter of the person intended to be summoned, and the latter had actual knowledge of the proceeding, but the court held this gave no jurisdiction to enter judgment against the person sought to be served by the writ, and that equity would restrain its enforcement, and other cases were cited to the same effect in the Epstein Case, supra. It may not be amiss to direct attention to a serious misconception of duty and power on the part of the justice in this case, who testified that there was no proof of assets, and no necessity for such proof, and also to the contradiction between his testimony that he waited three days after the daughter appeared on January 17, 1910, before entering judgment of condemnation, and his own record, which showed he entered judgment on the day she appeared, January 17, 1910. Some light is shed upon this feature of the case by the testimony of Mr. Wilmer, when he said that "after the girl left the justice decided to call the case," and that he himself filed the judgment against Dunn and read the writ, as an all-sufficient foundation for jurisdiction of the person of the garnishee, and as dispensing with the proof of assets, thus strongly suggesting that the plaintiff was not only the friend of the justice, as testified to by the justice, but also his philosopher and guide.

[§] The conclusion we have reached on the question of jurisdiction of the person of the garnishee renders it unnecessary to advert to any other questions presented in the briefs or argued at bar as to the invalidity of the judgment of condemnation, and if the decree had been passed on final hearing we would not hesitate to affirm it. But the hearing was upon motion to dissolve the injunction, and not upon final hearing; and in such case it has always been held error to proceed to final decree, even since the act of 1835, authorizing testimony to be taken on motion to dissolve. The most that can be asked, under such circumstances, is a continuance of the injunction till final hearing. *Hamilton v. Whitridge*, 11 Md. 141, 69 Am. Dec. 184; *Huston v. Ditto*, 20 Md. 332; *Dougherty v. Piet*, 52 Md. 425; *Blundon v. Crosler*, 93 Md. 357, 49 Atl. 1. There is enough disclosed in the testimony, notwithstanding the denials contained in the answer, to justify the continuance of the injunction till final hearing. *Phil. Trust Co. v. Scott*, 45 Md. 454; *My Md. Lodge v. Adt*, 100 Md. 253, 59 Atl. 721, 68 L. R. A. 752. For this reason we feel constrained to reverse the decree and remand the case for final hearing, but we shall direct the costs to abide the result of such final hearing.

Decree reversed and cause remanded; the injunction to be continued until final hearing. The costs in this court and in the court below to abide the final result.

OPINION OF THE JUSTICES.¹

(Supreme Court of New Hampshire. July 22, 1889.)

1. CONSTITUTIONAL LAW (§ 8*)—CONSTITUTIONAL CONVENTIONS—POWERS.

A constitutional convention, called pursuant to Const. pt. 2, arts. 99, 100, authorizing conventions for the revision of the Constitution, is not a body possessing legislative power vested in the Legislature by part 2, art. 2, and may only submit amendments to the Constitution for the approval of the voters, and has no legislative capacity, unless an incidental one is implied as necessary for the business of preparing questions of revision and submitting them to the voters.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 6; Dec. Dig. § 8.*]

2. CONSTITUTIONAL LAW (§ 7*)—AMENDMENTS—FIXING TIME OF TAKING EFFECT—LEGISLATIVE POWER.

An ordinance fixing the time when amendments proposed by a constitutional convention, approved by the people, shall take effect, is a law that can be made by the Legislature vested by Const. pt. 2, art. 2, with supreme legislative power, and articles 99, 100, providing for the calling of constitutional conventions for the revision of the Constitution and the submission to the people of proposed amendments, do not confer on a convention, as an implied power, the right to fix, by ordinance, the time when amendments shall take effect.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 3, 4; Dec. Dig. § 7.*]

3. CONSTITUTIONAL LAW (§ 7*)—AMENDMENTS—FIXING TIME OF TAKING EFFECT—LEGISLATIVE POWER.

Where the constitutional convention of 1889 fixed the time, as authorized by Laws 1887, c. 107, § 8, when amendments proposed by it and ratified by the people should take effect, and the people, when the proposed amendments were submitted, did not doubt the validity of the ordinance, a subsequent Legislature had no right to fix the time when such amendments shall take effect.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 3, 4; Dec. Dig. § 7.*]

Opinion of the Justices in response to question submitted by the House of Representatives. Question answered in the negative.

The constitutional convention of 1889, pursuant to authority assumed to be delegated to it by the Legislature, fixed the time when such amendments, as might be approved by the people, should become operative. Laws 1887, c. 107, § 8; Jour. Conv. 256. June 18, 1889, the House of Representatives required

¹This Opinion of the Justices, furnished to the House of Representatives of the New Hampshire Legislature on July 22, 1889, has never been printed in the New Hampshire Law Reports, nor in any collection of cases so far as is known. In the regular course, it should have been printed in volume 65, New Hampshire Reports; and whether its omission was due to an oversight of the reporter, or to neglect on the part of the judges to furnish the copy to him with that of other opinions, is purely a matter of conjecture. Hon. William S. Ladd, who was the New Hampshire reporter in 1889, and all the judges whose names are appended to this opinion, are long since dead.

—New Hampshire Reporter.

the opinions of the Justices of the Supreme Court upon the following question:

"Has the existing Legislature the power and right to fix the time when the alterations in and amendments to the Constitution, which were approved by the people at the election held on the 12th day of March, 1889, shall take effect?"

To the House of Representatives:

The undersigned respectfully comply with your resolution requiring our opinion on the question whether the existing Legislature can fix the time when the amendments of the Constitution, approved in March, 1889, shall take effect.

[1] If the time were not legally fixed in express terms, it might be claimed that some amendments take effect, for some purposes at least, according to their apparent purpose, when adopted by the people. Jameson, Const. Con. 545n. Assuming the construction to be settled, by usage and a general concurrence of opinion, that a limited or unlimited power of determining when such amendments as those recently adopted shall become operative is in a representative assembly, it must be in the Legislature or the convention. The Constitution does not establish a conflict of jurisdiction by vesting it in each of them. Articles 99 and 100 prescribe the mode of calling a convention; but, beyond a general purpose of revising the Constitution, the authority of the delegates is not set forth. They are not endowed with the entire sovereignty of the state. Their agency, like every branch of the public service, is marked on all sides by fixed bounds. As the Constitution cannot be altered until a proposed amendment is laid before the towns and approved by the voters, and as the second article vests "the supreme legislative power" in the Senate and House, little room is left for acts of the delegates that can have the force of law. Cool. Con. Lim. 32; Jameson, Const. Con. c. 6. For ordinary and general purposes, they are not a legislative body. They are a committee to whom the Constitution makes no express grant of law-making power. By direct derivation through that instrument, they have no enacting capacity, unless an incidental one of narrow range is implied as necessary for the business of preparing questions of revision and submitting them to the people.

[2] A valid ordinance, fixing the time when amendments take effect, is a law. In respect to repealability, it may be peculiar; but making it is an exercise of legislative power. If it were a part of the Constitution, it could not be made by the Legislature or the convention. If it is not a part of the Constitution, being a law, it can be made by the Legislature, unless articles 99 and 100 contain satisfactory evidence of an intention to modify article 2 by giving this part of "the supreme legislative power" to

the convention. The opinion that such an ordinance is an appropriate work of the convention has so far prevailed that the Legislature authorized it to be made by the conventions of 1850, 1876, and 1889. Laws 1850, c. 959, § 8; Laws 1876, c. 30, § 8; Laws 1887, c. 107, § 8. It could not be regarded as an inappropriate work of the Senate and House, when their sessions were annual; and the question of legislative capacity is not affected by the introduction of biennial sessions. If it were a mere question of suitableness and convenience, the exclusive right of the convention would not be apparent. As a grant of legislative power cannot be implied from anything less cogent than practical necessity, the present inquiry is not advanced by a consideration of what is merely suitable and convenient. And as the express grant in article 2 cannot be deemed an inadequate provision for the present case, no ground of necessity appears on which an implied grant can be sustained. No such ground is established by custom or common understanding. In 1792, the matter was disposed of by the Legislature under article 98. The order given by that article for their performance of this duty shows that its performance by others was then thought not to be a necessity. In the revision of 1876, a similar view was taken. The question of time, submitted by the Legislature to the convention, was referred back by the convention to the Legislature, and settled by statute. Proc. of Conv. 276, 279; Laws 1877, c. 83.

No convincing or substantial argument is found for the proposition that the Constitution has carved an authority to legislate on this particular subject out of the general province assigned in express terms to the Senate and House, and set it off as an implied power of the convention. Upon this conclusion, there is no occasion to inquire whether article 98 is applicable to revisions made after 1792.

[3] The Legislature having the power, and having assumed to delegate it to the convention of 1889, who have assumed to exercise it in pursuance of section 8, c. 107, Laws 1887, the question is whether these acts of the Legislature and the convention are void. While the rule is that the power of general state legislation cannot be delegated by the Senate and House, the transfer of power to the convention by section 8 of the act of 1850, copied in the acts of 1876 and 1887, has been universally understood to be legal. The convention of 1876 declared that, if the time were not determined by the Legislature at the June session, 1877, it would be determined by the convention at an adjourned session. Proc. of Conv. 276, 279. In 1889, when proposed amendments were laid before the towns, the people did not doubt the validity of the ordinance which had fixed the time. If their understanding was not ex-

pressed in the manner required to make it a part of the written law (a point which need not now be determined), their agreement with the Legislature and the convention in the opinion that the Legislature could authorize the convention to pass the ordinance is an argument on the constitutional question. The unanimity of judgment on a point repeatedly presented is enough to establish an exception that is harmless in its direct and immediate operation, and too clearly defined and too limited in its scope to unsettle the general rule or become a dangerous precedent. The time having been legally fixed, some of the amendments have already taken effect and are now in force; and, there being no legal necessity for any further legislation on the subject, the question proposed by the House is answered in the negative.

C. DOE.

W. H. H. ALLEN.

ISAAC W. SMITH.

LEWIS W. CLARK.

I. N. BLODGETT.

A. P. CARPENTER.

GEO. A. BINGHAM.

LOCKWOOD v. AMERICAN EXPRESS CO.
(Supreme Court of New Hampshire. Sullivan.
Jan. 7, 1913.)

1. NEGLIGENCE (§ 135*)—INJURY TO EMPLOYÉ OF ANOTHER—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for personal injuries to a brakeman, while riding on the running board of the locomotive, from being struck by a baggage truck of defendant express company too near the track, evidence *held* to warrant a finding that plaintiff exercised due care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 274-276; Dec. Dig. § 135.*]

2. NEGLIGENCE (§ 134*)—INJURY TO THIRD PERSONS—CAUSE OF INJURY—EVIDENCE.

In an action for personal injuries to a brakeman hit while riding on an engine by an express truck too near the track, evidence *held* to warrant a finding that the accident was caused by the negligence of one P., who was in charge of the trucks.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.*]

3. MASTER AND SERVANT (§ 330*)—INJURY TO THIRD PERSON—LIABILITY OF MASTER—EXISTENCE OF RELATION.

In an action for personal injuries by one hit by a truck near the track while riding on an engine, evidence *held* to show that a servant of the railroad was acting at the time as agent of the defendant express company, for whose negligence it was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.*]

4. MASTER AND SERVANT (§ 316*)—INDEPENDENT CONTRACTOR—RAILROAD—EXPRESS COMPANY.

A contract by a railroad with an express company, giving the latter the exclusive right to operate and control an express business, etc., and that it might hire certain employes of the railroad with the permission of an official, but

that the express company should pay the wages direct to the employé, and be liable for his misconduct in the scope of their business, did not render the railroad an independent contractor, but the express company was liable for negligence of an employé while acting for the express company in moving one of its trucks.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.*]

5. NEGLIGENCE (§ 134*)—CAUSES—PROOF—SUFFICIENCY.

In a negligence case, where a plaintiff charges certain acts as the cause of an accident, he is not bound to exclude all other possible causes; but it is sufficient if he makes it appear more probable than otherwise that the fact was as he claimed.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.*]

6. MASTER AND SERVANT (§ 332*)—INJURY TO THIRD PERSONS—MISLEADING INSTRUCTIONS.

In a brakeman's action for personal injuries, where the negligent person was alleged to be an agent for the defendant express company, as well as the railroad, an instruction that if such agent was hired and paid by, and was subject to the control of, the railroad, and if the express company had not hired him, did not pay him, and had no power to discharge him, then the defendant was not liable, etc., was misleading, and its refusal proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.*]

7. MASTER AND SERVANT (§ 192*)—INJURY TO EMPLOYÉ OF THIRD PERSON—FELLOW-SERVANT RULE.

In an action against an express company for negligence of one of its employes, who was also an employé of the railroad, of which the plaintiff was an employé, the question of the doctrine of fellow servant cannot enter into the case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 379-381; Dec. Dig. § 192.*]

Exceptions from Superior Court, Sullivan County; Plummer, Judge.

Action for personal injuries by Irving L. Lockwood against the American Express Company. Verdict for plaintiff, and the defendant excepts. Exceptions overruled.

The plaintiff's evidence tended to prove the following facts: The plaintiff was injured in an accident which occurred at the station of the Boston & Maine Railroad, at Claremont Junction, on the evening of September 5, 1910. One Ramsey was the station agent of the Boston & Maine Railroad, and also the agent of the defendants at that place. One Perkins, who was employed by the railroad, was, with the knowledge and assent of the defendants, in the habit of assisting Ramsey during the daytime in handling express matter. Ramsey left the station every afternoon at 5 o'clock, and from that time Perkins was the only person there whose duty it was to handle, and who customarily handled, the defendants' express matter. On the day of the accident, Ramsey stopped work as usual at 5 o'clock, leaving Perkins to handle the express matter on incoming trains that night.

Train No. 409, which carried express matter that night, came into the station on the east side from the Claremont division at about 9 o'clock. The express matter was destined for stations further north on the Passumpsic division, and had to be transferred to train No. 33, going north over that division from the west side of the station. The latter train was due at about 9 o'clock; but on the night in question it did not arrive until a few minutes later. It had just arrived when a freight train, moving in a northerly direction, came into the station on the east side from the Claremont division. The plaintiff was a brakeman on this train, being employed by the Boston & Maine Railroad, and in the performance of his duty was riding on a running board attached to the left side of the pilot of the locomotive. Along the east side of the station buildings and platform were five lights, and the headlight of the locomotive cast its rays 30 feet or more up the track. While the train approached and was passing the station, the plaintiff was looking up the track, but saw nothing upon it. The first he knew of the presence of an obstruction was when he was struck by a truck and injured. He then saw that it was a truck owned by the defendants, and loaded with express matter, and that Perkins had hold of the tongue of the truck and was endeavoring to pull it out of the way. The plaintiff had no opportunity to avoid the accident before he was struck. The defendants had three trucks at the station. When not in use and unloaded, they were left under a shed at the north end of the annex; but, when loaded and not in use on the platform, they were kept in the annex, which was a building just south of the shed and between it and the station proper. The platform, in the vicinity of the shed, sloped in an easterly and southerly direction, and away from the place of the accident, which was about 40 feet north of the northerly posts of the shed. The platform, at the place of the accident, sloped somewhat toward the easterly track; and, because of this, trucks left unchained were liable to be moved by the jar of passing trains. The defendants were aware of this liability, had provided chains to guard against such an occurrence, and had instructed Perkins not to leave the trucks unchained. Nobody was on the platform at the time of the accident, except Perkins and Canty, the baggagemaster. Perkins was there doing express work, and Canty was then starting, or had started, for train No. 33 to do baggage work. While awaiting the arrival of train No. 33, Perkins left the truck unchained, so that it was set in motion by the jar of incoming trains; or, in preparing the truck to cross the platform, he backed it in front of the freight train just as it was passing.

So much of the contract between the Boston & Maine Railroad and the defendants as is material to the questions here raised is reported in the opinion. The defendants' mo-

tions for a nonsuit and the direction of a verdict in their favor were denied, and they excepted. The following requests of the defendants for instructions were denied, except in so far as they were given in substance in the charge of the court, and, to such refusal to charge, the defendants excepted:

"(6) If the plaintiff was riding on the cowcatcher of the engine merely for his own convenience, in order to get to his home, which was near the station, the freight train on which he had been employed as a brakeman having been broken up back by the roundhouse, then, as he was riding in an obviously dangerous place, he is guilty of contributory negligence.

"(7) If the plaintiff was riding on the cowcatcher of the locomotive, even in the performance of his duties, it was his legal duty, when riding in that dangerous situation, to keep a lookout ahead for obstructions with which the locomotive might come in contact; and, if he failed so to do, he was guilty of contributory negligence, and cannot recover."

"(9) As the plaintiff, at the time of the accident, was riding in a place of obvious danger, he should have exercised care for his own safety by looking ahead for obstructions on the track with which he might come in contact. He had no right to rely solely upon other persons not being negligent."

"(13) The mere fact that Perkins was attending to the express work that night is not proof that he had anything to do with the truck at any time shortly before the accident, or that any conduct of his caused the truck to be on the track."

"(15) The fact that Perkins was seen to take hold of the handle of the truck and pull it away from the track at some time after the accident occurred does not in any way tend to prove that his conduct or act caused the truck to be upon the track at the time of the accident."

"(18) If Perkins was hired and paid by, and was subject to the control of, the railroad, and if the express company had not hired him, did not pay him, and had no power to discharge him, then he was not a servant of the defendant, and the defendant is not responsible for his conduct or his acts.

"(19) If the railroad had contracted with the defendant to furnish it transportation and services and facilities at stations in handling express matter, and if at the Claremont station the railroad employed and paid a laborer to handle express matter in connection with his other duties as a railroad employé, then the railroad is an independent contractor, for whose conduct, and for the conduct of whose servants, the defendant is not liable or responsible.

"(20) If the railroad was such an independent contractor, and in performance of its contract employed Perkins to carry out, in part, the duties of the railroad under such contract, the express company cannot be held

for any act of Perkins, no matter if such act was performed in a negligent manner and in the course of handling express matter.

"(21) If the jury find that Perkins was employed by the railroad and was at the same time a servant of the defendant, nevertheless as such railroad man he was a fellow servant of the plaintiff; and, if his negligence caused the plaintiff's injuries, the defendant cannot be held liable therefor, because such injuries were caused by the plaintiff's fellow servant.

"(22) If the plaintiff was injured through the negligence of a person who was employed jointly by the railroad, which employed the plaintiff, and by the defendant, such person was a fellow servant of the plaintiff, and the defendant is not liable for injuries to the plaintiff caused by the fellow servant."

The defendants also excepted to the charge, as given to the jury, on the question of agency, because it omitted from their consideration the question whether or not the railroad, in the handling of express matter at Claremont Junction, had assumed that duty as independent contractors.

Martin & Howe, of Concord, for plaintiff.
Austin M. Pinkham, of Boston, Mass., and
Elwin L. Page, of Concord, for defendant.

BINGHAM, J. It is unnecessary to again recount the evidence on the question of liability. A sufficiently adequate account of it is given in the statement of the case.

[1-3] From it, the jury were warranted in finding that the plaintiff was in the exercise of due care at the time he received his injury; that the accident was caused by the negligence of Perkins, while he was in the control and management of the defendants' express truck; that he either negligently left it unchained on the station platform, where the jar of approaching trains caused it to run back upon the track, or negligently backed it upon the track in front of the freight train just as it was passing; and that he was the agent of the defendants in the actual conduct of their business at the time of the accident, and for whose negligence they are responsible, unless the contract of May 1, 1907, made the Boston & Maine Railroad an independent contractor as to the work which Perkins did in handling express matter at the Claremont Junction Station.

[4] It appears that in May, 1907, the railroad entered into a written contract with the defendants, wherein it leased to them the exclusive right to carry on the express business on its passenger trains over all lines which were then, or might be thereafter, owned, leased, or operated by it, and assumed certain obligations for carrying the contract into effect. And we are of the opinion that, if the contract can be said to require the railroad to assume full control and direction of the business of loading, unload-

ing, and caring for the defendants' express matter at stations such as Claremont Junction, Perkins, who was a railroad employé, could not be found to be an agent of the defendants from the fact that he handled express matter at that station, with the defendants' knowledge and approval. The question is therefore presented whether the written contract is open to such a construction.

In it the railroad leases to the defendants: (1) "The exclusive right and privilege * * * to control, conduct, and transact all the express transportation business * * * over and upon the passenger trains of said railroad" then or thereafter controlled and operated by it. To enable the defendants to control, conduct, and transact this business, the railroad agreed (2) to furnish, at its own expense, for the use and benefit of the defendants, "sufficient space * * * in the baggage cars, or other cars especially set apart for the exclusive use of the express company, to accommodate the business of the express company, and to haul same with speed, * * * and to allow the express company reasonable time in which to load and unload such goods and valuables as it may have to load and unload into or from cars on the various trains of the * * * railroad at each of the stations at which trains are scheduled to stop," and to "warm and light such cars"; (3) to furnish the express company "all requisite, reasonable, and necessary facilities, conveniences, and rooms in or connected with its stations and depots, for the care and handling of its express matter, and the loading and unloading thereof, into and from the cars, with a view to the prompt dispatch of its business"; (4) that the "express company may from time to time employ station agents and baggagemen of the * * * railroad to act as agents and express messengers of the * * * express company, by and with the consent and approval of the proper official of the railroad; and the express company agrees that it shall * * * be solely and entirely responsible for all the acts of such agents and baggagemen, by them done or committed in the scope of their employment as such express agents or express messengers; compensation for any such service to be paid to the agent or baggagemen direct."

These are the only provisions of the contract that are material in considering the question raised. Their meaning, as applied to the situation here under consideration, is not doubtful or obscure. It is apparent, when they are read in the light of the surrounding circumstances, that the railroad did not undertake to transact the whole or any part of the defendants' express business, either on passenger trains or at stations, but leased, so far as it legally had the power, the exclusive right to control, conduct, and transact such a business to the defendants. In subdivision 2 of the contract, the railroad

expressly agrees that the defendants shall have adequate time in which to load and unload their express matter into and from cars at stations. If it was understood that the railroad and not the express company was to do this work, there was no occasion for the insertion of this provision. The only reasonable conclusion to be drawn from it is that the defendants themselves were to do this work, and the railroad was to allow them adequate time in which to do it. In subdivision 3, the "facilities, conveniences, and rooms" which the railroad were to furnish the defendants were such as were "requisite, reasonable, and necessary to enable them to care for, handle, load, and unload their express matter. For these accommodations, no additional compensation was to be paid; but for "special accommodations" in the way of "rooms set apart for the exclusive use of the express company," and for heating and lighting the same, an additional charge was provided for.

It would be wholly unreasonable to suppose that, by these stipulations, the railroad become an independent contractor vested with full control of the business of handling, caring for, loading, and unloading express matter at stations. If standing alone, and without reference to any other provisions of the contract, these stipulations could be said to contemplate the furnishing of men to the defendants, whom they could control and direct in this work at stations, it is evident that they are not here capable of even such a construction, for in subdivision 4 of the contract the railroad employes, whom the defendants may employ, are limited to station agents and baggagemen on trains, and they can employ them only after obtaining the approval of the proper official of the railroad, and upon the agreement that they shall be solely responsible for all acts of such employes done by them within the scope of their employment as express agents or express messengers. Indeed, there is no evidence in the case from which it could be found that the railroad had entered into a contract with the defendants whereby they assumed the duty of controlling, managing, and directing the business of handling and caring for express matter at Claremont Junction. Perkins was either the defendants' agent or a mere intruder. The evidence tended to show the former.

The contention is also made that, on the evidence, the conclusion of the jury that the negligent conduct of Perkins was the cause of the accident is mere conjecture; it having appeared that the station platform was a public place where people might come to meet and take trains.

[6] But when it is recalled that Perkins was present upon the platform in the control and management of the defendants' truck at the time of the accident, and that

the evidence does not disclose that any one else was there, except Canty, the baggageman, it is reasonably certain that the plaintiff has made it appear more probable than otherwise that the cause of the accident was as he contends. The plaintiff was not bound to exclude all other possible causes. He fulfilled the legal requirement when he made it appear more probable than otherwise that the fact was as he claimed it. *Boucher v. Larochelle*, 74 N. H. 433, 434, 68 Atl. 870, 15 L. R. A. (N. S.) 416.

For the reasons above given, the denial of the defendants' motions for a nonsuit and a verdict, the refusal of their nineteenth and twentieth requests for instructions, and the overruling of their exception to the charge were not error. As to the sixth, seventh and ninth requests for instructions, it is sufficient to say that they amount to nothing more than a request for a charge that, on the evidence, the jury, as reasonable men, could not find that the plaintiff was in the exercise of due care—a question already passed upon. The thirteenth, fifteenth, and eighteenth requests were misleading, and would have confused, rather than aided, the jury in their deliberations. In the first one the court was asked to tell the jury what was not true, as there was sufficient evidence from which they could find that Perkins was in charge of and had loaded the truck just before the accident occurred. The second of these requests misstated the evidence on which it was based.

[6] The third one, so far as it involved the doctrine of agency, was obscure and misleading, and, so far as it concerned the independent contractor theory, has already been considered.

[7] The twenty-first and twenty-second requests had no application to the case. The plaintiff was not a servant of the defendants; consequently the defendants' servants were not fellow servants of the plaintiff.

Exceptions overruled. All concurred.

FERRYALL v. YOULDEN.

(Supreme Court of New Hampshire. Hillsborough. Jan. 7, 1913.)

1. HIGHWAYS (§ 184*)—NEGLIGENT USE OF HIGHWAYS—EVIDENCE.

One charged with negligence in attempting to drive a horse on a highway may show his knowledge and understanding of the nature and character of the horse, and may show that he understood that the horse was safe and kind, and had been driven by a woman.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

2. HIGHWAYS (§ 184*)—NEGLIGENT USE OF HIGHWAYS—EVIDENCE.

Under a declaration alleging negligence of defendant in the manner in which he drove a horse on a highway, and in the fact that he drove the horse on the highway, evidence that a third person, who had sold the horse to defendant some days before, stated to defendant

that the third person's wife drove the horse, and that she thought a good deal of it and hated to part with it, was admissible to prove defendant's knowledge and understanding of the character of the horse as bearing on the question of his exercise of due care in driving the horse on the highway.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

3. APPEAL AND ERROR (§ 926*)—ADMISSION OF EVIDENCE—REVIEW—PRESUMPTIONS.

Where evidence received was competent for one purpose, the presumption is that its use was limited to such purpose.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1279, 2899, 3729, 3730, 3735-3747; Dec. Dig. § 926.*]

Transferred from Superior Court, Hillsborough County; Mitchell, Judge.

Action by Abraham Ferryall against William H. Youlden for personal injuries. There was a verdict for defendant, and cause transferred. Exception overruled.

While the plaintiff and the defendant were driving in the same direction upon a public highway in Hudson, the defendant's horse ran into the rear of the carriage in which the plaintiff was riding, and as a result of the collision the plaintiff was thrown out and injured. Among other things, the plaintiff's evidence tended to prove that the horse driven by the defendant was unsafe.

The declaration was as follows: "In a plea of the case, for that the plaintiff says that on the 11th day of April, 1909, he was riding in a northerly direction along the highway leading from said Hudson to Litchfield, in said county, in an open buggy drawn by one horse, at a point in said Hudson near the farm of William H. Youlden, and was then and there in the exercise of due care; that while he was so riding at said point a horse owned and driven by the defendant, and attached to a wagon, approached the plaintiff suddenly from the rear and ran violently into and upon the wagon in which the plaintiff was then and there riding; that said horse of said defendant was then and there running away; that by reason of the defendant's negligence in driving said horse upon the public highway, and by reason of the negligent and careless manner in which the defendant was then and there driving said horse, the wagon in which the plaintiff was riding was overturned, the plaintiff was thrown violently to the ground, two of his ribs on his left side were broken, his heart was injured, he suffered a severe nervous and mental shock, and has suffered, and still does suffer, great pain, and has been put to great expense for medical attendance and nursing, and by reason thereof has been unable, and will always be unable, to do severe manual labor."

The defendant was called as a witness by the plaintiff, and in response to inquiries testified that he did not try out the horse before he traded, but took the vendor's word that the animal was safe; that after making

the purchase, and before the accident, he drove the horse five or six times, but noticed nothing unsafe about him. Later in the trial the defendant was called as a witness in his own behalf, and was permitted to testify as follows, subject to the plaintiff's exception as set forth below: "Q. And you stated you got this horse from Mr. Bailey of Acton? A. Yes. Q. Where was it you first saw this Bailey horse? A. At West Acton. Q. And on what day was that? A. Why, it was one or two days before we exchanged horses, and we exchanged on the Monday before the Sunday the accident happened. Q. And did you drive the horse at that time? A. No. He met me at the depot with the horse, and drove me to his house and introduced me to his wife, and said his wife drove this horse. Mr. Doyle: We object to this conversation. Court: You charge that the horse was an unfit horse, or such that he had notice of its unfitness and unsafety. Mr. Spring: That goes in subject to our exception. Mr. Moran: What was your answer to that? A. That he drove me up to the house and introduced his wife and stated his wife drove this horse, and she said she did, and thought a good deal of him and hated to part with him; and she said Mr. Bailey— Mr. Doyle: This all goes in subject to our exception. Mr. Moran: Nothing only about the horse. A. That was about all said at that time. We put the horse in the barn. His wife took another rig to go downtown and meet her cousin, and he kept the horse there and showed me the horse under the saddle. When his wife went, he took the horse out and put a saddle on. There was a young man working for him. He jumped on and went up the road three or four times to show me how he could drive under the saddle. I never saw a horse I liked the looks of better. At train time he drove me back to the depot with the same horse, and I couldn't see anything wrong with the horse at all. I said: 'Mr. Bailey, you come over to-morrow.' Q. Were there any further representations, other than you have stated, about this horse, as to its suitability or safety? A. Except he [Bailey] made it pretty strong at the dinner table; and when we got to depot he made it pretty strong as to its being a safe and clever horse—clever like."

Hamblett & Spring and Doyle & Lucier, all of Nashua, for plaintiff. Wason & Moran, of Nashua, for defendant.

BINGHAM, J. [1-3] The declaration charges the defendant with negligence (1) in the manner in which he drove the horse upon the highway at the time of the accident, and (2) in the fact that he drove the horse upon the highway. As bearing upon the latter charge, the defendant's knowledge and understanding of the nature and character of the horse was material. *Connely v.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Brown, 73 N. H. 193, 60 Atl. 750. If he understood the horse was safe and kind and had been driven by a woman, evidence of that sort would tend to show that he was in the exercise of due care in attempting to drive the horse in the public streets. What the vendor told the defendant when he purchased the horse a short time before the accident was not competent to prove the nature or character of the horse, but was competent to prove what the defendant understood the nature and character of the animal was, and whether he was in the exercise of due care in driving him. There is nothing in the case indicating that the evidence was used for an improper purpose; and, being competent for one purpose, the presumption is that its use was limited to that purpose.

Exceptions overruled. All concurred.

SHEA v. STARR et al.

(Supreme Court of New Hampshire. Hillsborough. Jan. 7, 1913.)

1. ABATEMENT AND REVIVAL (§ 74*)—RETURN OF WRIT.

Under P. S. c. 191, § 9, providing that actions for personal injuries which abate upon the death of the defendant unless plaintiff shall procure a scire facias to be issued to the administrator before the end of the second term after the original grant of administration, an action does not abate because a writ of scire facias duly issued and properly served is not returned and filed at the term to which it was made returnable.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 429-431, 433-440, 442-444; Dec. Dig. § 74.*]

2. SCIRE FACIAS (§ 1*)—NATURE.

A "scire facias" is a judicial writ founded on some matter of record as a recognizance, judgment, etc. It is not an original, but a judicial, writ—a writ of execution.

[Ed. Note.—For other cases, see Scire Facias, Cent. Dig. §§ 1, 8; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6351-6355; vol. 8, p. 7796.]

3. TRIAL (§ 9*)—NATURE.

The issuance of a scire facias to revive an action against a deceased defendant's administrator is not the institution of a new action, but a continuation of an existing one, and hence is not subject to the rule of court forbidding the entry of the action on the docket until the writ or petition is filed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 21-26; Dec. Dig. § 9.*]

4. COURTS (§ 82*)—ISSUANCE—PETITION.

Even if the rule of court forbidding the entry of an action on the docket until the writ or petition is filed applies to the issuance of a scire facias to revive an action against a party's administrator, the court may suspend the rule, and issue the writ without the filing of a written petition.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 295; Dec. Dig. § 82.*]

5. ABATEMENT AND REVIVAL (§ 75*)—RETURN OF WRIT.

Where a writ of scire facias issued to revive an action against a deceased party's administrator was not returned at the term to which it was made returnable, defendants could, if necessary to enable them to make any de-

fense, appear specially, and move that it be placed on file or delivered to their counsel.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 441, 445-465, 467-482; Dec. Dig. § 75.*]

6. ABATEMENT AND REVIVAL (§ 74*)—RETURN OF WRIT.

The court has power on motion to permit a writ of scire facias to revive an action against an administrator to be filed after the return day.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 429-431, 433-440, 442-444; Dec. Dig. § 74.*]

7. APPEAL AND ERROR (§ 934*)—PRESUMPTIONS—SCIRE FACIAS—RETURN OF WRIT.

Where a writ of scire facias to revive an action against a deceased defendant's administrator was not returned for over a year after its service, but thereafter the court granted a motion to default defendants for failure to appear, it would be presumed that the court found that the delay in filing the return was a technicality which justice did not require should defeat the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.*]

Transferred from Superior Court, Hillsborough County; Chamberlin, Judge.

Action by Julia F. Shea against William J. Starr and another, executors. Case transferred from the superior court on defendants' motion to dismiss and plaintiff's exception. Case discharged.

The action was entered in the superior court during the lifetime of the original defendant, James S. Brown, who duly appeared by counsel. Brown died prior to the May term, 1909; and during that term, on June 3d, at the request of the plaintiff, a writ of scire facias was issued against the defendants as executors of Brown's will, commanding them to appear at the September term of said court to answer in said action. The writ was duly served upon the executors on July 9, 1909, but was not returned into court until October 12, 1910, when it was filed in the original suit. At the September term, 1911, upon motion of the plaintiff, the defendants, not having appeared, were defaulted, and the damages were ordered to be assessed by a jury. Immediately thereafter the attorneys who had been counsel of record for Brown in his lifetime appeared for the executors, and moved that the default be stricken off, and that they have leave to appear specially for the purpose of contesting the jurisdiction of the court under the scire facias. At the January term, 1912, this motion was granted, subject to the plaintiff's exception. Counsel for the executors then moved that the action be dismissed because of the want of a proper return of the writ of scire facias, in that the writ was not filed in court after service until October 12, 1910.

Jones, Warren, Wilson & Manning and Michael J. Driscoll, all of Manchester, for plaintiff. Branch & Branch, of Manchester, for defendants.

PARSONS, C. J. "Since 1844, actions pending at the death of the party have survived to his administrator, whether the cause of action did or not survive at common law. Laws 1844, c. 139; Gen. Laws, c. 198, § 16; Id. c. 226, § 12; Saltmarsh v. Candia, 51 N. H. 71. Sections 8 and 9 of chapter 191 of the Public Statutes introduced a time limit for appearance and issuance of a scire facias in pending actions for personal injuries: To that extent the law was changed." Piper v. Railroad, 75 N. H. 435, 442, 75 Atl. 1041, 1046. It is assumed that the present is an "action of tort for physical injuries to the person," since otherwise no question could arise; for all other actions of negligence survive without limitation. P. S. c. 191, § 14.

[1] The limitations introduced by the sections cited require the abatement of such actions "unless the administrator of the deceased party, if the deceased was plaintiff, shall appear and assume the prosecution of the action before the end of the second term after the decease of such party, or, if the deceased party was defendant, unless the plaintiff shall procure a scire facias to be issued to the administrator of the deceased party before the end of the second term after the original grant of administration upon his estate." P. S. c. 191, § 9.

In this case, the defendant having died, the plaintiff within the time limited procured a scire facias to be issued to the defendant executors, returnable at the next term, which was duly served upon them in season to give them legal notice to then appear. "If an administrator, having been duly served with a scire facias, shall not become a party to a suit, judgment may be rendered against the estate of the deceased in the same manner as if he had become a party." P. S. c. 191, § 22. Accordingly, the executors having been duly served and not having become parties to the suit or appeared, the plaintiff at the September term, 1911, had them defaulted and moved for an assessment of damages by the jury. The defendants, in support of their motion to dismiss, do not claim that the scire facias was not duly issued or properly served, but contend that this compliance with the statute was unavailing because the writ of scire facias was not returned to the clerk's office at the term to which it was made returnable. The statute upon which the defendants rely is, as stated, a modification of existing law, and it does not provide as a condition for the survival of the action when the scire facias should be made returnable or returned. All that is required is that it be issued and served.

[2] A scire facias is a judicial writ founded on some matter of record, as a recognizance, judgment, etc. 2 Tidd, Pr. 982. It is not an original, but a judicial writ—a writ of execution. 2 Sell. Pr. 187. While when founded upon a recognizance the proceeding is an original, when based upon a

judgment, or issued for the purpose of bringing in new parties, the proceeding is not a new suit, but the continuation of an existing one. 2 Tidd, Pr. 983; Parker v. Willard, Smith, 212; State v. Foster, 7 Vt. 52, 53; Wright v. Nutt, 1 D. & E. 388; Underhill v. Devereaux, 2 Saund. 71. "Calling on the representative to become a party to such suit is not the commencement of a suit against him." Parker v. Willard, supra, Smith, 214.

[3-6] As the issuance of the scire facias was not the institution of an action against the defendants, the rule of court (71 N. H. 675) forbidding the entry of the action upon the docket until the writ or petition is filed has no application. The action was already entered. As the writ was issued at the request of the plaintiff's counsel, it must be assumed they filed at that time such petition therefor as the court thought necessary. If the court authorized the issuance of the writ of scire facias without the filing of a written petition therefor, the court had authority to so far suspend the rule if it had any application. Petition of Rindge, 54 N. H. 106, 108. As not only the action itself, but the issuance of the scire facias, was entered on the docket before service upon the executors, they cannot ask for costs because of lack of entry. P. S. c. 229, § 10. They had legal notice to appear. If to make any defense they were advised was wise the actual paper constituting the writ was essential, they could and should have appeared specially and moved that the same be placed on file or delivered to their counsel. Wisheart v. Legro, 33 N. H. 177, 180. The defendants had every opportunity to defend the litigation which they would have had if the return of service had been promptly filed. If the writ should have been earlier filed after service, the court had power on motion to permit it to be filed after the return day. Taylor v. Cobleigh, 16 N. H. 105; Chadbourne v. Sumner, 16 N. H. 129, 133, 134, 41 Am. Rep. 720; Parker v. Pattee, 4 N. H. 530.

Though for some purposes a scire facias is in the nature of an original proceeding, yet when used merely to call in other parties it is not in principle more than an order of notice. It is so regarded in the statute. Section 11, c. 222, Public Statutes, provides: "No action shall be abated by the plea that there are other plaintiffs or defendants who ought to be joined therein, but such persons may be made parties * * * and may be summoned by scire facias, or notified by publication, as the court may order." Its purpose is simply to call the administrator into court. P. S. c. 191, § 19.

[7] Whether the plaintiff had the legal right to file the return one year after the return term, or whether after that time the court could properly have refused to permit it to be done, are questions not presented. The plaintiff complied with the statute by procuring the scire facias to be issued and

serving it upon the defendants. As the court allowed the motion for default when made, it must be presumed it was found that the error of delay in filing the return, if there was one, was a technicality in procedure which justice did not require should defeat the action. Whether the defendants, by appearing and moving to strike off the default, waived the grounds of their motion to dismiss, is not considered. *Woodbury v. Swan*, 58 N. H. 380; *Merrill v. Houghton*, 51 N. H. 61; *Roberts v. Stark*, 47 N. H. 223, 225; *March v. Railroad*, 40 N. H. 548, 583, 77 Am. Dec. 732; *Wright v. Boynton*, 37 N. H. 9, 72 Am. Dec. 319. If there has been delay in the prosecution of the suit, the defendants have themselves to blame. They could, as they were notified to do, have appeared two years before they did, and have prosecuted the action as vigorously as they deemed wise. Whether justice required that under the circumstances the default should be stricken off, and the defendants be permitted to contest the issue of liability, was, as the plaintiff concedes in her brief, for the trial court. The plaintiff's exception is overruled. The delay in the return of the writ of scire facias did not necessarily operate as an abatement of the original action.

Case discharged. All concurred.

ANGELL v. SPRAGUE et al.

(Supreme Court of Rhode Island. Feb. 12, 1913.)

1. REPLEVIN (§ 33*)—BONDS—STATUTES—"FORMS."

Under Gen. Laws 1909, c. 336, § 12, specifically authorizing district courts to issue writs of replevin where the goods are of the value of \$500 or less, and to "try the same and award execution therein, adhering in their proceedings, as near as may be, to the forms herein prescribed," section 4, providing for the court, in case of defendant's being dissatisfied, ordering further bond or further surety, applies to a case in the jurisdiction of the district court, as it does to one which is in the jurisdiction of the superior court, because of the value of the goods exceeding \$500; "forms" not referring merely to the form of a replevin writ prescribed in the chapter, but as well to the forms of procedure in replevin suits imposed by the chapter.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 138-153; Dec. Dig. § 33.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2910, 2911.]

2. COURTS (§ 169*)—DISTRICT COURT—JURISDICTION—AMOUNT IN CONTROVERSY—REPLEVIN BONDS.

The district court, in a replevin suit, in which plaintiff had furnished a bond of \$600, cannot, under Gen. Laws 1909, c. 336, § 4, providing that, if defendant be dissatisfied with the amount of the sureties, the court may order plaintiff to give further bond or further surety, order plaintiff to give a bond of \$1,000, without any provision for cancellation of the first bond, as the jurisdiction of such court is limited to cases in which the value of the property does not exceed \$500, and the amount of bond

required in a replevin suit cannot exceed double the value of the goods to be replevied.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 413-425, 428-436, 443-456, 458, 465. Dec. Dig. § 169.*]

Action by Ernest E. Angell against Amasa Sprague and others. Suit was dismissed for failure of plaintiff to comply with an order, and plaintiff petitions for writ of error. Judgment and order vacated, and case remitted.

Charles H. McKenna, of Providence, for petitioner. Irving Champlin and William A. Morgan, both of Providence, for respondents.

VINOENT, J. This is a petition for a writ of error against the district court of the Sixth judicial district, and sets forth that on the 9th day of August, 1912, the petitioner issued out of said district court a writ of replevin against the respondents. Amasa Sprague, Henry B. Hathaway, William F. Tucker, and Emma Tucker; that said writ was duly served and was entered in court August 28, 1912; that upon the return day the petitioner, as plaintiff, claimed a jury trial, the respondents entering their appearance and filing pleas; that, prior to the return day of the writ, the respondents filed a motion for further bond and surety, which motion was heard, and thereupon it was ordered that a bond for \$1,000 should be furnished, with sufficient sureties, on or before August 30, 1912; that, before the service of said writ of replevin, the petitioner, as plaintiff therein, executed a bond with two sureties in the sum of \$600; that the petitioner has not filed the bond for \$1,000; that the respondents, as defendants in said replevin suit, filed a motion to dismiss the same, and to have damages assessed and judgment entered in their favor, which said motion was heard and a decision rendered thereon in the district court, as follows: "September 19, 1912. Upon hearing of defendants' motion to dismiss this suit, the suit is dismissed for noncompliance by plaintiff with order of the court to give further bond with surety, and judgment is rendered for the defendant Henry B. Hathaway, for a return and restoration to him of the goods and chattels replevied, and for damage \$240, as shown at the hearing, and for his costs, and judgment is also rendered for each of the other defendants for his costs." The petition concludes with a prayer for a writ of error to the district court of the Sixth judicial district, requiring said court to certify its records of said suit to this court for the correction of errors, the entry of such judgment as law and justice may require, for stay of execution, for citation, etc. Upon the day of hearing in this court, the record of the district court of the Sixth judicial district, and the original papers in the case

were produced before this court as upon a formal return to a writ of error duly issued.

[1] The petitioner claims, in the first place, that a district court has no authority, under the statute, to order a further bond and surety, but that the authority to order further bond and surety is limited to replevin suits, where the goods sought to be replevied are over \$500 in value, and therefore beyond the jurisdiction of a district court. We do not think that the petitioner's claim in this regard can be sustained. District courts are specifically authorized by section 12 of chapter 336, Gen. Laws of 1909, to "issue writs of replevin where the goods and chattels to be replevied are of the value of five hundred dollars or less, * * * and to try the same and award execution therein, adhering in their proceedings, as near as may be, to the forms herein prescribed." The petitioner contends that the word "forms," in the section referred to, must be construed strictly, and he therefore claims, presumably, that it is limited and has reference to the form of a replevin writ, which the chapter in question prescribes. We think, however, that the word "forms" must be taken in its broader significance, and to refer to the forms of procedure in replevin suits which that chapter imposes, and which may be followed by district courts within their own jurisdictional limits.

[2] The petitioner further contends that if the district court has authority to order a further bond and surety, its jurisdiction being limited to actions where the goods replevied are of the value of \$500 or less, it cannot properly order a bond or bonds, the total amount of which exceeds \$1,000; and that in the present case, a bond having already been furnished in the sum of \$600, a compliance with the order of the court, and the giving of another bond for \$1,000, would increase the liability of the petitioner to \$1,600 in all, there being no provision for the cancellation of the first bond, and no attempt on the part of the respondents to effect such cancellation. In section 4, c. 336, Gen. Laws of 1909, it is provided that, in case the defendant shall, at any time pending the writ of replevin, be dissatisfied with the amount of the sureties or the surety company in such bond, the court before which the same shall be pending may, on motion and for cause shown, in their discretion, order the plaintiff to give further bond or further surety. The district courts having only such powers as are conferred upon them by statute, it follows, from the section last referred to, that their authority to increase or extend the bond security originally given is limited to two things: (1) To requiring further surety upon the bond already given; and (2) to requiring a second or further bond. While the bond for \$1,000, which the petitioner was ordered to give, is referred

to in some portions of the record as a "further bond," the order of the district court is simply for a bond of \$1,000 to be furnished by the petitioner within a specified time. However, as the statute only authorizes a "further" bond, we think that the one ordered must be considered as within that classification.

Taking the facts as they appear in the record, it is clear that the petitioner, should he comply with the order of the court and give the bond for \$1,000, would become liable on two bonds aggregating \$1,600. The amount of the bond required in any replevin suit cannot exceed double the amount of the goods to be replevied. The jurisdiction of the district court being limited to \$500, it naturally follows that it cannot require a bond exceeding \$1,000 in a replevin suit. To order a larger bond would be equivalent to finding that the case was one beyond its jurisdiction.

We think that the case should be reinstated in the district court, and that the order requiring the plaintiff to give a bond for \$1,000 should be vacated, but without prejudice to the right of the respondents to thereafter move for further surety or further bond, if they shall see fit.

The orders and judgments of the district court of the Sixth judicial district, entered on the 23d day of August, 1912, and on the 19th day of September, 1912, are vacated, without prejudice to the right of the respondents to move for further surety or further bond, if they shall see fit, and the case is remitted to said district court to be reinstated, and for further proceedings.

In re WHITING.

(Supreme Judicial Court of Maine. Feb. 15, 1913.)

1. EVIDENCE (§§ 506, 537, 555*)—ATTENDING PHYSICIANS—OPINION AS TO SANITY.

Attending physicians of skill and good repute, who are not experts in mental diseases, may testify as to the mental condition of their patients, and their opinions are admissible when the facts upon which they base them are detailed to the jury, although they may not give opinions as to the direct question to be determined.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2309, 2345, 2376; Dec. Dig. §§ 506, 537, 555.*]

2. WITNESSES (§ 219*)—PRIVILEGED COMMUNICATIONS—WAIVER — APPEAL — SUBSEQUENT TRIALS.

The right of privileged communication may be waived, and where waived cannot be again asserted with effect upon a subsequent trial or appeal of the same case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 769, 781, 782; Dec. Dig. § 219.*]

Exceptions from Supreme Judicial Court, Hancock County, at Law.

Petition for appointment of a guardian of George W. Whiting. Petition dismissed in

both the probate and the supreme court of probate, and to rulings of the latter Samuel K. Whiting excepts. Exceptions sustained.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and BIRD, JJ.

Peters & Knowlton, of Ellsworth, for appellant. Daniel E. Hurley, of Ellsworth, for appellee.

BIRD, J. This is a petition to the probate court of Hancock county for the appointment of a guardian of George W. Whiting under paragraph 2, section 4, of chapter 69, R. S. The petition was dismissed, after hearing, by the probate court and, on appeal, by the supreme court of probate. At the hearing in the latter court, certain evidence was offered by the appellant which was excluded by the presiding justice, and the case is before us upon exceptions to his rulings.

[1] I. The appellant called one McDonald, claimed to be the attending physician of George W. Whiting, and offered to introduce his opinion as to the mental capacity of George W. Whiting. The bill of exception alleges that this evidence so offered was excluded on the ground that no evidence had been produced that Dr. McDonald was an expert in mental diseases.

It is undoubtedly the rule of law of this state that attending physicians, of skill and good repute, who are not experts in mental diseases, may testify as to the mental condition of their patients, and that their opinions as to such condition are admissible, when the facts upon which they base their opinions are detailed to the jury, although they may not give opinions as to the direct question to be determined. *Fayette v. Chester-ville*, 77 Me. 28, 33, 52 Am. Rep. 741; *Hall v. Perry*, 87 Me. 569, 577, 33 Atl. 160, 47 Am. St. Rep. 352; *Ireland v. White*, 102 Me. 233, 238, 239, 66 Atl. 477; *Hathorn v. King*, 8 Mass. 370, 5 Am. Dec. 106; *Dickinson v. Barber*, 9 Mass. 225, 6 Am. Dec. 58; *Lewis v. Mason*, 109 Mass. 169. Tried by this rule, we are of the opinion that part at least of the questions excluded were admissible and that the exception must be sustained.

[2] II. An attorney at law was called by appellant and asked to give testimony of conversations between him and George W. Whiting in relation to matters of business for the purpose of showing that the latter had become incapable of managing his own affairs. The testimony was excluded upon the ground of privileged communication. The appellant sought to show that the privilege, if ever it existed, had been waived, and offered to prove that the same parties were present in the probate court as in the appellate court and that the testimony offered was given in the probate court without objection.

The right of privileged communication is a personal privilege and can be invoked only by him who makes it. *Leprohon*, Appellant,

102 Me. 455, 67 Atl. 317, 10 Ann. Cas. 1115. The rule of privilege is to be strictly construed. *Foster v. Hall*, 12 Pick. (Mass.) 89, 98, 22 Am. Dec. 400; *Hatton v. Robinson*, 14 Pick. (Mass.) 416, 422, 25 Am. Dec. 415. That the right may be waived is equally clear, not only expressly, but also by inference from acts and conduct (*Stewart v. Leonard*, 103 Me. 128, 132, 133, 68 Atl. 638; *Phillips v. Chase*, 201 Mass. 444, 449, 87 N. E. 755, 131 Am. St. Rep. 406), as by failure to object to the evidence when offered by the adverse party. See *Clifford v. Denver*, etc., R. R. Co., 188 N. Y. 349, 354, 357, 80 N. E. 1094.

Whether the right of privilege, once waived, can be again asserted with effect upon a subsequent trial or appeal of the same case is a question upon which reported cases are at variance. Those holding the negative base the conclusion upon the proposition that, when the privileged communication is once made public, the reason for its exclusion thereafter fails and the privacy between the parties to it then exists in legal fiction only. See *Green v. Crapo*, 181 Mass. 55, 62, 62 N. E. 956; *McKinney v. Grand Street*, etc., Co., 104 N. Y. 352, 10 N. E. 544. See, also, *People v. Bloom*, 193 N. Y. 1, 85 N. E. 824, 18 L. R. A. (N. S.) 898, 127 Am. St. Rep. 931, 15 Ann. Cas. 932; *Elliott v. Kansas City*, 198 Mo. 593, 96 S. W. 1023, 6 L. R. A. (N. S.) 1082, 8 Ann. Cas. 653. We think the cases holding otherwise not convincing and that appellant should have been permitted to introduce the evidence offered.

Exceptions sustained.

Case remanded to supreme court of probate for rehearing.

BLAIR v. LEWISTON, A. & W. ST. RY.
(Supreme Judicial Court of Maine. Feb. 17, 1913.)

1. CARRIERS (§§ 331, 347*) — CONTRIBUTORY NEGLIGENCE—RIDING IN DANGEROUS POSITION.

A passenger is not negligent per se in riding upon a rear platform of a street car, but, if he voluntarily chooses to ride there, he is to be held to the exercise of a high degree of care to avoid the dangers known or to be reasonably apprehended.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1371, 1374–1382, 1346, 1350–1356, 1388–1397, 1402; Dec. Dig. §§ 331, 347.*]

2. CARRIERS (§ 295*) — CARE REQUIRED—PERSON RIDING ON PLATFORM.

A street railroad permitting a passenger to ride on the platform is bound to take into account that he is thereby subjected to greater risks and to observe a high degree of care in the running of the car at points where there is danger that he may be thrown off.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1191–1197, 1199, 1213–1215, 1219, 1220; Dec. Dig. § 295.*]

3. NEGLIGENCE (§ 136*) — QUESTION FOR JURY — CONTRIBUTORY NEGLIGENCE IN GENERAL.

Whether a person was negligent in a given case, failing to exercise such care as a reasonable and prudent man would have exercised under like circumstances, is generally a ques-

tion for the jury, and it is always so when the facts are in dispute or are to be determined from conflicting testimony, and also when intelligent and fair-minded men might reasonably differ as to the conclusions and inferences to be drawn from the undisputed facts.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

4. CARRIERS (§ 347*)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

On evidence in an action for the death of plaintiff's intestate by being thrown from defendant's car while riding on the rear platform, *held*, that the question of his contributory negligence was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. § 347.*]

5. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCY.

When a person is required to act in an emergency and in suddenly impending personal peril, the question of his contributory negligence in choosing any particular one of the alternatives presented is for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

6. CARRIERS (§ 347*)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—INTOXICATION OF PASSENGER.

In an action against a carrier for the death of plaintiff's intestate, evidence, if any, tending to show that deceased was somewhat intoxicated at the time of the accident, made it a question for the jury as to what extent, if at all, that may have contributed to the accident.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. § 347.*]

Exceptions from Supreme Judicial Court, Kennebec County, at Law.

Action by Herbert L. Blair, administrator of Thomas Blair, deceased, against the Lewiston, Augusta & Waterville Street Railway. Judgment for defendant, and plaintiff excepts. Exceptions sustained, and case remanded for the assessment of damages only as per stipulation.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, KING, and BIRD, JJ.

B. F. Maher, of Augusta, for plaintiff. G. W. Heselton, of Gardiner, and Philbrook & Andrews, of Augusta, for defendant.

KING, J. Action to recover damages for the immediate death of the plaintiff's intestate, Thomas Blair, alleged to have been caused by the defendant's negligence. A nonsuit was ordered, with a stipulation that, if it is not sustainable, the cause is to be remanded for the assessment of damages only.

Blair was a passenger on defendant's car which left Augusta for Gardiner and Lewiston at 5 p. m. November 25, 1909. He boarded the car at Bradstreet's Platform, a point between Hallowell and Gardiner, and at Grant's Crossing, 2,239 feet from Bradstreet's Platform, as the car made a sharp curve or cross-over at a high rate of speed, he was thrown from the rear platform against a pole by the side of the track, and instantly killed.

The evidence is plenary that the car was

being driven at an unreasonable and negligent rate of speed at the time of the accident. The defendant does not question that, but contends that the nonsuit is sustainable on the ground of want of due care on the part of Blair.

The car may be thus briefly described. In the front is the vestibule room, occupied by the motorman, with a partition separating it from the smoking compartment, in which there are double seats on the sides at right angles with the sides of the car, and an aisle between, with a partition separating the smoking room from the main room. The seats in the main room are arranged substantially as in the smoking room. Unlike most cars, the main room stops with a partition about six feet from the extreme rear of the car, leaving an open platform with canopy overhead running as far as the end of the car. Upon each side of this observation platform is a seat, designed for two passengers, running lengthwise of the car from the main room partition part way to the end of the car, and leaving an open space or gateway on each side for the use of passengers in getting on and off the car. Two steps are constructed at each opening; the upper one being set into the platform its apparent width. On each side of the car at the inside rear corner of the upper step is an iron gate post, and on the outside rear corner of the same step is an iron rod extending from the platform to the canopy which it supports, and the distance from the iron canopy rod to the gate post is about nine inches; that being substantially the width of the upper step as let into the platform. The width of the platform between the upper steps is six feet and three inches. The extreme rear end of the car is an iron railing or fence, curved in line with the rear lines of the car, supported by rods and standards, and extending from the canopy post at the outside rear corner of the upper step on one side around to the corresponding post on the other side. At each opening there is a folding gate hung to the gate post, and so constructed that it can be completely shut up upon itself by being pushed back towards the curved railing. At the time of the accident the gateways were both open, the gates being folded back.

Situated at the extreme rear of the platform, and a little to the right of the center as you face the front of the car, is the controller mechanism, being, apparently, a steel cylinder about 15 inches in diameter and extending from the platform to the top of the railing; and on the very back of the car, a little below the top of the railing, and to the right of the center of the controller, is a device called the retriever, from which the trolley rope runs to the trolley arm, and which is designed to keep that rope taut.

The car was behind time, and went by Bradstreet's Platform some distance before

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stopping for Blair. It then backed towards him, while he, in turn, ran forward and boarded it on the right-hand side of the rear platform. There were no vacant seats in the main room of the car or on the rear platform, but it appears that there was one or two vacant seats in the smoking apartment forward. As Blair boarded the car, it started quickly and rapidly, and he stepped back against the rear railing of the car, on the right-hand side of the controller, grasping with his right hand the upright canopy rod, and taking hold of the railing with his left hand near the controller. The space where he stood was small, but large enough for him to stand therein; the distance from the canopy pole in a straight line to the edge of the controller on the back side being one foot and nine inches, and the distance from the gate post to the nearest point on the controller being about a foot.

There were two conductors on the car, both on the rear platform, but Blair was not notified that there was a vacant seat in the smoking apartment, nor told to take any other position on the car. There is a drop of 63.2 feet in the distance of 2,239 feet from the place where Blair boarded the car to the curve at Grant's Crossing where the accident occurred.

The evidence discloses that the car came down the grade to the curve at a very rapid rate of speed, slatting the passengers back and forth so much that they kept their seats with difficulty; that just as the car approached the sharp curve or cross-over the trolley arm was thrown off "with a bang"; that one conductor, Keene, grabbed the trolley rope, which was connected with the retriever, in an effort to control the trolley arm, and the other conductor, La Pointe, standing near the center of the platform, grasped and pulled the bell rope to stop the car; that simultaneously with these almost instantaneous happenings Blair moved quickly from his position beside the controller, and stepped forward up behind La Pointe, taking hold of his arms or shoulders in an effort to steady himself; and that as the car crossed the road, and slued into the straight track with a violent lurch, he was thrown clear of the car, and against the pole with the fatal result mentioned.

The speed of the car as it made the curve or cross-over will be more readily appreciated, perhaps, from the fact that the Goodrich house is 248 feet beyond the pole where the accident occurred, and Mr. Goodrich testified that, when he heard the trolley come off, he went into the front part of his house, and then outside of the house, and saw the car go by without any light, except the tail light behind, and that the car went by the house and down over the hill out of his sight. Presently he saw the car come back by his house to the crossing and pick up the body of Blair.

[1, 2] Blair was not negligent per se in riding upon the platform of the car. "Riding upon the platforms of such cars is too much encouraged by transportation companies and too much indulged in by the public for the court to say as a matter of law that the mere riding upon the platform of such a car is conclusive evidence of negligence, or is negligence per se, or is negligence in law." *Watson v. Railway Co.*, 91 Me. 584, 40 Atl. 699, 44 L. R. A. 157, 64 Am. St. Rep. 268.

Neither was it claimed that Blair was negligent in fact in taking the position he did on the platform. And, if that question had been involved, it is clearly one that should have been submitted to the jury.

But the defendant contends that Blair's act in leaving the position he had taken, back against the rear railing of the car and beside the controller, and stepping out upon the open platform between the gateways, "in view of all the perils of that particular moment," was so manifestly a negligent act contributing to the accident that the nonsuit was properly ordered. We do not think that contention is maintainable.

[3] When passengers are permitted to ride on the platforms of electric cars, it is the duty of the company to take into account that they are thereby subjected to greater risks, and to observe a high degree of care in the running of the cars at points where there is danger that such passengers may be thrown off. And likewise, when a passenger voluntarily chooses to ride on the platform of a car, he is to be held to the exercise of a high degree of care to avoid the dangers and perils of his position that are known to him or which are reasonably to be apprehended. Failing to exercise such a degree of care is negligence. But whether a person was negligent in a given case—in other words, whether he failed to exercise such care as reasonable and prudent men would have exercised under like circumstances—is generally and almost invariably a question for the jury; and it is always so, when the facts are in dispute, or are to be determined from conflicting testimony, and also when the facts are not in dispute, if intelligent and fair-minded men may reasonably differ as to the conclusions and inferences to be drawn from such facts.

[4] While the facts as to what Blair did and the existing circumstances and conditions under which he acted are, in a sense, not really disputed, nevertheless it cannot be said that they are disclosed with unmistakable accuracy, for they are to be discovered in the somewhat varying statements, naturally so, of the eyewitnesses as to the various and sudden happenings involved in the sad accident. Therefore we think that it cannot be properly held in this case that the facts and circumstances from which the question of Blair's negligence is to be determined are undisputed and certain. What he did,

when, and how he did it, and the circumstances and conditions under which he acted were matters for the jury to determine from all the evidence.

[5] But assuming that there is no dispute or uncertainty as to what Blair did, or as to the existing circumstances, conditions, and influences under which he acted, it cannot be said that the only reasonable conclusion to be drawn therefrom is that he acted negligently. He was in a position of apparent personal danger. The banging of the trolley arm above him, the noise of the retriever behind him, the controller beside him, the flashings of electricity as the trolley wheel struck the wire, and the onward rushing of the car into the curve, all these are facts and circumstances to be considered in deciding the question whether he was negligent, acting in those circumstances, in suddenly stepping forward as he did away from the retriever and controller. Might not men of equal intelligence and impartiality honestly differ in their conclusions upon the question whether Blair acted under those circumstances and in that emergency with reasonable care? We think so. Moreover, when a person is required to act in an emergency and under circumstances of suddenly impending personal peril, the law will not declare that reasonable care demands that he must choose any particular one of the alternatives presented, and hold him guilty of contributory negligence as a matter of law for not doing so. In such cases the law invokes the judgment of a jury upon the question of contributory negligence. *Larrabee v. Sewall*, 66 Me. 376, 381; *Shannon v. B. & A. R. R. Co.*, 78 Me. 52, 61, 2 Atl. 678.

[6] It is also suggested that there was some evidence introduced tending to show that Blair may have been somewhat under the influence of liquor at the time of the accident. But, if that was so, then it was a question for the jury to determine to what extent, if at all, that may have contributed to the accident.

It is therefore the opinion of the court that the question of the contributory negligence of the plaintiff's intestate should have been submitted to the jury with proper instructions.

Exceptions sustained. Case remanded for the assessment of damages only as per stipulation.

LOWE et al. v. HENDRICK.

(Supreme Court of Errors of Connecticut.
Feb. 15, 1913.)

1. TRUSTS (§ 72*)—FINDINGS—COPURCHASER—CONSIDERATION.

In a suit for damages for fraudulently inducing plaintiffs to enter into a purchase of land jointly with defendant, the fact that defendant took title in his own name did not de-

prive the plaintiffs of their interest, a presumptive trust arising; and a finding that there was no consideration for money given to defendant to invest in the property was incorrect.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 102, 103; Dec. Dig. § 72.*]

2. FRAUD (§ 31*)—ELECTION OF REMEDIES—RESCISSION OR DAMAGES.

Where plaintiff discovered that his joint purchaser of land had fraudulently exaggerated the amount paid for the land, he could either rescind the contract and recover payments made, or accept the contract and recover damages occasioned by the fraud.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 27; Dec. Dig. § 31.*]

3. FRAUD (§ 59*)—COPURCHASER—MEASURE OF DAMAGES.

Where a copurchaser fraudulently exaggerated the price he paid for land, the measure of damages was the difference between what was paid by plaintiffs for their shares and what they should have paid; it being immaterial what the true value was.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.*]

Appeal from Superior Court, New Haven County; Lucien F. Burpee, Judge.

Action by Robert A. Lowe and another against Philip E. Hendrick to recover damages for fraud in inducing plaintiffs to enter into a contract to purchase land. Judgment for plaintiffs, and defendant appeals. Reversed.

C. F. Thayer and C. V. James, both of Norwich, for appellant. D. G. Perkins and E. W. Perkins, both of Norwich, for appellees.

WHEELER, J. The finding, as modified by the paragraphs of the draft finding marked "proven," states that the defendant fraudulently induced the plaintiffs to enter into a joint contract for the purchase of real estate, for the purpose of selling again within a short time at a profit, by falsely representing that the price of the real estate was \$18,000; that \$8,000 of this purchase price must be paid in cash, one half to be paid by the defendant and the other half by the plaintiffs; and, as further inducement for said joint contract, the defendant represented that the balance of the purchase price could remain on mortgage, one for \$7,000, already on the property, and one for \$3,000, which he would give, and that the defendant would take title in his own name, care for the property, and pay all carrying charges. The plaintiffs accepted the contract, and paid, on January 20, 1908, \$2,500, and on April 14, 1908, \$750. The balance of said \$4,000, which they were to pay, was never paid. The defendant purchased the property for \$12,500, which was its value at the date of purchase, and paid down \$2,500 in cash, and has appropriated to his own use said \$750, and has not paid his one-half share of said \$8,000.

As part of the contract, the defendant gave

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the plaintiff Lowe, without any money consideration therefor, a mortgage for \$8,000 on said real estate, "solely to protect the plaintiffs against a sale of said property by the defendant at a price not satisfactory to them"; and, so far as the finding states, the plaintiff Lowe still holds this mortgage unreleased. The defendant seeks to have the finding corrected, and for that purpose the entire evidence and rulings have been certified.

The principal corrections asked for are: (1) The striking from the finding of that part of paragraph 11 which recites that "they [the plaintiffs] have never received from any one any consideration or valuable thing therefor, and they have had no consideration or valuable thing whatever by reason of their arrangement and agreement with the defendant, and the payment of said money to him"; and (2) an addition to the finding that, pursuant to said agreement, the title was taken in the name of the defendant January 21, 1908, that he gave said mortgage of \$3,000 on said date, and that he assumed and has paid all of the carrying charges upon said property, except a part of the mortgage interest. These facts were in evidence and uncontested. They are material, since they show that the defendant, pursuant to the agreement, took title to this real estate for the joint benefit of himself and the plaintiffs, which was worth \$12,500, or \$2,500 in excess of the said mortgages at the date of purchase and the inception of the fraud.

[1] The fact that the title was taken in the name of the defendant did not deprive the plaintiffs of their one-half interest in the property. Upon the purchase by the defendant, presumptively a trust arose in favor of the plaintiffs. *Ward v. Ward*, 59 Conn. 188, 195, 22 Atl. 149; *Corr's Appeal from Com'rs*, 62 Conn. 403, 408, 26 Atl. 478. The plaintiffs, therefore, secured by their contract a half interest in an equity worth \$2,500; and the finding that the plaintiffs received no consideration by reason of the agreement is contrary to the conclusion necessarily arising from the established facts. In these several particulars, the finding should be corrected; and, as the judgment to be rendered must depend upon their consideration, we do not feel at liberty, under the circumstances of this case, to direct a judgment. *Nichols v. Manchester*, 82 Conn. 621, 622, 74 Atl. 935.

The finding of the value of the property at the date of purchase to be \$12,500 rather than \$18,000, as the defendant claimed, was made upon a conflict of evidence. The defendant's witnesses placed the value of the property at \$18,000, and no other witness testified directly as to its value; but the court had before it the size, character, and location of the premises, the price of purchase, and the renewal at the same price, and we cannot hold that its conclusion could

not have been reasonably reached from these considerations rather than from the opinion of witnesses.

[2] Upon learning of the fraud perpetrated upon them, two methods were open to the plaintiffs: To rescind the contract and recover the payments made thereunder, or to accept the contract and recover the damages occasioned by the fraud. So far as the finding discloses, the plaintiffs neither rescinded nor attempted to rescind. On the contrary, they retained its benefits; and the plaintiff Lowe, so far as appears in the finding, has never released the \$8,000 mortgage given him for the joint protection of himself and the other plaintiff.

The trial court gave judgment for the sums paid the defendant by the plaintiffs, with interest from the date of payments; thus, either treating the contract as rescinded by the plaintiffs, as they now claim in their brief, or else treating the case as one of conversion, as the defendant claims was done.

Some justification of the defendant's contention is found in the manner in which the judgment was reached, as set forth in the memorandum of decision and in a ruling made during the trial, in which the court said in part: "I appreciate, from the complaint, that the plaintiff is suing the defendant for misappropriating money which he obtained under false pretenses. * * * The question is, What did he do with the money he got from the plaintiffs? If he didn't use it to buy this property, he appropriated it to himself, and has got it now, as they claim." Whatever be the measure of damages adopted by the court, it did not adopt the only one applicable to an action of fraud of this character.

[3] In this case the plaintiffs were led into the contract by fraudulent representations as to the price, and the cash payments required. Upon the facts as found, the purchase price was \$12,500, instead of \$18,000, as represented; and the plaintiffs were fraudulently induced to agree to pay in \$4,000, and did pay in of this \$3,250, when their share of the true price under the contract was \$1,250. The measure of damages in such case, where one joint purchaser is, by fraud, induced to pay the represented price for property, which he subsequently ascertains is more than that in fact paid, is the difference between what he in fact paid and what he should have paid of the true price.

It is immaterial in the assessment of damages that the property was in fact worth more than the true price, or as much, or more than the represented price. The joint purchaser is entitled to the profit of his bargain, and cannot be deprived of that by the fraud of his cojoint purchaser. *Johnson v. Gavitt*, 114 Iowa, 184, 185, 86 N. W. 256; *Bergeron v. Miles*, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911; *Jones v. Kinney*, 146 Wis. 130, 131 N. W. 339, Ann. Cas. 1912C,

200; Rutledge v. Tarr, 95 Mo. App. 265, 268, 69 S. W. 22; Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108; Mayo v. Wahlgreen, 9 Colo. App. 506, 517, 50 Pac. 40; Douglass v. Richards, 116 App. Div. 27, 29, 101 N. Y. Supp. 299; Sedgwick on Damages (9th Ed.) § 4391; 20 Cyc. 141.

There is error, the judgment of the superior court is reversed, and the cause remanded, to be proceeded with according to law.

STATE v. BROWN.

(Court of General Sessions of Delaware. Kent. Oct. 25, 1912.)

1. INDICTMENT AND INFORMATION (§ 101*)—SUFFICIENCY—PERSON INJURED—DESCRIPTION.

A count in an indictment for abortion was not rendered insufficient by a clerical omission of the name of the person operated on in one part of the count.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 272-277; Dec. Dig. § 101.*]

2. INDICTMENT AND INFORMATION (§ 111*)—SUFFICIENCY—NEGATING EXCEPTIONS.

An indictment for abortion, alleging that accused, with intent to procure a miscarriage, administered medicine to a pregnant woman, the same not being necessary to preserve her life, was not insufficient as negating only the necessity of the medicine, and not the necessity of the miscarriage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.*]

3. ABORTION (§ 5*)—INDICTMENT—SUFFICIENCY.

Counts in an indictment for abortion, alleging that accused, with intent to procure a miscarriage, used an instrument the character of which was unknown upon a pregnant woman, and that he used an instrument called a tube upon her body and womb, were not insufficient because of their failure to allege the manner in which such instruments were used.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 8-14; Dec. Dig. § 5.*]

4. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

The prosecution cannot prove the commission of other and distinct offenses, though of the same kind with that charged, for the purpose of proving the one charged, or of rendering it more probable that he committed the offense for which he is on trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

5. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES.

Where criminal intent is a material element of the offense charged, and accused's intent becomes an issue at the trial, proof of other similar offenses, within reasonable limits, is admissible to throw light on his intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

6. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES.

Where criminal intent need not be specifically proved, or is necessarily established by

proof of the commission of the act, evidence of the perpetration or attempted perpetration of similar offenses is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

7. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES.

The specific intent to produce a miscarriage by means of the medicine administered or instruments used is an essential ingredient of the crime of abortion, and must be proved, and hence may be shown by evidence of similar offenses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

8. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES.

On a trial for abortion, evidence of similar offenses can be considered by the jury only when satisfied from the other evidence that accused committed the acts charged, and then only on the question of his intent in so committing them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

9. ABORTION (§ 1*)—ELEMENTS—"PROCURING MISCARRIAGE."

Under Act Feb. 13, 1883 (17 Del. Laws, c. 226) § 2, providing that every person who, with intent to procure the miscarriage of any pregnant woman, shall administer any medicine, etc., whether the miscarriage is accomplished or not, shall be guilty of a felony, "procuring a miscarriage" is the unlawful destruction of, or the bringing or causing to be brought forth prematurely, the fetus or unborn offspring of a pregnant woman, at any time before birth according to the course of nature.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 1-5; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4530, 4531.]

10. ABORTION (§ 8*)—BURDEN OF PROOF.

On a trial for abortion, the state must prove to the satisfaction of the jury that accused administered or prescribed medicine or used an instrument, as alleged, with intent to procure the miscarriage of a pregnant woman, or woman supposed by him to be pregnant, and that the miscarriage was not necessary to preserve her life.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 16; Dec. Dig. § 8.*]

11. ABORTION (§ 2*)—DEFENSES.

A person administering medicine or using instruments with intent to procure a miscarriage is guilty of abortion, whether or not he actually causes the miscarriage; and hence it was no defense that the miscarriage was actually caused by the woman's own use of an instrument, medicine, or other means.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 6; Dec. Dig. § 2.*]

12. ABORTION (§ 2*)—DEFENSES.

Accused's reluctance or unwillingness to perform the operation, or the woman's consent or entreaty, were not defenses to a charge of abortion, if he subsequently committed the act charged.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 6; Dec. Dig. § 2.*]

13. ABORTION (§ 11*)—EVIDENCE—INTENT.

The intent to procure a miscarriage may be shown by accused's express confession or declaration, or by his acts and conduct, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

other circumstances from which it is naturally and reasonably inferable.

[Ed. Note.—For other cases, see *Abortion*, Cent. Dig. § 22; Dec. Dig. § 11.*]

14. CRIMINAL LAW (§ 381*)—WEIGHT AND SUFFICIENCY—GOOD CHARACTER.

Testimony as to accused's good character or reputation should be considered by the jury as other evidence tending to prove his innocence, and should be given such weight as, under the circumstances of the case, it is reasonably entitled to when considered in connection with the other evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 846; Dec. Dig. § 381.*]

15. CRIMINAL LAW (§ 553*)—CREDIBILITY—PROVINCE OF JURY.

The jury should reconcile conflicts in the evidence, if possible; but, if they cannot do so, they should accept the testimony of those witnesses who they think, under all the facts and circumstances, are most entitled to credit and belief, and should reject the testimony of those whom they think unworthy of belief.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1252; Dec. Dig. § 553.*]

16. CRIMINAL LAW (§ 553*)—CREDIBILITY—PROVINCE OF JURY.

In determining the credibility of witnesses and the degree of credit to be given to their testimony, the jury may consider their bearing on the stand, their apparent fairness or unfairness, their interest or bias, if any, their intelligence and opportunity of knowing and remembering the facts, and any other facts and circumstances disclosed by the evidence which indicate to the jury their reliability or unreliability.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1252; Dec. Dig. § 553.*]

17. CRIMINAL LAW (§ 308*) — DEGREE OF PROOF REQUIRED.

Every person accused of crime is presumed to be innocent, until proven guilty beyond a reasonable doubt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 731; Dec. Dig. § 308.*]

18. CRIMINAL LAW (§ 561*)—"REASONABLE DOUBT."

A "reasonable doubt," which will justify an acquittal, is not a mere imaginary, whimsical, or even possible doubt of accused's guilt, but is such a real and substantial doubt, naturally arising out of all the relevant evidence in the case, as intelligent and impartial men may reasonably entertain after a careful consideration of all such evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1267; Dec. Dig. § 561.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

Emanuel J. Brown was indicted for abortion. Verdict, not guilty.

Argued before PENNEWILL, C. J., and WOOLLEY, J.

W. Watson Harrington, Deputy Atty. Gen., and Caleb S. Layton, both of Dover, for the State. Alexander M. Daly and John B. Hutton, both of Dover, for defendant.

Indictment for abortion (No. 9, April term, 1912), alleging, in substance, that the accused, with the intent to procure the miscarriage of one Mary Tibbett, a young married, pregnant woman, supposed by the accused to be

pregnant, did administer and prescribe medicine, and use a certain instrument—a tube or catheter—the same not being necessary to preserve the life of her.

The facts appear in the opinion and the charge. The indictment in substance is stated in the charge.

At the April term, 1912, counsel for defendant moved to quash the said indictment, because it alleged that the administration or prescription of the medicine was not necessary to preserve the life of Mary Tibbett—the material allegation being that the miscarriage was not necessary to preserve her life.

This applies to the first two counts. *Bassett v. State*, 41 Ind. 303; *State v. Jones*, 4 Pennewill, 109, 53 Atl. 858 (opinion of the dissenting judge). *State v. Quinn*, 2 Pennewill, 339, 45 Atl. 544, did not rule upon the question as presented here.

PENNEWILL, C. J. The question seems to us to be the same as decided by a majority of the court in the case of *State v. Jones*. Sustaining the contention of the defense in this case would be practically overruling that case.

Mr. Hutton: In the case of *State v. Parm & Viney*, 5 Pennewill, 556, 60 Atl. 977, the court held that counseling was not within the statute. That applies to the third count. The objection to the fourth and fifth counts—that the defendant did use a certain instrument upon her the said Mary Tibbett, which is the extent to which the use is alleged—is that that is absolutely an insufficient statement of the manner of using the instrument. Even though there is a general averment of the intent with which it was used, the mere statement that he did use an instrument upon her is not a sufficient statement of the manner in which it was used.

As to the sixth count, counsel for defendant moved to quash the same as indefinite and uncertain, because of the omission in the last part of the count of the name of the person alleged to have been operated upon.

Mr. Harrington, Deputy Attorney General, replied, contending that the objection as to the third count had been passed upon by the court and sustained in a similar indictment, in the case of *State v. Quinn*, 2 Pennewill, 339, 45 Atl. 544, and the other objections had been passed upon and decided adversely in the case of *State v. Parm & Viney*, 5 Pennewill, 556, 60 Atl. 977.

[1-3] We hold that the first, second, fourth, fifth, and sixth counts are sufficient, and the third count is insufficient. The motion to quash is sustained as to the third count, and overruled as to the others.

At the trial (October term, 1912), after proving by the prosecuting witness, Mary Tibbett, the facts as alleged in the indictment, the state called one H. as a witness, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

offered to prove by him that the defendant, upon an occasion near the time when the offense charged in the indictment was committed, also committed an abortion upon the wife of said H. by the same means as charged in the indictment, as tending to show the intent with which the act charged was committed. This was objected to by counsel for defendant as wholly irrelevant and immaterial; but by agreement the evidence was admitted temporarily, subject to be stricken out upon motion of defendant's counsel, and argument at the conclusion of the testimony.

When the testimony was concluded on both sides counsel for defendant moved to strike out the above testimony of H. as inadmissible and irrelevant.

Argument in Support of Motion to Strike Out Testimony.

The general principle of law as laid down in all the authorities is that evidence tending to prove a distinct crime, although it may be similar to the one for which defendant is on trial, is wholly inadmissible. 12 Cyc. 405; 11 Enc. of Ev. 798, 799, and many cases cited in 37 different states.

In some jurisdictions evidence of other crimes is admissible to prove motive or intent. Such evidence has been admitted in cases of embezzlement, false pretense, forgery, counterfeiting, receiving stolen goods, murder, etc. 11 E. of E. 802-804; 12 Cyc. 408, 409.

Evidence of similar crimes is not admissible for the purpose of raising a presumption that defendant committed the particular crime, but only in cases where the intent is material and there is uncertainty as to such intent. 11 E. of E. 799, and note.

In abortion cases we have found no cases in which evidence of similar offenses was admitted. *Lamb v. State*, 68 Md. 285, 7 Atl. 400; *People v. Seaman*, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326.

Where the intent is a necessary conclusion from the act done, proof of other offenses of a similar character is inadmissible and violates the rule that the evidence must be confined to the issue. If the instrument was used as testified to on the behalf of the state, there is no room for an inference that it was used for any other purpose than that charged in the indictment; and, therefore, evidence of other offenses to show intent is inadmissible. *People v. Lonsdale*, 122 Mich. 388, 81 N. W. 277, distinguished from *People v. Seaman*, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326; *People v. Gibbs*, 93 N. Y. 470; *People v. Stewart*, 85 Cal. 174, 24 Pac. 722.

It is only in those cases where the intent is uncertain that evidence of other offenses is admissible. *Lamb v. State*, 68 Md. 285, 7 Atl. 400; *People v. Seaman*, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326.

Argument of State Contra.

The doctrine of admissibility of other acts to show knowledge or intent has been recognized in several cases in this state. *State v. Tindal*, 5 Har. 488 (1854); *State v. Freedman*, 3 Pennewill, 403, 53 Atl. 356; *State v. Hartnett*, 7 Pennewill, 204, 74 Atl. 82; *State v. Effler*, 78 Atl. 411.

In the *Tindal* Case, the defendant was indicted for passing counterfeit money, and evidence was admitted of the passing of other counterfeit money, of the same kind at other times, to show guilty knowledge.

In the *Freedman* Case, the defendant was charged with receiving stolen goods. Evidence of other similar transactions was also admitted, to show guilty knowledge. The report of this case does not take up this point, but I am informed that such evidence was admitted.

In the *Hartnett* Case, the defendant was indicted for obtaining money under false pretenses. I am informed that evidence of other similar acts was offered, and while ruled out by the court, it was on the ground of lack of connecting testimony. The rule of law itself was admitted by tacit consent.

In the *Effler* Case, the defendant was indicted for conspiracy to commit larceny, and evidence of similar transactions on other occasions was admitted for the purpose of showing guilty intent.

The case of *State v. Records*, as well as the case of *State v. King*, tried in Sussex county at the February term, 1911, not reported, does not contradict the rule to be deduced from the above cases, as the evidence offered in both of these cases was not for the purpose of showing knowledge or intent, but for the purpose of showing a plan or scheme of a general design on the part of the defendants to buy votes, which evidence the court held to be too remote.

In the case at bar the intent of the prisoner is not only the most material element, but it could not be contended that it was shown by the act itself. The alleged acts committed by him would not be criminal unless guilty knowledge and intent existed in his mind at the time. *Wharton*, pp. 516 and 1667.

PENNEWILL, C. J., delivering the opinion of the court:

A motion has been made by counsel for the defendant that all the evidence of the witness Hill be stricken out because the rule of law that permits the proof of other transactions by the defendant similar in character to that charged in the indictment, and committed at or about the same time, is not applicable to the present case.

[4] It is undoubtedly the general rule that the prosecution is not allowed to prove the commission of another and distinct offense, though of the same kind with that charged,

for the purpose of proving the latter, or for the purpose of rendering it more probable in the minds of the jury that the defendant committed the offense for which he is on trial.

[5] But, wherever the intent with which an alleged offense was committed is a material element of the charge, and such intent becomes an issue at the trial, proof of other similar offenses, within certain reasonable limits, is admissible, as tending to throw light upon the intention of the accused in doing the act complained of.

Wigmore in his work on Evidence (volume 1, 302) says: "In most cases of conspiracy and fraud, the question of intent, or purpose or design in the act done, whether innocent or illegal, whether honest or fraudulent, rarely admits of direct and positive proof; but it is to be deduced from various circumstances of more or less stringency and often occurring, not merely between the same parties, but between the parties charged with the conspiracy or fraud and third persons. And in all cases where the guilt of the party depends upon the intent, purpose or design with which the act was done, or upon his guilty knowledge thereof, I understand it to be a general rule that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose or knowledge."

The rule is very well stated in *People v. Seaman*, 107 Mich. 357, 65 N. W. 206, 61 Am. St. Rep. 326, as follows:

"The general rule is that evidence shall be confined to the issue, and that on a trial for felony the prosecution will not generally be permitted to give evidence tending to prove the defendant guilty of another distinct and independent felony. There are, however, exceptions to this rule. * * * Where it is necessary to show a particular intent in order to establish the offense charged, proof of previous acts of the same kind is admissible for the purpose of proving guilty knowledge or intent. * * * Upon principle and authority, it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain. * * *"

[6] Where, however, the intent is not required to be specifically proved, or from the nature of the offense under investigation

proof of its commission as charged necessarily establishes the criminal intent, or the intent is a necessary conclusion from the act done, evidence of the perpetration, or attempted perpetration, of other like offenses, should not be admitted.

These rules were recognized by the court in the decisions cited from this state.

In *State v. Tindal*, 5 Har. 488, the defendant was indicted for passing counterfeit money, knowing that the same was counterfeit money. Proof that the defendant passed counterfeit money would not be sufficient to sustain the indictment in that case. That might have been done innocently. It was incumbent upon the state to show the guilty knowledge of the defendant, his intent to pass counterfeit money, and similar acts were admitted for that purpose only.

In *State v. Freedman*, 3 Pennewill, 403, 53 Atl. 356, the indictment charged the receiving stolen goods. It was not enough for the state to show that the defendant received stolen goods, but it was also necessary to show that the defendant knew they were stolen. Similar acts were admitted as tending to prove that the defendant had the guilty knowledge that the goods were stolen.

The *Hartnett Case*, 7 Pennewill, 204, 74 Atl. 82, is not at all in point, the question involved being entirely different from the one here.

In none of these cases was the testimony allowed for the purpose of proving the offense charged, but to be considered by the jury in determining the knowledge or intent of the defendant when they were satisfied by other testimony that the accused passed the counterfeit money, received the stolen goods, or entered into an unlawful conspiracy or combination, as charged. Proof of such facts would not carry with it the evident implication of a criminal knowledge or intent, and therefore collateral facts, such as similar acts, were held to be admissible as tending to prove such knowledge or intent.

[7] In the present case the defendant is charged with giving medicine and using an instrument with the intent to procure a miscarriage. The indictment, as well as the statute upon which it is based, make the intent with which the medicine is administered and the instrument is used, an essential part or ingredient of the charge, and it is incumbent upon the state to prove such specific intent before a conviction can be secured. The very gravamen of the offense charged being the intent with which the defendant committed the acts alleged, it is not sufficient to prove the giving of the medicine because it may be given for a proper purpose. It is not enough to prove the use of the instrument merely because such an instrument might be employed for a legitimate purpose. The specific intent

or purpose to produce a miscarriage must be proved before the guilt of the accused is established, and the performance of similar operations on the same or other women about the same time, we think are admissible. Such operations, however, are not admissible to prove that the defendant committed the acts charged, viz., gave the medicine and used the instrument mentioned in the indictment, but are only to be considered by the jury in determining the intent with which the acts charged were done, when the jury are satisfied by other testimony that the medicine was given, or the instrument was used by the defendant in the manner charged in the indictment.

From the cases cited such appears to have been the position taken by the courts of many states, and is recognized generally by the text writers. Indeed, abortion, or the attempt to procure miscarriage, are offenses in the trial of which evidence of similar acts has been generally admitted. The rule permitting the introduction of such evidence is applicable to such cases because the law makes the intent with which the alleged act is done, or attempted, an essential ingredient of the charge, and places the burden upon the prosecution to prove the specific intent. *Underhill on Evidence*, 410; *Commonwealth v. Corkin*, 136 Mass. 429; *People v. Seaman*, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326; *Underhill, Criminal Evidence*, 345; *Wigmore on Evidence*, §§ 301, 302, 359; *Wharton on Criminal Evidence*, § 887; *Commonwealth v. Corkin*, 136 Mass. 429 (other act, same woman); *Commonwealth v. Holmes*, 103 Mass. 440 (other acts, different women); *People v. Sessions*, 58 Mich. 594, 600, 601, 26 N. W. 291 (other women); *Clark v. Commonwealth*, 111 Ky. 443, 63 S. W. 740, 745 (other women); *People v. Seaman*, 107 Mich. 348, 65 N. W. 203, 206, 61 Am. St. Rep. 326 (other women); *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 194; *Wharton, Criminal Evidence*, vol. 1, page 78 et seq.; *Scott v. People*, 141 Ill. 195, 30 N. E. 329; *Commonwealth v. Follansbee*, 155 Mass. 274, 29 N. E. 471.

[8] We decline to strike out the testimony objected to, but we do instruct the jury now, as we shall also do in the charge, that the testimony of the witness Hill cannot be considered by them at all in determining whether the defendant committed the acts charged in the indictment, that is, gave the medicine, and used the instrument, mentioned. Such testimony, offered by the state to show that defendant performed an operation on Hill's wife similar to the one charged in the indictment, can be considered only when the jury are satisfied from other evidence that the defendant did commit the acts charged, and even then it can be considered only for the purpose of determining whether he committed those acts with the unlawful intent to procure a miscarriage.

At the close of the testimony, the following prayers for instructions to the jury were presented:

State's Prayers.

The material element in this case is the proof on the part of the state that the defendant intended to produce the miscarriage of Mary Tibbett at the time he performed the alleged operation upon her.

And if such an intent existed in the mind of the said defendant at the time he performed the alleged operation upon the said Mary Tibbett it is no defense that the means used could not have caused the said Mary Tibbett to miscarry; nor would the fact that the said Mary Tibbett was not then pregnant be a defense if the said defendant then thought that she was in a pregnant condition.

If the jury believe that the defendant, Emanuel J. Brown, inserted a rubber tube or other instrument into the private parts of Mary Tibbett, believing her to be a pregnant woman, and with intent to cause her to miscarry, and they further believe that such miscarriage was not necessary to preserve her life, the verdict should be guilty.

Defendant's Prayers.

Counsel for defendant prayed the court to charge the jury as follows:

First. That in order to warrant the jury in finding a verdict of guilty in the present case, the burden is on the state to prove to their satisfaction beyond a reasonable doubt:

(A) That the defendant, Emanuel J. Brown, on or about January 9th, of the present year, in this county, used an instrument as alleged in the indictment.

(B) That he so used it then and there with the intent to procure the miscarriage of Mary Tibbett, she being then and there pregnant, or supposed by the said defendant to be so pregnant.

(C) That said miscarriage was not then and there necessary to preserve the life of the said Mary Tibbett. *State v. Magnell*, 8 Pennewill, 307, 51 Atl. 606.

Second. That the fact that the woman is a consenting party to the alleged abortion may be considered by the jury as affecting her credibility as a witness. *Com. v. Brown*, 121 Mass. 69; *Watson v. State*, 9 Tex. App. 237; *Frazer v. People*, 54 Barb. (N. Y.) 306; *Commonwealth v. Wood*, 11 Gray (Mass.) 85; *Commonwealth v. Drake*, 124 Mass. 21; 1 Enc. of Ev. 60; 1 A. & E. 192.

Third. If the jury should believe that there was a payment of money by the defendant, but such payment was made merely to buy his peace, and without any direct admission of guilt, they should not consider such payment as evidence against the defendant. *State v. Nugent*, 134 Iowa, 237, 111 N. W. 927; *State v. Emerson*, 48 Iowa, 172;

Stinson v. State, 8 Ala. App. 74, 57 South. 509; Martin v. State, 2 Ala. App. 175, 56 South. 64; Sanders v. State, 148 Ala. 603, 41 South. 466; 2 Wigmore on Ev. 1231, § 1061; Wilson v. State, 73 Ala. 527, 532; State v. Bridges, 86 Miss. 377, 38 South. 679.

Fourth. That the defendant is entitled to the benefit of every reasonable doubt. Every presumption is in favor of his innocence. If the facts shown are capable of explanation on any reasonable hypothesis in favor of innocence, there can be no rightful conviction. State v. Jones, 4 Pennewill, 117, 53 Atl. 858; State v. Aiken, 109 Iowa, 643, 80 N. W. 1073; Howard v. People, 185 Ill. 552, 57 N. E. 441; 1 Enc. of Ev. 56.

Fifth. That the defendant's previous good character, if shown, is a fact which should be taken into consideration like any other fact in determining the defendant's guilt or innocence.

PENNEWILL, C. J. (charging the jury). Gentlemen of the Jury: The indictment upon which the defendant is being tried charges as follows:

First, that Emanuel J. Brown, the defendant, on the 9th day of January of the present year, in this county, unlawfully, feloniously, and with the intent to procure the miscarriage of one Mary Tibbett, she the said Mary Tibbett then and there being a pregnant woman, then and there supposed by the said Emanuel J. Brown to be pregnant, did administer to her the said Mary Tibbett certain medicine (the same not being necessary to preserve the life of her the said Mary Tibbett), against the form of the act of the General Assembly.

Second, that the said Emanuel J. Brown, at the county aforesaid, at the time aforesaid, did unlawfully, feloniously, and with the intent to procure the miscarriage of one Mary Tibbett, she the said Mary Tibbett then and there being a pregnant woman, then and there supposed by the said Emanuel J. Brown to be pregnant, did prescribe for her the said Mary Tibbett, certain medicine (the same not being necessary to preserve the life of her the said Mary Tibbett), etc.

(The third count of the indictment was stricken out.)

Fourth, that the said Emanuel J. Brown, at the time and place aforesaid, unlawfully, feloniously, and with the intent to procure the miscarriage of one Mary Tibbett, she the said Mary Tibbett then and there being a pregnant woman, then and there supposed by the said Emanuel J. Brown to be pregnant, did use a certain instrument upon her the said Mary Tibbett, the kind and character of which instrument is to the jurors aforesaid unknown, so intending to procure the miscarriage of her the said Mary Tibbett (the same not being necessary, etc.), against the act of assembly.

Fifth, that the said Emanuel J. Brown, at the time and place aforesaid, did unlawfully, feloniously, and with the intent to procure the miscarriage of one Mary Tibbett, said Mary Tibbett then and there being a pregnant woman, etc., use a certain instrument commonly called a tube, in and upon the body and womb of her the said Mary Tibbett, so intending to procure the miscarriage of her the said Mary Tibbett, etc., against the act of assembly.

Sixth, that the said Emanuel J. Brown, at the time and place aforesaid, unlawfully, feloniously, and with the intent to procure the miscarriage of one Mary Tibbett, she the said Mary Tibbett then and there being a pregnant woman, then and there supposed by the said Emanuel J. Brown to be pregnant, did use a certain instrument upon her the said Mary Tibbett, so intending to procure the miscarriage of her the said Mary Tibbett, etc., against the form of the act of assembly.

[9] On February 13, 1883, the General Assembly of this state passed an act entitled "An act to punish the procurement of abortion" (17 Del. Laws, c. 226), and section 2 of said act, under which the defendant is now on trial, is as follows:

"Every person who, with the intent to procure the miscarriage of any pregnant woman or women supposed by such person to be pregnant, unless the same be necessary to preserve her life, shall administer to her, advise, or prescribe for her, or cause to be taken by her any poison, drug, medicine, or other noxious thing, or shall use any instrument or other means whatsoever, or shall aid, assist, or counsel any person so intending to procure a miscarriage, whether said miscarriage be accomplished or not, shall be guilty of a felony," etc.

[10] Procuring a miscarriage, within the meaning and purpose of this act, is the unlawful destruction, or the bringing or causing to be brought forth prematurely the fetus or unborn offspring of a pregnant woman, at any time before birth according to the course of nature. In order to warrant the jury, in the present instance, in finding a verdict of guilty under this statute, the burden is on the state to prove to your satisfaction, beyond a reasonable doubt, first, that the prisoner, Emanuel J. Brown, on or about the 9th day of January, of the present year, in this county, administered or prescribed medicine; or used an instrument, as alleged in the indictment; second, that he so administered or prescribed medicine, or used the instrument, then and there, with the intent to procure the miscarriage of Mary Tibbett, she being then and there pregnant, or the said prisoner supposing her to be so pregnant; and, third, that said miscarriage was not then and there necessary to preserve the life of the said Mary Tibbett.

If you find that the state has failed to prove beyond all reasonable doubt all, or any one, of these essential facts and constituent elements of this alleged felony, it will be your duty to render a verdict of not guilty.

[11] It is not necessary for the state to prove that the prisoner actually caused or accomplished the alleged miscarriage of Mary Tibbett. It will be sufficient, so far as respects this element of the offense here charged, if you are satisfied beyond a reasonable doubt, that the prisoner administered or prescribed certain alleged medicine, or used the alleged instrument with the intent to procure the miscarriage of Mary Tibbett, whether such intent was accomplished or not. If you are so satisfied, it will be immaterial, in your determination of this case, whether or not Mary Tibbett had herself caused the alleged miscarriage by her own use of any instrument, medicine or other means, and therefore of no avail for the defense of the prisoner.

[12] Nor would the consent of Mary Tibbett to the prisoner's attempt to procure her miscarriage, nor the prisoner's reluctance or unwillingness to perform the operation, be a sufficient or lawful defense, in view of the positive provisions of the statute, if the prisoner subsequently prescribed the medicine or used the instrument as alleged in the indictment.

[13] The intent to procure the miscarriage may be shown by direct evidence of the intent—that is, by the express confession or declaration of the accused; or such intent may be proved by the acts and conduct of the prisoner, and other circumstances, from which the jury may naturally and reasonably infer the intent charged. In this connection we again call your attention to the testimony of the witness Hill respecting an operation alleged to have been performed on his wife similar to the one charged in this indictment. We say to you that such testimony cannot be considered by you at all in determining whether the defendant committed the acts charged in the indictment, that is, administered or prescribed the medicine or used the instrument alleged. Such testimony offered by the state to show that the defendant performed an operation on the wife of Hill similar to the one charged in the indictment can be considered only when the jury are satisfied from other evidence in the case that the defendant did commit the acts charged, and even then the testimony given by Hill can be considered only for the purpose of determining whether the defendant committed those acts with the unlawful intent to procure a miscarriage.

[14] In respect to good character, we say that testimony respecting the good character or reputation of the accused, is to be consid-

ered by the jury as any other evidence tending to prove the innocence of the accused, and is to be given just such weight by the jury as under the circumstances of the case it is reasonably entitled to when considered in connection with all the other evidence.

[15, 16] When the evidence is conflicting in any case it is the duty of the jury to reconcile such conflict if they can. If, however, they cannot do so, it is their duty to accept and be governed by the testimony of those witnesses whom they think, under all the facts and circumstances of the case are most entitled to credit and belief, and reject the testimony of such witnesses as they think unworthy of belief. In determining the credibility of witnesses and the degree of credit that should be given to their testimony, the jury may consider their bearing upon the stand, their apparent fairness or unfairness, their interest or bias if any they have, their intelligence and opportunity of knowing and remembering the things about which they testify, and any other facts or circumstances disclosed by the evidence which indicate to the jury the reliability or unreliability of the witnesses, or any of them.

[17] Every accused person is presumed to be innocent until he is proven guilty beyond a reasonable doubt.

[18] A reasonable doubt, in legal contemplation, is not a mere imaginary, whimsical or even possible doubt of the guilt of the accused, but is such a real and substantial doubt naturally arising out of all the relevant evidence in the case as intelligent and impartial men may reasonably entertain after a careful consideration of all such evidence.

The case is now submitted for your verdict in accordance with the facts as you shall find them, and with the law as the court has given it for your guidance.

Verdict, not guilty.

IN RE MILLER'S WILL

(Superior Court of Delaware. New Castle.
Jan. 26, 1912.)

1. WILLS (§ 52*)—TESTAMENTARY CAPACITY.

The burden of showing an unsound mind in a testator rests on the party contesting the validity of the will, and the testimony must relate to the time of its execution; but, if insanity is once clearly established, the burden shifts, and the testamentary capacity at the time of making the will must be shown by a preponderance of the evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101-110; Dec. Dig. § 52.*]

2. WILLS (§§ 31, 38*)—"TESTAMENTARY CAPACITY"—INSANE DELUSIONS.

In determining "testamentary capacity," the question is whether, at the precise time of making the will, he was of sound and disposing mind and memory, that is, capable of exercising

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thought, judgment, and reflection; and if he knew how he was disposing of his property, what he was about, and had memory and judgment, his will cannot be invalidated, the degree of mind or memory or the wisdom of the dispositions not counting, nor even delusions, unless the will was a direct offspring therefrom.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 66-68, 78-81; Dec. Dig. §§ 31, 38.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6929-6931.]

3. EVIDENCE (§ 501*)—OPINION EVIDENCE—SANITY.

The law makes a distinction between the subscribing witnesses to a will, who may testify to their opinion of the soundness of mind of the testator, and all other witnesses, including medical men, who must testify as to facts, and, if allowed to give their opinions, must base them on such facts; but, if it is shown that a subscribing witness did not pay any attention to the testator, or conditions were such that he had no opportunity, his evidence is no more important than the others.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.*]

4. WILLS (§ 52*)—TESTAMENTARY CAPACITY—SUICIDE.

Neither from attempted suicide before the making of a will, nor the completed act afterward, does the law draw any inference of insanity; it being but a fact, among others, to be considered by the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101-110; Dec. Dig. § 52.*]

5. WILLS (§§ 37, 55*)—TESTAMENTARY CAPACITY—"LUCID INTERVAL"—EVIDENCE.

A "lucid interval" is not merely a cessation of the violent symptoms of an insane disorder, but a restoration of the mind sufficiently to have a sound and disposing mind and testamentary capacity, and the evidence to show a lucid interval should be as strong as that to show insanity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 77, 137-153, 161; Dec. Dig. §§ 37, 55.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4255, 4256.]

Probate of the will of George Miller, deceased. William H. Miller and another oppose the probate. Probate allowed.

Argued before PENNEWILL, C. J., and BOYCE and RICE, JJ.

Willard Saulsbury and Hugh M. Morris, both of Wilmington, for appellants. Benjamin Nields and John P. Nields, both of Wilmington, for respondents.

An issue, directed by the court, on an appeal from the decree of the register of wills, for New Castle county, probating the will of George Miller, deceased.

The proceeding before the register arose on a caveat opposing the probate of the said will, bearing date the 27th day of December, A. D. 1887.

John H. Danby was the only living attesting witness to the will. When asked, "As to the best of his knowledge was George Miller of sound and disposing mind and memory?" his answer was, "I believed he was; yes." He later testified: "If I had known at the time what I found out very soon after I

witnessed that will, I wouldn't have witnessed the will."

It clearly appeared that the legal business of George Miller, except the writing of his will, was transacted by the late Victor Du Pont and Willard Saulsbury. Robert C. Fraim, who wrote the will and was named an executor therein, went with Miller to the Union Bank, where the will was executed, and did the talking.

George Miller was an excellent mechanic, and acted as a foreman in the shops of the E. I. Du Pont De Nemours Company until the latter part of the year 1886. He became from about 1880 a very excitable, eccentric, impulsive and irritable person, and could not very well stand contradiction or opposition. During the last few years when working in the Du Pont shops he sometimes acted in a very peculiar and unaccountable manner. He would throw his hands, curse and talk to himself when at work, and often curse other workmen without apparent cause. One of the workmen witnesses said he jumped around and cursed everybody, that he talked about signs the people were throwing to some lady, and acted like a crazy man, and accused one of flirting with a certain woman and another of being about his place at night, and threatened both of them.

He lived with his brother, William Henry, for about nine years, and until August, 1886, when, falling out with Henry, he went to live with his brother John S. Both testified that George was crazy for three or four years before he went to California the first time in December, 1886. John said while living with him "he would write wills by the day and throw them away"; he would ponder over a deaf and dumb alphabet hour after hour: "sometimes when talking with him in the presence of my brother, if I would move my legs or arms he would jump up and curse me, claiming that I was making signs. I have found him standing more than once in my bedroom at midnight with a revolver in his hand. I have known him to get up at midnight and go over to my brother Henry's hunting for some supposed person who was in company with this woman (meaning his niece Jennie, daughter of Henry). He was off on signs and notions about Jennie. He would have hallucinations. He was crazy. If you agreed with these fool notions of his about Jennie, he would do anything you wanted him to do, but if you did not he would not speak to you. She was the one he always talked about in these hallucinations; he was terribly interested in her and terribly afraid some accident would befall her. His condition and habits continued all the four months he was with us, and while he lived with Henry. We had the same trouble with him for years. He had a sunstroke in Cuba when he was a young man. He was foreman in the Du Pont shops when he came to live with me, and transacted his own busi-

ness, made his own deposits and wrote his own checks before going to California in 1886." William Henry said his brother George was always rather irritable, and would not sit at table when company came. Toward the last he could not manage his affairs in the shop; would quarrel with the men, and stand and look around for hours, "but his money affairs I would not like to say much about, because he used to talk to me a good deal about those things and tell me everything he done. They were in Mr. Saulsbury's and Mr. Du Pont's hands, and he would only do such things as they sanctioned him to do. I knew that from his own mouth. He and I would often have a little argument between ourselves and he would always make me go to those gentlemen to have them written out." Witness thought the habit of studying a deaf and dumb alphabet was evidence of insanity. George had tied his (Henry's) door at night and had made him look under the lounge and for people outside. "I know he liked Jennie. He was queer from 1880 to 1886. For nine months I lived in purgatory. It was all on account of this girl here. We told him over and over again that he was going crazy. He said, 'Did you ever hear of a crazy Miller?' If the boys going up and down the road would whistle, or the women folks shake the tablecloth he would say it was a sign, and go around at a terrible rate, especially if the girl here would do it. He was jealous of other people coming around there after her. He would sometimes come in my room when I was in bed with a revolver in his hand, and my wife would say something to him and he would leave. He was always looking for some one, afraid of some one, or imagining some one was after him, and we could not convince him to the contrary. George and I were the fastest two brothers there were in the town. He wrote me some letters from the asylum, and he wrote me some before he went to the asylum, which were nice and affectionate letters." Other witnesses testified respecting the strange actions and peculiar condition of the testator before he went to California in 1886, from which it appears that he believed the common acts of others were signs intended to attract the attention of Jennie; that he would threaten to shoot when he had no revolver; would be out with a revolver until midnight or after, and imagined that some one was after him or Jennie. He would at times go around with bowed head talking to himself. On one occasion he became angry because a boy's cap was pulled down over his face, and on another occasion when it was snowing and he was about to leave for California, said the boys up the creek would throw flour over him.

Alfred I. Du Pont, called as a witness in support of the will, testified that George Miller was a foreman mechanic in the shops and the witness was in almost daily communication with him, as assistant superintendent of

the powder works, from 1884 till he left late in 1886. Had known him since witness was a little boy. He never knew a better machinist. He carried on his business in a normal manner. He had conversations and dealings with him in relation to his business.

Thomas J. Sterling testified that he knew George Miller more intimately than a brother for many years. He at times saw George in the shops, when he was working; they were frequently together at theaters, political meetings and gatherings. He was sometimes very irritable and would get mad, but would soon get over such spells. "In 1886 about the time Mrs. Deer (Jennie) was going to boarding school, and shortly before George went to California, he told me he intended to make a will and also to leave the majority of that will to Jennie Miller, and intended her to be the richest Miller in the state of Delaware, and said, 'I expect there will be some trouble about this will, and if you are living at that time, come up and testify that is the way I intended to make the will.' He hadn't made any will at that time. He was thinking about making one."

Several other witnesses who knew George Miller, and had seen and talked with him at various times up till he went to California in 1886, and some of whom had business with him at the shop in connection with machinery, also testified. Those who testified for the caveators believed him incapable of making a will, while those who testified in support of the will believed him capable of making a will.

Jennie Deer, niece and the chief beneficiary under the will, testified that she saw her Uncle George every day while he lived with her father and mother. She was at school when he went to California the first time, having started to school in September, 1886. Her Uncle George came to see her often when she was at school at Bridgeton, New Jersey. She was at school about four months. "My mother and I were the ones who waited on my uncle, and I was the one he ever took out with him walking and driving until I went to school. He was employed at Du Pont's machine shop and my father kept the time of the employes every day up until the last of the month. He kept it in a little paper, and at the end of the month he wrote that off for Uncle George and he made up the men's monthly time. That is what they paid the men off from, the time sheet that Uncle George made up. He made that the last night in every month. I was right there, but I never helped any more than getting his paper and ink, and everything like that, ready for him. He taught my brother then to keep the books and my brother taught my husband. After he left our house he used to stop in every morning to see us, coming from John's before he would go to work. He always said that I was the one who was to have his money. Always did so. He always

said he would leave me well fixed. I never knew of his giving any trouble while living at our house, such as tying the doors, jumping out the window, complaining about the croaking of frogs, and shaking of tablecloths or napkins. Never heard of such things till I heard them here. He did not object to my going with others—only wanted me to pick my company and not go with the creek boys. After he left the shop he came to our house only once before I went to school, and he drove me to Coatesville. I was not afraid of Uncle George and nobody else was. I never went to Aunt Maria Kirk's during the time he was staying there. Never went there in my life."

It appears that on the 22d day of November, five days before the will was made, that William H. and John S. Miller joined with their brother George in a deed conveying, for the sum of \$743.75, a lot of land in Wilmington to David Fox; and also on the 20th of February, 1886, in a deed conveying, for the sum of \$2,305, a lot of land in said city to George W. Beckley; and that William H., by deed dated September 6, 1886, conveyed to George, for the sum of \$1,200, the one-third part of the interest of William H. in a tract of land in Brandywine hundred, containing 30 acres. It further appears that George, on September 17, 1887, satisfied a mortgage which he held against David B. Ferris for \$8,000, which mortgage was given on November 3, 1886.

John S. Miller testified that Mr. and Mrs. J. Wendell Wood wrote George letters urging him to come to California and bring all the money he could get with him. They were instrumental in getting him to go to California. "When he made up his mind to go he got Harry Richards, my son-in-law, to buy his ticket. George started to California on December 9, 1886, and on the second day out he attempted to commit suicide by cutting his throat with a small penknife while in the toilet room of the car, the door of which he had locked. He cut his throat about two inches, but failed to finish the job, because his knife was so dull. When they tried to force open the door George jumped out of the window while the train was in rapid motion. He ran about two miles and brought up in a stable, where he was discovered by the people of the place who took care of him. He refused to tell them his name or residence, and was taken to a nearby town and given up to the authorities. When he found he could not get off, he referred them to Victor Du Pont, who was notified. I went out and when he first saw me at the hotel where he was confined there was a dozen men sitting around, and he said: 'By God, there is our Jack. He will make you fellows stand around.' I asked him why he did this trick, and he said, 'Jack, I thought every man in that train was a detective, and that they were after me, and that they were going to arrest me.' I stayed with him about a month and got him from there to Kansas

City and from there sent him on to Los Angeles, California. I bought a ticket for him placed him in charge of the porter of the Pullman car and returned home."

He came back from California in June 1887, bringing with him a niece, Mary Walker, daughter of a sister, about 10 or 12 years old. Mr. Walker came on with him from Kansas. His two brothers, John S. and William H. testified that after he returned from California in 1887 he regarded them as his enemies and would not visit them, talk to them or have anything to do with them. He was altogether changed in his feelings towards them, who had been his best friends before. Neither they nor their wives had any relations or conversations with him at any time after his return. The testimony respecting George's mental condition from the time John left him at Kansas City till the time the will was made, is briefly as follows:

Lewis M. Miller said: "George would not go among strangers. He got queer. He would go to see my father and would get irritated and mad at almost anything. Before he was a perfect gentleman. He showed that he was lacking of mind. It might be that in 15 minutes he would change his entire method without saying anything. This was all the time he was at Mr. Kirk's. He seemed to be afraid all the time. I guess he could exercise thought. The last time he went to California he got me to go to the office with him to get his ticket. He attended to getting his ticket and getting a stop-over. I checked his trunk. Mary Walker went with him. He bought a ticket for her."

Sarah Watson: "Saw George many times when he was staying at the Kirk's. He stayed at my home at times. He was restless and nervous and talked very strange. He seemed to have turned on all his people. He spoke about seeing signs, and many little things that were done he would say were signs. He was altogether different from what he was before, changed for the worse. I know he was not sound. He would walk backwards and forwards and talk to himself. He told me about his attempt to commit suicide, and said there was some one after him and it seemed as if he was driven to it. He could talk on some subjects sensibly enough. He had a disease of the brain. I suppose he could think and form a judgment about things."

Robert Miller testified that George was a nervous quick-spoken man when he saw him at Mrs. Watson's; that was about all.

Sarah Jane Newlin, sister: "Eighty years of age. George made me a visit the year he came back from California. I think it was in August. When he came the first thing he said was: 'Sister Sallie, here is your crazy brother come to pay you a visit.' He was with me nine weeks anyway, and till December. His actions were not like they were before that. He acted differently altogether. He always seemed as if there was something

after him, or that he was afraid of something, and did not talk much, and wanted to be alone. He would go out in the lane on moonlight nights after the family had gone to bed, and would be wringing his hands and crying when I would go to see him to coax him to come in. Sometimes I could not get him to come in, and he would say if he did he would cry all night and could not sleep. Sometimes out as late as 12 o'clock, but he would never go outside the door if it was dark. He never read any, although he was a great reader before. He seemed to think the two boys, John and Henry, were his enemies. Gave no reason, just had that feeling towards all his people, I think. Mary Walker was with him, and he did not seem to want her to go to see his brothers' families. He told me he went into John Miller's bedroom and took a revolver with the intention of shooting himself, and he said that there was a good angel on one side, and that was his mother, and a little devil on the other, and the demon told him to do it; and the other one begged him not to do it. Just this good angel that saved him, his mother. He showed me the scar when he attempted to commit suicide. He didn't talk to me like an uncle ought to talk about his niece Jennie, but more like a lover. Said she was much nicer than any of the rest, and that she acted with signs. She acted more gracefully than any one he knew. It was not her fault. She was an innocent little girl. He would start conversations and never finish them. Went to Maria Kirk's from my place."

Jane Deer: "He came to my home the day he made the will, and he told me, he says, 'Jennie, Uncle George has fixed everything for you to-day,' and he says, 'I have made a will.' I didn't say anything to him, or ask him how, but he says, 'I have clinched it, and I have double clinched it; and John S. or no other Miller will take that away from you.' I never said aye, yes, or no. After he returned from California in 1887 I believe I saw him every day and sometimes twice a day, only when he was in Coatesville. He would often bring me something, and the second time he came he gave me money to buy fruits to do all my preserving. That was after I was married. Gave me a Christmas present in 1887, a \$20 gold piece. I think it was about February he left for California again. The Millers were not a very social family. There were six or seven years when my father never spoke to John S. Miller, and had not been visiting Uncle John, and had not been at his home for six years before Uncle George died."

Wm. H. Deer: Talked with George Miller many times in 1887 on various subjects—his trips to California, mechanics, processes of various nature, and particularly about the finishing of cotton—"the business I was engaged in at Bancroft's. He explained to me a short and simple way of getting the ca-

capacity of a cylinder, and said it would save a lot of figuring. I have always kept it and found it a very quick method for determining results of that kind. He was at our home often, and sometimes stayed all night. He was there as late in 1887 as the latter part of December. I thought he was a very intelligent man, and never noticed anything wrong."

Daniel Fisher, powder maker: Worked for Du Pont Company; knew George Miller when he went to California in 1886, and many years before. "Saw him after he returned from California, and talked with him once I remember for 15 or 20 minutes. I certainly knew him well. He was all the time the same George Miller to me. I never saw any change in the man. He was always the same except sometimes when he would get off a little—that is, get a little worked up—excited. I heard the women say he was crazy. I never saw any craziness in the man, or any other kind of matter with him. I never saw anything peculiar, only he would get off that quick, and then it was all over. He never tried to control his passions."

In February, 1888, George Miller returned to California unaccompanied by any one except the little girl Mary Walker, who was returning to her home in Kansas. One witness sat at a table with him during a meal while he was at his sister's in California; he did not say anything, but looked at her in a peculiar way.

John S. Miller testified that Dr. Lowry, who attended George after he attempted to commit suicide, told him George's mental condition would never be any better but would grow worse. Dr. Powell was called by William H. Miller to examine his daughter Jennie. He thought Miller was suffering from delusions and hallucinations concerning his niece Jennie.

Dr. Springer testified as an expert, and, basing his opinion upon the testimony given in the case and which he had read, thought George Miller insane and incapable of making a will.

George Miller was in September, 1890, adjudged insane by the superior court of Los Angeles county, Cal., and ordered to be confined in the Stockton State Asylum for the insane. On the 19th day of December, 1890, a guardian and trustee was appointed by said court of the estate of said George Miller insane. He was confined in said asylum until his death in 1910. Certain letters were written to his brother while he was in the asylum, and also shortly before, which indicated that he was of unsound mind at the time.

PENNEWILL, C. J. (charging the jury). Gentlemen of the Jury: This is a case in which the validity of an alleged will is contested. The court has seen fit to direct an issue to be tried by a jury in order the bet-

ter to determine the question they must decide.

The caveators, or contestants, are William H. Miller and John S. Miller, brothers of the testator, who oppose the probate of a certain paper writing as the will of their brother George Miller, on the ground that at the time of the execution of said paper writing George Miller did not have testamentary capacity. They contend, generally, that he was at the time of unsound mind, and in particular, that he was then laboring under insane delusions both with respect to his said two brothers, and also with respect to his niece Jennie, who is a daughter of William H. Miller, and the chief beneficiary under the alleged will.

We will not undertake to state the testimony. The alleged will, and certain other papers, letters and legal instruments are in evidence, marked as exhibits, and you will have them with you when you retire to your room.

All the other evidence, consisting of the testimony of many witnesses; you must remember as best you can, and we have no doubt your recollection will be good and true, because you have been remarkably attentive during the progress of the case for several days.

George Miller, the testator, was never married. He was born in New Castle county in the year 1836, and went to Cuba as a mechanic when a young man and remained there for several years. When he returned to this state he lived with his father and mother till they died, and later resided with his brother William H. for about nine years. He left there in August, 1886, and went to his brother John's where he remained until he started for California in December, 1886. He began working as a mechanic at the Du Pont De Nemour Powder Mills about 1867, and continued to work there till a short time before he left for California. A day or two after he started West he attempted to commit suicide by cutting his throat with a knife, and jumping from a rapidly moving train on his journey. His brother John S. having received information of such occurrence went West and remained with his brother until he had sufficiently recovered to resume his journey to California. He remained in that state at the home of John Wendell Wood for about six months when he returned to this state, and stayed for a short time at the Clayton House in Wilmington. After that he resided with certain female relations until he returned to California in the latter part of January or the first part of February, 1888.

He executed his alleged will December 27, 1887, before he started for California the second time. After returning to California he lived with the said John Wendell Wood during most of the time until he was adjudged insane and committed to an insane asylum in September in the said state in the

year 1890, where he remained continuously until his death on the 3d day of June, 1900.

The question that you are to determine in this case is whether the paper writing bearing date December 27, 1887, and purporting to be the last will and testament of George Miller, deceased, is or is not his last will and testament.

[1] Under the law of this state any person of the age of 21 years or upwards, being of sound and disposing mind and memory, may make a will. Every person is presumed in law to be of sound mind until the contrary is shown, and the burden of showing an unsound mind in the testator to the satisfaction of the jury by competent evidence rests on the party contesting the validity of the will, and the testimony must relate to the time of its execution.

Testamentary incapacity is not to be presumed, but must be satisfactorily shown to the jury by the preponderance or greater weight of the evidence in the case.

If, however, insanity is once clearly established, the burden shifts, and it devolves on those supporting the will to show, by testimony as strong as that required to establish insanity, that it did not exist at the time the will was made; the burden, however, does not shift until insanity is so established to your satisfaction by a preponderance of the evidence.

[2] In determining the question of testamentary capacity, that is, whether the testator was of sound mind, you must direct your minds to the precise time of the execution of the will. In cases like this courts have been liberal in admitting testimony as to the mental and physical condition of the testator, both before and after the time of the execution of the will; but such testimony is admitted only for the purpose of enlightening your minds, so that you may have the environments of his life, and be able to concentrate your judgment upon the critical moment, and to say in that concentrated light whether at the precise time of the making of the will he was of sound and disposing mind and memory. If he was, then it is a matter of indifference what may have been his condition at any other time. *Ball, Guardian, v. Kane's Executor*, 1 Pennewill, 104, 39 Atl. 778.

In the case of *Smith v. Smith's Adm'r*, 2 Pennewill, 251, 45 Atl. 398, this court said: "The law gives a person the right to dispose of his property as he sees fit, and he alone is the judge of how he will dispose of it. You are not to consider whether it is such a will as you would have made, or such a will as you think he ought to have made. If he was possessed of a sound and disposing mind and memory, it was his right to dispose of his property by will as he pleased, and with that disposition you have nothing whatever to do."

There are many varying grades of mental capacity, ranging from weak to strong—from

the lowest to the highest degree of intelligence.

Intellectual feebleness alone, or mere weakness of the understanding, whether this condition of the mind be natural or the result of injury, or of disease, does not disqualify a person from making a valid will. A partial failure of mind or memory, that is to say, even a failure of mind or memory to a considerable extent, from whatever cause, is not, in itself, sufficient ground for setting aside a will, if there still remains sufficient mind and memory to enable the testator to comprehend and understand what he is about, or what he is doing. If he is able to understand that he is disposing of his estate by his will, and to whom he is disposing of it, however weak his intellect may be, he is able and competent to make a valid will. And hence the courts never undertake to measure the size, the degree, or the extent, of a man's understanding or capacity; nor do they ever inquire into the wisdom, or the folly, of the dispositions which he may have made of his estate.

The question is not so much as to the degree of mind or memory possessed by the testator, as this: Had he sufficient mind and memory? Had he a disposing mind and memory? Was he capable of recollecting what property he was disposing of, and to whom he was disposing of it? In a word, were his mind and memory sufficiently sound to enable him to know, and understand, the business in which he was engaged, at the time when he executed his will? *Jamison v. Jamison's Will*, 3 Houst. 108.

If the jury are of the opinion from the evidence that the testator was capable, at the time he executed his will, of exercising thought, and judgment and reflection—if he knew how he was disposing of his property,—what he was about, and had memory and judgment, his will cannot be invalidated. *Chandler v. Ferris*, 1 Har. 454; *Lodge v. Lodge's Will*, 2 Houst. 418.

In the case of *Sutton v. Sutton*, 5 Har. 461, Chief Justice Harrington instructed the jury that testable capacity on the part of the testator amounted to nothing more than a knowledge of what he was about, and how he was disposing of his property, and the purpose so to do it.

In considering and determining the question of capacity, the time when the will was executed is the material point to which the jury must look, to ascertain the state and condition of the testator's mind. For, although he may have been incapable at any time before or after that period, yet, if he had sufficient capacity at the time when the will was executed, his prior or subsequent incapacity amounts to nothing and the will must stand.

[3] It is to the words, the conversations, the appearance, the acts and doings, the conduct and behavior of the testator we are to

look to ascertain the state of his mind; they alone are to us the external, visible and natural signs, or indications, of his mental condition. And therefore, in this case, as in all other cases of like nature, the question of capacity must be determined from the facts and circumstances disclosed and established by the evidence. In examining and weighing that evidence, you will carefully consider the character of the witnesses, for veracity and integrity—their bias and interest, on the one side, or on the other, if any—their intelligence and judgment, and their respective opportunities and powers of observation. And here it is but proper we should say to you that the law makes a distinction between the subscribing witnesses to the will and other witnesses. The subscribing witnesses being placed by the law around the testator, at the time of the execution of his will, for the special purpose, among others, of ascertaining and judging of his capacity, they are permitted to testify as to the opinion they formed at the time, of the condition of his mind—whether it was sound or unsound. And if they are persons of intelligence and veracity their opinions are entitled to great weight with the jury. Other witnesses may testify to his behavior, his conduct and conversations, his appearance, and to particular facts, tending to throw light on the state of his mind, and from which its condition can be fairly inferred, at the time he executed his will, but they cannot testify to their opinion, merely, of his capacity, without also stating the facts upon which that opinion is founded; and if the facts do not fully and clearly warrant that opinion, the opinion must go for nothing, for it is the fact, and not the opinion, upon which you must rely, in forming your judgment.

The testimony of medical men stands upon the same ground, except that, being more competent to form an opinion upon subjects of this kind, greater weight will in general be given to such opinions. *Jamison v. Jamison's Will*, 3 Houst. 108.

Of course the value of the opinion of a subscribing witness, like other witnesses, depends upon the opportunity the witness had to observe and judge the testator's mental condition and capacity at the time the will was executed, and upon his use of such opportunity. If it clearly appears from the testimony that he did not have, or having, did not use, his opportunity of observation, the special value of his opinion ceases, because the peculiar weight given by law to such testimony arises from the witness' opportunity of observation and the probability of his using the opportunity on account of his participation in the transaction.

In the *Kane Will Case*, the court said: "In determining the testator's condition at the precise time of the making of the will, the jury should give to the testimony of the

subscribing witnesses to the will such credit as their peculiar relations to and opportunities of knowing his condition just then entitle them. The law places them there to speak to that point."

In the case of *Duffield v. Morris*, 2 Har. 375, the court charged the jury that: "The paper itself (that is, the will) which was before the jury would afford important aid in determining the question of insanity. Are its dispositions in accordance with, or in opposition to, the previously expressed purposes and known affections of the testator? The internal evidence that it affords, with all the circumstances which surrounded it, may be fairly brought to bear on this question; remembering that whilst we are looking into the will itself for evidences of sanity or insanity, we are not to make a will for the testator ourselves, but to let his will be the reason for his act, unless something appear plainly inconsistent with sanity itself, or with his previously expressed and deeply fixed purposes."

It is not denied that George Miller attempted to commit suicide in the manner shown by the testimony about a year before he made his will, and it is contended by the caveators that such act established the fact that the testator was insane at the time. And they further contend, that if insane at that time the law presumes that his insanity continued up to the making of the will, and that the will is therefore invalid, unless it is shown to your satisfaction that he was, at the time the will was made, of sound and disposing mind and memory.

This would be a sound proposition of law if an attempt to commit suicide established the fact of insanity.

Does it establish such fact, or does the law infer insanity from such an act?

Upon this point the court in the *Duffield* Case said:

"The day after the execution of this paper, Dr. Morris committed suicide, and this introduces another important question as to what operation and weight this fact ought properly to have in determining the question of sanity or insanity at the time of making the will. This also is a question of fact for the jury, to be determined according to their own view of the nature of the act in general, and in reference to the particular case before them. * * * All the court had to say to them on the subject was that in our opinion the law draws no inference either of sanity or insanity from the fact of suicide itself alone. * * * The law makes no inference from it. It stands as a fact, together with all the other acts of the deceased's life, together with his character, situation, habits, thoughts, purposes, principles and affections, so far as these are made known to the jury through the medium of the evidence, from which they are to determine whether the deceased, not merely at the time of committing

suicide, but at the time of making his will was of unsound mind."

In *Koegel v. Egner*, 54 N. J. Eq. 623, 3 Atl. 394, it was said by the court: "The fact that the testator's mind was so affected as to cause him to attempt suicide, in which he was ultimately successful, is not inconsistent with testamentary capacity. It is in its very nature transitory, and the proof of the existence of an attempt at suicide, or of the act itself, by no means establishes its existence at an antecedent or subsequent period of time. No presumption of fixed or lasting mental aberration arises upon such proof."

[4] We therefore state this to be the law upon this point: Neither from an attempt at suicide, nor from the completed act, does the law draw any inference of insanity. The proof of such an attempt or act does not establish unsoundness of mind at an antecedent or subsequent period of time. It stands simply as a fact, together with all the other facts shown by the evidence, from which the jury are to determine whether the deceased at the time of making his will, was of sound or unsound mind.

As we have already said the caveators contend that George Miller was before, and at the time, of making his will laboring under insane delusions with respect both to his said brothers and his niece, and that the will in question is, therefore, invalid.

This court, in the *Duffield* Case to which we have referred, in speaking of delusions used the following language:

"A sound mind is one wholly free from delusion, all the intellectual faculties in a certain degree of vigor and harmony; the propensities, affections and passions being under the subordination of the judgment and will, the former being the controlling power, with a just perception of the natural connection or repugnancy of ideas. Weak minds again only differ from strong ones in the extent and power of their faculties. * * * A perfect capacity is usually tested by this: That the individual talks and discourses rationally and sensibly, and is fully capable of any rational act requiring thought, judgment and reflection. This is the standard of a perfect capacity; but the question is not how well a man can talk or reason, or how much judgment he can display, or with how great propriety and sense he can act; it is only, has he mind and reason, can he talk rationally and sensibly, or has he thought, judgment and reflection? Weakness of mind may exist in many degrees without making a man intestate. * * *

"An unsound mind is marked by delusion: it mingles ideas of imagination with those of sensation, and mistakes one for the other. It is often accompanied by an apparent insensibility to, or perversion of, those feelings which belong to our nature. Insane delusions consist in the belief of facts which no rational person would have believed. It may sometimes exist on one or two particular sub-

jects, although generally it is accompanied by eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may lead to confirm the existence of delusion, and to establish its insane character. * * *

"It is hard to define the invisible line that divides perfect and partial insanity. Each case must rest on its own circumstances. * * * And this doctrine of partial insanity is applicable to civil cases, if existing at the time of the act done, and will avail to defeat a will, the direct offspring of such partial insanity. But it has been held that a will cannot be set aside on the ground of monomania, unless there be the most decisive evidence, that at the time of making the will, the belief in the testator's mind amounted to insane delusion."

The court in the Duffield-Morris Case said, in speaking of insane delusions: "This was the great question for the jury to try, whether the testator was the subject of such insane delusions, fancying things which did not exist, and could not exist, and which no reasonable mind could believe to exist; did this delusion (if any existed) continue up to the time of making his will, without intermission at that time, and to such an extent as to exclude thought, judgment and reflection, to deprive him of the power of rational conversation on the matter he was about, and of that kind of knowledge that would enable him to apprehend in his own mind that he was making a will, and the objects and purposes of such an act? If he had this knowledge, memory and judgment, it is what the law means by a sound and disposing mind and memory, which is sufficient to make the will valid, whatever may have been the state of the testator's mind before or after."

We think the law respecting delusions is well settled. It was very clearly and tersely expressed by the court when they said, in the Duffield Case: "Partial insanity, meaning insane delusion, will avail to defeat a will which is the direct offspring of such partial insanity or insane delusion."

Such is the doctrine now recognized by the courts, not only of this state, but of this country and of England. It is no longer held that the mere existence of a delusion, at the time of the execution of the will, will invalidate the will; and the noted case of *Warring v. Warring* has been long since disregarded and overruled.

In *Redfield on Wills*, 79, cited by the caveators, it is said: "Where the testator is subject to delusions with regard to persons who would be the natural objects of his testamentary bounty, his will made while he is under the influence of such delusions is invalid."

And *Theobald* in his work on *Wills*, at 14, says: "When the delusion manifestly operated upon the disposition in the will, then the will must be declared void."

In the case of *Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211, the court, repeating the language used in an earlier case, said:

"Beyond all question it is within the previous rulings of other courts of the highest respectability that where there is insane delusion in regard to one who is an object of the testator's bounty which causes him to make a will which he would not have made but for that delusion, such will cannot be sustained."

In *Re Segur's Will*, 71 Vt. 224, 44 Atl. 342, it was held: "If he has an insane delusion in respect to one of his children, or other natural objects of his bounty, and the instrument presented for probate is the product of such insane delusion, it is void because he has not the testamentary capacity the law requires."

The same principle is recognized in other cases cited by the caveators, including *Shaw's Will*, 2 Redf. Sur. (N. Y.) 107, and *Matter of Dorman*, 5 Dem. Sur. (N. Y.) 112.

Such being the law, we say to you that the mere fact that a testator had delusions at the time he made his will is not sufficient in itself to invalidate the will. To have such effect the jury must be satisfied that the will was the direct offspring or product of such delusion, was made under the influence thereof, or the delusion manifestly operated upon the disposition in the will.

The rule is, that if the delusion was not such as to affect the testator's knowledge, memory and understanding of the extent and nature of his estate, the proper objects of his bounty, and the nature of the testamentary act, he has capacity in law to make a will. In the particular case the inquiry should be: Did the testator, notwithstanding the delusion, have a sound and disposing mind and memory at the time he made his will? In the last analysis that is the question the jury must decide, and we have stated as clearly as we can the law that must control you in reaching such decision.

We cannot define or describe to you specifically the symptoms or evidences of insanity or insane delusions, and any attempt to do so would probably confuse rather than assist you. All that we can say, and we think all we should say, is that you must determine from the facts disclosed by the evidence in the case whether George Miller was insane, or laboring under an insane delusion, at the time he made his will; and if you find that he was, you must then determine whether the insanity or delusion was such as would invalidate his will under the law as we have stated it.

[5] We may say that a lucid interval, as the term is used in speaking of lucid intervals of insane persons, is not merely a cessation of the violent symptoms of the disorder, but a restoration of the mind sufficiently to have a sound and disposing mind

and testamentary capacity as we have defined it in the course of this charge. The evidence in support of a lucid interval, after derangement has been established, should be as strong and demonstrative of such fact as when the object of such proof is to show insanity.

Because of the importance of this case, we have given you at some length the principles of law respecting testamentary capacity, as declared by the courts of this state; and courts and juries, too, must be governed by that law in determining whether the testator had or had not, at the time he executed his will, testamentary capacity, that is, a sound and disposing mind and memory.

The law respecting testamentary capacity being so well settled in this state, there does not seem to be any necessity or reason for resorting to authorities in other jurisdictions in order to determine whether George Miller was, or was not, of sound and disposing mind and memory at the time he executed his alleged will. The cases in other jurisdictions are almost innumerable, but after all the general principles declared by the courts in the different states are substantially the same. Generally, the important and difficult thing is to apply such principles to the facts of the particular case.

In conclusion we will say that the question which you are now called upon to decide lies within a very narrow compass. It is simply this, whether George Miller on the 27th day of December, 1887, the time when the will now in issue before you was executed by him, had sufficient mental capacity, that is, mind and memory, to make a valid will; and if you shall be satisfied from the evidence that the mind and memory of the testator at the time when he executed his will was not sufficiently sound to enable him to know and understand what he was about or what he was doing, your verdict should be against the will. But if, on the contrary, you should be satisfied from the evidence that the mind and memory of the testator, at the time he executed his will, was sufficiently sound to enable him to exercise thought, reflection and judgment and to know and understand what he was about, or what he was doing, then his will should stand, and your verdict should be in favor of its validity.

The jury found the paper writing to be the last will and testament of George Miller, deceased.

KENNEDY et al. v. AMERICAN TANNING CO.

(Court of Chancery of New Jersey. Jan. 29, 1913.)

BANKRUPTCY (§ 144*) — STATE INSOLVENCY PROCEEDINGS—EFFECT.

After an adjudication of bankruptcy, all the rights, liens, and claims alleged against the property or the bankrupt must be determined

by the bankruptcy court; and as soon as a proper custodian is designated by that court, and an application is made to the Court of Chancery to have the assets in receivership or custodia legis turned over to that court, the receiver should be ordered to turn over all that he has received, less his compensation, including any expenditures actually made or incurred to that end.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 237; Dec. Dig. § 144.*]

Suit by John A. Kennedy and others against the American Tanning Company. Upon report of receiver, and motion to turn assets over to a trustee in bankruptcy. Decreed that receiver's account be settled, deducting expenditures, and the balance of the property turned over to the trustee in bankruptcy.

Elmer H. Geran, of Jersey City, receiver pro se. Wilfred C. Roszel, of Newark, for trustee in bankruptcy. Pitney, Hardin & Skinner, of Newark, for Junius Beebe.

GARRISON, V. C. The facts necessary to be considered are as follows: The defendant corporation was incorporated under the laws of the state of New Jersey. An application under the Corporation Act was made for an injunction and a receiver, and Elmer H. Geran was appointed receiver on the 2d day of February, 1911. The company occupied premises owned by Junius Beebe, and the receiver and Mr. Beebe made some arrangement about compensation for the use of the premises during the time that the property of the defendant company occupied the same after the receivership. The receiver disposed of all of the assets of the company excepting a secret formula. With things in this situation a petition in bankruptcy was filed on the 23d day of April, 1911, and the American Tanning Company was adjudicated a bankrupt on the 13th day of November, 1911, and thereupon one Paul M. Fisher was appointed as trustee in bankruptcy. The trustee in bankruptcy has applied to the receiver of this court to turn over to him all of the assets in his hands, and the receiver of this court has presented his report and requested an allowance, and has requested that the obligations incurred by him for caring for and preserving the property during the time that it was in his possession as receiver shall be allowed. The trustee in bankruptcy opposes the receiver in these requests, and insists that this court shall turn over to such trustee in bankruptcy all of the property in the possession of the receiver, without passing upon his accounts and making any allowances for his services or for any expenses incurred by him in caring for and preserving the property.

A full consideration of all the possible questions arising out of this situation would entail much time and would result in an extended review of many decisions. In view of certain settled principles, and of a pre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

vicious ruling in this court, I do not purpose at this time to make any such extended review or exposition. In the case of *Singer v. National Bedstead Manfg. Co.*, 65 N. J. Eq. 290, 55 Atl. 868 (Stevenson, V. C., 1903), the court decided that, where there was no opposition insisting that this court should keep all of the assets in its possession under some claim of jurisdiction, the proper order would be to direct that the receiver of this court should forthwith present his account and report, and that proper allowances thereout should be made, and the residue of the assets in the receiver's hands should be turned over to the trustee in bankruptcy. The conclusion reached by the Vice Chancellor in that case is sustained, not only by the reasons advanced by him therein, but also by authority. The following cases clearly indicate in my view that the course pursued is the proper one: *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 344, 50 Atl. 387, 6 Am. Bankr. Rep. 740; *Wilson v. Parr*, 115 Ga. 629, 42 S. E. 5, 8 Am. Bankr. Rep. 230; *Hanson v. Stephens*, 116 Ga. 722, 42 S. E. 1028, 11 Am. Bankr. Rep. 172; *Loveless v. Southern Grocer Co.*, 159 Fed. 415, 86 C. C. A. 395, 20 Am. Bankr. Rep. 180; *Re Watts and Sachs*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, 10 Am. Bankr. Rep. 113.

To the extent that it is necessary for me to do anything more than to cite the precedent established in this state and supported, as I view it, by authorities elsewhere, I may thus briefly summarize it: Since it is not suggested in this case that the jurisdiction being exercised in this case was not one which was superseded by the bankruptcy proceeding, I concede, for the purpose of further consideration, that the effect of the proceeding in bankruptcy was to supersede the existing proceeding in this court. I understand the law to be that all liens, rights, obligations, and claims alleged to exist against the property, or the bankrupt, must therefore be adjudicated and determined by the bankruptcy court. I understand that, so soon as a proper custodian is designated by the bankruptcy court, and application is made to this court to have the assets in custodia legis turned over to the bankruptcy court, an order to that end should be made. In my view, what should be turned over is all that the custodian appointed by this court received less that which it has taken to compensate the receiver or custodian for taking care of the property. This would necessarily include his expenses in that respect, compensation for such care and preservation, and any expenditures actually made or incurred to that end.

Without going deeply into the matter, I cannot conceive it possible that the bankruptcy court would contend that it was entitled to take over the property which had been in custodia legis in this court until this court should have reimbursed those who had, under

its direction or with its sanction, expended moneys for the preservation of the property in question. Very different questions arise where moneys are to be paid out for any other purposes, and I shall not herein discuss those other questions. In the case at bar it will be recalled that the receiver herein was appointed on the 2d of February, 1911; that the application in the bankruptcy case was filed on or about the 23d of April, and the adjudication was not until November, during all of which time the property of necessity was in the custodianship of the receiver appointed by this court, and all the expenses intended to be allowed are for actual preservation and care.

The order herein will be that the receiver's account shall be settled; that all expenditures actually made for preservation of the property shall be reimbursed to him; that any obligation that he undertook for the purpose of caring for and preserving the property shall be paid; and that the balance of the money, after deducting the amount necessary to meet the items above mentioned, shall be turned over to the trustee in bankruptcy. The secret formula has already been turned.

An order in accordance therewith may be settled on notice.

IN RE VAN NOORT.

(Supreme Court of New Jersey. Dec. 9, 1912.)

1. ELECTIONS (§ 271*)—RECOUNT—PURPOSE.

Under Election Act (2 Comp. St. 1910, p. 2125) § 159, authorizing a recount of election returns, a candidate is given a right to a recount for the purpose of having a correct result of the voting declared, and not for the purpose of detecting fraud or crime, though they may be incidentally disclosed.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 248; Dec. Dig. § 271.*]

2. ELECTIONS (§ 278*)—RECOUNT — TIMELY APPLICATION—MANDATORY STATUTE.

The provision of Election Act (2 Comp. St. 1910, p. 2125) § 159, limiting the time within which a candidate may present his petition for a recount to 10 days after the election, is mandatory.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 258-262; Dec. Dig. § 278.*]

3. STATUTES (§ 227*)—CONSTRUCTION — AFFIRMATIVE WORDS MANDATORY.

Affirmative words in a statute make it imperative, if they are absolute, explicit, and peremptory, and show that no discretion is intended to be given.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.*]

4. ELECTIONS (§ 278*)—RIGHT TO A RECOUNT —TIMELY APPLICATION.

Where the court, under authority of Election Act (2 Comp. St. 1910, p. 2125) § 159, authorizing a recount on application made within 10 days after election, granted an application for a recount of the vote of a part of the county, on condition that if the partial recount should change the result an entire recount of the county would be ordered, the applicant having declined to have the vote of the entire county recounted, the court had no power to grant a recount of the entire county on a second ap-

plication more than 10 days after the election, regardless of whether the second application be considered a new or an amended petition.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 258-262; Dec. Dig. § 278.*]

5. ELECTIONS (§ 271*)—RIGHT TO RECOUNT—REASON TO BELIEVE ERROR.

Where a petition for a recount of election returns was based upon a mere conjecture that the result might be in the applicant's favor, and it appeared equally probable, in view of a partial recount already had, that the result would be to the credit of the incumbent, the petition could not be allowed; the petitioner having no "reason to believe" an error had been made "whereby the result of such election has been changed," as the quoted words are used in Election Act (2 Comp. St. 1910, p. 2125) § 150, authorizing a recount.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 248; Dec. Dig. § 271.*]

Petition by Frank J. Van Noort to recount the votes for sheriff of Passaic county. Petition denied.

Argued before MINTURN, J., under the statute.

William B. Gourley, of Paterson, for the application. William I. Lewis and Thomas F. McCran, both of Paterson, opposed.

MINTURN, J. [1] The power of the court to grant a recount is based upon the theory outlined in the 159th section of the election act (2 Comp. St. 1910, p. 2125), that an error has been made by the board of elections, or of canvassers, "in counting the vote or declaring the vote of such election," and that the petitioner has "reason to believe" that an error has been made "whereby the result of such election has been changed."

While the existence of fraud may be developed as the result of such a recount, it is quite manifest from the language of the act that the object of the Legislature in committing the recount to the county board of elections was not for the purpose of detecting fraud, or of demonstrating that fraud in fact existed, but of rectifying irregularities and miscalculations in the count, for the purpose of having a correct result of the voting declared. If fraud incidentally develop during the recount, the court and the grand jury will be expected to take notice of it. If it should not develop, but be reasonably charged, the grand jury, as the conservators of law and order, may be expected to investigate it.

The prime object, therefore, of the 159th section of the act is to enable a candidate to secure a recount within 10 days after the election, where he has reason to believe, not that a crime has been committed, but, as the section declares, "that an error has been made in counting the vote or declaring the vote."

[2] It is insisted that the limitation of 10 days contained in this statute, within which a candidate may present a petition for a recount, is merely directory, and that the court

may exercise the power to direct a recount of the whole county at any time. I cannot so view this act. It cannot be that the Legislature contemplated the existence of an unsettled condition of public affairs in the county without limitation as to time, as such a construction as that contended for would necessarily involve. "*Interest respublica ut sit finis litium!*" And this maxim has a peculiar application to the settlement of public affairs. *Hill v. Smith*, 12 M. & W. 631. The period of 10 days after the election was the limit imposed within which time candidates, who had reason to believe the declared result was wrong as to them, might apply for a recount; and after that period the clear inference is that they were to be foreclosed of that privilege. This limitation, therefore, is manifestly mandatory in the public interest. If, therefore, the petition be presented after the expiration of the 10 days, it confers no jurisdiction upon the justice, since the whole scheme of review is entirely statutory, and is based upon a petition presented within time.

[3] "Affirmative words make the statute imperative, if they are absolute, explicit, and peremptory, and show that no discretion is intended to be given." *Potter's Dwarries on Statutes*, 228. "If an affirmative statute introductive of a new law directs a thing to be done in a certain manner, that thing cannot, even although there are no negative words, be done in any other manner." *Cook v. Kelly*, 12 Abb. Prac. (N. Y.) 35; *Com'rs v. Gains*, 3 Brev. (S. C.) 396; *Norwegian Street*, 81 Pa. 349.

[4] In granting the recount in the present case, the court suggested at the time that the ballots cast in the whole county be recounted; but the applicant objected, upon the ground that he desired only a recount of certain districts, and the order was made accordingly, with the reservation on the part of the court, which was part of the order that if the partial recount should change the declared result a recount of the entire county would be ordered. The court repeated this condition on the first day of the recount, in open court. The object was, of course, to have the actual result of the election declared, not by a partial recount, but by an entire recount of the county. The applicant therefore could have obtained an order for an entire recount in the first instance; but he declined it, asserting a desire to recount only certain districts wherein the true result, as he conceived it, had been misstated by the election officers, to his detriment. The result of this partial recount has been to increase the majority of the incumbent from 119 to 154.

[5] Since the present application must be based, in the language of the statute, upon the ground that the applicant "has reason to believe" that the declared result is er-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

aneous, and that a recount will result in changing it, it is quite obvious that his reason for the present application is predicated upon no more substantial ground than mere conjecture, based upon the possibility of the rejection by the election board or by the court of sufficient ballots, by reason of supposed informalities, to change the result in his favor. This is not the state of mind of an applicant contemplated by the statute; nor does it follow, if such informalities be conceded to exist, that they will redound to the credit of the applicant.

The chances, we must assume from the recent partial recount, are equally probable that they may redound to the credit of the incumbent. This petitioner therefore presents practically a new petition, based upon new grounds entirely conjectural in character, quite obviously predicated upon the element of chance in his favor, and depending for the correctness of his conclusions upon the view which the board of elections, or the court, upon a recount, may conclude to take of ballots challenged for alleged informalities, palpably due in most cases, as we have observed in the recent recount, to the inexperience or ignorance of the voter rather than to any manifest intent to defraud.

If the petition be viewed as a new petition, quite obviously it cannot be considered, since it has not been presented within 10 days after the election, as required by the statute.

If it be argued that it is an application to amend the petition, the statute presents no authority upon which such an order can be made after the expiration of 10 days; and, since the entire proceeding is statutory, it is manifest from the provisions of the act that the power to amend does not exist. The right to recount the entire county vote was imposed by the court, as already stated, as a condition to the granting of the partial recount, but only upon the theory that the partial recount would result in changing the result as declared by the election board; and that condition not having presented itself no substantial reason is apparent why the entire county vote should now be canvassed.

The petition is therefore denied.

KOMP v. THOMAS.

(Court of Chancery of New Jersey. Jan. 16, 1913.)

1. WILLS (§ 600*)—CONSTRUCTION — ESTATES CREATED—FEE SIMPLE.

A devise of an estate, generally, with a power of disposition absolutely and without limitation, imports such dominion over the property that an estate in fee is created, and any devise over is void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1335-1339; Dec. Dig. § 600.*]

2. WILLS (§ 616*)—CONSTRUCTION — ESTATE CREATED—LIFE ESTATE.

Under a will giving one-half of the residue of testatrix's estate to a daughter for life, with the right to use and dispose of so much thereof, in addition to the income, as she might deem necessary for her comfortable support, and upon her death such share or so much as then remained to another daughter, the first taker had a life estate with the right to use what might be deemed necessary for her comfortable support; such construction applying as well to personalty as to realty.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418-1430; Dec. Dig. § 616.*]

Bill for an accounting by Carrie J. Komp against George Thomas, administrator of the estate of Agnes E. Thomas, deceased. Decree for an accounting.

Collins & Corbin, of Jersey City, for complainant. Frank A. Boettner, of Newark, for defendant.

GARRISON, V. C. This is a suit by Carrie J. Komp, who is the daughter of Caroline M. Wood, and is against George Thomas, who is administrator of his wife, Agnes E. Thomas, deceased; said Agnes being a sister of Carrie J. Komp, the complainant. The purpose of the suit is to obtain an accounting from the defendant with respect to certain property which was in the possession of his decedent, his wife, at the time of her death. The proper disposition of the case depends upon the construction to be placed upon the will of Caroline M. Wood. The clause of the will in question reads as follows: "Fifth. One half of all the rest and residue of my estate, real, personal or mixed, I give, devise and bequeath to my daughter, Agnes E. Thomas, wife of George Thomas, for and during the term of her natural life with the right to use and dispose of so much of said Estate in addition to the income, rents, issues and profits thereof, as she may deem necessary for her comfortable support and maintenance, and upon the death of my said daughter, Agnes E. such share of my said residuary estate, or so much thereof as then remains, I give to my daughter, Carrie J., wife of Frederick Komp, if then living for the term of her natural life, and with the right to use and dispose of so much of the same in addition to the income, rents, issues and profits thereof, as she may deem necessary, and upon the death of both of my said daughter, Carrie J. and my said daughter Agnes E., then forever to such of the children of my said daughter Carrie as shall then be living and to the issue of any such of my said daughter, Carrie's children as may, prior to that time have died, leaving issue, such issue to take per stirpes the share that such deceased child of my said daughter Carrie should have taken under this will, if then living."

The one-half of the remainder above provided for passed into the possession of Agnes E. Thomas, and remained in her possession during her lifetime, she expending the income

and portions of the principal. The contention of the complainant is that the proper construction of the clause in question gave to the said Agnes E. Thomas a life estate in the property thus devised to her, and then a life estate in the same property (or what remained thereof) to complainant, and then a remainder over, with which latter we are not concerned. The insistence of the defendant is that a proper construction of the will in question results in vesting the entire interest devised to Agnes E. Thomas in her absolutely without remainder over; his argument being that the power to dispose of the property being without qualification or limitation indicates an intention to give a fee, and will be so construed.

[1, 2] The case has been so entirely and satisfactorily disposed of by the principle established and enforced in the Court of Errors and Appeals in this state that it is only necessary to cite one such authority. *Wooster v. Cooper*, 53 N. J. Eq. 682, 684, 33 Atl. 1050, 1051 (Ct. of Er. 1895). In that case the court said: "It [the will] gives to his wife, by express words, a life estate in his property, and then annexes to it a power to dispose of the same without qualification or limitation. The rule that a devise of an estate, generally, with a power to dispose of the same absolutely and without limitation, imports such dominion over the property that an estate in fee is created, and that a devise over is consequently void, has one exception, which is this: That where the testator gives an estate for life only, by certain and express words, and annexes to it such a power of disposal, the devise for life will not become an estate in fee." This case also is authority that the same principle applies to bequests of personal estate as well as devises of realty. It is unnecessary to burden this opinion with the numerous cases subsequently decided in this state which recognize and enforce the principle as above expressed. By reference to the main case and the notes next to be cited, it will be found that a similar principle is almost universally recognized and applied. *Steiff v. Selbert*, 6 L. R. A. (N. S.) 1186 (128 Iowa, 746, 105 N. W. 328).

The result is that Agnes E. Thomas will be held to have had a life estate with the right to use what may be deemed necessary for her comfortable support and maintenance, and that an account must be rendered by the defendant of the property, less such sums as may be found to have been necessary for the comfortable support and maintenance of the said Agnes E. Thomas. This is in accordance with the finding in *Cox v. Wills*, 49 N. J. Eq. 130, 22 Atl. 794 (reversed in the Court of Errors and Appeals, 49 N. J. Eq. 573, 25 Atl. 938, upon other grounds, the Court of Errors expressly sustaining the Vice Chancellor upon the point just adverted to).

I will advise a decree in accordance with the conclusions above expressed.

BAKER v. BAKER.

(Court of Chancery of New Jersey. Jan. 13, 1913.)

HABEAS CORPUS (§ 99*)—ACCESS TO CHILDREN—RIGHT OF PARENT—BASTARD CHILD.

Where parents live separately, either parent has the right, in a proper case, to see a legitimate child in the custody of the other parent, and the same right exists in case of a bastard child living with its mother, when the father contributes to its support, in absence of a showing by the mother that such right is detrimental to the child's best interests; the question of access being considered from the viewpoint of the child's best interests.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 84; Dec. Dig. § 99.*]

In the matter of the application of Alfred C. Baker for a writ of habeas corpus against Helen L. Baker. Application granted.

J. Harry Hull, of Nutley, for petitioner.
Walter L. McDermott, of Jersey City, opposed.

HOWELL, V. C. The parties to this controversy are husband and wife. They are now living separate from each other. They have two children, one about six years of age, which was born out of wedlock, and is therefore illegitimate, and the other about three years of age, whose legitimacy is not questioned. The father now petitions the court, first, for the custody of the children; and, second, in case the custody shall be denied, for reasonable access to them. The case was heard on petition and answer thereto and a replication. The answer alleges as one reason why the father ought not to have custody of or access to the children to be that he is not a fit person to exercise those privileges. Before going into the question of fact, the parties submitted a question of law, viz., whether the father had a legal right to reasonable access to his bastard child, who is now in the custody of the mother, in the hope that a decision of the question of law might obviate any further inquiry into the facts. On the argument, counsel for the father declined to press the claim for the custody of the children. This leaves only the question of reasonable access.

In the case of legitimate children, there is no question about the right of access. Where the parents are living separately, either has a right to see any child which is in the custody of the other, and, if the parties cannot agree, the court will make such order in the premises as seems best under all the circumstances; but the books are singularly void of precedents relating to access to illegitimate children, and, while this question appears never to have arisen, I see no reason, in the nature of things, why this court should in a proper case, be debarred of a right to give access to illegitimate children as well as to legitimate ones. It is said that chancery is the *parens patrie*, and as such administers its jurisdiction for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

benefit of infants. Why this jurisdiction should be confined to legitimates is not apparent. *Rossell v. Rossell*, 64 N. J. Eq. 21, 53 Atl. 821. While the relations between the parents of illegitimates and the rights of inheritance and custody and the duty of maintenance are different from the same rights and duties as appertaining to legitimate children, the state has the same interest in the one as in the other; and it may well be that the right of this court to interfere would be a stronger right in case of illegitimate children of parties living separate than in the case of legitimate children known and acknowledged to be such, who might be expected possibly to have greater care than might be exercised in the case of the illegitimate. The question is not one of custody; it is widely separated therefrom. It may be that in this case the mother would have a superior right to the custody of her illegitimate child, although even that is doubted. *Hesselman v. Haas*, 71 N. J. Eq. 689, 64 Atl. 165; *Schouler*, Dom. Rel. § 278; and cases cited hereinafter.

It was stated on the argument that the father in this case was making a monthly contribution to the maintenance of the children. Why has he not a right to see the children and determine for himself whether the stipend is being properly administered? Why has he not an interest to satisfy himself by inspection that the illegitimate child is being properly clothed and nourished, and that it has a proper home to live in, that care is being taken of its training, its education, and its moral bringing up? The statutes of this state, relative to the custody, care and maintenance of children, are supposed to relate solely to children born in lawful wedlock. Why the principles thus legislated upon do not apply with equal force to illegitimates, I am not able to perceive.

The question is one of new impression, and must be decided upon principle, and not upon authority; yet the cases relating to the custody of illegitimates may throw some light upon the obligations which ought to be imposed upon the parties to a controversy like the present one. In the case of *Queen v. Nash*, 10 Q. B. D. 454, 52 L. J. Q. B., Sir George Jessell said that the question of custody of an illegitimate did not depend upon the mere legal rights upon habeas corpus, but upon equitable doctrines; that regard was always had to the mother, the putative father, and the relations on the mother's side; that in such case there was that sort of blood relationship which, although not legal, gives the natural relations a right to the custody of the child. In the same case Lord Lindley said the question was not whether the mother is the legal guardian of the child, but whether, as between her and strangers, the court ought not to have regard to the natural relationship of the mother; and Lord Justice Bowen said: "It is said that the mother has no legal right, but

that is not the question; the question is, whether, in considering what is for the benefit of the child, the court will have regard to the natural relations. As a general rule, the mother is the proper person to have the custody of a child. In this case, when we consider what is for the benefit of the child, the scale is turned by the respectability of the persons with whom she is to be placed." The doctrine of this case was affirmed in the House of Lords in the case of *Barnardo v. McHugh* (1891) A. C. 388, 61 L. J. & Q. B. 721. Halsbury, L. C., said: "I doubt very much whether any absolute rule can be laid down; but in *Queen v. Nash*, supra, this very question came for decision before the Court of Appeal, and Sir George Jessell appears to have pointed out the distinction between strict legal rights as to guardianship and the jurisdiction which a court of equity does, and always did, exercise in regard to such orders as are now in question. Sir George Jessell pointed out that the court is now governed by equitable rules, and that in equity regard was always had to the mother, the putative father, and the relations on the mother's side. Natural relationship was thus looked to with a view to the benefit of the child. There is, in such a case, he says, a sort of blood relationship which, though not legal, gives the natural relations a right to the custody of the child. His lordship, I think, did not mean an absolute right, but such a right as he had already described to be considered by a court of equity in making such orders." The opinion of Lord Herschell and Lord Hannen were to the same effect.

This is the latest expression of the court of last resort in England, and it is entitled to our best consideration. If no general rule can be laid down respecting the custody of an illegitimate child, but if, on the other hand, the child's own best interests are always to be consulted, why should not the same equitable doctrine be applied to the question of access? To find out what is the best thing for the infant must be the object of the present inquiry. Animosities between the parents cannot control, because it may well be that they would be detrimental to the best interests of the infant. I think it is much better for the child to have the father visit it at stated times, not only to learn of its continued welfare, but to infuse into it, at an early age, the natural love and affection that it should have for a parent who is interested in its well-being. In his later years, he will be able more lightly to bear the ignominy of his origin, if he has the consciousness that he is acknowledged to be on the same affectionate footing as the other child, notwithstanding the disparity between their legal situations.

The question therefore resolves itself into this, What is the best thing for the child? The reasons which I have herein set out on that subject seem to me to be controlling.

The question of access, like the question of custody, is one that must be considered from the viewpoint of the child's best interests; and it is my opinion, therefore, in this case, that unless the mother can prove that the visits of the father to the child will be detrimental to the child's best interests, or if the personal objection to the father shall be waived, an order should be made giving the father reasonable access to both children.

MISSELL v. HAYES et al.

(Supreme Court of New Jersey. Jan. 30, 1913.)

PROCESS (§ 78*)—PERSONAL SERVICE—PLACE —“USUAL PLACE OF ABODE.”

Practice Act (3 Comp. St. 1910, p. 4067) § 52, which provides that, in the absence of personal service upon a defendant, the summons may be served at his usual place of abode, means his usual place of abode in the state, if any, which need not be his domicile or his home in that sense of permanency in which those terms are applied in the divorce act, the election law, and the tax acts, and hence, as to defendant, a student at a college in another state, who, while on vacation, was living at his father's home in this state, service of a summons, by leaving the writ at his father's home, was a good service at his “usual place of abode.”

[Ed. Note.—For other cases, see Process, Cent. Dig. § 90; Dec. Dig. § 78.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7241-7243.]

Action by Florence Missell, by next friend, against Edward R. Hayes and others. Motion by defendant J. Arthur Hayes to set aside the service of a summons. Motion denied.

Argued before MINTURN, J., under the statute.

Fred G. Stickel, Jr., of Newark, for plaintiff. Edmund A. Hayes, for defendant.

MINTURN, J. The defendant J. Arthur Hayes moves to set aside the service of a summons which was left at his father's home, in New Brunswick, by the sheriff of Middlesex county, in an endeavor to serve the son by leaving the writ, in compliance with the language of the statute, at the defendant's “usual place of abode.”

J. Arthur Hayes is, and for some time past has been, a student at St. Charles College, Md., in preparation for the ministry, and he insists that this course of preparation has resulted in compelling him to give up his abode in this state, except for occasional visits to his family and friends. At the time of the service of the summons, he was in New Brunswick, living at his father's home, and the sheriff returned the summons as served “at the residence of J. Arthur Hayes.” He claims that, when he leaves the seminary he may be assigned by his superior to any

section of the state, and that, for all practical purposes, his residence at New Brunswick, under the parental roof, is at an end. His affidavit of nonresidence does not disclose his last voting place; and, so far as the animus revertendi is concerned, it is by no means clear that, when the vacation periods present themselves, he will not, as heretofore make the parental home his usual abode.

The language of section 52 of the practice act provides (3 Comp. St. 1910, p. 4067), that in the absence of personal service upon a defendant, the summons be served at “his usual place of abode.” I take this language to mean his usual place of abode in this state, if he have such a place. It need not be his domicile or at his home in that sense of permanency in which those terms are applied in the divorce acts, the election law, and the tax acts, but may be the place where he abides when in the state. This construction of the statute is consonant with the reasoning of the authorities, wherever the question has been mooted. It is quite apparent that, if his effects in New Brunswick were attached under process, he might quite properly claim that, since summons could be served upon him in the statutory mode, process by attachment would not lie. *Cadwalader v. Howell*, 18 N. J. Law, 138; *Del Hoyo v. Braddred*, 20 N. J. Law, 328.

In *Clark v. Likens*, 26 N. J. Law, 207, a hotel keeper at Atlantic City, whose permanent residence was in Philadelphia, was held for the purpose of vacating a writ of attachment to have his usual place of abode at Atlantic City, even after his hotel there had been closed for the season. So in *City Bank v. Merrit*, 13 N. J. Law, 131, a writ of attachment was vacated where it appeared that the defendant, who had his permanent residence in New York City, went for a few weeks in the summer, to avoid the heat, to a nearby village in this state, where summons could be served upon him.

The test, invariably applied in all cases involving the regularity of the service of process of attachment, is whether a summons could be served upon the defendant in the statutory manner; in other words, whether he had an abode in this state, at which some person may reside, who is capable, under the statute, of accepting service of process. In *Harrison v. Farrington*, 35 N. J. Eq. 4, the defendant, a resident of New York, but when in this state resided with his mother, service of subpoena ad respondendum in chancery was held to have been properly served upon him at the mother's home.

The rationale of the cases in which the question has been considered, in various forms of procedure, lead to the conclusion that the legislative intent, in this section of the practice act, was to prescribe a method of service of process upon a defendant, in lieu of personal service, by leaving the writ with some one, complying with the statutory re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

quirement, at the defendant's usual place of abode, if he have one in this state.

The method of service here meets with this requirement, and the motion will therefore be denied.

AIKMAN et al. v. ARMSTRONG et al.
(Court of Chancery of New Jersey. Feb. 7, 1913.)

(Syllabus by the Court.)

1. WILLS (§ 555*)—CONSTRUCTION—INTENTION—SUBSTITUTION FOR DECEASED LEGATEE.

The testatrix devises and bequeaths an estate upward of \$170,000, which came to her from both of her parents, concerning which she uses these words in the will: "And as my estate was derived from both of my parents, I deem it proper to devise the same among their respective relatives and to such societies as would best meet their wishes if living, and, therefore, order and direct as follows." After making a number of specific and general bequests in the first 17 paragraphs of the will, she uses the following words in the eighteenth paragraph: "The rest, residue and remainder of my estate I order and direct my executors to divide into one hundred equal parts, or shares, and I give, devise and bequeath to my cousins [here the testatrix names 11 of her female cousins on her father's side], their heirs, executors, administrators and assigns, forty-three and one-half parts of said one hundred shares or parts, to be equally divided between them, share and share alike." Then follow bequests to five additional classes of legatees of allotments of shares varying in number, but, with the 43½ above mentioned, disposing of the entire original division of 100 shares. In the same paragraph, and immediately following the classification of the residuary legatees, is this important proviso: "If any of said residuary legatees or devisees shall not survive me, his or her share shall go to the others of the class of distributees to which he or she may belong in the above distribution. And if all of the distributees of any of said classes shall die before me, the heirs of the last survivor of such class shall take and receive the shares or parts which the survivor of such class would have taken if living." The original will was made in the year 1888, and the testatrix lived until the year 1909, during which time she made three codicils to her last will. In the first codicil, she substituted a male cousin on her father's side for one of the legatees who had died; and, in the second codicil, she substituted another male cousin on her father's side in the place of two of the legatees who had died, using the same habendum in each of these codicils. In all of these codicils the testatrix declares: "In all other respects, I hereby ratify and confirm my last will." Seven of these 11 original legatees, and one of the two who were substituted, predeceased the testatrix. *Held*, that the five survivors take the whole of the 43½ shares.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1199-1202, 1204; Dec. Dig. § 555.*]

(Additional Syllabus by Editorial Staff.)

2. WILLS (§ 850*)—LAPSES—STATUTES—COUSINS—LEGATEES.

Wills Act (3 Gen. St. 1895, p. 3763) § 34, providing for the prevention of lapses, does not apply to legatees who are cousins.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 850.*]

Bill between Walter M. Aikman and others, executors of the estate of Jane A. Aikman, deceased, and Sarah Armstrong and others. Decree as to distribution of estate.

Reginald Branch, of Burlington, for complainants. Gaskill & Gaskill, of Camden, for surviving residuary legatees named in first clause of eighteenth paragraph of the will. Enoch A. Higbee, of Atlantic City, and David Murray, of New York City, for defendants Hathaway et al. Howard Eastwood, of Burlington, for defendants Armstrong et al.

LEWIS, V. C. Jane A. Aikman died on or about the 16th day of September, 1909, having first made, executed, and published her last will and testament and codicils thereto. In the introductory paragraph of the will, the testatrix says: "As my estate was derived from both of my parents, I deem it proper to divide the same among their respective relatives and to such societies as would best meet their wishes if living, and, therefore, order and direct as follows." The testatrix then proceeded to bequeath a large number of legacies to different charitable organizations and individuals, not including each and every relative of her father and mother.

The significant paragraph of the will in question is the eighteenth: "The rest, residue and remainder of my estate I order and direct my executors to divide into one hundred equal parts or shares, and I give, devise and bequeath to my cousins Mary S. Aikman, Catherine Cook, Sarah Dunnings, wife of James Warren Dunnings, Rebecca Aikman, Caroline Aikman, Julia Aikman, Abigail Marvine, Marion Ann Stewart, Agnes Morris, Mary Hathaway and Emma J. Aikman, daughter of Robert S. Aikman, their heirs, executors, administrators and assigns, forty-three and one-half parts of said one hundred shares or parts to be equally divided between them share and share alike. Twenty-two other equal shares or parts thereof I give, devise and bequeath to 'the American Baptist Publication Society,' Philadelphia, the New Jersey Baptists State Convention and the American Baptist Home Mission Society, their successors and assigns, to be equally divided between them. Twelve and a half equal shares or parts thereof I give, devise and bequeath to the widow and children of my deceased cousin Aikman Welch, their heirs, executors, administrators and assigns, to be equally divided between them. Seven and one-third equal parts or shares thereof I give, devise and bequeath to my cousin James H. Canfield and Martha H. Canfield to be equally divided between them. Seven and one-third shares or parts thereof I give, devise and bequeath to the children of my deceased cousin Jeanette Platt, who shall survive me, to be divided equally among them. Seven and one-third shares or parts thereof I

give, devise and bequeath to the daughters of my deceased cousin Anna H. Woolman, who shall survive me, to be equally divided between them. If any of said residuary legatees or devisees shall not survive me his or her share shall go to the others of the class of distributees to which he or she may belong in the above distribution. And if all of the distributees of any of said classes shall die before me, the heirs of the last survivor of such class shall take and receive the shares or parts which the survivor of such class would have taken if living."

[1] The sole issue in this case is whether the heirs of those legatees mentioned in the eighteenth paragraph of the will, which legatees predeceased the testatrix, shall take the share that the legatee would have taken, if living at the time of the death of the testatrix. The general rule is that a legacy to A. and his heirs is a legacy to A. alone, the word "heir" being a word of limitation and not of substitution; that, in the case of a legacy to A. "or his heirs," the general rule is otherwise. But a special meaning of words may be accepted, if such intention can be gathered from the whole will, when construed with the aid of such extrinsic evidence as the law makes competent, and the word "and" may thus be construed in the sense of the word "or," if such meaning is plainly indicated. See *Zabriskie et al. v. Huyler et al.*, 62 N. J. Eq. 697, 51 Atl. 197.

The question is raised, Why did the testatrix use the word "heirs" after the name of certain legatees in several instances, and not use it in all, if some meaning was not to be given to these words; and why did she continue to do the same thing in several of her codicils? And the court is asked to find the word "heirs" to be a word of substitution, and not a word of limitation, because the testatrix used it in some places and not in others.

In the present case, the original will was made in the year 1888, and the testatrix lived until the year 1900, a period of 21 years. She made three codicils to her last will. In the first codicil, dated the 14th day of June, 1900, she stated that her cousin Caroline Aikman, whom she had named among the first class of legatees under the eighteenth paragraph of her will, having since died, she desired to substitute her cousin in the Reverend William Aikman as legatee in her place. "I, therefore, now give, devise and bequeath unto the said Rev. William Aikman, his heirs, executors, administrators and assigns, such share or portion of my said residuary estate as the said Caroline Aikman would have received or taken if she had survived me." The testatrix also, in this first codicil, makes an alteration in another of the classes of legatees provided for under the eighteenth paragraph of her last will, by adding to the members of that class, consisting of "the daughters of my deceased cousin, Anna H.

Woolman, who shall survive me," and their brother Howard Woolman.

The second codicil, dated the 22d day of June, 1906, also contains a clause affecting the eighteenth paragraph of the will in question, stating that, whereas two of the cousins named in the first class of said paragraph, to wit, Catherine Cook and Rebecca Aikman, had since died, she desired to substitute Walter M. Aikman "as a residuary legatee in the place and stead of each of my aforesaid two deceased cousins, therefore, I now give, devise and bequeath unto my said cousin, Walter M. Aikman, his heirs, executors, administrators and assigns, such shares or portions of my residuary estate as the said Catherine Cook and Rebecca Aikman would have taken, received or been entitled to, if both of them had survived me."

The third codicil, dated the 22d day of April, 1908, does not affect the paragraph under discussion. However, an important feature of all the codicils, including those making the above specific substitutions in the various classes under the eighteenth paragraph of the will, is that in each of them testatrix declares: "In all other respects I hereby ratify and confirm my last will"—while in the last one she also confirms the two prior codicils.

Of the cousins named under the first class in the eighteenth paragraph of the will, the following had departed this life previous to the death of the testatrix: Mary Hathaway, Agnes Morris, Sarah A. Dunning, and Abigail Marvine, for no one whom had the testatrix substituted a legatee. Besides these, Caroline Aikman predeceased the testatrix, and the Rev. William Aikman was substituted, as set forth in the first codicil; Catherine Cook and Rebecca Aikman also predeceased the testatrix, and Walter M. Aikman was substituted for both of them in the second codicil. The Rev. William Aikman, one of these two substitutes, died before the testatrix.

The executors of the testatrix having paid debts, converted the real estate into money, etc., as empowered under the various clauses of the will, now hold the sum of, approximately, \$98,656.62, representing the residue of this estate, and await the construction of the first clause of the eighteenth paragraph as to who shall participate in the distribution of this residue.

The question involved is whether the children and heirs at law of the said William Aikman, Mary Hathaway, Agnes Morris, Sarah A. Dunning, and Abigail Marvine, being those persons named in the first class of legatees who died before the testatrix, and for whom no one else was substituted, shall take the part which would have been paid to their ancestors, had they survived the testatrix; or does this portion of the residue go to those of this class who survived the testatrix, namely, Mary F. Aikman, Marion

Ann Stewart, Julia Aikman, Emma J. Aikman, and Walter M. Aikman, to the exclusion of the children and heirs at law of the predeceased cousins?

It is the duty of the court to so construe the will as to carry out the intention of the testatrix. It is likewise the established and universal law that the intention of the testator is to be gathered from the whole will, and the will is to be construed in the light of the circumstances surrounding the testator at the time of making it. The codicils are to be considered, in arriving at the construction, and regarded as a republication of her will, as modified by the codicil. The ordinary and technical meaning of words may be disregarded, and special meaning accepted, if such intention of the testator can be gathered from the whole will. "Or" will be construed "and" in order to maintain the express general intent of the testator. This power of changing "or" into "and" is founded on judicial decisions that run back more than 200 years. *Brown v. Mugway*, 15 N. J. Law, 330. Though a will must be construed as an entirety, yet the legal construction of one section cannot be controlled by guesses as to the intent of the testator arising from the disposition of his property in the remaining sections. See *Gulick v. Gulick*, 27 N. J. Eq. 498. The first great leading rule from which courts of justice never depart is, to put such a construction on apparently conflicting parts, that both of them, if possible, may stand, and the whole will be carried into effect. The rule of law is imperative that every clause in a will shall be made to operate.

[2] Since the legatees in question are cousins of the testatrix, their heirs do not come within the operation of the Thirty-Fourth section of the wills act (Gen. Stat. p. 3763), for the prevention of lapses, as that section only applies to a devise or bequest to a child or brother or sister, or any descendant of a child, or brother, or sister of a testator.

In searching for the intention of the testatrix throughout the whole will, I find nothing to indicate that the testatrix, by the use of the ancient technical formula constituting the habendum clause, viz., their heirs, executors, administrators, and assigns, meant anything other than the function which it has performed, from time immemorial, in all sorts of written transfers of property to define the title and tenure of the legatees. The contention of the counsel for the next of kin of the legatees who predeceased the testatrix, that the proviso in the last part of paragraph 18 of the will, which provided for survivorship and substitution in the different classes of distributees, refers only to the three legacies of $7\frac{1}{2}$ shares each, has no force, as it applies to the eighteenth paragraph. I do not think the testatrix could have imagined that all the legatees and their

next of kin could possibly have predeceased her. See *Bonnell v. Bonnell*, 47 N. J. Eq. 540, 20 Atl. 895; also *Hendershot v. Shields*, 42 N. J. Eq. 317, 3 Atl. 355.

In accordance with the law governing this case, the executors of Jane A. Aikman, deceased, will be directed to pay the $43\frac{1}{2}$ shares of the residue of \$98,656.62 now held by them, awaiting distribution, to the members of the class in controversy, who survived the testatrix, to wit, Mary A. Aikman, Marion Ann Stewart, Julia Aikman, Emma J. Aikman, and Walter M. Aikman, and to the exclusion of the children of the deceased cousins, as provided for under clause 1 and the last two sentences of the eighteenth paragraph of the will, and the fifth and second paragraphs of the first and second codicils, respectively.

I will advise a decree accordingly.

POOLE v. SUPREME CIRCLE, BROTHERHOOD OF AMERICA, et al.

(Court of Chancery of New Jersey. Oct. 17, 1911.)

1. EQUITY (§ 97*)—PARTIES AFFECTED—CLASS BILL.

Where a bill is brought on behalf of complainant and all other members of a benefit fund, being a class bill, a decree for complainant will beneficially affect all of the class, although none of them have made themselves active parties.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 257; Dec. Dig. § 97.*]

2. INSURANCE (§ 719*)—MEMBERSHIP—CONTRACTS—INCREASE OF DUES—POWERS.

One who entered into a death benefit fund which had a by-law that the dues should be 50 cents, except that when the receipts were insufficient they would be increased to 60 cents until the liabilities were paid, cannot be made to pay dues of 90 cents under a law allowing, in general terms, alterations and amendments to the laws, since this would impair the contract of membership.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.*]

3. CONTRACTS (§ 303*)—PERFORMANCE—DEFENSES—NECESSITY.

The plea of necessity is never a valid defense against the performance of a contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409-1443; Dec. Dig. § 303.*]

Bill by Hamlet Poole against the Supreme Circle, Brotherhood of America. Heard on pleadings and proofs. Decree for plaintiff. See, also, 85 Atl. 453.

Frank S. Katzenbach, Jr., of Trenton, for complainant. John F. Harned, of Camden, and Miles M. Dawson, of New York City, for defendants.

WALKER, V. C. [1] The bill in this case is filed by the complainant on behalf of himself and all other members of the death benefit fund of the Supreme Circle, Brotherhood of America, and is a class bill. If success-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ful, the decree will beneficially affect all of the class, notwithstanding none of them have made themselves active parties to the suit. Dan. Ch. Pl. & Pr. *238 et seq.; Wallworth v. Holt, 4 My. & Cr. 619, 635.

On September 17, 1904, the complainant became a member of the William Penn Circle, one of the subordinate circles or homes of the grand body, the Supreme Circle, Brotherhood of America, and in virtue of such membership he thereby became a member of the death benefit fund of the Supreme Circle. He made an application for membership in the fund, which stated the different benefits to be paid upon his death, according to the cause of death. This application was forwarded to the Supreme Circle by the subordinate circle, with request to register the complainant as a member of the death benefit fund. In response, the Supreme Circle sent to the William Penn Circle a communication, saying that the complainant had been registered in the fund. At the time of his admission the complainant was furnished with a copy of the constitution and by-laws of the William Penn Circle, and of the death benefit fund laws of the Supreme Circle, which latter provided, in article 15, § 14, that "the dues to this fund shall be fifty cents per month for all members, * * * provided, however, that when the receipts * * * are not sufficient to pay the liabilities * * * the trustees shall increase the monthly dues to sixty cents until the income and cash in hand shall equal the liabilities." In 1909 the Supreme Circle amended the death benefit fund laws by establishing a new rate of dues, which change made the dues payable by the complainant 90 cents instead of 50 cents a month, an increase of 80 per cent. in the cost of the complainant's insurance.

The Supreme Circle seeks to justify its action in thus raising the complainant's dues under article 18, § 1, of the supreme laws, which provides that "alterations and amendments to these laws can be made after such alterations and amendments shall have been proposed in writing," etc.

There is no claim but that the amendment in question was adopted with due formality. The question is one of power. It will be observed that there is no express power to alter the provisions as to the death benefit fund, which were part of the laws of the order at the time the complainant became a member. The power to make the alteration, if it exists, is to be implied from the provision quoted.

[2] I have no hesitation in holding that the complainant's membership in the death benefit fund constitutes a contract between him and the order, and one which could not be materially altered under the assumption of power to amend existing in the laws of the order in general terms. The remarks of Mr. Justice Pitney (now Chancellor), speak-

ing for the Supreme Court in *O'Neill v. Supreme Council*, etc., 70 N. J. Law (4: Vroom) 410, 420, 57 Atl. 463, 467 (1 Ann. Cas. 422) are particularly apposite. He said, at page 420: "The third plea sets up that the benefit certificate was made in consideration of the full compliance by the plaintiff with all by-laws of the order then existing or thereafter to be adopted, and avers that on August 22, 1900, an amendment of the by-laws was made that went into effect on the 1st of October, declaring that \$2,000 should be the highest amount paid on the death of a member upon any benefit certificate theretofore or thereafter issued; wherefore the plaintiff is bound by the reduction of the benefit from \$5,000 to \$2,000, and has no cause of action by reason of such reduction. But it is very generally, if not universally, held that these benefit certificates, like other contracts, confer a vested interest upon the member which may not be impaired by a subsequent amendment, even though the power to amend be reserved in general terms. If the member's stipulation to comply with all by-laws thereafter enacted could be construed to relate to a by-law that reduced the benefit from \$5,000 to \$2,000, it must also relate to a by-law canceling the benefit certificate entirely—a result wholly unjust and absurd. This stipulation must be construed as referring only to reasonable by-laws and amendments adopted in furtherance of the contract, and not to such as would overthrow it or materially alter its terms."

[3] The fact that when the complainant became a member of the order the death benefit laws provided that his dues might be increased 20 per cent. affords some reason for the proposition that they could not be increased beyond that figure without his consent; and that therefore they could not be increased at all under the general reserved power to alter or amend the laws of the order. However, upon the authority of the *O'Neill* Case, it seems to me it must be held that the order had no power to increase the dues 80 per cent. If this increase is to be held good, then it would appear that the complainant and those in the class with him are at the mercy of the Supreme Circle with reference to any impairment of their contracts of membership in the death benefit fund which that circle may see fit to make. It is not an answer to say that the increase is necessary to the prosperity of the order. The plea of necessity is never, as I understand it, a valid defense against the performance of a contract.

The impression made upon my mind at the conclusion of the oral arguments was that the complainant was entitled to prevail. Since then I have very carefully reviewed the case and considered the able and voluminous briefs submitted, and have made an examination of the authorities bearing upon

the question at issue, and find that my first impression has been strengthened.

There will be a decree for the complainant, with costs.

BRADY v. CARTERETT REALTY CO.

(Court of Chancery of New Jersey. Jan. 14, 1913.)

1. QUIETING TITLE (§ 52*)—STATUTORY ACTION—DECREE—ENFORCEMENT BY DEFENDANT—WRIT OF ASSISTANCE.

Under the "act to compel the determination of claims to real estate, and to quiet title to the same" (4 Comp. St. 1910, p. 5399), a court of equity, if title is shown to be in a defendant, has jurisdiction to issue a writ of assistance to put him in possession; but he must plead, and the decree must show, his right to "immediate possession" as well as title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 57; Dec. Dig. § 52.*]

2. QUIETING TITLE (§ 52*)—STATUTORY REMEDY—DECREE FOR DEFENDANT—WRIT OF ASSISTANCE.

In a statutory suit to quiet title, decree was rendered that defendant had title absolute, and that complainant had no interest; but the right to possession was not determined. Subsequently the defendant brought ejectment against its adversary, to which the statutory plea of not guilty was filed; whereupon there was a motion for judgment, on the ground that the plea was sham. This motion was denied, after which defendant moved for a writ of assistance in chancery. *Held* that, considering the scope of the decree in chancery and the ruling on the motion for judgment at law, the question of defendant's right to possession was not so clear as to warrant disposing of it on motion.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 57; Dec. Dig. § 52.*]

Bill by Michael Brady against the Carterett Realty Company and others to quiet title. Decree having been rendered for defendant named, it moved for an order for possession and writ of assistance. Denied.

Gilbert Collins, of Jersey City, for petitioner. Ephraim Cutter, of Woodbridge, and Linton Satterthwait, of Trenton, for respondents Michael Brady and Thomas J. Brady.

STEVENSON, V. C. This is an application for an order for possession and, if necessary, a writ of assistance to put the defendant the Carterett Realty Company in possession of certain lands under a decree heretofore rendered in this cause, establishing an absolute title in fee simple to the same in the defendant, the petitioner in this present proceeding.

The bill was filed under the statute which is commonly cited as the act to quiet titles. 4 Comp. St. 1910, p. 5399. The true title of the statute more adequately disclosing its object is "An act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same." It is singular how often the important function of the stat-

ute disclosed in the first part of its title has been overlooked.

The case undoubtedly is novel. So far as our reports indicate this is the first application by a defendant in this statutory suit, whose absolute title to the premises concerning which the bill of complaint was filed has been established by the final decree entered in the cause, to oust the unsuccessful complainant and obtain possession for himself by a writ of assistance.

1. The first question to be determined is whether the Court of Chancery of New Jersey has jurisdiction to enforce a decree establishing the defendant's title and right of possession in the action provided by the statute above cited. The argument is made on behalf of the respondents with ingenuity and considerable force that it is not the intention of the statute to afford any remedy in respect of possession on behalf of any defendant; that the utmost that the final decree in this statutory action can do for a defendant is to "determine" his claim—establish his title.

No doubt one great object of the statute is to enable the complainant in peaceable possession to have all "claims" of the defendants to the "real estate," of which the complainant has such peaceable possession, settled and defined and "determined," so that he may know what titles and interests, if any, are outstanding in the defendants with which he has to reckon. No doubt this suit may be applied to having a claim to a mortgage determined and, if the alleged mortgage is established by the decree of the court, the amount thereof ascertained finally, so that the complainant may pay the same.

[1] I am unable, however, to adopt the view that has been presented on behalf of the complainant that under no form of decree which can be made in this statutory suit can a defendant be put in possession by a writ of assistance. The crucial question is whether the attainment of the object of the statutory action and the enforcement of the statutory decree in an appropriate case upon appropriate proceedings may not sometimes necessarily involve the use of the writ of assistance. I think the question may be stated in different terms, but substantially to the same effect, as follows: Is it competent for the Court of Chancery, in a proper case, to make a decree not only establishing the title of a defendant, but also establishing his right of immediate possession, and directing the complainant to yield possession to him?

I shall not discuss at length the various provisions of the statute which have been examined minutely by counsel, and which must be considered in deciding the questions raised in this cause. In addition to the significance of the title of the act, which I have already pointed out, the most important provision of the statute relating to this case

is found in section 6, which directs "that the final determination and decree * * * shall fix and settle the rights of the parties in said lands, and the same shall be binding and conclusive on all parties to the suit." It may be noted also that section 4 provides that defendants may, in their answer, set forth any "interest" which they claim in the land in question.

It seems to me quite plain that where the complainant in peaceable possession of land challenges a defendant to assert any interest which he claims in such land, and asks the court to make a decree binding upon himself and the defendant which shall "fix and settle the rights" of both parties in the land, it is competent for such defendant to come forward with an answer setting up that his "claim" and his "interest" consist of a right of immediate possession of the land in derogation of the peaceable possession of the complainant and destructive thereof. In such case the complainant seems to invoke the jurisdiction of the Court of Chancery under this statute to "determine" whether he is to remain in peaceable possession, or possession is to be awarded to the defendant. In short, the decree, if the defendant is successful, establishes his right of immediate possession; and there can be no enforcement of such a decree without putting the defendant in possession.

It will be observed that I have not referred to any question of title, although naturally in the case supposed a determination of title will go with the determination of the right of possession. Suppose, in the case above referred to, the defendant claimed that he held a mortgage and an accompanying right to have the land sold in satisfaction thereof. It may be that he must file a cross-bill in order to secure a sale and later a writ of assistance. But we are not considering any question of pleading, but a question of the jurisdiction of the court to make a certain decree in a case properly presented to it.

Upon the first question raised on this application, I should, as at present advised, reach a conclusion, if any conclusion were necessary, in favor of the petitioner.

2. The second question is whether, in the absence of anything in the defendant's answer making the claim, or in the final decree establishing the claim on the part of the defendant to possession, his right of possession can be established and then enforced upon a petition for an order for possession and writ of assistance. This question, if necessarily requiring an answer for the determination of this present controversy, I think I should feel constrained to decide in favor of the respondents.

The decree in this case merely adjudged that the Carterett Realty Company, one of the defendants in the cause and the petitioner in this proceeding, "has an estate in fee simple absolute in said lands, of which the said complainant is in possession," and

further adjudges "that the complainant [Michael Brady] has no estate or interest in the said lands."

An examination of the pleadings and of the decree shows that the sole question litigated was as to the respective titles of Michael Brady and the Carterett Realty Company. The complainant in the cause, Michael Brady, was necessarily adjudged to be in peaceable possession. The defendant the Carterett Realty Company was asserting title without making any effort by an action of ejectment or otherwise to obtain possession. As a matter of fact, the Carterett Realty Company may not have had a right to possession as against Michael Brady, who was in peaceable possession, because of some outstanding lease made by the Carterett Realty Company, or because of some other relation to a third party. Precisely as the Carterett Realty Company stood with reference to the peaceable possession of Michael Brady when this bill was filed, so they seem to me to have elected, by their answer and by the decree in their favor in respect of their title, to stand at the conclusion of the suit. In brief, the sole question in this statutory action was in regard to the respective legal titles of the parties, and this question of legal title was the question which was fixed and settled and determined by the decree.

We are dealing with a case where the statutory suit is employed to compel the defendant to put a legal title claimed by it to a test. But suppose the defendant had been compelled to submit an alleged mortgage to "determination," and it had merely set up its mortgage, and the decree in its favor drawn by its solicitors had merely "fixed" and "settled" and "determined" the exact extent of its mortgage claim, would the court then enforce such a decree by issuing process for the sale of the land in question, and subsequently issue a writ of assistance to put the purchaser in possession? It is easier, I think, to answer this question in favor of the mortgagee, whose rights as such have been established by the decree, than to answer the corresponding question raised in this case in favor of a defendant, whose legal title alone, without any claim of a right to immediate possession, has been so established.

It may certainly be argued with plausibility that where the defendant seeks, not only the establishment, but the enforcement, of his "claim" he may, as a general rule, secure that result, if his claim is equitable, only by a cross-bill; and that when his claim is strictly legal the decree in his favor cannot do more than "settle" and "determine" it, leaving its enforcement to the courts of law. However this may be, it would seem that if an answering defendant claims a right of immediate possession based upon a strictly legal title he must set up such "claim" in his answer or cross-bill, and have it established in his decree, if he wishes to have it enforced by a writ of assistance.

Assuming that the question requires a de-

termination in this case, I reach the conclusion that where the decree, recognizing the peaceable possession of the complainant, adjudges that a defendant has a legal estate in fee simple absolute in the lands of which the complainant is so possessed, and further adjudges that the complainant has no estate or interest in the said lands, an order for possession will not be made, and a writ of assistance will not go in favor of such defendant, unless the decree expressly adjudges that he has a right to immediate possession. This statutory suit in a case like this may compel a defendant practically to bring an action of ejectment in the suit in equity, in which either party may have a trial by jury, upon the idea that it is inequitable for such defendant to assert title to the injury of the complainant in peaceable possession, but take no legal step to put his title to a test. But where the defendant confines himself to a bare assertion of title, and enters a decree sustaining that bare assertion, I do not think that he can subsequently try his action of ejectment upon a petition for a writ of assistance. Notwithstanding the wide terms describing the function of a writ of assistance employed by Mr. Justice Dixon in delivering the opinion of the Court of Errors and Appeals in the case of *Strong v. Smith*, 68 N. J. Eq. 686, 705, 60 Atl. 66, 63 Atl. 493, I feel constrained to hold in the class of cases to which this belongs that orders for possession and writ of assistance are used for the enforcement of the decree against the parties to the suit, and all others bound by the decree, and not for the enforcement of rights which may have been established by evidence in the cause, or made the basis of the decree.

3. Pending this suit, Michael Brady made a conveyance of all his estate, or alleged estate, in the land in question to Thomas J. Brady, whose appearance has been entered in this proceeding, and who has filed an answer to the petition for the order for possession. The Carterett Realty Company, whose absolute title in fee simple had been established against Michael Brady, instead of applying to this court for a writ of assistance and thus raising the questions which so far have been discussed, brought an action of ejectment in the Supreme Court, in which Michael Brady and Thomas J. Brady and the New York & New Jersey Telephone Company were made defendants. To the plaintiff's declaration in this ejectment suit the defendant Thomas J. Brady appeared and filed the statutory plea of not guilty. Thereupon application was made to the Supreme Court for judgment over this plea as a sham plea, upon which application the Carterett Realty Company relied upon the decree of this court as establishing their absolute title in fee simple, and also establishing that Michael Brady had no estate or interest in the lands in question; the defendant Thomas J. Brady being regarded as a party entering, pending

a suit, under a defendant, and hence bound by the final decree.

[2] The motion for judgment over the plea as a sham plea was heard before two Justices of the Supreme Court, who united in a decision, expressed in words, to the effect that the motion was denied.

Apart from the views hereinbefore somewhat tentatively expressed, I feel constrained to hold that this court must regard it as *res adjudicata* between these parties that in this case there is a question relating to the legal right of possession which is not so "clear" but that the respondent Thomas J. Brady is entitled to have it tried at law by a court and jury. This conclusion is fatal to an application for a writ of assistance. *Schenck v. Conover*, 13 N. J. Eq. 220, 227, 78 Am. Dec. 95. The speculations which were indulged in by counsel for the petitioner in regard to the grounds of the decision of the Supreme Court, it seems to me, cannot be allowed much weight. It would seem to be improper for this court to undertake first to conclude that the Supreme Court ought to have granted the petitioner's motion, so far as the merits are concerned, and that therefore the Supreme Court must have rendered its decision because of some technical defect in the procedure on the part of the petitioner, the plaintiff in the action of ejectment, which, however, the court does not see fit to disclose.

A transcript of the proceedings in the Supreme Court on the motion for judgment for the plaintiff in ejectment, on the ground that the defendant's plea was a sham plea, was put in evidence; and, while, as stated above, the grounds for the denial of the application are not set forth in the announcement of the decision, the affidavits of the respective parties exhibit the matters which were submitted to the court for its judgment. On behalf of the plaintiff, the only evidence submitted to the court was a brief affidavit of one of his solicitors, setting forth the institution of this present suit, and that the "Carterett Realty Company filed its answer, setting up a claim to own the said lands in fee simple," and further alleging that an issue at law was tried before a jury, resulting in a verdict in favor of the Carterett Realty Company, and that "a decree establishing its title was made and filed on May 16, 1905." Thus it appears that the solicitor and counsel who personally conducted this whole litigation on behalf of the Carterett Realty Company exhibited to the Supreme Court the bare fact that this court had established the title of the Carterett Realty Company to the land in question. No pretense was made before the Supreme Court that the decree of this court dealt with the question of immediate possession. The decree of this court seems to have been presented as a decree denying the right of the complainant in peaceable possession to have his title and possession quieted as to the alleged title of the Carterett Realty Company, because it was

found that the Carterett Realty Company had an absolute title in fee, while the complainant had no title.

On behalf of the defendant, voluminous affidavits were presented, which, among other things, undertook to attack the title of the Carterett Realty Company by showing that their title was bad against some older outstanding titles.

The Carterett Realty Company, the applicant for the order for possession in this case, having obtained the decree of this court establishing its title, elected to bring an action of ejectment in the Supreme Court of this state to enforce the right of possession which it claimed to hold under such established title. The Supreme Court had before it the exact form of the decree of this court, and also had the matters above referred to presented by the affidavits of the parties.

I do not feel called upon to decide upon what ground the motion of the petitioner, in its action of ejectment against the respondent Brady to have his plea adjudged a sham plea was denied by the law court in which such action was pending. Nor do I have to decide that the action of the Supreme Court in denying such motion makes it res adjudicata upon this application to this court for a writ of assistance that there is such doubt as, under the authorities, precludes the proper use of a writ of assistance. All that I have to conclude, in order to dispose of this application, is that, giving due consideration to the action of the Supreme Court as a most important factor in this case, the right of the petitioner, under the decree entered by it in its own favor in this cause upon the answer which it saw fit to file, is far too doubtful a "determination" of its immediate right of possession as against the respondent Brady who is in peaceable possession, to make it proper that a writ of assistance should be issued for the enforcement of such doubtful right. I may add that, in my judgment, it would be unwise to encourage the practice followed in this case by the successful defendant, the Carterett Realty Company, of first bringing an action of ejectment in a court of law and then, after failing to get a summary judgment over, a plea discontinuing the action at law and invoking the summary jurisdiction of this court to award a writ of assistance.

An order denying the application of the Carterett Realty Company and dismissing its petition will be advised.

ST. PAUL'S ROMAN CATHOLIC CHURCH OF GREENVILLE v. MAYOR AND ALDERMEN OF JERSEY CITY et al.

(Court of Errors and Appeals of New Jersey. March 3, 1913.)

Error to Supreme Court.

Certiorari by St. Paul's Roman Catholic Church of Greenville, N. J., against the Mayor

and Aldermen of the City of Jersey City and others, to review an ordinance passed by the board of street and water commissioners of Jersey City. Judgment was rendered by the Supreme Court (81 N. J. Law, 110, 78 Atl. 1064), setting aside the ordinance, and defendants bring error. Affirmed.

Warren Dixon, of Jersey City, Frank Bergen, of Newark, and Gilbert Collins, of Jersey City, for plaintiffs in error. Herrmann & Steelman, of Jersey City, for defendant in error.

PER CURIAM. The ordinance brought up by certiorari was passed in 1910, and purported to amend an ordinance that had been passed in 1893. The Supreme Court set aside the ordinance of 1910, upon the ground that jurisdiction to pass it had not been conferred upon the board of street and water commissioners, as required by the acts of 1894 (P. L. p. 374) and 1896 (P. L. p. 329). In this conclusion we concur, for the reasons stated by Mr. Justice Parker, whose opinion in the Supreme Court is reported in 81 N. J. Law, 110, 78 Atl. 1064. Incidentally, the Supreme Court decided that the ordinance of 1893 was defective, under the case of *Theberath v. Newark*, 57 N. J. Law, 309, 30 Atl. 528. Upon this point we express no opinion, not because we question the soundness of the conclusion reached by the court below, but because it is not essential to the decision of the case.

The judgment of the Supreme Court is affirmed.

WEST SHORE R. CO. v. HENDRICKSON et al.

(Court of Errors and Appeals of New Jersey. March 3, 1913.)

Appeal from Supreme Court.

Certiorari by the West Shore Railroad Company against Charles Hendrickson and others as the State Board of Assessors, and others, to review a tax assessment. From a decree of the Supreme Court (82 N. J. Law, 37, 81 Atl. 351), granting petitioner a part only of the relief demanded, it appeals. Affirmed.

Vredenburgh, Wall & Carey, of Jersey City, for appellant. Edmund Wilson, Atty. Gen. and John R. Hardin, of Newark, for appellees.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Swayze in the Supreme Court.

DENVER CITY WATERWORKS CO. et al. v. AMERICAN WATERWORKS CO.

(Court of Chancery of New Jersey. Feb. 1, 1913.)

1. CORPORATIONS (§ 622*)—DISSOLUTION—DIRECTIONS TO RECEIVER—PROCEEDINGS TO OBTAIN.

A foreign corporation which has brought suit to wind up an insolvent corporation, and holds shares of stock in the insolvent company, has a standing to petition the Chancery Court to direct the domestic receiver to discontinue his attack on the sale by a suit in the federal court.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2470, 2471; Dec. Dig. § 622*]

2. JUDGMENT (§ 592*)—CAUSES OF ACTION—CONCLUSION BY JUDGMENT.

It is the duty of one who brings a suit to include in it every cause of action available to him, which is consistent with the general purpose of his bill, and an available claim not therein alleged is forever lost.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1107; Dec. Dig. § 592.*]

3. JUDGMENT (§ 528*)—CAUSES OF ACTION—CONCLUSION BY JUDGMENT.

The assets of an insolvent corporation were sold on foreclosure, and purchased by a Colorado corporation. Thereafter a person claiming to be a creditor, stockholder, and officer of the insolvent company procured an order authorizing him to make its domestic receiver a defendant to a proceeding in Colorado to set aside the sale. The receiver answered, claiming that the foreclosure proceedings were void, but judgment of the Colorado Supreme Court quieted the purchaser's title, and enjoined the receiver from asserting any claim thereto. Subsequently the receiver brought suit in the federal court on practically the same grounds as those in the state courts. *Held*, that it was the duty of the receiver to have set up in the former attack on the sale every ground which he had, and on his failure so to do, it was forever lost.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.*]

4. RECEIVERS (§ 174*)—ACTION—LEAVE OF COURT—DENIAL OF RIGHT—CONCLUSIVENESS.

The action of the Chancery Court on report of a referee, refusing to permit or direct its receiver to take proceedings in another state to set aside a foreclosure sale of the assets of the corporation, makes his right to attack the sale *res judicata*.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 333-343; Dec. Dig. § 174.*]

5. RECEIVERS (§ 110*)—CONTROL AND SUPERVISION OF COURT.

A receiver is an officer of the court having certain statutory duties to perform, but at all times subject to the court's jurisdiction.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 195-197; Dec. Dig. § 110.*]

6. JUDGMENT (§ 815*)—FOREIGN JUDGMENT—CONSTITUTIONAL PROVISIONS—FULL FAITH AND CREDIT.

Where a domestic receiver, a party to a proceeding in another state attacking a foreclosure sale of the assets of the corporation in receivership, was forever enjoined from claiming title thereto, he will not thereafter be permitted to bring suit attacking the validity of the sale, since to do so would violate the full faith and credit clause of the federal Constitution.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1445-1448; Dec. Dig. § 815.*]

7. RECEIVERS (§ 210*)—FOREIGN RECEIVERSHIP—ACTION BY RECEIVER.

Independent of statutory provision and simply as a matter of comity, a court will extend its aid to the receiver of a foreign corporation to enable him to get possession of property which should in equity be applied in payment of its debts, and hence a receiver, a party to a proceeding in the courts of another state attacking the validity of a foreclosure sale of the assets of his insolvent, and therein enjoined from claiming any title thereto, has exhausted his right to appeal to state comity, so that the Chancery Court will not thereafter permit him to attack such injunction order.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 417-420; Dec. Dig. § 210.*]

8. RECEIVERS (§ 174*)—ACTION—LEAVE OF COURT.

Where a suit is a mere speculative one prosecuted as a stock jobbing operation, or for the purpose of extorting money, the Chancery Court ought not to allow its receiver to have any hand in it.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 333-343; Dec. Dig. § 174.*]

9. CORPORATIONS (§ 622*)—DISSOLUTION AND FORECLOSURE—VOCATION—LACHES AND LIMITATIONS.

By a delay of nearly 20 years, a receiver of a corporation whose assets were sold in foreclosure and its affairs wound up forfeits all right to take affirmative action to have the foreclosure proceeding declared void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2470, 2471; Dec. Dig. § 622.*]

10. RECEIVERS (§ 60*)—DISCHARGE—PENDING SUIT.

A domestic receiver will not be discharged pending his suit in another jurisdiction to set aside a sale of the assets of a corporation in receivership.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 105-107; Dec. Dig. § 60.*]

Suit between the Denver City Waterworks Company and others and the American Waterworks Company. On motion to direct the receiver to discontinue a pending suit in the United States District Court for the District of Colorado. Motion granted.

This is an administration suit; its purpose being to wind up the affairs of the American Waterworks Company as an insolvent corporation. This company was incorporated on March 31, 1891. On April 9, 1892, the original bill was filed in this cause, alleging the insolvency of the company, and praying for the appointment of a receiver. On July 20, 1892, the corporation was adjudged insolvent, and one E. Hyde Rust was appointed receiver. Rust qualified and acted as receiver until his death on February 12, 1901. The present receiver, John S. McMaster, was appointed March 11, 1901, and he has been acting in that capacity hitherto.

At the time of the organization of the defendant company certain properties at Denver and Omaha were transferred to it which were subject to mortgages for large amounts, and, the defendant having made default in the payment of interest on the bonds secured by the mortgages on the property, proceedings were taken to foreclose the same, which resulted in final decrees against the company, and in pursuance thereof the property was sold at public auction and was struck off to one Underwood, representing a bondholders' protective committee. These sales were afterwards confirmed by the proper court on April 23, 1894. The property was then conveyed to Underwood, and thus the defendant corporation lost its title thereto. On February 25, 1895, one Venner, claiming to be a creditor, a stockholder, and an officer of the defendant company, petitioned this court for an order directing the receiver to take proceedings in Colorado to set aside the fore-

closure sale because of certain alleged irregularities in procedure. This resulted in an order referring the matter to the receiver, and directing William H. Corbin, his counsel, to inquire into the facts, and report thereon to the court. Mr. Corbin reported adversely to the petition, and this court declined to make the order prayed for. Venner then procured an order authorizing him to make the receiver a party defendant in his Colorado proceeding. These proceedings were begun on or about April 6, 1896, by a bill filed in a Colorado state court to set aside the mortgages and the sales thereunder, to which bill the receiver, Rust, filed an answer, disclaiming any right, title, or interest in the cause of complaint, and protesting that he was not a necessary or proper party to the suit, and that the complainant did not state facts sufficient to constitute any cause of action against him. After the death of Rust, McMaster filed an amended answer and answers to cross-petitions which had been filed against him, claiming that the foreclosure decrees and all proceedings thereunder were void as against him and the company which he represented for lack of jurisdiction of himself and the company, and claiming an avoidance of all the decrees, orders, sales, and proceedings in the foreclosure suits upon the ground that it was attempted thereby to deprive him and his company of their interest, title, and equity in the property in question, without giving them an opportunity to have their day in court and without due process of law, and contrary to the Constitutions of the state of Colorado and the United States. Issue was joined on these pleadings and a hearing had. On June 3, 1902, the cause was decided, and subsequently a decree was entered by which it was declared that neither the said McMaster as receiver nor his company had any right, title, interest, or claim in or to the mortgaged premises, but that the Denver Union Water Company was the owner thereof and had been in possession thereof since October 18, 1894, and was entitled to have its title thereto quieted and set at rest, and thereupon it was adjudged that the title of the said Denver Union Water Company in and to the said mortgaged premises be and the same was thereby quieted, and that the American Waterworks Company, the defendant herein, and John S. McMaster, its receiver, their successors and assigns, and any and all persons claiming by, through and under them, were forever enjoined and restrained from asserting, setting up, or claiming any right, title, or interest of any kind or nature whatever in or to the above-described premises. This judgment was affirmed on appeal by the court of last resort of Colorado (40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036), and a writ of error was taken to remove the cause into the United States Supreme Court upon the ground that there were federal questions

involved, which writ was dismissed on February 20, 1911, for want of jurisdiction. *Venner v. Denver Union Water Co.*, 219 U. S. 583, 31 Sup. Ct. 472, 55 L. Ed. 346.

Subsequently, and on December 21, 1911, Mr. McMaster filed an original bill of complaint in the United States District Court for the district of Colorado for what appears to be the same cause of action as that which was litigated in the Colorado state court suit. An examination of the pleadings filed by the receiver in the two cases discloses the fact that they are identical, in substance, in purpose and in object.

Application is now made on behalf of one of the complainants in the administration suit (the Denver City Waterworks Company) claiming to be a stockholder in the defendant corporation to direct the receiver to discontinue this last-mentioned suit upon the grounds (1) that there has already been an adjudication against him on the same questions; (2) that he in his capacity of an officer of this court is violating an injunctive order made by a competent court of a sister state, and affirmed by its highest court of appeal; (3) that state comity does not reach to the point of permitting any such proceeding on the part of a foreign receiver; (4) that the receiver is not prosecuting the last suit in good faith on behalf of creditors and stockholders, but is permitting the said Venner to use his name for the purpose of disturbing titles which vested under the foreclosure suit nearly twenty years ago.

Norman Grey, of Camden, and John M. Enright, of Jersey City, for the motion. Pierre F. Cook, of Jersey City, opposed.

HOWELL, V. C. (after stating the facts as above). [1] The status of the complainant to move the court on its petition for the relief now sought is questioned in limine upon the ground that it has no interest to protect, and therefore is a mere volunteer. I think it sufficiently appears that the complainant is still the owner or holder of shares of stock in the defendant the American Waterworks Company, and, if so, there can be no question of its right to prosecute this matter. Besides, it is the complainant in the suit in which the receiver was appointed, and it comes with ill grace for him to say that the proceeding in which he was so appointed is irregular, because he thus casts a reflection upon his own title. I hold therefore that the petitioner may properly take the proceeding now pending.

[2, 3] The first ground alleged on behalf of the motion is that there has already been an adjudication against the receiver on the same question, and this must be true if as a matter of fact the remedy now sought in the suit pending in the United States District Court is the same sought in the previous Colorado suit. But it is urged that there are new matters alleged in the present suit

which were not alleged or dealt with in the first suit. I have failed to find any such new matter, but, if it exists, I do not see how under the rules of law, and the allegations in these pleadings, such new questions can be availed of by the receiver. The rule undoubtedly is that it is the duty of one who brings a suit to include in it every cause of action available to him, which is consistent with the general purpose of his bill, and the same rule must from the nature of things apply to defenses. It is the duty, therefore, of every defendant to set up and prove every defense which he may have to the claim, and, if either complainant or defendant shall omit to allege or prove any available claim or defense, such claim and such defense are lost to him forever. I had occasion to examine this question in the case of *Rosenstein v. Burr*, 83 Atl. 785, opinion filed June 14, 1912. That was a suit to compel the specific performance of a contract to convey lands. Previously the defendant brought a suit in this court to cancel the contract, on two grounds: (1) That it had been obtained by fraud; and (2) that it was executed in Connecticut on Sunday, and that it was void because violative of the Connecticut Sunday laws. The bill was eventually dismissed, and its prayer denied. In defending the suit for specific performance the answer denied the due execution of the so-called agreement and the tenders of performance charged in the bill. On the hearing other defenses were interposed. One was that the agreement relied upon was invalid for lack of assent, and the other was that there was a stipulation that the agreement should not be binding, until it should have been made the subject-matter of a formal document to be drawn by a scrivener and formally executed. These new defenses were rejected upon the ground that they were available to the defendant as weapons of attack and defense in the first suit, and, that having neglected to use them, thus they were lost to him forever.

In *N. Y. Life Ins. Co. v. Bangs*, 103 U. S. 780, 26 L. Ed. 608, the facts were that an action at law was brought against the life insurance company on policies of life insurance in which the plaintiff recovered. Subsequently the company brought suit in equity to set aside the policies on the ground of fraud, to which the former recovery was pleaded as a defense. The court said: "The judgment in the action at law was a bar to this suit. Its recovery concluded all matters which might have been urged as a defense to the policies. A fraudulent purpose in procuring them subsequently carried into execution would have been a good defense. It was, in fact, originally pleaded and afterwards withdrawn. Its withdrawal did not authorize a suit in another forum for its establishment against the demand of the plaintiff. When an action at law is brought upon a contract, the defendant denying its

obligation, either from fraud, payment, or release, or any other matter affecting its original validity or subsequent discharge, must present his defense for consideration. A recovery is an answer to all future assertions of the invalidity of the contract by reason of any admissible matter which might have been offered to defeat the action."

The point is likewise well illustrated by the cases of *Fourniquet v. Perkins*, 7 How. 160, 12 L. Ed. 650; *N. P. R. Co. v. Slaght*, 205 U. S. 122, 27 Sup. Ct. 442, 51 L. Ed. 738; *U. S. v. Cal. & O. Land Co.*, 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476; *Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 205; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195, which latter case has been followed in this state in *Paterson v. Baker*, 51 N. J. Eq. 49, 26 Atl. 324; *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq. 658, 37 Atl. 599; *Mercer County Traction Co. v. United Railroads*, 64 N. J. Eq. 588, 54 Atl. 819. This point would seem to be decisive of the status of the domestic receiver, and to be sufficient to justify granting the motion. It may well be that in the receiver's present suit the defendant might plead the former adjudication against him, and it would seem that such a plea, under the authorities above cited, would necessarily prevail. What the practice and procedure on such a plea would be in Colorado we do not know, but it certainly would eventuate in some sort of hearing to determine its validity, and I see no reason why the parties should be put to the delay, trouble, and expense of such a hearing. The remedy now sought by this motion goes to the root of the whole matter, and obviates the necessity of further expense and delay.

[4] In addition to the adverse judgment in the Colorado court, there is also an adjudication of distinct weight on the same subject-matter in this court. It appears that application was made here in 1895 for an order permitting or directing the receiver to take proceedings to set aside the foreclosure transaction, which proceedings, of course, must have been brought in Colorado, where the property lies; that the matter was referred to William H. Corbin, who inquired into it, and before whom witnesses were sworn. He made his report to the court. The court refused to make the order sought, which I take to be an adjudication on the exact situation that is now presented.

[5-7] There are, however, other grounds equally cogent upon which the decision of this motion may rest. The receiver is an officer of this court. He has certain statutory duties to perform, but he is at all times subject to this court's jurisdiction. He was a party to a suit in Colorado in which an injunction was issued against him enjoining him from doing the very thing which he subsequently did. To allow such a proceeding after it has once been brought to the

attention of this court is for this court to allow one of its officers to affirmatively violate an injunction order made by a competent court of a sister state and affirmed by its highest court of appeals. There could be no justification for any such action on the part of this court, and it will not permit itself or its officers to be put in a position of antagonism to final decrees made in foreign jurisdictions, thus violating the "full faith and credit" clause of the federal Constitution, but more especially as the domestic receiver can only obtain admission to the courts of the foreign state upon the ground of state comity, the extent of which is clearly set forth in *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Falk v. Janes*, 49 N. J. Eq. 484, 23 Atl. 813; and *Irwin v. Granite State Provident Association*, 56 N. J. Eq. 244, 38 Atl. 680. It is there stated that independent of statutory provision and simply as a matter of comity the court will extend its aid to the receiver of a foreign corporation for the purpose of enabling him to get possession of property which should in equity be applied in payment of its debts. Such an attempt was made in the Colorado suit. It failed, and I am constrained to hold that upon this point alone the receiver has exhausted his right to appeal to state comity on this question. It may well be that this objection might be urged in the present pending suit, but I make the same remark concerning that suggestion that was made in deciding the first point.

[8] Lastly, it is urged that the receiver is not prosecuting his present suit in good faith on behalf of creditors and stockholders, but is merely lending his name and authority to a scheme devised by Venner for speculative purposes. The affidavits on this point are meager and consist principally of innuendo and argument, so that I am unable to say whether the point is well taken in fact or not. If the suit is indeed a mere speculative one, and is being prosecuted as a mere stock-jobbing operation, or for the purpose of extorting money, this court ought not to allow its receiver to have any hand in it.

[9] The proceedings in the foreclosure suit which are attacked were wound up and ended nearly twenty years ago, and, if the plea of former recovery was not sufficient to oust the jurisdiction, it might be thought that the domestic receiver by his long delay had forfeited all right to take the affirmative action which he has taken in the present suit. I am therefore of the opinion that the domestic receiver should with all convenient speed relieve himself of the burden of the prosecution of his present cause of action, and cease to be its *magister litis*. There can be no objection, however, to his assisting any interested parties in procuring some one to take his place, or in changing the form of the suit to meet the necessity of his retirement, and to take such time thereafter as may

be reasonably necessary, and to this end he should perhaps render all assistance that may be reasonably required to reach the end in view.

[10] There is one other branch of the motion which has not yet been mentioned. The petitioner seeks to have the domestic receiver file his account, and be discharged from the further performance of his trust. It appears that he has never received any assets, and it would seem useless to continue a receivership which is now over twenty years old and which has not yet brought any benefit or advantage to the company's creditors. When the receiver shall have discharged himself from all duties and obligations in his present pending suit, the question of his discharge will then be taken up.

GIVERNAUD v. GIVERNAUD et al.

(Court of Chancery of New Jersey. Jan. 11, 1913.)

1. DIVORCE (§ 167*)—DECREE—OPENING—FRAUD—DEATH OF SPOUSE.

A court of equity will not entertain a suit to open a final decree of divorce after the spouse that obtained it is dead; but, where the decree was obtained fraudulently, the defrauded spouse may bring a suit for the enforcement of any civil right notwithstanding that the decree, if honest, would be a complete bar.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 533-548; Dec. Dig. § 167.*]

2. DIVORCE (§ 167*)—DECREE—FRAUD—BILL OF REVIEW.

A bill of review to set aside a fraudulent divorce after the death of the other spouse, which states that the object of setting it aside was to prevent the bar of limitations from interfering with the collection of a judgment rendered 40 years before, will be held good as a bill to collect the judgment.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 533-548; Dec. Dig. § 167.*]

3. DIVORCE (§ 167*)—DECREE—ENFORCEMENT—LACHES.

Where a wife obtained a limited divorce in France charging adultery, the only divorce allowed at the time, and got a judgment against the husband, and he came to America, got an absolute divorce, married again, grew wealthy, and had many relatives living in the vicinity of his first wife, during which time she refused to have anything to do with him and did not attempt to collect the judgment, she will not be allowed to recover the judgment 40 years after, and after his death, claiming that she did not know that he had obtained an absolute divorce.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 533-548; Dec. Dig. § 167.*]

Bill by Jeanne Marie J. Givernaud against Charles L. Givernaud and others. Bill dismissed.

J. W. Rufus Besson, of Hoboken, and Maurice Leon, of New York City, for complainant. Abel I. Smith and John S. Mabon, both of Hoboken, George Malraison, of New York City, and Gilbert Collins, of Jersey City, for defendants.

STEVENSON, V. C. (orally). My conclusion in this case is that the bill of complaint must be dismissed.

1. The bill is filed as a bill of review, or a bill in the nature of a bill of review. A petition was presented to the court for leave to file the bill. An order was made permitting the bill to be filed, and the consent of the court was further indorsed by the hand of the Vice Chancellor on the back of the bill. I have a very grave doubt that, in a divorce case where a decree has gone by default, the case having been tried *ex parte* in the lifetime of the parties, at any time before the enrollment of the decree, after the enrollment of the decree, within the time allowed for an appeal in a contested case, or after such period has elapsed, the correct method of obtaining on behalf of the defendant a right to contest the case is by a bill of review rather than by a petition in the cause setting forth the default, setting forth the fact that the defendant had not been heard in the case at all, setting forth, further, that application was made at the earliest moment possible, and then setting forth the merits which underlie—must underlie—the application. I think at present the Court of Chancery has full power at all times during the lifetime of the parties to hear a defendant in the cause where the divorce has gone against him or her by default, who alleges that the decree was obtained by fraud and that he or she, as the case may be, has only recently received actual notice of either suit or decree.

We have, however, this bill filed as a bill of review setting forth, or attempting to set forth, a cause of action in equity. It is not such an application as I mentioned a moment ago, which is made during the lifetime of the parties. This application is made to the court after the death of the husband who obtained a decree of divorce *ex parte*, and it is very plain both from the fact that this bill was filed as a bill of review and also from the frame of the bill, and particularly of the prayer, that the pleader had in view as a complete cause of action in equity the setting aside of this decree of divorce on the ground of fraud.

The bill assigns the reason why the complainant, the defendant in the divorce suit, comes into this court with such a bill. She says that she recovered a judgment for 44,000 francs against her husband, now deceased, in 1866, in France where both parties were then domiciled, and the reason why she wants to have the decree of divorce opened is not a sentimental one—not for any vindication of her character against the charge of desertion which her husband made and proved *ex parte*. She has a very practical reason. She says: "I want my money, my judgment for 44,000 francs," equivalent to over \$8,000, "and I cannot obtain any remedy for the collection of that judgment because I am

barred by the statute of limitations which began to run in 1872 when this fraudulent divorce was obtained. I therefore desire to have a decree of this court vacating that decree of divorce and leaving me at liberty to proceed for the collection of my judgment in any court of competent jurisdiction, law or equity."

And I may say, in passing, that a question is suggested right on the face of this case, whether in case the divorce were set aside the action of the widow, as she then would be, against her husband's executor, would be at law or in equity. If her judgment is only enforceable in equity—if her case is equitable—the mere death of her husband, by which she is able to sue his executors in a law court, would not give the law court any jurisdiction, because the incapacity of the law court to take jurisdiction of such a case does not arise out of the fact that the litigation is between a man and wife; it arises from the fact that the cause of action is purely equitable, of which the court of law can take no cognizance.

But I do not want to pursue this thought further. I only intended to say that the question arises, or might arise, what the remedy of Mrs. Givernaud for the collection of this money would be in case the decree of divorce were vacated and she stood now before the courts of this state as the widow of her husband, seeking to recover from her husband's executors the amount of this judgment of a French court, rendered 46 years ago when both parties were citizens of France and were domiciled in France.

[1] I do not think that any such equitable action will lie as the pleader had in mind when he drew this bill and framed the prayer for relief and obtained leave to file the bill as a bill of review. In other words, it seems to me that the Court of Chancery of New Jersey will not entertain an application in any form, either by bill of review or by petition in the cause, to open a decree of divorce—final decree of divorce—when the party, the spouse who obtained it, is dead. The subject-matter of the litigation in a divorce suit is the marriage relation, the status of marriage, and that has perished; that has been destroyed by the death of one of the spouses.

It is difficult to see what would be the result of the opening of this decree of divorce. The husband could not contest the case any further. The effect would seem to be that immediately upon opening the decree the court must recognize the fact that the suit has abated without hope of revival, and so the result of opening the decree would be not to recognize the litigation and give the complainant an opportunity to try his case and the defendant to defend, but to have the whole litigation immediately puffed out of existence.

I have considered the authorities which

have been submitted, and which are conflicting, in regard to the status of a fraudulent decree of divorce after the death of the party who obtained it, and my conclusion is that no direct application is proper to open the decree, but the defrauded spouse may bring a suit for the enforcement of any civil right in any appropriate court in the state of New Jersey and obtain such enforcement, notwithstanding the fact that the decree of divorce, if honest and valid, would be a complete bar.

Generally, an adjudication that the decree of divorce was void would be made by the court in which the spouse—we will say the wife—was undertaking to prosecute her claim. If, however, for any reason the court of law should consider that it could not entertain the attack of the wife upon the validity of the divorce, if by applying the rule against collateral attack or for any reason the court of law should reach that conclusion, it may be that the wife would have to file her bill in this court to enjoin the other party in the lawsuit from setting up the divorce. In one way or another it seems to me that, where a spouse has been defrauded—the wife, we will say—by a decree of divorce obtained by imposition upon this court, and the husband has died before she was able to learn about it and attack the decree, she can then maintain an action against the heir for dower and, either in that proceeding or in a proceeding in this court in aid of her suit for dower, have the impediment from the fraudulent divorce removed.

Mrs. Givernaud might assert a variety of rights as widow of Mr. Givernaud. She might wish to contest the probate of the will. She does not say in her bill that she has the slightest claim against the probate of that instrument. She might also, as I said a moment ago, wish to recover dower in a large amount of valuable real estate. She does not assert in her bill that her husband left any real estate, or that she has any claim to dower. If she had, she can, as I have said, take the appropriate action to have her right of dower enforced, and she could have an adjudication either in the court where she was proceeding to get her dower or in this court, which would sweep aside the fraudulent divorce as a defense if she proved that it was fraudulent, and that she could have had it vacated if her former husband were alive.

What Mrs. Givernaud has in view as the object of this suit, or rather the ultimate object of the litigation or litigations which this suit initiates, is the recovery of the 44,000 francs out of her husband's estate, and that is the sole ground upon which she comes into court now and asks to have this decree of divorce set aside.

The slightest reflection will show how great a variety of possible claims a woman may have in the situation of Mrs. Givernaud, and the theory of the pleader is that he can file a

bill in the nature of a bill of review and have the fraudulent divorce vacated, and then the woman can look around and determine what she will do—whether to bring an action for dower against some heir or devisee, or bring some proceeding to have the validity of the probate of the will contested, or collect money that is due her and be rid by her decree setting aside the divorce of the bar of the statute of limitations, or bring no further action of any kind in the absence of any enforceable claim as widow.

My conclusion is that a spouse cannot do that, cannot maintain that kind of suit. I indicated this view to counsel at the opening of the case, and my examination of the authorities and further reflection upon the subject only strengthen my view that we must regard this bill as an original bill, filed by Mrs. Givernaud to collect 44,000 francs out of the estate of her deceased husband.

Undoubtedly the original theory of the framer of this bill, as counsel for the complainant fully explained at the opening of the case, was that it was a bill of review, and that the allegations setting forth the recovery of the judgment for 44,000 francs were inserted merely to show the court that there were substantial rights involved; that the complainant was not merely exploiting a sentimental case for the sake of escaping from the reproach of being a divorced woman, but, on the contrary, had a very substantial interest in the estate of Mr. Givernaud which, however, she could only recover by having the divorce set aside so that the statute of limitations would not be a bar to her proposed future action in some court for the recovery of her 44,000 francs. The bill, however, although styled a bill of review and filed as such in my judgment, as I pointed out to counsel, presented an independent cause in equity for the recovery of the 44,000 francs against the executors of Mr. Givernaud, who were made defendants, and no objection had been made on the ground of multifariousness or misjoinder.

[2] Counsel for the complainant then positively declared that he intended to ask for a decree for the amount of the complainant's judgment and did not intend to stop merely with a decree setting aside, on the ground of fraud, the divorce which Mr. Givernaud had obtained. Such relief was plainly within the scope of the premises of the bill and could be granted by a court of equity under the general prayer, notwithstanding that the complainant may not have originally intended to ask for any other relief than the vacation of the decree of divorce.

The cause then proceeded; all parties being distinctly notified of the nature and extent of the complainant's case which would be presented to the court for determination upon the evidence.

The question whether this bill might be maintained, not as a bill of review but as presenting an independent cause of action

in equity, the object of which is to set aside a decree of a court which had been obtained by fraud, it being a matter of no consequence whether the alleged fraudulent decree had been obtained in the Court of Chancery of New Jersey or in some other court of this state or of a foreign state, was not raised. If such a claim, however, had been within the theory of the bill, it was exceedingly improper and misleading to go through all these forms required to give it the name and character of a bill of review.

There being no argument on the subject, I have dealt with the bill only in two aspects, namely, as a bill of review the object of which would be accomplished according to the complainant's original theory by a vacation of this decree of divorce on the ground of fraud, and also as a bill for the recovery of the amount of this judgment for 44,000 francs. The discussion of the bill as presenting an original cause in equity for the setting aside of a fraudulent judgment or decree recovered in a domestic, not a foreign, court not being suggested in any way during the trial of the cause, and being utterly inconsistent with the character of the bill as a bill of review, would involve some very difficult and, as yet, unsettled questions which I am entirely willing to disregard.

An examination of a few reported decisions with the citations therein contained will disclose these questions in their application to both domestic and foreign judgments. *Dringer v. Receiver*, 42 N. J. Eq. 573, 8 Atl. 811; s. c. (on appeal) 43 N. J. Eq. 701, 13 Atl. 664; *Kearns v. Kearns*, 70 N. J. Eq. 483, 62 Atl. 305; *Flower v. Lloyd*, 10 Ch. D. 327; *Abouloff v. Oppenheimer Co.*, 10 Q. B. D. 295; *Cole v. Langford* (1898) 2 Q. B. 106.

Whether the courts of New Jersey would adopt the broad and somewhat indefinite definition or description contained in the later English cases of the fraud which will afford a sufficient basis for setting aside a judgment of a domestic court by an ordinary suit in a court of equity, may very well be considered a matter of doubt, especially in view of the narrow action of the Court of Errors and Appeals in the case of *Dringer v. Receiver*, which action is erroneously set forth in the reporter's syllabus. It would seem to be quite safe to conclude that, if the decree of divorce in this case would not be opened and vacated upon a bill of review, it would not be interfered with upon an independent bill in equity making an original attack upon the decree as fraudulent and invoking the jurisdiction of courts of equity to set aside judgments and decrees, both domestic and foreign, upon the ground of fraud.

No objection has been made in any form to the jurisdiction of this court over this present controversy. It is practically conceded by the parties and their counsel that so far as the forum is concerned Mrs. Giver-

naud has made no mistake, in whatever aspect her bill is considered. This is a perfectly plain case where the court should not raise any jurisdictional question, and I shall therefore dispose of the case on its merits.

2. For fear I may forget it, my attention was called, in looking through the papers the other day, to a separate and distinct defense set up in the answer of the executor, to the effect that all creditors of Mr. Givernaud's estate were barred by a decree of the surrogate or the orphans' court of Hudson county. That defense was not referred to, I think, in the argument. I am not going to deal with it. It seems to be a bar to this action, so far as the executors are concerned, because the bill does not contain any allegations which take the case out of the operation of that decree of the surrogate or the orphans' court. Probably, however, the maintenance of such a defense by the executors in the end would not be very beneficial to them. The indications are that there is a large estate here undistributed, and probably the defense was not pressed in order that there might be a final adjudication upon the merits, and therefore I shall not refer to this defense again.

3. Now, then, we come to the case: Mrs. Givernaud and her husband, Louis Givernaud—Charles Louis, is it not, Judge Smith?

Judge Smith: Charles Louis.

The Court: Charles L. Givernaud was married in 1860, in France—

Judge Smith: Louis Barthelemy, I think he called himself.

The Court: Very good. They were married in the year 1860 in France, in Lyons, where they both were domiciled and where I understand they were born and lived. That is 48 years before this suit was brought. They lived together as man and wife only for about 3 or 4 years, I think until some time in 1864, when they separated and Mrs. Givernaud returned to her parents' home, where, I think it appears, she has lived ever since, or until their death.

Mr. Givernaud maintained a sort of separate establishment in Lyons for about two years, part of the time living with his parent—his father. In this brief period of married life it seems there were three children born who have always been with the mother.

In 1866 Mr. Givernaud was engaged with his brothers in the silk business in Lyons. He got into financial embarrassment, or rather the firm did, and the result was bankruptcy. At this time Mrs. Givernaud, who was separated from her husband, and who evidently entertained feelings of great animosity toward him as did her father, commenced a suit under the French law for a separation of her property from that of her husband, because it was imperiled by his bankruptcy.

Her dowry had been about 44,000 francs, and that she wished to recover. She prosecuted that suit, and the husband defended it, and on the 7th day of February, 1866, she obtained the judgment which is set forth in this bill and which is the cause of this suit; the judgment being substantially for 44,000 francs.

The judgment provides that there should be an abatement of a portion of that decree—4,000 francs of it—equal to the value of such articles of a personal nature, apparel and jewelry, I suppose, as Mrs. Givernaud might recover in kind. The decree of the court was that she was entitled to 40,000 francs, the amount of money that she and her father contributed, and 4,000 francs, the value of her trousseau, less, however, the value of such articles from that trousseau as she might recover in kind. I do not find from the papers that there was ever any ascertainment of the value of the things she recovered, if she recovered anything. It makes the status of the judgment somewhat peculiar, but I shall treat the judgment as counsel treated it in their argument as equivalent to an absolute judgment for 44,000 francs—a judgment recovered by this woman against her husband.

Let us now see what the circumstances were which characterize the relations of these people to each other in 1866. They not only litigated this matter in the courts relating to the wife's separate property, in which litigation she recovered a judgment for her whole dowry, but immediately the wife further separated herself from her husband. She brought an action for a separation of persons, a limited divorce, the only kind of divorce known at that time to the French law. There was no law providing for an absolute divorce or dissolution of the marriage bond, according to the testimony of the expert, the French lawyer, until 1884, 18 years after Mrs. Givernaud got her limited divorce. I did not mention the date when she procured this divorce. It was in August, 1866.

In the latter part of February or the first part of March, 1866, Givernaud, discarded by his wife and repudiated by his wife's father, left France and came to this country and started in business with his brothers, became a citizen of the United States, and prosecuted successfully a large business, a good business which became large, for a great many years, and died finally in Los Angeles, Cal., where he seems to have been temporarily abiding in 1908, 42 years after this judgment had been recovered against him. And during the greater part of that period, as is indicated by the testimony in this case, he was absolutely responsible for anything which his wife might recover here upon that judgment against him.

In the suit for limited divorce, the record of which has been put in evidence, it appears

that Mrs. Givernaud made most severe and offensive charges against her husband. She charged him with maintaining concubines, I think, in the home of the couple. She charged him with illicit relations with women, and the evidence indicates the bitterness of her hate for this man, and her desire to be absolutely rid of him, and now in her old age when she is interrogated, upon the commission which was issued in this cause, in regard to what she knew about her husband, she takes pains to show her contemptuous disregard. She wanted to have nothing to do with him whatever. She had recovered her property as far as she could. She obtained her judgment, perhaps collected a part of it in the bankruptcy proceedings, divorced herself from her husband so far as was permitted by the laws of her country, and refrained from making any inquiry about him, although she would not have had the slightest difficulty in obtaining full information. Mr. Givernaud had relatives and friends in Lyons. He was not concealed. His prosperity was known by rumor to Mrs. Givernaud, but she would have nothing to do with him and took no steps to find him or to collect this judgment or the remainder of it out of his property in this country.

In view of those facts, which are beyond dispute in this case, in view of the relations between this couple, a rule of law which prevents the statute of limitations from being a bar to any recovery is simply a hard and fast technicality of the worst kind which courts of equity usually endeavor to avoid if they can.

[3] 4. It has often been pointed out that the statute of limitations is not addressed to courts of equity but to courts of law only. Courts of equity, however, are said to enforce the statute by analogy. Several reasons have been assigned for the rule that the defense of the statute of limitations will not be recognized by courts of equity in litigations between husband and wife. Sometimes it has been said that a married couple cannot sue each other in courts of law, and that therefore the legal defense of the statute of limitations should not be sustained when they sue each other in a court of equity.

I do not think there is much force in this reasoning, and undoubtedly the main reason for the well-settled rule is founded upon a consideration by courts of equity of the relations of love and confidence which presumably exist between man and wife, the fiduciary relation which must powerfully influence the conduct of persons who are bound by it with respect to each other's property as well as person. Courts of equity will not foster a litigation between a man and wife which naturally would tend to break up the peace of the home. The plainest reasons pertaining to public policy and the good order of society underlie this rule.

I have very hastily gathered some recent authorities on this subject, which are as follows: *Yoemans v. Petty*, 40 N. J. Eq. 495, 4 Atl. 631; *Gray v. Gray*, 39 N. J. Eq. 512; *Bennett v. Finnegan*, 72 N. J. Eq. 155, 65 Atl. 239; *Ten Broeck v. Jackson*, 71 N. J. Eq. 582, 69 Atl. 488.

These authorities fully recognize the reasons which I have stated, why courts of equity ordinarily exclude the defense of the statute of limitations from litigations between husband and wife. They also recognize the fact that in ordinary cases the defense of laches in like manner must be excluded. But the authorities hold that the delay of one spouse in bringing his or her action against the other while the status of marriage exists may be fatal under the equitable doctrine of laches. The correct view is that a court of equity must look at all the circumstances of the case without being bound by the hard and fast rule of the statute of limitations imposed upon courts of law, and that the defense based upon undue delay will be sustained or rejected according to purely equitable considerations in view of the equitable doctrine of laches. This is plainly what Chief Justice Beasley says in his opinion for the Court of Errors and Appeals in the case of *Gray v. Gray*, which I have cited.

In the case of *Ten Broeck v. Jackson*, which I cited a moment ago, Vice Chancellor Stevens held that under the circumstances of that case the complainant, who was a widow, was chargeable with laches during the time when she was living with her husband prior to his decease, and such laches barred her of recovery of an alleged debt from her husband's executor. The Court of Appeals affirmed the decree of this court upon one of the grounds upon which the same was based, without finding it necessary to consider the question of laches. 73 N. J. Eq. 734, 69 Atl. 490.

It must be borne in mind, in dealing with all the authorities which recognize the rule to which I have referred excluding this defense of laches or the defense of the statute of limitations in equitable suits between man and wife, that the reason for the rule, apart from a bare, and as it seems to me inapplicable, technicality, consists in the assumption that a relation of love and confidence, the finest and most potent fiduciary relation perhaps known to the law, exists between a man and his wife.

When the couple have separated, when, for instance, the wife has secured a divorce from bed and board in a suit in which she has charged her husband with extreme cruelty under our law or gross violations of his marriage vow, as was done in *Mrs. Givernaud's* case in France in 1866, is it not absurd to apply to the case this rule excluding the statute of limitations from consideration and also excluding the defense of laches?

It seems to me there is a very strong reason for sustaining a general rule that, where the married couple have been separated for years by a decree of limited divorce under our statute and have never become reconciled, but on the contrary have persistently maintained sentiments of bitter animosity so that every particle of love or confidence which may formerly have existed between them has been wholly destroyed, courts of equity will enforce the statute of limitations in all litigations between the so-called married couple.

It is somewhat difficult for me to perceive any sound reason why a woman who has thrown off her husband by a decree of limited divorce and absolutely separated herself from him should be allowed to hold open indefinitely a claim, for instance for money lent to her husband in former days of confidence, and then obtain a decree in equity for the amount of the loan 40 years afterwards, against her husband or her husband's executors.

But I do not have to lay down any such rule in this case, because it is conceded that, however courts of equity may regard or disregard the statute of limitations in suits between man and wife, the great equitable doctrine of laches stands on an independent basis and may or may not afford a defense according to equitable considerations.

Now, then, let us see what sort of a case this is for the application of the doctrine of laches. This woman, as I said, recovered a judgment in 1866. The judgment debtor, her husband, died 42 years later, here in America, where he occupied a position of prominence in the trade of the country. He had relations in France. This woman had no difficulty in finding out about him, and she does not pretend that she did not know that he was abundantly able to respond if she brought her suit over here in New Jersey—sent her judgment over here. But she waited, and she waited 42 years, and just see what happened during that interval! Her husband died. Ordinarily, there is a presumption of the payment of a judgment after 20 years. No defense of payment has been set up in this case, and therefore I do not deem it necessary to consider how far such a defense, if it had been set up, would have been sustained. The husband undoubtedly knew a great deal about this matter. For all that appears in this case, there might have been payment or a release. At any rate, the husband certainly might, if he had been sued some time during these 42 years, have thrown some light upon this affair which would have been exceedingly beneficial to him and exceedingly harmful to his wife. We can speculate about the various defenses that he might have raised. He might have disclosed facts founding defenses which his executors know nothing about. If he were alive he might establish the defense

that the judgment had been paid in accordance with the ordinary presumption.

But let us go further and see how the laches of Mrs. Givernaud has injuriously affected the defense actually set up in this case. The bill admits that the complainant cannot recover a dollar of this money and interest, and I suppose with interest it amounts to something like \$25,000, does it not?

Judge Smith: Yes.

The Court: No, no; you stated, although there was no proof on the subject, that 27½ per cent. was paid in the bankruptcy proceedings, \$10,000 or \$15,000. At any rate, it is a large sum of money, and she admits, and her bill admits, and her counsel admits, that she cannot make any recovery unless the bar of this divorce is removed. She has got to have that bar swept aside in order to recover any portion of this debt, and for 42 years she has held her claim in abeyance, and for 36 years during the lifetime of her former husband she has held it while this decree of divorce was standing against her on the records of this court.

But she says, "I didn't know of any divorce," and I suppose I am safe in saying that this bill never would have been filed unless Mrs. Givernaud was prepared to swear point blank that until recently she had no notice that the divorce had been obtained against her. I doubt if any lawyer would have filed a bill if he could not be assured that she would testify to that, that she never heard of this divorce. That lies at the foundation of all her rights which she seeks to assert in this case, and when we take her bill in order to ascertain the grounds on which she seeks to set this decree of divorce aside at this late date, we find, I think, two grounds, and one consists in the charge that her husband fraudulently procured a misdirection of the letter which was sent to notify her of the commencement of the divorce suit.

Well, we have to find that she did not know of this suit if she says she did not know of it, and we must consider this charge that in respect to the mailing the notice there was fraud. And she says another ground is: "My husband fraudulently concealed from the court the fact that I was living under a decree of separation which I recovered or obtained in France, in August, 1866. It is true I began my suit after Mr. Givernaud had come to this country and he was not served with any process, nor was any notice of my suit published in a newspaper or sent to him by mail, but he knew about my suit; he got actual notice of it."

Now, it will be observed that the complainant wishes to maintain that she did not know about the institution of the New Jersey divorce suit or that a divorce had been obtained afterwards at any time, and also that her husband did know or get notice of the French divorce which she had obtained.

Well, is this court to-day in the situation that it would have been in if this suit had been brought earlier, with reference to the ascertainment of the facts of the case and the hearing of both sides? *Lutgen v. Lutgen*, 64 N. J. Eq. 773, 53 Atl. 625; *Ten Broeck v. Jackson*, supra. Not only Mr. Givernaud has died, but about 15 years ago Mr. John C. Besson, the lawyer who recovered this decree of divorce in New Jersey in 1872, and who according to the theory of the bill was the unconscious instrument by which this man perpetrated a gross fraud, also died. It appears from the papers in evidence that Mr. Besson, a practitioner of ability and integrity, attended personally to the business of mailing the notice.

See what a disadvantage these executors are under when they are resisting this old stale claim which this woman makes and which she has kept unenforced, unrecognized, unasserted for 42 years, up to the time of Mr. Givernaud's death, and for 44 years prior to the institution of this present suit! It seems to me that, if ever there was an ideal case for the application of the great equitable doctrine of laches, this is such a case.

5. Let us suppose now that I am in error in the view that I have expressed or indicated, in regard to the power of the Court of Chancery, on the ground of fraud, to vacate a decree of divorce after the death of the spouse who obtained it, where the bill is filed simply as a bill of review, or an application is made in the cause to open the decree. Let us suppose that the view which has been taken in some courts is correct, that after the death of the spouse who has obtained a fraudulent decree of divorce the injured spouse may, by some form of proceeding, either by a bill of review or by a petition in the cause, upon notice, of course, to the executors and heirs of the deceased spouse and all parties interested, get an order or decree opening the decree of divorce and thus establishing, in case such injured spouse is a woman, not her matrimonial status which has been destroyed by death, but all her rights as widow in respect of her deceased husband's estate without, however, including as part of her relief the enforcement of any one of those rights. If that is the correct view of the power of this court in this case, the result which I have stated would not be changed. We still have in this case a bill of review, in order to secure the vacation of the fraudulent decree of divorce for the sole purpose of permitting the wife to collect her judgment without being thwarted by the statute of limitations.

This is the sole reason for bringing the suit which is set forth in the bill. Evidently it was the theory of the framer of the bill, indicated also by the declaration of complainant's counsel, that the court would not open this decree of divorce, with all the

baleful effects of such action, upon the rights and feelings of the second wife of Mr. Givernaud and his son, if no possible benefit could thereby accrue to the complainant—benefit, I mean, in respect of a property right.

But if this statement requires qualification, it must be borne in mind that the complainant in this case does not make the absurd claim that she desires vindication from the charge that she deserted this husband whom she had cast off over 40 years before she brought this suit. The bill of complaint does not set forth that the complainant has any other right in respect of property apart from her judgment, the enforcement of which is in any way affected by the decree of divorce. The sole effect of vacating the divorce would be to enable the complainant to maintain an action in some court for the recovery of this ancient judgment without meeting the bar of the statute of limitations.

But I have already found that the defense of laches would be fatal to the complainant's claim, even if the restoration of the technical status of marriage from the year 1872 until the death of Mr. Givernaud in 1908 had the effect to relieve the complainant's case from the bar of the statute of limitations.

If the complainant set forth that Mr. Givernaud died seised of real estate, and that she desired to commence actions at law or in equity, or had commenced such actions for the recovery of her dower, we should have an entirely different case, because the vacation of the decree of divorce plainly would not be futile. No defense of the statute of limitations or of laches would bar such suits for dower, and this distinction brings us to the last point which I intend to discuss.

6. I shall now assume that I am in error in supposing that a court of equity will not open this decree of divorce on behalf of Mrs. Givernaud when the sole purpose which Mrs. Givernaud discloses for procuring such judicial action is to enable her to prosecute a suit free from the bar of the statute of limitations which, on the face of her bill, is subject to a fatal defense of another kind which makes her whole claim absolutely of no value.

We come back to the proposition, which possibly the frame of the bill of complaint in this case accepted as sound, upon the strength of some authorities in other states, that where a divorce has been obtained ex parte by fraud the defendant, the injured spouse, may take proceedings in some appropriate manner, after the death of the fraud doer, for the sole object of having the fraudulent decree of divorce vacated so that, for all purposes as against all parties and in all courts, the marriage relation must be held to have continued unbroken by the fraudulent divorce during the joint lives of the two spouses.

I have pointed out that the pleader in this case took pains to assign a very practical reason for seeking to have the decree of divorce in this case opened, but that feature of the case I now disregard.

Adopting the widest proposition in favor of the complainant which I have heretofore rejected as unsound, it seems to me that her laches, proved beyond all doubt in this case, prevents her from obtaining any relief against this decree of divorce, although the evidence now procurable and before this court may indicate that that decree was obtained by fraud of such a character that it would have been opened during the lifetime of Mr. Besson and Mr. Givernaud if Mrs. Givernaud's application for such relief had been made earlier.

(1) Counsel for the complainant admits that the whole claim of the complainant for relief, on the theory which we are now provisionally accepting, turns on the question of notice to Mrs. Givernaud of the commencement of the divorce suit or subsequent notice of the fact that a divorce had been obtained. If Mrs. Givernaud had notice of either of these two things, it seems quite clear that she would have no standing whatever in this court at this late date to claim a vacation of the decree of divorce which she submitted to for so many years when her object now is merely to recover property.

(2) The record of the divorce suit, with the facts proved in regard to the mailing of notice to Mrs. Givernaud and the postal regulations and practices which prevailed in the city of Lyons in 1866 when the notice was mailed, and the circumstances of Mrs. Givernaud's residence at that time in Lyons with her father, an old citizen of the place, in my judgment establishes a presumption that the notice of the suit was received by Mrs. Givernaud, and this presumption weighs heavily against her uncorroborated testimony after this long period of years to the effect that she did not, in fact, receive the notice which was mailed to her.

(3) If we may accept Mrs. Givernaud's uncorroborated testimony that, in fact, she did not receive the notice of the divorce suit which was mailed to her, it is still necessary that she should establish the almost incredible proposition that she did not at some time during the 36 years which extended from the date of the divorce until Mr. Givernaud's death, let us say prior to Mr. Besson's death, learn of facts which amounted to notice that a divorce had been obtained. I shall not undertake to set forth the testimony bearing upon this subject. Apart from Mrs. Givernaud's denial there are strong indications that she learned of facts in regard to Mr. Givernaud's second marriage which plainly indicated that he had obtained a divorce, so that, if she had undertaken to make what would seem to be merely a few casual inquiries in Lyons, she would have found out

all about the New Jersey divorce which her husband had obtained.

(4) The evidence also strongly indicates that, if Mrs. Givernaud in fact did not get notice of the divorce suit by mail or otherwise and did not get notice of the fact that a decree of divorce had been obtained by her husband, it was due to her resolution to ignore her husband and to disregard any possible legal existence of the marriage bond which she had sundered as far as the law of her country would permit. Mrs. Givernaud's own testimony shows what her state of mind was, and the proofs disclose the natural reasons for that state of mind. It is difficult to believe that if Mrs. Givernaud received notice of the institution of the suit for divorce she would have taken the trouble to send her decree for the separation of her person to America in order to defeat Mr. Givernaud's suit, although she alleges in her bill and testifies that she would have taken this course.

However this may be, the evidence shows that, if Mrs. Givernaud did not get actual notice of the divorce suit or the divorce decree, it was because she did not care to learn anything about these things or about any other things pertaining to the life in America of her husband whom she despised and had cast off as far as was possible under the law of her country. I know of no principle of equity or of ethics which aids this lady, who, for 36 years, repudiated her husband and renounced the marriage relation, in now promptly after his death obtaining a vacation of the decree of divorce for the sole purpose of getting some of the pecuniary benefits of the marriage which she had repudiated as long as the maintenance of any marriage with her husband was possible.

(5) There is another very strong reason for the exercise of the greatest possible caution on the part of this court before opening this ancient decree of divorce arising from the fact that such action would bastardize Mr. Givernaud's adult son by his second marriage, now a married man of 37 years of age, one of the defendants in this suit and as such bound by any decree to be made herein, and also stigmatize the relations of Mr. Givernaud with his second wife, who presumably relied innocently upon this divorce which was absolutely valid on its face during the long years that the couple lived together, as not marital but meretricious.

To allow the complainant on the strength of her uncorroborated oath to an improbable story after 38 years to open a decree of divorce, regularly obtained, after these witnesses to the transaction which she impeaches are dead, and thereby bastardize the issue of the marriage which followed the divorce and presumably was entered into in good faith by the second wife, all for the sake of enabling the complainant to obtain

money or other property as the widow of a man to whom during his long life she refused to be a wife, would, in my judgment, be a travesty of justice.

MAYOR AND ALDERMEN OF JERSEY CITY v. MONTVILLE TP.

(Supreme Court of New Jersey. Jan. 16, 1913.)

1. TAXATION (§ 318*)—ASSESSMENT—EXEMPTIONS—DATE OF DETERMINATION.

Under Tax Act (4 Comp. St. 1910, p. 5087), requiring property to be taxed as of the 20th of May, section 7 requiring the assessor to enter on his list a description of real property exempt from taxation, section 22 requiring the county board not later than the third Tuesday in September to fill out a table of aggregates showing among other things the total valuation of exempt property and specifying among other items the total value of exempt property in each taxing district, section 37s requiring assessors to have their duplicates before the county board on the first Tuesday of August, section 37t requiring the county board to perform the duties of county boards of equalization or other boards charged with the review of assessments and of the county board of assessors, section 37w requiring such board to fix the rate sufficient according to the valuation on the duplicate to produce the sum required, and to deliver the duplicate thus prepared to the collectors on or before October 1st, property which was not exempt on May 20th is taxable, although subsequently purchased by a city entitled to exemption.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 530, 531; Dec. Dig. § 318.*]

2. TAXATION (§ 511*)—LIEN—TRANSFER OF PROPERTY.

A purchaser of property after October 1st and before a tax previously assessed has become a lien takes it subject to the lien thereafter created, although he is given no notice, especially in view of Tax Act (4 Comp. St. 1910, p. 5136) § 57, authorizing the owner to redeem from a tax sale, and section 59, requiring notice to foreclose his right to redeem.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 947-949; Dec. Dig. § 511.*]

3. TAXATION (§ 509*)—LIEN—PRIORITY.

The Legislature has power to make taxes a lien paramount to prior claims.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 943-945; Dec. Dig. § 509.*]

Certiorari by the Mayor and Aldermen of Jersey City against the Township of Montville to review a tax assessment. Proceedings affirmed.

Argued before SWAYZE, J., under the statute.

James J. Murphy, of Newark, for prosecutor. Philip R. Van Duyn, of Newark, for defendant.

SWAYZE, J. [1] On May 20, 1911, the property subjected to the present tax belonged to the Jersey City Water Supply Company, and was assessed to them. On October 10th that company conveyed the property to the mayor and aldermen of Jersey City, and the city now claims exemption from the whole or a portion of the tax. I think this claim of

*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key-No. Series & Rep'r Indexes

the city cannot be allowed. The Tax Act requires that property shall be taxed as of the 20th of May. In this respect it is like the act of 1866 (Laws 1866, p. 1078), under which it was held that the assessment must relate to that day, and that real estate could not be assessed in the name of one who became an owner subsequent to May 20th. *Shippen v. Hardin*, 34 N. J. Law, 79. It follows almost necessarily that exemptions from taxation must be as of that day, and that land is not exempt because subsequently it passes to an owner who is exempt. We are not left however to this inference. Section 7 of the act (4 C. S. p. 5087) requires the assessor to enter on his list a description of real property exempt from taxation. Section 22 required the county board of taxation not later than the third Tuesday in September to fill out a table of aggregates showing among other things the total valuation of property exempt from taxation, specifying among other items the amount of public property other than school property, and the total value of exempt property in each taxing district. By the act of 1906 (4 C. S. p. 5118, pl. 37s), the assessors were required to have their duplicates before the county board on the first Tuesday of August. The county board was required to perform the duties of county boards of equalization or other county boards charged with the review of the tax assessments, of tax lists, and of the county board of assessors (4 C. S. p. 5119, pl. 37t), and to fix the rates per dollar "which shall be such as according to the valuation on the duplicate will be sufficient to produce the sum required." The act requires the duplicate thus prepared to be delivered to the collectors on or before October 1st. C. S. p. 5119, pl. 37w. The scheme obviously requires that the amount of the ratables and the rate of taxation shall be fixed before October 1st. This is impossible if the amount of the ratables is subject to variation by reason of a change of ownership after October 1st, which shall render the property exempt from that tax levy. The fact that the property is exempt at some time before the tax is payable is not important. Under our statutory scheme, taxes are imposed not for a particular year, calendar or fiscal, but on a particular day. *State v. United N. J. R. R. & C. Co.*, 76 N. J. Law, 72, 78, 68 Atl. 796. That day in the case of the general property tax is May 20th. On May 20, 1911, the property in question was taxable to the Jersey City Water Supply Company, and there was no exemption.

[2,3] The fact that the property passed to Jersey City before the tax became a lien does not prevent the collection of the tax. The statute expressly provides that the lien shall be a first lien paramount to all prior or subsequent alienations and descents of the land except subsequent taxes. The effect is to make the taxes when properly assessed a

lien paramount to a deed made between the 20th day of May and the 20th day of December. Every one purchasing land must be held to know that it is liable to taxation, and certainly if he purchases after the 1st of October, and probably if he purchases after the 20th of May, that no notice will be given to him, and that the notice required by statute will be given to the owner as of the 20th of May. He must therefore be held to know that his right may be subjected to a lien without notice. The lien depends not upon any procedure as against him, but upon the procedure against a former owner. He is in the position of one buying *pendente lite*. The provision that the owner may redeem (section 57), and that notice must be given in order to foreclose his right to redeem (section 59), indicate that, unless he redeems, his rights will be cut out. This right of redemption was relied upon in *Pater-son v. O'Neill*, 32 N. J. Eq. 386, to demonstrate that a tax lien would take precedence of a prior mortgage. It is well settled in this state that the Legislature may make taxes a lien paramount to prior claims. *Morrow v. Dows*, 28 N. J. Eq. 459; *Vreeland v. Jersey City*, 37 N. J. Eq. 574. The last was a case of water rents, the principle of which was subsequently approved by the United States Supreme Court. *Provident Institution for Savings v. Jersey City*, 113 U. S. 506, 5 Sup. Ct. 612, 28 L. Ed. 1102.

Section 49 of the present Tax Act, making taxes a paramount lien, is adapted from section 1 of the original act of 1879 (P. L. 1879, p. 340), which was evidently meant to extend throughout the state the rule that prior thereto had been made applicable to cities by their special charters. The proceedings in this case are therefore affirmed.

LESSER v. WARREN BOROUGH.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

MUNICIPAL CORPORATIONS (§ 864*)—DEBT LIMIT—WATER BONDS—"DEBT."

Borough bonds authorized by Act May 31, 1907 (P. L. 355), as amended by Act April 22, 1909 (P. L. 135), to purchase waterworks, and secured solely by the waterworks, without any further liability on the part of the borough, nevertheless constitute a "debt" within Const. art. 9, § 8, limiting municipal indebtedness, if the aggregate of such bonds, taken with the prior indebtedness of the borough, amounts to more than 7 per cent. of the taxable property of the municipality; the term "debt" being given its ordinary general meaning, to wit, a contractual obligation to pay in the future for considerations received in the present.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1828-1835; Dec. Dig. § 864.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

Appeal from Court of Common Pleas, Warren County.

Suit by Daniel E. Lesser against Warren Borough. From a decree in favor of complainant, defendant appeals. Affirmed.

Bill in equity to restrain an issue of borough bonds. Prather, P. J., specially presiding, found the facts to be as follows: "(1) The defendant, the borough of Warren, was chartered under the act of April 3, 1832 (P. L. 259), and is now organized under and subject to the general borough act of April 3, 1851 (P. L. 320). (2) That the Warren Water Company is a corporation organized under the corporation act of April 29, 1874 (P. L. 73), and from the year 1881 has been, and is now, furnishing water to the citizens of defendant borough. (3) The plaintiff, Daniel E. Lesser, is a citizen and taxpayer of the borough of Warren. (4) That under date of February 8, 1903, by a contract in writing, it was agreed, by and between the said borough and the said water company, that the value of said water plant should be fixed by appraisers chosen as therein provided. (5) Pursuant to said agreement, and for the purpose of determining the value of said water plant, to the end that it might own, possess, and operate said plant, the defendant borough caused an appraisal of said water plant and system to be made, and filed the same in the court of common pleas of Warren county. (6) The valuation of said water plant or system, as so determined, is \$390,000, at which price the water company proposes to sell, and the defendant borough proposes to buy, issuing bonds to said water company in payment therefor, according to the provisions of the act of May 31, 1907 (P. L. 355), and its supplement, the act of April 22, 1909 (P. L. 135). (7) The value of the taxable property in said borough at the last assessment was \$4,692,545. The constitutional limit of indebtedness, upon the consent of its qualified electors at a public election, is therefore \$328,478; and the presented indebtedness of said borough is \$190,000. (8) The bonds proposed to be issued are to be paid solely out of the receipts and revenues derived or to be derived from said waterworks or system, and the said borough, by an ordinance duly adopted and approved by its burgess and council, has made full and ample provision for the creation of a sinking fund out of the said receipts and revenues for the payment of the interest and principal of said bonds as they respectively shall mature. (9) Section 4 of said ordinance reads: 'Section 4. That to provide an adequate sinking fund from the receipts and revenues derived from said waterworks or system for the payment of the interest on said bonds and for their redemption there shall be set aside annually from said receipts and revenues the sum of thirty-two thousand five hundred (\$32,500) dollars until and including the year 1921, and the sum of twenty-six thousand (\$26,000) dollars until and including the year 1931, and the sum of

nineteen thousand five hundred (\$19,500) dollars until and including the year 1941, during the existence of the bonds herein authorized and directed to be issued to provide for the payment of the interest and liquidation of the principal thereof. And the moneys arising from said receipts and revenues shall be applied at the periods stated in said bonds herein authorized and directed to be issued and to their redemption at par according to their terms and not otherwise.' The court entered a decree enjoining the issue of the bonds.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

D. I. Ball and Wm. Schnur, both of Warren, for appellant. T. L. Hampson, of Warren, for appellee. Frank P. Cummings and Max L. Mitchell, for city of Williamsport, intervening.

BROWN, J. The borough of Warren, incorporated by act of April 3, 1832 (P. L. 259), became subject to the general borough act of 1851 on March 10, 1854. The Warren Water Company, incorporated under the general corporation act of April 29, 1874 (P. L. 73), has been furnishing water to the inhabitants of the borough of Warren from the year 1881. On February 8, 1903, the borough and the water company entered into a written agreement for the appointment of appraisers to appraise the works, rights, franchises, and property of the water company, and the appraisal so to be made was to be regarded as the value of the plant. In pursuance of said agreement, appraisers were chosen, and an appraisal was made, which was subsequently filed in the court below in a proceeding instituted by the borough to acquire the ownership of the plant or system of the water company. The valuation of the water plant or system, as determined by the appraisers, was \$390,000, at which price the company proposed to sell, and the borough to buy, the latter to issue bonds to the water company in payment for its property, in accordance with the provisions of the act of May 31, 1907 (P. L. 355), as amended by the act of April 22, 1909 (P. L. 135). The value of the taxable property in the borough at the last assessment was \$4,692,545. The constitutional limit of its indebtedness is \$328,478. The present indebtedness of the borough is \$190,000. The bonds, which it proposes to issue, are to be paid solely out of the receipts and revenues to be derived from the said waterworks or system, "without other liability whatsoever" on the part of the said borough. The court below found that, by an ordinance duly adopted, it has made full and ample provision for the creation of a sinking fund out of the said receipts and revenues for the payment of the principal and interest of the bonds as they respectively shall mature.

If the borough be permitted to purchase

the plant of the water company, the bonds which it proposes to issue will be \$251,522 in excess of the indebtedness which the Constitution permits it to incur. It insists that it may issue these bonds under the act of 1907, as amended by the act of April 22, 1909 (P. L. 135), which provides for the purchase by municipalities of the waterworks of corporations, firms, or individuals. The provision of the amended act, which the borough invokes, is the following section: "Section 5. For the purpose of said purchase the municipality may issue bonds, which shall be secured solely by such water works, systems, and property, and the revenues thereof, and without other liability whatever of said municipality thereon, to an amount not exceeding the appraisement of the value fixed by said appraisers or the court. The proceeds of the sale of such bonds shall be used exclusively for the purpose of making payment for the property so acquired." To enjoin the proposed issue of the bonds by the borough, the appellee, a taxpayer, filed this bill, averring that their issue would be in violation of section 8, art. 9, of the Constitution, which declares that the debt of any municipality, except as therein provided, "shall never exceed seven per centum upon the taxable property therein." The injunction prayed for was awarded on the ground that the borough would, if permitted to issue the bonds, increase its indebtedness beyond the limit fixed by the Constitution; and, from the decree enjoining it, we have this appeal.

When the borough of Warren and the Warren Water Company entered into the agreement of February 8, 1903, the former could have become the owner of the works and property of the latter under clause 7 of the thirty-fourth section of the act of April 29, 1874, which provides that it shall be lawful, at any time after 20 years from the introduction of water into a borough in which the water company shall be located, to become the owner of the works and the property of the company by paying therefor the net cost of erecting and maintaining the same, with interest thereon at the rate of 10 per centum per annum, deducting from said interest all dividends theretofore declared. The proposed purchase of the waterworks is not based on a valuation ascertained under the provisions of the act of 1874, or 1907, but upon the appraisement made in pursuance of the agreement of February 8, 1903. The act of 1874 is not involved in this proceeding, and the only provision of the act of 1907 to be considered, as amended by the act of 1909, is the above-quoted fifth section of the latter act. For the purpose of purchasing waterworks, it authorizes a borough to issue bonds, which shall be secured solely by such waterworks system and property and the revenues thereof, without other liability whatever of said municipality thereon. Whether this is valid legislation is not the question before us; for, assuming it to

be such, it cannot avail the borough of Warren, if the bonds which it proposes to issue will represent a municipal "debt" within the meaning of section 8, art. 9, of the Constitution. No legislation can confer upon a municipality authority to contract indebtedness which the state Constitution expressly declares it shall not incur. *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138. The narrow question raised on this appeal is whether the indebtedness to be incurred by the borough of Warren in the purchase of the waterworks, by issuing for the purchase of the same bonds which are to be secured solely by such waterworks, without any further liability whatever on the part of the borough, will create a constitutionally forbidden indebtedness. If, by issuing the bonds, the borough will incur such an indebtedness, they cannot be issued, and the decree of the court below must be affirmed.

Words used in the Constitution are to be given their general and popular meaning; and "debt" and "indebtedness" in section 8, art. 9, of the Constitution, "are not used in any technical way, but in their proper general meaning of all contractual obligation to pay in the future for considerations received in the present." *Keller v. Scranton*, 200 Pa. 130, 49 Atl. 781, 86 Am. St. Rep. 708. The bonds which the borough would issue to enable it to pay for the property of the water company, amounting to \$390,000, will constitute obligations to pay in the future for a consideration to be received in the present; but to this the borough makes answer that they will not represent forbidden indebtedness, because they are to be secured solely by the waterworks and the revenues thereof, without any other liability whatever on the part of the municipality. They will, however, be obligations of the borough to pay out of the revenues and the proceeds of a sale, if necessary, of the property which the borough wishes to purchase with them, or their proceeds; and, if they should not be paid, the borough will lose the purchased property. The situation is thus tersely and correctly stated by the learned judge of the court below: "This is buying the waterworks on credit, pledging the waterworks to pay the debt. It is the exact equivalent of the borough giving its mortgage, upon the water system purchased, to the water company to secure the payment of the debt. A default in payment would subject the property to foreclosure proceedings, and the borough would lose the property, together with all improvements and extensions of the waterworks system." A municipal debt will be incurred, for the payment of which certain municipal property will be pledged, and, if the debt should not be paid, that property will be sold to pay it. Certain assets of the borough may be taken from it to pay its indebtedness. It could not purchase the waterworks under an unconditional promise to

pay \$390,000 for them, for such promise, evidenced by bonds, would concededly be the incurring of indebtedness beyond the constitutional limit, and both reason and many authorities sustain the conclusion of the learned judge below that what the borough proposes to do is violative of the letter and spirit of the constitutional restriction upon municipal indebtedness.

That the scheme by which the borough has undertaken to acquire the plant of the water company would, if carried out, result in the creation of municipal indebtedness, in excess of the constitutional limit, is to be regarded as settled by what was decided in *Brown v. Corry*, 175 Pa. 528, 34 Atl. 854. In that case the municipality, whose indebtedness was in excess of the constitutional limit, entered into a contract to purchase water-works, to be paid for by 20 annual installments out of "the current revenues of said city, and not otherwise." The contract further provided that, if the said revenues should be insufficient to meet the payments, the interest of the city in the said works should revert to the vendor, or his assigns, and the contract should be terminated. It was contended on the part of the city that the contract did not constitute a debt within the meaning of the Constitution, because the liability of the city to pay was limited to its current annual revenues, and could not be enforced by action; but it was held that this created a debt, and was therefore a violation of the constitutional provision prohibiting the incurring of indebtedness beyond certain prescribed limits. In so holding, we approved the following, *inter alia*, from the opinion of the court below: "It is a debt for the purchase money, and in principal analogous to the debt for purchase money for land, for which a mortgage has been given, with no accompanying personal obligation, which is universally termed a 'mortgage debt.'" Courts of other jurisdictions have placed the same meaning upon "debt" or "indebtedness" prohibited by state Constitutions. The Court of Appeals of New York, in *Newell v. People*, 7 N. Y. (3 Seld.) 9, in passing upon the validity of an act of the Legislature undertaking to make a loan for the state by pledging certain state revenues for its repayment, under a clause exempting the state from all liability to pay any deficiency that might arise in the fund pledged for the repayment of the loan, held that a state debt, within the meaning of the Constitution, would be created.

In *Mayor and City Council of Baltimore v. Gill*, 31 Md. 375, the city of Baltimore undertook to make a loan by hypothecating a number of shares of the capital stock of the Baltimore & Ohio Railroad Company, which it owned. The ordinance authorizing the loan provided that the parties lending the money should look for its repayment ex-

clusively to the stock pledged, and that in no event should the city be liable or responsible for the return or repayment of any part of the loan, even though the stock pledged should prove insufficient for its repayment. It was held that this was adopted for the purpose of avoiding the restriction imposed by the Constitution upon the borrowing capacity of the city; and, in holding that it was altogether ineffective for that purpose, it was said: "It has been argued that no debt is created by the ordinance, because, by the second section, it is provided that the parties loaning the money shall look for its repayment, exclusively to the stock pledged, and that in no event is the city to be liable or responsible for the return or repayment of any part thereof, even though the stock pledged should prove insufficient. This provision was doubtless adopted for the purpose of avoiding the restriction imposed by the Constitution. We think it altogether ineffectual for that purpose. A debt is money due upon a contract, without reference to the question of the remedy for its collection. It is not essential to the creation of a debt that the borrower should be liable to be sued therefor. No suit can be maintained against the state by one of its citizens, and yet debts are created by the state, which it is bound in good faith to pay. If money be borrowed by the mayor and city council, which, by the contract, is to be repaid, it is immaterial to inquire whether the city is liable to be sued therefor, or its payment be secured by the pledge or hypothecation of specific property held by the city. It would be, in our judgment, equally the creation of a debt, within the meaning of the Constitution in one case as in the other. The Constitution is not to have a narrow or technical construction, but must be understood and enforced, according to the plain and common-sense meaning of its terms. The plain intent of this section is to restrain the municipal government of Baltimore from borrowing money, except for the purposes and in the manner prescribed, either upon the general credit of the city or by a pledge of its revenues or assets; thereby creating a debt, and imposing additional burdens upon the citizens, which may directly or indirectly involve increased taxation. This is not a new question. By the twelfth section of the Constitution of New York, the Legislature was prohibited from creating a debt, except for the purposes, and in the manner specified and excepted in the Constitution. An act was passed which provided for borrowing a sum of money, and its repayment was secured by the hypothecation of certain state revenues, to be derived from the canals. The law contained a provision, similar to that in the ordinance before us, declaring that 'the state should in no event be liable to make up any deficiency in the

canal revenue, or to redeem the certificates from any other source than the canal revenues, as directed by the act.' In the case of *Rodman v. Munson*, in the Supreme Court, 13 Barb. (N. Y.) 63, and in *Newell v. People*, in the Court of Appeals, 7 N. Y. (3 Seld.) 9 to 139, the question was considered whether the act was in violation of the provision of the Constitution, forbidding the creation of a debt. In both cases, it was ruled upon full argument, and, in our opinion, upon sound reason, that the act created a state debt within the meaning of the Constitution, notwithstanding the clause exempting the state from all liability to pay any deficiency that might arise in the fund pledged for its payment."

In *Browne v. Boston*, 179 Mass. 321, 60 N. E. 934, the city of Boston desired to acquire certain land. The price asked for it was \$226,000. The borrowing capacity of the city, under the statute limiting its indebtedness, was but little over \$24,000, and it had no money in its treasury available for the purchase of the land. It was arranged with the owners of it that they should mortgage it to third parties for \$202,000, and the city should buy it, subject to the mortgages for \$24,000. The city was not to be mentioned in the mortgages, and the deeds to it were to contain the statement that it was not to be held liable in any way for the payment of the mortgages or the interest thereon. In a proceeding to enjoin the city from carrying out the transaction, it was held that it was, in substance and effect, a purchase of the land by the city for the sum of \$226,000, and it was enjoined from consummating the sale, because it would thus have incurred an indebtedness beyond its borrowing capacity. In so holding, the court said: "It is true that no action could be maintained against the city for the balance of the purchase price, and that in that sense the city would not be indebted for such balance. But the property, when conveyed, will be subject to the mortgages that have been placed upon it pursuant to the arrangement that has been made, and the city either will have to pay them or submit to have the property taken from it by foreclosure proceedings."

Another authority to be cited in support of the decree of the court below is *Joliet v. Alexander*, 194 Ill. 457, 62 N. E. 861. The city of Joliet had a system of waterworks and adopted an ordinance to extend it by issuing bonds for that purpose, to be paid out of the water fund, and to be secured by a mortgage upon the waterworks. The ordinance was in accordance with the statute of the state authorizing cities to build or extend waterworks. The city was indebted in excess of the constitutional limit of 5 per cent. of the value of its taxable property. It was held that the issue of the bonds, though to be paid out of a special fund, would create

a debt of the city, and, being in excess of the indebtedness permitted by the Constitution, the issue was enjoined, the court saying: "It is claimed that the certificates issued and secured upon property of the city under this act and the ordinance will not constitute a debt, and that no indebtedness will be thereby incurred, because the holder of certificates cannot enforce their payment out of general funds of the city, and the only effect of the mortgage will be to insure that the waterworks will earn the money to pay for the extension. It is true that no action can be maintained against the city on the certificates other than to compel it to appropriate the water fund to their payment and to make the city defendant in a foreclosure suit by which its property is taken and applied to such payment. But it is not essential that there should be a right of action on the certificates against the city in order to constitute a debt, where its money or property can be taken in payment."

While some courts have sustained the contention of the appellant that the debt which it would create is not one forbidden within the meaning of the Constitution, the weight of authorities, including our own, sustains the sounder rule that the letter and spirit of constitutional restriction upon municipal indebtedness is not to be evaded by any scheme or device, such as the appellant would adopt. In determining whether any legislative or municipal act conflicts with the Constitution, its substance, and not its form, must always be the test. To sanction what the appellant proposes to do would permit municipalities, burdened with debt almost up to the constitutional limit, to constantly overstep it, with results easily to be conjectured. Public improvements, which could not be made in the face of the Constitution, would be made in defiance of it. To permit a borough or city to borrow money under a contract that it shall not be liable for its repayment, but that the lender must look solely to pledged municipal property or assets, would, in effect, annul the constitutional restriction upon municipal improvidence, and strike down a safeguard against municipal profligacy.

The Constitution is not to be thus set at naught, and the decree of the court below is affirmed, at appellant's costs.

IN RE TODD'S ESTATE.

Appeal of HAVERSTICK.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

WILLS (§ 567*) — CODICIL — CONSTRUCTION — LEGACY — ADEMPMENT.

Testatrix gave to her grandnephew, to whom she did not stand in loco parentis, all obligations which she should hold against him at the time of her death, on condition that he pay the interest thereon to that date. By the same clause she also gave him such principal sum

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of money as would make "this bequest," in addition to the securities, "equivalent to a principal sum of \$25,000." After making the will testatrix surrendered to the legatee all the obligations she held against him in consideration of an agreement to pay her an annuity of \$314. Thereafter she made a codicil, by which she revoked the legacy clause in the will and proceeded, "I now give and bequeath" to him "all of the judgments, notes and other obligations against him I may hold at the time of my death, on condition that he pay the interest on all such securities up to the time of my death;" and in addition she gave him such a principal sum of money as should make the bequest equivalent to a principal sum of \$20,000. *Held*, that the legatee was entitled to receive the full sum of \$20,000 from the executor.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1240; Dec. Dig. § 567.*]

Appeal from Orphans' Court, Cumberland County.

Judicial settlement of the estate of Sarah A. Todd, deceased. From a decree dismissing exceptions of S. W. Haverstick to the report of C. S. Brinton, Esq., auditor, exceptant appeals. Reversed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

E. M. Biddle, Jr., of Philadelphia, for appellant. Joseph P. McKeehan, of Carlisle, for appellee.

POTTER, J. This is an appeal from the decree of the orphans' court of Cumberland county, affirming the report of an auditor appointed to make distribution of the amount in the hands of the executors of the decedent.

Mrs. Sarah A. Todd, of Carlisle, Pa., executed her will upon November 6, 1906. In the fourteenth section she provided as follows: "I give and bequeath to S. W. Haverstick, of Carlisle, Pa., all the judgments, notes and other obligations against him I may hold at the time of my death, on condition that he pay the interest on all such securities up to the time of my death. In addition to these, I hereby give and bequeath to the said S. W. Haverstick such a principal sum of money that shall make this bequest equivalent to a principal sum of twenty-five thousand dollars."

Upon the date when the will was made, the testatrix held judgments, notes, and other obligations against S. W. Haverstick, including liens against real estate owned by him, amounting in all to \$7,850. But nearly six months later, on April 15, 1907, Mrs. Todd satisfied of record the judgments and mortgages, and canceled and surrendered the notes and other obligations held by her against S. W. Haverstick. At the same time Haverstick executed a new agreement, which recited that Mrs. Todd held obligations against him, aggregating \$7,850, and that she had agreed to satisfy and cancel all such obligations in consideration of the written promise of Haverstick to pay her annually the sum of \$314, being interest on \$7,850 at 4 per cent. per annum during her natural

life. By a subsequent indorsement on the paper, it was agreed the interest should be paid semiannually. A little more than nine months later, on January 20, 1908, Mrs. Todd made a codicil to her will, as follows: "The 14th section of my will I revoke, and in lieu thereof I now give and bequeath to S. W. Haverstick, of Carlisle, Pa., all of the judgments, notes and other obligations against him I may hold at the time of my death, on condition that he pay the interest on all such securities up to the time of my death. In addition to these I hereby give and bequeath to the said S. W. Haverstick such a principal sum of money that shall make the bequest equivalent to a principal sum of twenty thousand dollars. It is understood and agreed by the said S. W. Haverstick that he will continue to render the same attention and service to the care and comfort of my son, Wilson L. Todd, as he has been accustomed to do during my lifetime."

It will be noted that the codicil reduced the amount of the bequest from \$25,000 to \$20,000, and it recited an agreement upon the part of Haverstick to care for and serve the son of the testatrix. The obligation to pay the sum of \$314 interest annually, in semi-annual installments, was the only obligation held by the testatrix against Haverstick at the date of the codicil, and at the date of her death, which occurred October 19, 1909.

The auditor appointed by the court below to make distribution held that the amount of Haverstick's obligations that were in Mrs. Todd's hands when the original will was made, \$7,850, was to be deducted from the legacy of \$20,000 given him by the codicil, and therefore awarded him \$12,150 only. Exceptions filed by Haverstick were dismissed by the court and the report confirmed. Haverstick has appealed, and the single question raised is whether the auditor and the court below erred in deducting the sum of \$7,850 from the legacy left to appellant.

The language of the codicil is clear. It gives to S. W. Haverstick the sum of \$20,000, less such notes and obligations as the testatrix should hold against him at the time of her death. Admittedly at that time the only obligation she held was the agreement to pay interest, and that obligation was discharged by payment in full. The legacy was not of the judgments, notes, and obligations held by testatrix when the will was made, but only of such as "I may hold at the time of my death." As she held none at that time, the legacy was effective for the full amount, unless the surrender and cancellation of the obligations prior to the making of the codicil is to be regarded as an ademption or satisfaction of the legacy to that extent. The presumption which arises where the testator is the parent of the legatee, or stands in loco parentis, that a gift made in the lifetime of the testator is intended as an ademption or satisfaction of the legacy

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

does not arise here. The testatrix was the great aunt of the legatee, and it does not appear that she ever assumed the duties of a parent towards him. It does appear that the relations of debtor and creditor existed. She loaned him money and took his obligations, and he paid her interest. In so far as appears from the evidence, or from the will, the legacy was pure bounty, or was a reward for services rendered and to be rendered by appellant to testatrix and her son. We find nothing in the record from which it can fairly be inferred that the testatrix intended the gift to appellant of the obligations and evidences of indebtedness as a satisfaction pro tanto of the legacy.

The auditor accepted as a correct statement of the law the suggestion that a legacy can be reduced or adeemed only by what occurs subsequent to the making of the will, and not by anything that transpires prior to that date. But he failed to apply the principle to this case. The obligations were surrendered by Mrs. Todd on April 15, 1907, and, as noted above, on January 20, 1908, she executed the codicil to her will, which expressly revoked the section of the will containing the legacy to appellant. The codicil substituted a new will, in so far as that portion of it was concerned, as she said, "I now give and bequeath to S. W. Haverstick," etc. By revoking the entire original fourteenth section, instead of merely reducing the amount of the legacy, as she might have done, and by the use of the word "now," the testatrix showed a clear intention that the codicil should speak as of its date. While at that time she held no obligation against appellant, except the agreement to pay interest, yet it was quite possible that new and additional obligations might be created before her death. She had loaned him money before, and she might do so again. We are not able to see any intention upon the part of testatrix to describe obligations which she had already satisfied, canceled, and surrendered, when she referred in the codicil to "judgments, notes and other obligations against him I may hold at the time of my death." If testatrix had intended to deduct from the legacy the amount of the obligations which at that time were canceled and surrendered, it would have been very easy for her to have said so. In the original will she gave appellant \$25,000, including the obligations, which then had a face value of \$7,850. When she drew the codicil, having in the meantime surrendered the obligations, she reduced the legacy by the sum of \$5,000. We think it reasonable to suppose that, while this reduction was less than the amount of the gift, yet it was made because she had it in mind, and she then intended appellant to receive from her estate the full sum of \$20,000, less any future indebtedness to her which he might incur prior to her death. We conclude that S. W.

Haverstick is entitled to receive from the fund for distribution the full sum of \$20,000, without any deduction.

The assignments of error from the second to the eighth, inclusive, are sustained, and the decree of the orphans' court, to the extent herein indicated, is reversed. The record is remitted to the court below, that the decree of distribution may be modified accordingly.

In re TODD'S ESTATE.

Appeal of SARAH A. TODD MEMORIAL HOME.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

1. WILLS (§ 734*)—LEGACIES—INTEREST—REMAINDER.

Where testatrix bequeathed money in trust to pay the income to her grandson for life, remainder as to the principal to his surviving children when they become 21, and the grandson died before the testatrix, leaving an infant daughter surviving, to whom testatrix did not stand in loco parentis, and who was neither destitute nor in need of an allowance for maintenance, the granddaughter was not entitled to interest on the legacy during the year from testatrix's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. § 734.*]

2. TAXATION (§ 879*)—COLLATERAL INHERITANCE TAX—LEGACIES PAID IN LIFETIME OF TESTATRIX—STATUTES.

Where a transfer is intended to take effect, either in possession or enjoyment, after the grantor's death, the property conveyed is subject to the collateral inheritance tax imposed by Act May 6, 1887 (P. L. 79), though the right to income is retained during the life of the transferor, and the enjoyment does not take effect until his death.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. § 879.*]

3. TAXATION (§ 879*)—COLLATERAL INHERITANCE TAX—CONVEYANCE DURING TESTATRIX'S LIFETIME.

Where testatrix bequeathed certain legacies, the principal of which was paid over to the legatees during her lifetime, taking obligations from them to pay interest during her life, the transfers were subject to the collateral inheritance tax on testatrix's death.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. § 879.*]

Appeal from Orphans' Court, Cumberland County.

Judicial settlement of the estate of Sarah A. Todd, deceased. Appeal by the Sarah A. Todd Memorial Home from a decree dismissing exceptions to the report of C. S. Brinton, Esq., auditor. Modified and affirmed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

E. M. Biddle, Jr., of Philadelphia, for appellant. Joseph P. McKeehan, of Carlisle, and Geo. L. Reed, of Harrisburg, for George Edward Reed, trustee. S. B. Sadler, of Carlisle, for the Commonwealth.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

POTTER, J. In the second clause of the will of Mrs. Sarah A. Todd, of Carlisle, Pa., she gave to Dr. George Edward Reed the sum of \$25,000, in trust, the income thereof to be paid to her grandson, Walter Holroyd Todd, during his life, and at his death the principal sum to be paid over, share and share alike, to the surviving children of the said grandson; the share of any minor to remain in the hands of the trustee until said minor attained the age of 21 years. It is admitted that Walter Holroyd Todd died in the lifetime of his grandmother, leaving one child, Anne Wilson Todd, a minor, to survive him. The auditor awarded to the trustee of the minor child the sum of \$837 as interest on the legacy of \$25,000, given as above, from the date of the death of testatrix to May 8, 1910, when it was paid by the executors to the trustee. To this award of interest the Sarah A. Todd Memorial Home, the residuary legatee, excepted; but the court below dismissed the exception and confirmed the report.

[1] This appeal has been taken on behalf of the residuary legatee, and in the first and second assignments error is alleged in the dismissal of the exceptions to the award of interest upon the legacy to the child of Walter Holroyd Todd from the death of the testatrix. The general rule upon the subject is thus stated in a late case: "It is plainly reasonable, and the authorities agree, that a legacy bears interest from the time it is payable under the terms of the will. If the time is not fixed, then interest runs from the expiration of a year from the testator's death." *Gunning's Estate*, 234 Pa. 148, 83 Atl. 63. Mr. Chief Justice Gibson said, in *Gill's Appeal*, 2 Pa. 221, 222: "The case of a destitute child, which alone is excepted out of the rule that, in the absence of specific intention to the contrary, a legacy does not bear interest before it is payable, rests on the natural obligation of a father to maintain the helpless being he has contributed to bring into the world till it can maintain itself; and interest is allowed on a legacy to it, not as interest, but as maintenance." In *Leech's Appeal*, 44 Pa. 140, 142, Mr. Chief Justice Lowrie said: "It is only by equity that any [interest] can be allowed; and it allows none on such a legacy, except where the relation of the legatee to the testator, in connection with circumstances of destitution and dependence of the legatee, seems to demand it, and thus to support the supposition that it was intended." In 2 *Williams on Executors* (7th Am. Ed. 1895) § 1287, it is said: "A further exception to the rule exists in the case of a legacy given to a child by a parent, or one in loco parentis, whether by way of portion or not, in which instance the court will give interest from the death, to create a provision for its maintenance." At section 1201 it is also said: "The proper definition of a person in loco parentis to a child is a person who

means to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making a provision for the child. * * * Mothers, great-uncles, uncles, grandfathers or grandmothers, or putative fathers are not to be considered in loco parentum, unless they have intended to assume the office and duty of a parent."

In the present case there is nothing in the will to indicate any intention upon the part of Mrs. Todd to assume the duties of a parent to the child of her grandson. When the will was made, the grandson was living, and the gift to his child or children was in remainder, after the expiration of the life estate given to him. Nor is there anything in the evidence to show that the child is destitute, or in need of the allowance for its maintenance. We cannot, therefore, hold that the testatrix was in loco parentis to her great-grandchild.

Another exception to the rule is where an annuity or the income of a fund for life is given, in which cases interest runs from the death of the testator. *Eyre v. Golding*, 5 Bin. 472; *Hilyard's Estate*, 5 Watts & S. 30; *Flickwir's Estate*, 136 Pa. 374, 20 Atl. 518; *Brown's Estate*, 190 Pa. 464, 42 Atl. 890. If Walter Holroyd Todd had survived his grandmother, undoubtedly he would have been entitled, under the above cases, to interest from the date of her death. But he did not survive her, and there is no gift of income to his children. The principal sum only is given to them. The daughter of the grandson is in the same position as though the legacy had been given to her without any estate precedent, and without any time fixed for payment. She was not, therefore, entitled to interest. The first and second assignments of error are sustained.

[2] The remaining assignments of error question the liability of the estate to the payment of collateral inheritance tax upon certain legacies. At various times after her will was made the testatrix paid to various churches to which she had given legacies, with one exception the amounts of such legacies, taking from them obligations or "annuity notes," by which they agreed to pay her interest on the amounts during the term of her natural life. She had also taken such obligations or notes from the churches to which she had previously made gifts enumerated in her will. She did the same with respect to a legacy to S. W. Haverstick. The auditor held that the entire amount of the gifts represented by these "annuity notes" was subject to collateral inheritance tax, and by the terms of the will was payable out of the balance of the estate. Exceptions were filed to this ruling by the residuary legatee, and the court below sustained the exceptions as to the notes given before the will was made, but dismissed those relating to the notes given in payment of legacies contained in the will. The conclusions reached by the auditor in this respect were as follows:

(12) "The testatrix advanced certain sums

to churches and others, receiving therefor notes, which provided for the payment of income to her at the legal rate of interest [save the note of S. W. Haverstick, which bears interest at the rate of 4 per cent.] during her life. The possession of the fund was transferred, but the enjoyment thereof was reserved during life. Under such circumstances the fund is chargeable with collateral inheritance tax."

(15) "The notes before us are, in effect, testamentary gifts, though the fund passed upon the giving of the obligations in the lifetime of the decedent."

(16) "In the will itself they are considered in the light of testamentary gifts, as is evidenced by frequent references to these various transfers."

Upon the facts shown we think these conclusions are sound, and they are amply sustained by the authorities.

In *Reish v. Commonwealth*, 106 Pa. 521, 526, the owner of property, both real and personal, conveyed it absolutely to his brother, taking a bond conditioned for the payment of the net income accruing from the property so conveyed. Upon the death of the grantor the property was held to be subject to collateral inheritance tax. Mr. Justice Clark said: "The whole matter depends upon the single fact whether or not the transfer was made or intended to take effect in enjoyment at the death of the grantor. The policy of the law will not permit the owner of an estate to defeat the plain provisions of the collateral inheritance law by any device which secures to him for life the income, profits, and enjoyment thereof; it must be by such a conveyance as parts with the possession, the title, and the enjoyment in the grantor's lifetime." This case was followed in *Selbert's Appeal*, 110 Pa. 329, 331, 1 Atl. 346, *Du Bois' Appeal*, 121 Pa. 368, 387, 15 Atl. 641, and *Lines' Estate*, 155 Pa. 378, 393, 26 Atl. 728. Under the provisions of the act of May 6, 1887 (P. L. 79) § 1, where a deed or transfer is intended to take effect, either in possession or enjoyment, after the grantor's death, the property conveyed is subject to the tax. When the right to income is retained during the life, the conveyance, as to enjoyment, does not take effect until the death of the grantor.

[3] The effect of the scheme adopted in the present case was to give to the testatrix a life income from the legacy greater, perhaps, than could be derived from an ordinary investment; and the full enjoyment of the principal could be had by the legatees only after the death of the testatrix.

The position taken by the auditor, and affirmed by the court below, in awarding to the commonwealth collateral inheritance tax on the legacies given, with a reservation of interest thereon during the life of the testatrix, was entirely correct.

No appeal has been taken from the action of the court below, reversing the award by the auditor of tax upon the gifts made by the testatrix before the date of the will, but intended to be testamentary. That question is not therefore before us. The assignments of error from the fourth to the eleventh, inclusive, are dismissed.

The decree of the court below, except as herein modified by the disallowance of interest upon the legacy to Dr. George Edward Reed, in trust for Anne Wilson Todd, is affirmed.

SWARTZ v. BOROUGH OF CARLISLE.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

1. MUNICIPAL CORPORATIONS (§ 864*)—STATUTES (§ 95*)—VALIDITY—SPECIAL LEGISLATION—CURATIVE ACT—MUNICIPAL ELECTIONS.

Act June 19, 1911 (P. L. 1044), validating municipal elections for increasing indebtedness invalid because of failure to observe certain statutory requirements, was not invalid as special legislation, nor as violative of Const. art. 9, § 8, forbidding municipalities to increase their indebtedness to an amount exceeding 2 per cent. of the assessed valuation without the assent of electors at a public election.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1823-1835; Dec. Dig. § 864.* *Statutes*, Cent. Dig. §§ 106, 106; Dec. Dig. § 95.*]

2. MUNICIPAL CORPORATIONS (§ 859*)—INDEBTEDNESS—INCREASE—DEFECTIVE ELECTION—CURATIVE ACT.

That municipal authorities did not signify their desire to increase indebtedness before an election therefor, that the ballots were not certified or signed by county commissioners, that full and proper return had not been made to the court or counted by the court, were irregularities as to legislative matters of detail which could be cured by subsequent retroactive legislation, and were cured by Act June 9, 1911 (P. L. 1044), validating all municipal elections for increasing indebtedness.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1814; Dec. Dig. § 859.*]

3. CONSTITUTIONAL LAW (§ 186*)—CONSTRUCTION AND OPERATION—RETROACTIVE LEGISLATION.

The Legislature has power to legislate retrospectively on all matters not penal, nor in violation of contracts, not expressly forbidden by the Constitution.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 526-529; Dec. Dig. § 186.*]

Brown, Mestrezat, and Stewart, JJ., dissenting.

Appeal from Court of Common Pleas, Cumberland County.

Suit by G. Wilson Swartz against Carlisle Borough. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Bill in equity to enjoin the issuing of municipal bonds. The case turned upon the constitutionality of the act of June 19, 1911 (P. L. 1044), the material provisions of which

are quoted in the opinion of the Supreme Court. The court entered a decree dismissing the bill. Error assigned was the decree of the court.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCH-ZISKER, JJ.

E. M. Biddle, Jr., of Philadelphia, and Merrill F. Hummell, of Carlisle, for appellant. S. B. Sadler and A. R. Rupley, Borough Sol., both of Carlisle, for appellee.

ELKIN, J. At a special election held for the purpose a majority of the electors voted in favor of increasing the indebtedness of the appellee borough for the purpose of constructing a main sewer, installing a disposal plant, and providing for proper drainage. The returns represented the will of a majority of the electors as expressed by their votes at the election. There is no charge of fraud, or of unfair methods in the conduct of the election, nor is it asserted that a majority of the voters did not favor the increase of indebtedness for the purposes stated. It is urged, however, that the election so held was illegal because certain statutory requirements were not observed in holding the same, and that the election itself and all subsequent proceedings should be declared void in law by reason of these defects. This bill was filed by a resident taxpayer for the purpose of enjoining the borough and its officers from issuing bonds for the purposes stated, and from carrying out the provisions of the ordinance providing for the increase of indebtedness. An amended bill was filed and some questions are raised as to whether the amendment was proper, but, in the view we take of the case, it is not necessary to pass upon these questions, although in some respects they may have substantial merit.

Without reference to the pleadings the real question in controversy is the effect to be given the validating act of June 19, 1911 (P. L. 1044). The matters complained of are as follows: That the ballots were not properly indorsed and certified by the county commissioners; that the borough council had not by separate vote expressed its intention or desire to increase the debt; that the vote was not counted by the court; and that the ballot boxes were not furnished by the county commissioners and deposited after the election with a justice of the peace.

[1] There can be no doubt that all of these defects, if they be deemed material, except the last, were intended to be cured by the act of 1911. If this act is a valid exercise of legislative power, it necessarily follows that the learned court below took a proper view of the case, and that the decree entered there should be affirmed here. The act provides that all elections heretofore held by any county, city, borough, township, school district, or other municipality, for the purpose of voting for or against an increase of indebtedness under the act of April 20, 1874

(P. L. 65), and its amendments, where the majority of the votes cast at such election was in favor of such increase, "be and the same are hereby ratified, confirmed, and made valid, notwithstanding the authorities of such county, city, borough, township, school district, or incorporated district, did not, by separate and independent action prior to the ordinance or vote in pursuance of which notice of the election was given to the electors, signify their desire for such increase of indebtedness, or where the ballots were not certified or signed by the county commissioners, or where full, complete and proper return of the votes was not made to the proper court, or counted by the court, and notwithstanding any defect or informality in the manner of giving notice of such election, all bonds issued or to be issued in pursuance of every such election are hereby made valid, binding obligations of every such county, city, borough, township, school district, or incorporated district." The act is general in its terms, and applies to every county, city, borough, township, or other municipal division of the commonwealth, where the conditions exist upon which its provisions are intended to become operative. It is not restricted to any particular county, or city, or borough, or township, or other municipal division, and is therefore a general act as contradistinguished from a local law. It deals with the general subject of the increase of municipal indebtedness, and cannot be regarded as special legislation in a legal sense in so far at least as the subject-matter of the act is involved. It is argued, however, with much force and ability, that the act of 1911 violates article 9, § 8, of the Constitution, which provides that a borough cannot increase its indebtedness to an amount exceeding two per centum of the assessed valuation of property located therein, "without the assent of the electors thereof at a public election in such manner as shall be provided by law," and that failure to observe the requirements of existing election laws renders the election invalid, and that these defects cannot be cured by subsequent legislation.

[2] In the case at bar there was an assent of the electors at an election held for the express purpose of giving the voters an opportunity of expressing their will upon the question of increasing the borough indebtedness, and in this respect there was a compliance with the constitutional mandate. It is true some of the statutory requirements relating to the manner of holding the election were not observed, but these were all matters of detail relating to legislative and not to constitutional provisions. The Constitution gave the Legislature the power to prescribe the manner in which such elections shall be held, and the Legislature from time to time has exercised this power by changing old methods and prescribing new ones. The form of the ballot, the method of counting

the vote, the requirements as to notice of intention, custody of the ballot boxes, and all other details connected with the holding of the election are clearly within the scope of legislative power. It has been decided over and over again that the Legislature may by subsequent act validate and confirm previous acts of a municipal corporation, which would otherwise be invalid.

[3] It is settled law in Pennsylvania that the Legislature has the power to legislate retrospectively on all matters, not penal, nor in violation of contracts, not expressly forbidden by the Constitution. *Weister v. Hade*, 52 Pa. 474; *Grim v. School District*, 57 Pa. 433, 98 Am. Dec. 237; *Hawkins v. Commonwealth*, 76 Pa. 15. The act of 1911 does not relate to penal matters, is not in contravention of contractual rights, and nothing attempted to be done by this act is expressly forbidden by the Constitution. It would seem to clearly follow that the Legislature acted within the scope of its power in passing the retroactive curative act in question. Defective acknowledgments have been frequently validated by subsequent legislation. *Tate v. Stooltzfoos*, 16 Serg. & R. 35, 16 Am. Dec. 546; *Journey v. Gibson*, 56 Pa. 57. Municipal assessments, uncollectible by reason of defects in the proceedings, have been cured by subsequent retroactive acts. *Commonwealth v. Marshall*, 69 Pa. 328; *Donley v. Pittsburgh*, 147 Pa. 348, 23 Atl. 394, 30 Am. St. Rep. 738. Defects in tax levies have been cured in the same way. *Weister v. Hade*, 52 Pa. 474; *Hewitt's Appeal*, 88 Pa. 55. So, too, it has been held in a judicial proceeding, where jurisdiction had attached, but on account of a formal defect in the proceedings they would have to be declared invalid, the Legislature may subsequently correct such defect and provide a remedy. *Lane v. Nelson*, 79 Pa. 407. Our reports are full of cases to the same general effect. The true rule seems to be, as we gather it from our own cases, and from decisions in other jurisdictions, and from text-writers generally, that, where the omission to be cured is some act which the Legislature might have dispensed with by a prior statute, the courts will construe the curative act so as to give it the retrospective operation intended. It will not be seriously contended, we assume, that the Legislature could not have dispensed with all of the matters relating to the election complained of in the present bill, and if these requirements could have been dispensed with by a prior statute, under the rule above stated, they can be cured by subsequent retroactive legislation. The Legislature intended by the act of 1911 to cure these defects and to validate elections so held. We think it was a valid exercise of legislative power, and must be sustained. The same rule is recognized and followed in many other jurisdictions. Acts validating defective elections and legalizing municipal bond issues have fre-

quently been held to be constitutional. *Springfield Safe Deposit & Trust Co. v. Attica*, 85 Fed. 387, 29 O. O. A. 214; *State v. Brown*, 97 Minn. 402, 106 N. W. 477, 5 L. R. A. (N. S.) 327; *Witter v. Polk County*, 112 Iowa, 380, 83 N. W. 1041; *Schneck v. Jeffersonville*, 152 Ind. 204, 52 N. E. 212; *Read v. Plattsburgh*, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414; *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. 736, 30 L. Ed. 786.

It is argued for appellant that article 9, § 8, of the Constitution, prohibits retroactive legislation relating to the increase of municipal indebtedness because of the provision which requires the assent of the electors to be expressed "at a public election in such manner as shall be provided by law." This position was answered by the court below in *Rebman v. School District*, 201 Pa. 437, 50 Atl. 972, wherein it was said: "The evident meaning of the section is that the election held for such purpose is subject to such regulation as the Legislature may thereafter prescribe." The decree in that case was affirmed by this court on the opinion of the court below, and we are therefore committed to this view of the law. This would seem to be a complete answer to the contention that the Constitution forbids what it expressly authorized the Legislature to do.

The other matters complained of relate to minor details, and are without substantial merit under the facts and the law. The expression of the popular will of the people upon the question of an important municipal improvement affecting the health and convenience of the inhabitants should not be defeated because the election officers did not deposit the ballot boxes with a proper officer within a certain time after the election. Especially is this true, when no fraud is charged, and the result of the election is in no way questioned. Failure to perform such duties on the part of election officers may subject them to penalties, but in the absence of fraud should not be held sufficient to set aside the election itself. Where tally papers were not returned as required by law, it was held that failure to perform this duty did not invalidate the election itself. *Mann v. Cassidy*, 1 Brewst. 11; *Ewing v. Filley*, 43 Pa. 384.

We therefore conclude that all matters of substance about which complaint is made in the present bill, as to the manner of holding the election, were validated by the act of 1911, and that the bill was properly dismissed.

Decree affirmed at the cost of appellant.

BROWN, J. (dissenting). The learned chancellor below correctly said that, as the council of the borough of Carlisle had not by a separate ordinance or vote signified its desire to increase the indebtedness of the municipality, the election of February 21, 1911, was fatally defective, and he would be com-

pelled to do so hold but for the validating act of June 19, 1911 (P. L. 1044). The election was void. It was a nullity. *Hoffman v. Pittsburg*, 229 Pa. 36, 78 Atl. 26; *Bullitt v. Philadelphia*, 230 Pa. 544, 79 Atl. 752. An election upon the question of the increase of municipal indebtedness is a constitutional one, for the mandate of the Constitution is that no municipality shall increase its indebtedness to an amount exceeding 2 per centum upon assessed valuation of property, without the assent of the electors thereof at a public election in such manner as shall be provided by law. When this election was held the manner in which it was to be held had been provided by law, and certain statutory requirements, mandatory in character, were to be complied with before it could be held. These were totally disregarded, and, as the constitutional mandate that the election should be held as provided by law was ignored, the election was void under the Constitution. How can the Legislature infuse life into that which is constitutionally dead? This I regard as the vital question in the case. If a public election on the question of the increase of municipal indebtedness can be held in admitted disregard of all statutory requirements—in the face of the constitutional provision that it shall be held as provided by law—and such an invalid election can be subsequently made valid by an act of the Legislature, the plain constitutional requirement will become a dead letter, for, as in this case, an act of assembly under the guise of general legislation can make a void election valid, and a safeguard of the Constitution against municipal improvidence will be stricken down. Nothing in *Rebman v. School District*, 201 Pa. 437, 50 Atl. 972, is in conflict with the foregoing view. All that was there decided was that section 4 of article 8 of the Constitution, which provided that "every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the elector who presents the ballot," did not apply to an election upon the increase of a debt of a school district. No other question was before the court.

I would reverse the decree, reinstate appellant's bill, and direct the injunction to issue as prayed for.

STEWART, J. (dissenting). The power of the Legislature to give validity to something which, because of its want of conformity to existing legal requirements, is without validity, is subject to a manifest limitation. The Legislature may not accomplish by curative legislation that which it could not have done by and through the act which prescribed the requirements, the neglect or disregard of which had resulted in the defect sought to be cured. For very manifest reasons it could

not, in the act prescribing these requirements, have excepted the borough of Carlisle from its terms. What is the act of June 19, 1911, but an attempt to accomplish indirectly through subsequent legislation something that was forbidden the Legislature that passed the original enactment? The same infirmity that would have attached to the original act, had it excepted any borough from its requirements, must attach to the later. It is special legislation, and that too in regard to a subject which by express constitutional provision can be regulated only by uniform law.

For this additional reason I dissent from the decision. I am authorized by my Brothers **BROWN** and **MESTREZAT** to say that they concur herein.

WINGROVE et al. v. CENTRAL PENNSYLVANIA TRACTION CO.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

1. APPEAL AND ERROR (§ 589*)—RECORD—ABSTRACT.

A paper book with an abstract setting forth extraneous matter is in violation of Supreme Court rule 26, providing for an abstract of proceedings showing the issue and how it was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2690; Dec. Dig. § 589.*]

2. APPEAL AND ERROR (§ 589*)—RECORD—STATEMENT OF QUESTION INVOLVED.

A statement in four lengthy paragraphs, covering a page of closely printed matter, is in violation of Supreme Court rule 34, providing for a statement of the question involved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2690; Dec. Dig. § 589.*]

3. WITNESSES (§ 331½*)—IMPEACHMENT—EVIDENCE ADMISSIBLE.

Where two physicians testified at the first trial of a negligence case that plaintiff's rib was fractured, and on the second trial neither of them is called, and plaintiff offers no proof of fracture of her rib, the testimony of the physicians at the first trial is not admissible to impeach the credibility of plaintiff.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 331½.*]

4. JUDGMENT (§ 648*)—CONCLUSIVENESS—NATURE OF PROCEEDING.

Judgments in criminal cases are generally inadmissible to establish the facts of a civil case, and vice versa.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1309, 1310; Dec. Dig. § 648.*]

5. WITNESSES (§ 359*)—IMPEACHMENT—COMPETENCY OF EVIDENCE.

On the second trial of an action by a husband and wife for injuries to the wife, the conviction of the husband and another, between the two trials, of conspiracy to fabricate evidence cannot be proven by the record of the court of quarter sessions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1161, 1162; Dec. Dig. § 359.*]

6. TRIAL (§ 252*)—REMARKS OF JUDGE.

In an action by a woman against a street railway for personal injuries, it is not error for the judge to suggest to the jury that plaintiff's failure to complain of her injury to the conductor might have been due to her suffer-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

ing, though she made no such explanation in her testimony, where she did testify that she could not remember very much at the time; that another passenger took her purse and paid her fare; that she was assisted home; and that when she arrived there she was suffering pain over her whole body.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 505, 596-612; Dec. Dig. § 252.*]

7. EVIDENCE (§ 87*)—ACTIONS — ABSENCE OF HUSBAND AT TRIAL.

In an action by a husband and wife for injuries to the wife, it is not error to instruct the jury that they may find a verdict for the husband, though he was not present, nor called as a witness; his absence raising, at most, an unfavorable inference, which must be drawn by the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 109; Dec. Dig. § 87.*]

Appeal from Court of Common Pleas, Dauphin County.

Action by Sarah Wingrove and another against the Central Pennsylvania Traction Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

The abstract of proceedings was as follows: Action in trespass against the Central Pennsylvania Traction Company, defendant, by Sarah Wingrove and W. G. Wingrove, her husband, plaintiffs, for injuries alleged to have been suffered by Mrs. Wingrove by the negligent starting of defendant's car while she was attempting to get on. Defendant pleaded not guilty. Upon trial verdict in favor of Sarah Wingrove for \$2,200 and in favor of W. G. Wingrove for \$1,000. Motion for a new trial made. Pending motion, W. G. Wingrove, plaintiff, and O. Z. Shaver, one of plaintiff's witnesses, were, in No. 90, March sessions, 1907, convicted of conspiracy to fabricate testimony, and to procure and offer false evidence in the case; Shaver being sentenced to imprisonment to one year and W. G. Wingrove to pay a fine and costs. Following these proceedings, the pending motion for a new trial was granted and trial had, with verdict in favor of Mrs. Wingrove for \$4,500 and in favor of the husband for \$300. Motion for a new trial was made, and a new trial ordered, unless Mrs. Wingrove should file a remittitur for \$1,500 of the amount of the verdict in her favor. Remittitur having been filed, judgment was entered on the verdict for its amount, less the amount remitted, and this appeal taken.

The statement of questions involved covered a page and a quarter of closely printed matter divided into four lengthy paragraphs.

At the trial the defendant made the following offer: "Mr. Bergner: We propose to offer in evidence the testimony of Dr. Dalley, and the testimony of Dr. Gilbert, offered at a former trial of this case, showing that this woman was suffering from a fractured rib, which had not reunited, and the same constituted a permanent injury; that to be followed by the evidence that she was not suffering from a fractured rib of any kind. This for

the purpose of affecting the credibility of the plaintiff, Mrs. Wingrove, and the integrity of her case as presented on the second trial. Mr. Beidleman: We object to that, if the court please, as being an improper way of attacking credibility, being irrelevant, immaterial, inadmissible, and incompetent. (Objection sustained. Exception.) Mr. Bergner: We propose, may it please the court, the witness on the stand having testified as to the efforts to subpoena W. G. Wingrove, one of the plaintiffs in this case, and in view of the fact that W. G. Wingrove, one of the plaintiffs in this case, is absent from the courtroom, and has been absent during the trial of this case, to offer evidence by the witness on the stand to show that W. G. Wingrove, plaintiff in this case, and O. Z. Shaver, the person stated by Mrs. Wingrove, the other plaintiff in the case, to have been the person who assisted her onto the car at the time of the accident, and the same person who testified on the former trial of this case that he had assisted Mrs. Wingrove after the accident to get on the car, the said Wingrove and Shaver are the same persons who were convicted in the court of quarter sessions of Dauphin county, No. 90, March sessions, 1907, of conspiracy to fabricate testimony, and to procure and offer false evidence in this case, to wit, the case of Wingrove and wife against the Central Pennsylvania Traction Company. This for the purpose of affecting a bona fides and showing the absence of integrity in the case of the plaintiffs, husband and wife, against the Central Pennsylvania Traction Company. Mr. Beidleman: This is objected to as being incompetent, inadmissible, and irrelevant; and, further, that Shaver has not been offered as a witness in the case, whereby an attempt upon his credibilities cannot be admissible. Mr. Bergner: This to be followed by the record of the court of quarter sessions of Dauphin county, showing the conviction of O. Z. Shaver and W. G. Wingrove for conspiracy to fabricate testimony with respect to the case on trial now. (Objection sustained. Exception.)"

The court charged in part as follows:

"But before we come to that, gentlemen of the jury, on the other point which we have left, I call your attention—and you will give it just such weight as you think it is entitled to—to the absence of any complaint on the part of Mrs. Wingrove at the time the accident occurred. She says she was helped to her seat in the car. The conductor was at the head of the car, coming down, and took her fare. It was paid by a man by the name of Shaver, who had helped her onto the car, out of her purse; and it does not appear that any complaint was made by her at that time to the conductor, or anything said by her to the conductor that she had been injured, or that any accident of any kind had occurred. You will consider what effect that

has upon the question of how the accident occurred. Was that due to the pain and suffering she was then undergoing, or was it due to some other cause? You will have to determine how that was."

"When you render a verdict, if you find in favor of the plaintiffs, you will find for the plaintiff Mr. Wingrove so much, being guided by the measure of damages to which we have just referred."

Verdict for Sarah Wingrove for \$4,500, upon which judgment was entered for \$3,000; all above that amount having been remitted. Verdict for W. G. Wingrove for \$300, upon which judgment was entered. Defendant appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

O. L. Bailey and C. H. Bergner, both of Harrisburg, for appellant. E. E. Beidleman, of Harrisburg, for appellees.

POTTER, J. This was an action of trespass brought by Sarah Wingrove and W. G. Wingrove, her husband, to recover damages from the Central Pennsylvania Traction Company for injuries alleged to have been sustained by Mrs. Wingrove by reason of the negligence of the defendant. Mrs. Wingrove alleged that on August 19, 1905, as she was boarding a car of the defendant company in the city of Harrisburg, it was prematurely started, and she was thrown down and severely injured. The case was tried twice in the court below. The second trial resulted in a verdict for the plaintiff Sarah Wingrove in the sum of \$4,500, and for W. G. Wingrove in the sum of \$300. A motion for a new trial was made by defendant, which, for some unexplained reason, was not disposed of for nearly three years. On February 27, 1912, the court below made an order requiring the plaintiff to remit \$1,500 of the verdict in her favor, or submit to a new trial. A remittitur was filed, reducing the verdict to \$3,000, and judgment was entered thereupon. Defendant has appealed.

[1] The paper book presented in behalf of appellant does not conform to the rules of this court. Rule 29 provides for an "abstract of proceeding showing the issue and how it was made." The abstract here presented sets forth extraneous matter. It contains an account of the conviction in the court of quarter sessions of one of the plaintiffs and another person of conspiracy. Nothing of this appeared in the pleadings or in the evidence, and it is out of place in the abstract of proceedings.

[2] The statement of questions involved is altogether too long, and is in plain violation of rule 34.

[3] Taking up the appeal upon its merits, in the first assignment of error it is alleged that the trial judge erred in excluding the offer by the defendant of the testimony of

two physicians, taken at the former trial. These witnesses then testified that Mrs. Wingrove had suffered a fracture of a rib, or separation of the cartilage from the bony part of the rib. Upon the second trial neither of these doctors was called to testify; nor was there any allegation that plaintiff's rib had been fractured. Defendant offered the testimony of the physicians at the former trial, and proposed to follow it with evidence that plaintiff was not in any way suffering from a fractured rib; and this for the purpose of affecting her credibility. Counsel for appellant have cited no authority to support their position that the credibility of the plaintiff can be attacked in this way. If admitted, the evidence would not have contradicted any testimony given on the second trial. It would only have shown that upon the first trial the physicians testified to certain matters which were not mentioned at the second trial. We see no error in the refusal of the offer.

[4, 5] In the second assignment of error it is alleged that the trial judge erred in excluding the offer in evidence of the record of the conviction of one of the plaintiffs and another in the court of quarter sessions. The question raised by the offer was not as to the right of the defendant to show the fact of a conspiracy to fabricate evidence, but it was to the admissibility of the record of the court of quarter sessions to establish that fact. We think the learned judge was right in excluding the record for that purpose. In 2 Elliott on Evidence, § 1525, note 28, it is said: "Judgments in criminal cases where the state is prosecutor are generally held inadmissible to establish the facts of a civil case, and vice versa." In *Bennett v. Fulmer*, 49 Pa. 155, it was held, as appears from the syllabus, that "the record of a criminal prosecution against defendants for forcible entry and detainer, wherein plaintiffs were prosecutors and witnesses, is not admissible on the trial of the civil action of trespass involving the title to the premises." In *Summers v. Brewing Co.*, 143 Pa. 114, an action to recover damages for injuries sustained by a child by being run down by defendant's wagon, it was held, as appears from the syllabus: "The record of a prosecution of the driver for assault and battery, in the quarter sessions, instituted by the father and next friend of the child, offered to show that at the trial thereof there was no contention that the driver was asleep when the accident occurred, was irrelevant to the issue and properly excluded."

The third assignment of error is to the refusal of the trial judge to permit defendant to show that the plaintiff W. G. Wingrove was the same person who was convicted of conspiracy. We have held that the record in the conspiracy case was properly excluded, and this offer was, for the same reason, properly refused.

[6] In the fourth assignment complaint is made that the trial judge erred in his charge to the jury in suggesting that the failure of the plaintiff Mrs. Wingrove to make complaint to the conductor of the car at the time of the accident might have been due to the pain and suffering she was undergoing, although she had given no such explanation when on the witness stand. It does appear from the evidence that Mrs. Wingrove testified that she could not remember very much that happened after she got in the car; that when the conductor came around a passenger took her purse and paid her fare for her; and that she was assisted home. On cross-examination she said further that when she reached her home after the accident she was suffering pain over her whole body. We think this testimony was sufficient to warrant the suggestion of the trial judge that the plaintiff's condition may have prevented her making complaint to the conductor. He left the matter for the jury to determine.

[7] In the fifth assignment of error complaint is made that the trial judge instructed the jury that they might find a verdict in favor of the plaintiff Mr. Wingrove. The objection made to this instruction is that Wingrove was not present at the trial; nor was he called as a witness. It is argued that his absence was a fact which, in itself, justified an inference against the plaintiff, unless it was explained. Granting that this may be true, yet the inference was one for the jury to draw. If the defendant desired specific instructions as to this matter, a point should have been drawn and submitted. This was not done.

The sixth assignment alleged error in the refusal of the defendant's seventh point, which assumed the admission in evidence of the testimony of two physicians as set forth in the offer, whose exclusion was specified as error in the first assignment. As we have held that there was no error in the exclusion of that testimony, it follows that the seventh point was properly refused.

The assignments of error are all overruled, and the judgment is affirmed.

MIDLAND GAS CO. v. JEFFERSON COUNTY GAS CO. et al.

(Supreme Court of Pennsylvania. Nov. 7, 1912.)

1. ACKNOWLEDGMENT (§ 16*)—AUTHORITY OF PROTHONOTARY—TAKING PROBATE.

A prothonotary of the court of common pleas is not an officer authorized to take proof of the execution of an instrument within the recording acts, and cannot take the probate of an unacknowledged assignment of an oil and gas lease for the purpose of having it placed on record.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 96-103; Dec. Dig. § 16.*]

2. MINES AND MINERALS (§ 74*)—CONTRACTS—RECORD.

The record of an assignment of an oil and gas lease, probate of which is taken by the prothonotary of the court of common pleas, is a nullity.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 202; Dec. Dig. § 74.*]

3. MINES AND MINERALS (§ 74*)—CONTRACTS—ASSIGNMENTS—ESTOPPEL.

Where a bona fide assignee of an oil and gas lease with the consent of the lessors surrenders the lease to them, a person claiming to own the lease under an earlier assignment without any evidence to support it cannot prevent the lessors from making a new lease to another party by inducing them, through false representations, to accept rentals under the original lease, and receipts given for rentals paid under such circumstances are not evidence of a written contract of lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 202; Dec. Dig. § 74.*]

Appeal from Court of Common Pleas, Jefferson County.

Bill in equity by the Midland Gas Company against the Jefferson County Gas Company and another for an injunction. From a decree for plaintiff, defendants appeal. Affirmed.

Reed, P. J., filed the following opinion in the court below:

"From the pleadings and evidence in this case the following facts are found:

"(1) The plaintiff and defendants, respectively, are Pennsylvania corporations, and by their charters were authorized to do and to engage in the matters and things involved in this proceeding.

"(2) The W. O. Anthony heirs, being the owners of 100 acres of land in Eldred township, Jefferson county, Pa., November 26, 1902, leased the same to Thomas Neal, Jr., for oil and gas purposes. This lease provided that the lessee should have and hold the land for said purposes for the term of two years from its date, and as much longer as oil or gas was found thereon in paying quantities. In consideration thereof the lessee was to deliver into tanks or pipe lines to the lessors' credit the one-eighth part of all oil produced from the premises, and pay \$150 per year for each gas well during the time gas was sold or marketed from the premises. The lease further provided that it should 'become null and void if a well is not completed on the premises within two years from the date hereof, unless the lessee thereafter pay fifty dollars per acre per year until a well is completed.' This lease was duly recorded December 11, 1902, in Jefferson County Deed Book No. 99, p. 27.

"(3) Thomas Neal, Jr., June 20, 1903, assigned the lease to the Oil City Fuel Supply Company, and at the same time delivered to it the original lease. The assignment was duly acknowledged, but never recorded. June 22, 1904, the lease, by a writing duly executed and acknowledged, was canceled and

annulled by mutual consent of the parties, and the lease, with the written cancellation thereof, delivered to J. R. Anthony, one of the original lessors.

"(4) Subsequently the W. O. Anthony heirs, March 25, 1911, executed and delivered to the plaintiff, the Midland Gas Company, a lease of this same land for oil and gas purposes, and at the same time delivered to it the Thomas Neal, Jr., lease, together with the assignment thereof to the Oil City Fuel Supply Company and the written cancellation by it of said lease; but informed the plaintiff company that the defendant, the Jefferson County Gas Company, claimed the land, and had been paying rental thereon to some of the heirs, but had no lease for it.

"(5) The plaintiff caused the writing canceling and annulling the Thomas Neal, Jr., lease to be recorded June 6, 1911, in Jefferson County Deed Book No. 128, p. 475, and the Anthony lease to it to be recorded June 20, 1911, in Jefferson County Deed Book No. 128, p. 544, and on the same day that the lease was recorded it went into the actual possession of the leased premises and proceeded to drill the same for oil and gas, and on July 27, 1911, found gas in paying quantities. It thereupon started drilling a second well, when the defendants, claiming to be the owner of the Thomas Neal, Jr., lease referred to in the proceeding findings, went upon the land, and located a well midway between the plaintiff's wells, which they proposed to drill. The plaintiff then filed this bill and obtained a preliminary injunction restraining the defendants from drilling said well, etc., which injunction subsequently, on hearing, was continued until the final disposition of the case.

"(6) The defendants allege, but have failed to offer any evidence in support thereof, that Thomas Neal, Jr., January 5, 1903, assigned the Anthony lease dated November 26, 1902, to the defendant, the Jefferson County Gas Company, which was prior to his assignment of said lease to the Oil City Fuel Supply Company, which latter assignment was recorded November 14, 1903, in Jefferson County Deed Book No. 102, p. 342. This assignment was not acknowledged by the lessee, Thomas Neal, Jr., and it was placed on record by virtue of an affidavit made by the subscribing witness before the prothonotary of the court of common pleas of Jefferson county. The prothonotary being without authority to take proof of the execution of the assignment, it was improperly recorded. There was no attempt to prove the assignment except by the production of this void record. The alleged assignment was not produced, and no witness was called who ever saw such assignment.

"(7) The defendant the Jefferson County Gas Company in July, 1905, called on a number of the lessees in the Thomas Neal, Jr., lease, and represented to them that it was

the owner of the Neal lease, and wanted to pay the rental therein stipulated for failure to drill the land. These lessors at first refused to accept the rent, stating that the Neal lease had been canceled and surrendered; but on the representations of this defendant that some fraud, without disclosing what it was, had been practiced and that it was the owner of the lease, they were finally prevailed upon to accept the rent and thereupon to execute receipts therefor, stating that it was the rental stipulated to be paid in the lease from W. O. Anthony et al., to Thomas Neal, Jr., bearing date November 26, 1902, of 100 acres of land in Eldred township, Jefferson county, Pa., said lease being recorded in Jefferson County Deed Book No. 89, p. 27, and now belonging to the said Jefferson County Gas Company. This was repeated each year as to five of the eight lessors, and by virtue thereof the defendants claim to own the five-eighths of the oil and gas in said land under its alleged assignment of the Thomas Neal, Jr., lease and the payment of this rental thereunder, thereby extending said lease to the 26th day of November, 1911.

"(8) The plaintiff had actual notice at the time the lease to it was executed and delivered of the Jefferson County Gas Company's claim of ownership of the Thomas Neal, Jr., lease and of its payment of the rental therein stipulated; but this is immaterial, since inquiry only would have disclosed the facts as hereinbefore found, namely, that its claim of ownership of said lease was without evidence, either verbal or written, to sustain the same and that the acceptance of the rental therein stipulated by the lessors was induced by its unfounded claim of ownership of said lease and erroneous representations that some fraud had been perpetrated in the assignment of said lease to the Oil City Fuel Supply Company and its subsequent cancellation and surrender thereof to the lessors, which vitiated those transactions.

"(9) Neither Thomas Neal, Jr., nor any other person claiming to hold under the said lease to him, ever entered into the actual possession of the leased premises or operated the same or made any improvements thereon until after the plaintiff took a lease of said land and proceeded to drill a well thereon as stated in the fifth finding of fact.

"(10) The defendants have no legal or equitable title or claim under or by virtue of the Thomas Neal, Jr., lease, or otherwise, to the oil or gas in the premises leased to the plaintiff, and the injunction heretofore granted restraining it from going upon said premises for the purpose of operating the same for oil or gas, or otherwise interfering with the plaintiff's right thereto, should be made perpetual.

"Questions Involved.

"(1) Has the prothonotary of the court of common pleas authority to take the probate

of an assignment of an oil and gas lease for the purpose of placing the same on record?

"(2) Is the record of an alleged assignment thus procured evidence for any purpose?

"(3) Where there has been a bona fide assignment of such lease to another party, and this party subsequently, with the consent of the lessors, cancels and surrenders the lease to them, can an alleged assignee of the lease, in the absence of evidence to sustain the alleged assignment, estop the lessors from making a second lease to another party by inducing them to accept the rental stipulated in the first lease for failure to complete a well on the premises within a specified time by falsely representing that some fraud had been perpetrated in the cancellation and surrender of the lease and that said lease belonged to it?

"(4) Can a receipt taken for the rent so paid, which identifies the lease by the name of the lessee and by the date and place of its record and also by the quantity of land and the township where located, and containing a statement that said lease 'now belongs to it,' be construed to meet the statutory requirements of a writing signed by the parties, as evidence of the title to real estate?

"Conclusions of Law.

[1] "(1) The prothonotary is not an officer authorized to take proof of the execution of an instrument within the recording acts for the purpose of having the same recorded. Only those officers authorized by some statute have this power. *Fallon on Conveyancing*, § 233; *Peters v. Condron*, 2 Serg. & R. 80; *Davey v. Ruffell*, 162 Pa. 443, 29 Atl. 894. No statute has been cited and none can be found authorizing the prothonotary of the court of common pleas to take acknowledgments or proof of the execution of deeds, etc.

[2] "(2) The record of an instrument recorded contrary to law is a nullity. *Simon v. Brown*, 8 Yeates, 186, 2 Am. Dec. 368; *Goepp v. Gartiser*, 35 Pa. 130. A defectively probated instrument cannot be offered in evidence without proof of execution. *Downing v. Gallagher*, 2 Serg. & R. 455. The record of the assignment of the Thomas Neal, Jr., lease to the Jefferson County Gas Company having been made contrary to law, it afforded no evidence whatsoever of the execution of the alleged assignment, and the offer of this record thereof was properly excluded, as appears in the notes of testimony.

[3] "(3) The acceptance by the lessors from the Jefferson County Gas Company of the rental stipulated in the Thomas Neal, Jr., lease on the faith of its erroneous representations that it was the owner of said lease and that the assignment thereof to the Oil City Fuel Supply Company by the lessee and the subsequent cancellation and surrender

of the lease by the Oil City Fuel Supply Company to the lessors were void and without legal force, cannot be given the effect to estop the lessors from asserting the contrary or from making a valid lease to another party upon the discovery of the falsity of such representations. To decide otherwise would be to hold that a party could take advantage of his own fraud to acquire the title of another to real estate by estoppel. Under these circumstances, there is no contract to rescind and no obligation resting upon the party thus imposed upon to refund the rental received before controverting the erroneous claims of the party who paid it.

"(4) The receipts given for rental, paid as stated in the preceding conclusion of law, cannot be used or treated as evidence of a written contract of lease of the land therein referred to or as evidence of the Jefferson County Gas Company's title to the lease from the Anthony heirs to Thomas Neal, Jr. This would be giving them an effect not intended by either party, and would violate the purpose expressed in the receipts themselves which they were intended to serve. The receipts cannot be disassociated from the fraud which induced their execution, and, so considered, they are valueless as evidence for any of the purposes for which they are now sought to be used.

"(5) The plaintiff is entitled to the relief prayed for in its bill and to an order that the defendants pay the costs of this proceeding."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

D. I. Ball, of Warren, and C. Z. Gordon, of Brookville, for appellants. J. E. Mullin, of Kane, W. El. Rice, of Warren, and A. B. Stewart, of Punxsutawney, for appellee.

PER CURIAM. The decree of the court is affirmed at the cost of the appellant on the findings of fact and law by Judge Reed.

FRANKLIN TRUST CO. v. PHILADELPHIA, B. & W. R. CO.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

CARRIERS (§ 57*)—NEGLIGENCE—ISSUE OF BILLS OF LADING.

In an action against a carrier to recover for negligence in issuing shipping receipts for goods not actually delivered, binding instructions for defendant were required, where the uncontradicted evidence shows that the shipping receipts as made out and delivered to the shipper did not include goods not actually received, but were fraudulently altered by the shipper after the receipt.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 169-178; Dec. Dig. § 57.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Franklin Trust Company against the Philadelphia, Baltimore & Washington Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

El. J. Sellers, of Philadelphia, for appellant. Alex. Simpson, Jr., Alfred Aarons, and Henry N. Wessel, all of Philadelphia, for appellee.

POTTER, J. The defendant in this case was charged with negligence in issuing, through its agent, shipping receipts or bills of lading for goods which were not actually delivered by the shipper to the railroad. Relying upon these bills of lading, plaintiff claims it advanced money to the shipper, with resulting loss and damage to itself. The trial judge in charging the jury said: "As I have already instructed you, there is but the merest scintilla of evidence here that there might have been negligence upon the part of the employes of the defendant railroad company. I leave it to you, although I confess I have very serious doubts about it." We are not able to find in the evidence even a spark of proof tending to show negligence upon the part of the defendant, with respect to the matter in question. The fact to be determined is the condition, as shown by the evidence, of the various bills of lading, at the time when the signature of the agent of the defendant was affixed thereto. Did they or did they not at that time call for more goods than had actually been delivered to the railroad company?

The plaintiff sought to establish the fact in this respect by calling as a witness in its behalf Mr. Warnock, who took up the various bills of lading one by one, and stated just what was and what was not included in them, when they were signed, and what goods were actually delivered at that time to the company for shipment. Thus, on shipping receipt No. 10 on the list, he testified that as agent for the company, when he signed the bill of lading, and the duplicate memorandum copy, it was for 5 rolls of carpet, and these were actually received. As presented by the plaintiff this receipt called for 25 rolls, 20 of which were not received by the company, and were added to the receipt, as Mr. Warnock testified, after he signed the bill of lading and delivered it to the shipper. Shipping receipt listed as No. 15, in like manner, as he testified, was for 5 rolls of carpet when he signed it, and that number were delivered to the railroad when the bill of lading was given to the shipper. Five rolls were afterwards inserted in this bill of lading, and the duplicate memorandum copy of it. The next, No. 49, was for 5 rolls as originally made out and signed, and 20 rolls were afterwards added. And so on through the entire list as made up in plaintiff's Exhibit A, embracing the whole of plaintiff's claim in this case. With re-

spect to them all, Mr. Warnock testified that, as originally signed by the agent of the company, the bills of lading covered only goods which were actually delivered to the company. He said that the items for which it is here sought to hold the defendant responsible were added to the bills of lading, and to the copies, after they passed from the hands of the agent to the shipper. It was further explained that three papers were generally made out at once, by means of carbon copies, for each shipment. These were a shipping order, the bill of lading, and a duplicate memorandum copy of it. The shipping order was signed by the shipper, the other two papers by the agent of the company. In nearly every shipment here involved, Mr. Warnock produced the shipping order, in corroboration of his statement as to what the bill of lading originally contained, at the time he signed it. This testimony of Mr. Warnock was not contradicted or varied in any way by any other evidence offered by the plaintiff. In fact, it produced no other witness who had any personal knowledge of what was contained in the bills of lading when they were signed, or as to what goods were delivered by the shipper to the railroad at that time. The other witnesses were officers and employes of the plaintiff, who never saw the bills of lading until they were brought in by the shipper. The only witness called on behalf of the defendant fully corroborated the testimony of Mr. Warnock who was called by the plaintiff. The evidence was thus undisputed that the bills of lading as made out, signed by the agent of the railroad, and delivered to the shipper, did not include any goods which were not received by the railroad. That being so, there was nothing upon which to base the charge of negligence in this respect, against the defendant. As negligence is a fact which must be proven, and as the burden of such proof is upon the party who asserts it, in this instance the plaintiff, it is clear that the latter failed to make out a case, and the defendant was entitled to binding instructions in its favor. If, as the evidence shows, the agent did not sign the bills of lading for more goods than at the time were actually delivered to the railroad, that is an end to the charge of negligence. No matter whether it was the shipper or some one else who added to the bills of lading descriptions of more goods than were included when the bill of lading was made out, that was not a matter for which the defendant was responsible. In the face of the clear evidence of plaintiff's own witness, that the bill of lading as originally signed did not call for more goods than were delivered, it was for plaintiff to offer some other evidence to the contrary. In the absence of such additional evidence, there was no disputed question of fact for the jury to pass upon. It appears from the record in this appeal, as it did when the case was here

before, that the shipper perpetrated gross frauds upon the plaintiff in connection with this same series of shipments, and that it began a prosecution against him for forgery, which apparently ended when the shipper committed suicide. Many of the bills of lading were so palpably forgeries that all claim under them was abandoned by plaintiff. Those upon which the claims in this case were finally based do not seem to have contained alterations quite so palpable upon the face of the bills; but, under the clear testimony of the chief witness on behalf of plaintiff, the fact of alterations made after the delivery of the shipping receipts to the shipper was made to appear very clearly.

It might be pertinent to add that the transactions in this case were not the usual ones in which the bill of lading is used as the symbol of the property shipped, and retained for the purpose of controlling the title to the goods. The plaintiff here purchased from a shipper certain book accounts, and regarded the bills of lading merely as evidence of the fact that the goods which were supposed to be the basis of the accounts had actually been shipped. The bills of lading were not retained, but were sent to the supposed purchasers, and it was upon the financial standing and credit of the purchaser that the plaintiff relied, and not upon any title secured through the bill of lading. The latter was regarded simply as evidence that a shipment had been made. And for alleged carelessness in putting out misleading statements in the bills of lading the effort to recover was made in this case.

The charge of negligence having failed for want of any proof, it becomes unnecessary to consider the very interesting legal question, raised in the argument of the learned and able counsel for appellee, as to the proper rule of law which should be followed, in cases where bills of lading have inadvertently or fraudulently been issued for goods which have not actually been received. That question is not now before us.

The second and third assignments of error are sustained.

The judgment of the court below is reversed, and judgment is here entered for the defendant.

ETTER v. McAFEE, Secretary of Commonwealth, et al.

(Supreme Court of Pennsylvania. Oct. 8, 1912.)

STATES (§ 51*)—OFFICERS—LENGTH OF TERM.

The amendment of Const. art. 4, § 21, fixing the term of the Secretary of Internal Affairs, the Auditor General, and the State Treasurer at four years each, construed with reference to other amendments adopted at the same time, relating to the election of state officers in even-numbered years, did not enlarge the term of the Auditor General, elected in November, 1909, to four years, but left it

at three years, expiring on the first Tuesday in May, 1913, so that his successor would be elected at the general election on November 5, 1912, to serve four years.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 56; Dec. Dig. § 51.*]

Appeal from Court of Common Pleas, Dauphin County.

Bill in equity by George E. Etter against Robert McAfee, Secretary of the Commonwealth, and others for an injunction. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Lyman D. Gilbert, of Harrisburg, John G. Johnson, of Philadelphia, and Frederic W. Fleitz, of Harrisburg, for appellant. John O. Bell, Atty. Gen., D. T. Watson, of Pittsburgh, J. A. Stranahan and Chas. H. Bergner, both of Harrisburg, and J. E. B. Cunningham, Deputy Atty. Gen., for appellees.

MESTREZAT, J. This is a taxpayer's bill to restrain the Secretary of the Commonwealth from transmitting to the commissioners and sheriffs of the various counties of the state the names of certain nominees or candidates for election to the office of Auditor General to be voted for at the general election to be held on November 5, 1912, and to restrain the county commissioners and sheriff of Dauphin county from printing the names of such nominees or candidates upon the official ballot to be furnished at said election, or making proclamation for the election of Auditor General. The defendants demurred to the bill, and the case was heard in the court below on the bill and demurrer thereto. The assignments of error raise the single question: Does the term of the present Auditor General end upon the first Tuesday of May, 1913, or the first Tuesday of May, 1914?

Under the Constitution of 1874, an annual election was held in February at which local officers were elected, and in November at which state officers were elected. The primary purpose of the several amendments to the Constitution adopted in 1909, as they disclose and as is conceded, was to abolish the February election, and to provide for one election in each year to be held in November, the election in even-numbered years to be known as a general election at which state officers were to be elected, and the election in the odd-numbered years to be known as a municipal election at which county and local officers were to be elected. By the change made by the amendments, biennial in place of annual elections will be held for state as well as local officers. The change in the time for holding elections necessarily required an adjustment of the length of the terms of some of the officers so that official terms would expire at a time at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which the officers could be elected at an election appropriate to the several offices. Under the former Constitution, the Secretary of Internal Affairs held his office for four years, the Auditor General for three years, and the State Treasurer for two years. By the amendment to section 21, art. 4, the terms of the Secretary of Internal Affairs, the Auditor General, and the State Treasurer were each fixed at four years, and those officers were to be chosen at general elections. An Auditor General and a State Treasurer were elected at the November election of 1909 at which the amendments to the Constitution were submitted for adoption. It is apparent that an adjustment of the length of the terms of both officers was necessary to enable the people to vote for their successors at the appropriate election under the amendments. The Secretary of Internal Affairs was elected in November, 1906, and his successor was elected in November, 1910, an even-numbered year, as required by the amendment. The Auditor General's term was three years, and, having been elected in 1909, his successor will be elected in 1912, an even-numbered year, at which the office could be filled by an election. It was different, however, with the State Treasurer. His term was for two years under the prior Constitution, and, having been elected in November, 1909, the term expired in May, 1912, necessitating the election of his successor in November, 1911, an odd-numbered year, at which, under the amendments, he could not be elected. It was therefore necessary to provide that the two-year term for which the State Treasurer was to be elected in November, 1909, should be shortened so his successor could be elected in the even-numbered year of 1910 or lengthened so he could be elected in the even-numbered year of 1912. The draftsman recognizing the necessity for such a provision regulating the election of a State Treasurer inserted the following in the amendment to section 21 of article 4: "But a State Treasurer, elected in the year one thousand nine hundred and nine, shall serve for three years, and his successor shall be elected at the general election in the year one thousand nine hundred and twelve, and in every fourth year thereafter." His term was thus lengthened and special provision made for the election of his successor in 1912, an even-numbered year. Under the amendments, as thus construed, the terms of the Secretary of Internal Affairs, Auditor General, and State Treasurer would expire at such times as would permit successors in the offices to be elected in even-numbered years as is required by the amended Constitution.

[1] It is contended by the appellant that the amendment to section 21 of article 4 made the term of the present Auditor General four years, and that he is entitled to hold the office until May, 1914. This conten-

tion is based on the theory that the amendment became operative when it was adopted, and fixed the term of the Auditor General at four years, regardless of the other amendments adopted at the same time. As his successor must be elected, if this contention be correct, in an even-numbered year which would be in November, 1914, the effect of the appellant's contention is to create a vacancy in the office from May, 1914, to May, 1915, to be filled by appointment by the Governor. But it is a settled rule of construction that every part of a Constitution must be given effect, if it can possibly be done without doing violence to the language of the instrument. A single provision may not be selected out of several relating to the same subject, and a full literal meaning given to its words without reference to the qualifying effect of other provisions, and thus produce an apparent repugnancy of one provision to another. *Guldin v. Schuylkill County*, 149 Pa. 210, 214, 24 Atl. 171. Standing alone and not qualified or controlled by the other amendments, section 21 of article 4, as amended, might well be construed to justify the contention that the section gave to the present Auditor General a term of four years expiring in May, 1914. But, as observed, the rule of construction does not permit us to interpret this section of the Constitution without seeking light from the other parts of the instrument. When this is done, it is seen that such a construction would defeat the manifest intention of the several related constitutional amendments adopted in 1909. The constitutional intention in the adoption of section 21, art. 4, must therefore be determined by a consideration of the several related amendments adopted at the same time. This amendment must be read with and as part of the amendments which provide for biennial elections, and that state officers shall be elected in even-numbered years. These amendments are so closely related that they must be read as one in order to accomplish the primary purpose in making the change in the organic law. If they are construed separately and literally, there is a manifest conflict between them. If, as contended by appellant, the present Auditor General is entitled to a four-year term, the provision in the amendment that his successor shall be chosen at a general election cannot be given effect without creating a vacancy in the office to be filled by appointment. The primary purpose of the several amendments is therefore defeated. The established rule of constitutional construction, as already noted, does not permit such interpretation. On the other hand, if the present Auditor General was elected for three years, the term fixed by the old Constitution, his successor will be elected in 1912, an even-numbered year, as required by the amendments. This construction makes the proposed system created by the several

amendments harmonious, and carries out the manifest purpose of the electors in adopting them.

[2] We do not agree with the appellant as to the inference to be drawn from the provision fixing the State Treasurer's term in the amendment to section 21, art. 4. It is said, *arguendo*, in support of his position, that if no special provision in the section had been made for the present State Treasurer that both he and the present Auditor General would serve four years, their terms expiring in 1914, that the amendment diminishes the State Treasurer's new term and does not extend his former term, and that, if it applies to the State Treasurer, it also applies to the Auditor General and extends his term to four years. Whether the purpose of the special provision was to diminish a four-year term or extend the former two-year term of the Treasurer is immaterial in view of the language which supports one as well as the other contention, and declares "that a State Treasurer elected in the year 1909 shall serve for three years, and his successor shall be elected at the general election in the year 1912 and in every fourth year thereafter." This provision unquestionably applies in terms to the State Treasurer elected in 1909 and requires his successor to be elected in 1912 for a four-year term, but it does not follow, as argued, that the section applies to the Auditor General elected in 1909 so as to fix his term at four years. As suggested above, that contention would have a substantial basis, if this amendment were read alone, in view of the fact that it became operative at the date of its adoption in 1909. The contention, however, overlooks the fact that another amendment of like force and effect, adopted at the same time, requires the three state officers to be elected in even-numbered years which did not require a change in the length of the existing terms of the Secretary of Internal Affairs and Auditor General, but did necessitate a change in the length of the term of the State Treasurer to make his successor elective in an even-numbered year. Special provision had therefore to be made as to the term of the State Treasurer elected in 1909 so as to accomplish the purpose of the several amendments establishing biennial elections. The first even-numbered year after the adoption of the amendments at which an election for State Treasurer could take place was 1910, but this would have made the length of the term of that officer, elected in 1909, but one year, which would not have been in accord with the declared policy of extending the former term. The next even-numbered year at which he could be elected was 1912, making his term three years, which would have been nearer the new constitutional term and beyond which an election could not take place without exceeding the four-year term. The amendment to section 21 of article 4

therefore met the necessity for a change in the existing term of the State Treasurer by the special provision contained therein by fixing the term at three years so that his successor could be elected at a general election in an even-numbered year.

The argument of the appellant that it was not the constitutional intention that the terms of the State Treasurer and Auditor General should be coterminous is not supported by any alleged policy of the state nor by anything contained in any of the amendments. It is true that prior to the present Constitution the length of the terms of the two officers was not the same, but the reason is not to be found in "the long established policy of the state." Under the prior Constitution, the terms of the two officers were not of the same duration, but it did not establish a policy that the officers should be elected at different elections, because it did not have that effect, as appears by the list of Auditors General and State Treasurers, contained in appellant's paperbook, since the Treasurer became elective under the Constitution of 1874. With this list before the draftsman he knew that the practical operation of making a difference in the length of the terms of the two officials did not at all times make them elective at different elections, and it cannot therefore be presumed that such was the intention in adopting the amendments. Had it been so desired, the purpose could and would have been accomplished by inserting in the amendment a plain and unequivocal declaration to that effect. A matter so important and in conflict with the whole tenor of the several amendments would not have been left to conjecture and judicial construction.

The amendment to section 8 of article 4, providing for filling vacancies in the several offices, was not made with special reference to filling vacancies created by the adoption of the several amendments in 1909. The schedule was adopted to prevent such vacancies in office as might arise from the changes made by the amendment, and, as it declares, to carry the amendments into complete operation. Presumably, therefore, no vacancies would occur by reason of the changes in the time of holding the elections and the extension of the terms of the several officers.

The majority of the court are of opinion that under the familiar rule of interpretation the several amendments to the Constitution adopted at the November election of 1909 must be construed together, and therefore that under section 21 of article 4, construed with reference to the purpose and in the light of the other amendments, the Auditor General was intended to be elected at the election in November, 1909, for a term of three years, and that his successor should be elected at the November election in 1912.

The decree of the court below dismissing the plaintiff's bill is affirmed.

BOWERS et al. v. MYERS et al.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

1. APPEAL AND ERROR (§ 733*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error which failed to assign the final decree for error are defective.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3025-3027; Dec. Dig. § 733.*]

2. EASEMENTS (§ 50*)—CREATION—GRANT—CONSTRUCTION.

A right of way grant expressed in general terms includes any reasonable use to which the right of way may be put.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 109-112; Dec. Dig. § 50.*]

3. EASEMENTS (§ 50*)—EXTENT OF RIGHT—MODE OF USE.

In the absence of any covenant defining, limiting, or restricting the use of an alley between two dwelling houses, the owner of one may use the alley for the passage of horses and vehicles, as well as for foot passengers, provided he does not interfere with its use by the owner of the adjoining property.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 109-112; Dec. Dig. § 50.*]

4. EASEMENTS (§ 58*)—PROCEEDINGS TO PROTECT—INJUNCTION.

Where a testator devised separately two lots with houses thereon to different persons, giving the devisees the joint right and privilege to an alley between them which was wholly upon one of the properties, but ran along the line of the other, and after the properties changed ownership, the owner of the servient property entered into an agreement with the other owner, under which he built over it and erected a large gate in front of it sufficient to permit the alley to be used as a driveway with a gate inserted for pedestrians, and the alley was used both before and after the agreement as a driveway, the owner of the dominant estate is entitled to enjoin the building of a curb by the owner of the servient estate, which would prevent the use of the alley as a driveway.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 121-127; Dec. Dig. § 58.*]

Appeal from Court of Common Pleas, Lancaster County.

Bill in equity by Herbert R. Bowers and another against John H. Myers and another for an injunction. From a decree for plaintiffs, defendant named appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Bernard J. Myers and W. U. Hensel, both of Lancaster, for appellant. Wm. R. Brinton, of Lancaster, for appellees.

POTTER, J. This was a bill in equity filed by the plaintiffs to restrain the defendants from obstructing them in the use of an alley. The right of plaintiffs to a certain use of the alley is not denied, but the extent of that right is in dispute. Plaintiffs claim the right to use the alley as a driveway for horses and vehicles. Defendants seek to limit them to the use of the alley as a footway for persons. The learned trial judge found the facts substantially as follows: The prop-

erties of both plaintiffs and defendants were owned by John Miller, who acquired title to them in 1777. Miller died about 1809 and by his will devised the two lots with the houses upon them separately, giving to the devisees the joint right and privilege to the alley or gateway between them, which is the alley here in question. This alley has continued to be used by the occupants of the two adjoining buildings up to the present time and has been of the same width as now for at least 70 years, and probably so ever since John Miller created the easement. On August 14, 1885, all the persons interested in the properties adjacent to the alley entered into an agreement which was duly signed, acknowledged, and recorded, which provided as follows: That, whereas, the northern wall of the Russel building stood upon the southern line of the said alley, and Baumgardner and Brimmer desired to build over and into the said northern wall. The right to do so was, in consideration of the sum of \$700, granted to them, to build over said alley to a depth from North Queen street "not further east than the northeastern corner of the said building" on the Russel property, and "at a height from the ground not less than ten feet from the present level of the pavement on said North Queen street," and also the right to build against, upon, and into the said wall its whole length. It was further agreed therein that the said Baumgardner and Brimmer might maintain a gate extending across the western end of the alley on North Queen street, over the whole width of it, but that they should place and keep a door of ordinary size in it for the use and convenience of the Russels, "their heirs and assigns." It was also stipulated that the boundary line between the two properties, from the main building erected on the Russel property to the brick stable erected on the Baumgardner and Brimmer property, should be a straight line, running from the northeastern corner of the main building on the Russel property to the southwestern corner of the said stable, and that along this division or boundary line Baumgardner and Brimmer might build a stone wall of the width of two feet and six inches, one-half of which wall to be built upon each property, and, if this wall was built, Baumgardner and Brimmer were to place thereon, at their own expense, a fence of wood, with locust posts, and place therein "a gate in that portion of the said fence adjoining the ground now and heretofore used for the aforesaid alley or passageway." The height of this wall was not restricted. It was lastly stipulated "that the said alley or passageway between the said adjoining premises * * * shall be used and remain as heretofore, except so far as its use shall be altered and affected by the grants, conveyances, stipulations and agreements contain-

in the indenture." After the execution of this agreement, Baumgardner and Brimmer built over the alley into the northern wall of the Russel property to the northeastern corner of said building. A large gate was placed by them at the North Queen street entrance of the alley, hung from above, with a door 32 inches wide in it, for the use and convenience of the Russels. A wall was built between the northeastern corner of the main building on the Russel property and the southwestern corner of the stable on the Baumgardner and Brimmer property, half of which was on each property. This wall is now from 12 to 15 inches above the surface of the ground on the plaintiffs' side, and earth has been filled in, on the Baumgardner and Brimmer side, at least along it. Upon this wall was placed a fence, with locust posts, and a gate of ordinary size was provided leading into the Russel premises. These conditions have continued practically until the present time. About the time the bill was filed, Dorsheimer, the tenant of the property which formerly belonged to Baumgardner and Brimmer, by permission of Myers, the owner, placed a curb on North Queen street, which practically prevented the use of the alley by horses or vehicles. Steel posts were also erected by him along the Myers side of the stone wall; and that portion of the alley extending north of the line between the Russel main building and the brick stable was built over by placing a structure upon the said posts and resting crossbeams on the posts; and Dorsheimer was permitted by Myers to make these changes. The court below directed that the curb on North Queen street be removed and the entrance to the alley be so constructed that the plaintiffs might have access thereto for such reasonable purposes as they might desire, and granted a permanent injunction restraining the defendants from interfering with the right of the plaintiffs to use the alley as theretofore for passage to and from Queen street. Exceptions were filed and dismissed, and a final decree was entered as directed by the trial judge. Defendant Myers has appealed.

[1] The assignments of error are defective in that the final decree is not assigned for error. *Yerger v. Hunn*, 231 Pa. 245, 80 Atl. 527; *Standard Soap & Oil Co. v. Degreasing Co.*, 232 Pa. 64, 81 Atl. 129; *Condron v. Penna. R. R. Co.*, 233 Pa. 197, 82 Atl. 64. But as the first assignment alleged error in overruling defendant's exception to the decree recommended by the trial judge, which was subsequently entered as final, it may be treated as in effect assigning the final decree as error.

[2] The authorities establish the proposition that a right of way expressed in general terms is to be construed to include any reasonable use to which it may be put. Thus in *Jones on Easements* (1898) § 375, it is

said: "A right of way granted or reserved in general terms may be used for any purpose reasonably necessary for the party entitled to use it. The fact that the person entitled to such way has used it for one purpose only for a long series of years does not restrict its use to that purpose only. The grant being in general terms, it must be construed to include any reasonable use to which the land may be devoted." In *Benner v. Junker*, 190 Pa. 423, 43 Atl. 72, it was held, as expressed in the syllabus, "where the use of an alley between two dwelling houses is not defined, limited, or restricted by any covenant, the owner of one of the properties may use the alley for business purposes, provided he does not interfere with its use by the owner of the adjoining property." To the same effect are the decisions in *Gunson v. Healy*, 100 Pa. 42, and *Greenmount Cemetery Co.'s Appeal*, 1 Sadler (Pa.) 371, 4 Atl. 528.

[3] In the present case the original grant was general in its terms. It gave "a right and privilege to the alley or gateway between the said house and my dwelling house," and this language is repeated several times, in substance. A reasonable construction of this wording would permit the use of the alley for the passage of horses and vehicles, as well as for foot passengers.

[4] The agreement of 1885 made no change in this respect, for it stipulated that the alley "should be used and remain as heretofore," except as set forth in the agreement. In case of doubt, the contemporaneous construction placed upon the contract by the parties is to be adopted, and the application of this principle sustains the view taken by the court below, for it appears from the findings of fact that, before the agreement of 1885, the owners of both properties used the alley, not only for walking upon the same, but also for driving in with horses and wagons, as often as they had occasion so to do, and "since 1885 the said alley has been used by the plaintiffs and their predecessors in title as a passageway for foot passengers, and for horses, carriages, and wagons, to and from their said premises, and that merchandise of various kinds has been delivered to the plaintiffs' said premises by wagons passing in and out of said alley." It was also found, as a fact, that when, after the execution of the agreement, Baumgardner and Brimmer built over the alley, "a large gate was placed by them at the North Queen street entrance of the alley, hung from above, with a door 32 inches wide in it, for the use and convenience of the Russels." These findings of fact are amply supported by the testimony, and have the weight of a verdict of a jury. If the intention under the agreement of 1885 had been to exclude horses and vehicles, the large gate would have been unnecessary. A fence with a small gate would have better answered the purpose. What

they did was to provide at the entrance of the alley a gateway wide enough for the passage of vehicles, and in this gate they placed a door for the use of persons desiring to pass through on foot when the large gate was closed. As the court below found that the curb of which complaint is made practically prevented the use of the alley by horses and vehicles, the injunction was properly awarded.

The assignments of error are overruled, and the decree of the court below is affirmed.

In re ACKLIN'S ESTATE.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 327*)—SALE OF REAL ESTATE—PAYMENT OF DEBTS.

A direction by testator to his executors to sell his real estate and distribute the proceeds, with a trust for the widow for life, confers the real estate for the purposes of distribution, but does not oust the jurisdiction of the orphans' court to order the sale of the real estate to pay debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1844; Dec. Dig. § 327.*]

2. EXECUTORS AND ADMINISTRATORS (§ 380*)—SALE OF DECEDENT'S ESTATE—SETTING ASIDE.

Where real estate of a decedent has been sold to pay debts, and the sale confirmed and a deed delivered two years thereafter, a party in interest cannot, in the absence of fraud, have the sale set aside for inadequacy of price.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1545-1552, 1555-1564, 1567; Dec. Dig. § 380.*]

Appeal from Orphans' Court, Fayette County.

In the matter of Robert H. Acklin. From a decree refusing to set aside executor's sale of real estate, Mary M. Acklin appeals. Affirmed.

Argued before FELL, O. J., and POTTER, ELKIN, and MOSCHZISKER, JJ.

W. J. Sturgis, E. H. Reppert, and S. J. Morrow, all of Uniontown, for appellant. D. W. McDonald, John S. Christy, J. B. Adams, H. L. Robinson, W. C. McKean, and James R. Cray, all of Uniontown, for appellees.

POTTER, J. Robert H. Acklin died April 15, 1908, testate, and leaving a widow, Mary M. Acklin, and three daughters. By his will, of which the Citizens' Title & Trust Company of Uniontown, Pa., was executor, he directed that part of his real estate, including the premises here in controversy, should be sold by his executor, and one-third of the proceeds should be invested, the income to be paid to his widow during her life, and, upon her death, the principal to be paid to his daughters, to whom he gave also the remaining two-thirds absolutely. The widow elected to take under the will. On August

3, 1908, the executor presented a petition to the orphans' court, showing that the personal estate of the testator was insufficient for the payment of his debts, and praying for an order for the sale, for the payment of his debts, of a farm of about 38 acres, situated in Luzerne township, Fayette county. The court made a decree authorizing a public sale of the property, and on September 4, 1908, such sale was made, and it was purchased for \$5,125 by two of his daughters. The sale was duly confirmed, and security entered, and on September 30, 1908, the executor received the purchase money and executed and delivered a deed to the purchasers, who took possession of the property, and have since made improvements upon it. Subsequently the executors filed an account, which included the purchase money, and distribution was made to creditors and parties in interest. On November 7, 1910, the widow presented a petition, alleging that the sale was the result of a conspiracy among the other legatees to defraud her; that the price realized was so grossly inadequate as to amount to a constructive fraud; and that the sale was invalid in law, because the will worked a conversion of the land sold, into money, and consequently the testator's debts were not liens upon it. She prayed that the sale be set aside and revoked, the deed surrendered and canceled and the purchase money returned by the executor to the purchasers. A citation was granted, and answers were filed by the executor and the purchasers. After hearing, the court below dismissed the petition, stating, in its opinion, that no evidence had been offered to support the charge of conspiracy, and it was therefore disregarded. The remaining questions, raised by this appeal, are whether the court below had jurisdiction to order the sale, and whether the sale should have been set aside on the ground of inadequacy of price.

[1] The petition under which the sale was made was filed under the Act of February 24, 1834 (P. L. 76) § 20, which provides: "Whenever it shall satisfactorily appear to the executor or administrator, that the personal estate of the decedent is insufficient to pay all just debts, and the expenses of the administration, he shall proceed, without delay, in the manner provided by law, to sell, under the direction of the orphans' court having jurisdiction of his accounts, so much of the real estate as shall be necessary to supply the deficiency; and such real estate so sold shall not be liable, in the hands of the purchaser, for the debts of the decedent." The testator directed that all his real estate except certain coal lands, should be sold by his executor within one year after his death. It is conceded that this provision worked a conversion of the property for the purpose of distribution. For all purposes other than

those necessary to carry out the will, the property remains as it was.

In *Yerkes v. Yerkes*, 200 Pa. 419, at page 423, 50 Atl. 186, Mr. Justice Mitchell said: "It should never be overlooked that there is no real conversion. The property remains all the time, in fact, realty or personality, as it was; but, for the purpose of the will, so far as it may be necessary, and only so far, it is treated in contemplation of law as if it had been converted. Few testators have any knowledge of the doctrine or any actual intent to change the nature of their property, except when and to the extent that may be required to carry out the special purpose of the will. The presumption, therefore, no matter what the form of words used, is always against conversion; and, even where it is required, it must be kept within the limits of actual necessity. These are very elementary propositions; but it is necessary to recur to them frequently to avoid the tendency already referred to, the danger of which is apparent in many of our cases." In *Painter v. Painter*, 220 Pa. 82, at pages 87, 88, 69 Atl. 323, at page 324, 20 L. R. A. (N. S.) 117, our Brother Mestrezat said: "While the doctrine of equitable conversion is well settled on principle and reason, and is recognized in numerous cases determined by this court, the sphere or limitation of its application is equally well established and should be observed. The sole purpose of the doctrine, in the case of a will, being to effectuate the intention of the testator, it cannot be invoked when his intention fails or is incapable of accomplishment. The reason of the rule then ceases, and the rule itself no longer obtains. * * * This limitation upon the doctrine of equitable conversion is settled by a uniform current of decisions in this country and in England." Thus, where the direction was to sell and pay certain legacies, the surplus remaining was distributed as real estate, and not as personality. *Wilson v. Hamilton*, 9 Serg. & R. 424. Where there is a conversion of real estate for the purposes of distribution, the distributees may agree that it shall remain land, and this will effect a reconversion, *Mellon v. Reed*, 123 Pa. 1, 15 Atl. 906; *Brandon v. McKinney*, 233 Pa. 481, 82 Atl. 764. In the present case, the claims of the creditors were paramount to any provision in the will; and, until those claims were discharged, there was nothing to which the legal fiction of conversion could apply. Counsel for appellant argue that the executor was empowered to sell without any authority from the court. Whether that be so or not, the validity of the sale is not unfavorably affected by the order made by the court, even though it was not necessary. Under any aspect of the case, the purchasers would take a good title under the deed of the executor.

[2] As to the question of inadequacy of price, that was a matter peculiarly within

the discretion of the court below. Only a palpable abuse of that discretion can justify interference by this court. No such abuse is shown here. It does not appear that any better price has been offered for the property, nor is any security tendered to insure a higher price at a resale. The petitioner was slow in moving. She waited more than two years after the sale was confirmed, the purchase money paid, the deed executed, delivered, and possession given to the purchasers. As far back as *Simmond's Estate*, 19 Pa. 439, at page 441, Mr. Justice Lewis said: "After a sale made under an order of the orphans' court, and a final confirmation of it according to the rules of court, followed by the payment of the purchase money and the delivery of the deed, it is too late to make objections to the sale. This is the general rule." The only exceptions to this rule are in the cases of fraud (*Grindrod's Estate*, 140 Pa. 161, 21 Atl. 259), or of gross mistake (*Johnson's Appeal*, 114 Pa. 132, 6 Atl. 556). In the present case, neither fraud nor mistake was shown; and it further appears that appellant knew all about the proceedings and attended the sale, and bid for the property. She was also present at the audit of the account of the executor in 1909, when the proceeds of the sale were distributed. No reason appears why she could not have made her application to have the sale set aside, for inadequacy of price, before it was confirmed and the deed delivered. Instead of so doing, she waited for more than two years after confirmation before filing this petition. The delay would be sufficient to justify the refusal of her petition. But on the merits it was properly dismissed.

The assignments of error are overruled, and the order and decree of the orphans' court is affirmed.

COX et al. v. PENNSYLVANIA R. CO.
(Supreme Court of Pennsylvania. Nov. 7, 1912.)

1. CARRIERS (§ 19*)—REGULATION—ACTION FOR DISCRIMINATION.

The right of action against a railroad company for unlawful discrimination in refusing a siding to a coal property was, as a matter of law, in the individual plaintiffs, where they held the legal title during the whole period of the discrimination, though prior thereto they had made an oral agreement to convey the property to a corporation, and, before the action was brought, they did so convey it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 33-49; Dec. Dig. § 19.*]

2. CARRIERS (§ 18*)—REGULATION—DISCRIMINATION.

That a railroad's line was congested is not an excuse for refusing a siding to a coal property, where the railroad afforded siding privileges to other operators and a reduction of the cars to other operators would have prevented an increase of the total traffic.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 21-24; Dec. Dig. § 13.*]

3. APPEAL AND ERROR (§ 978*)—REVIEW—DISCRETION OF TRIAL COURT—REMITTITUR OR NEW TRIAL.

In an action against a railroad for discrimination, where the jury disregards the correct instructions as to the measure of damages, the trial court's discretion in directing a reduction of the verdict by remittitur or new trial will not be reviewed, where it is not clearly shown that the defendant was injured thereby.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3866-3870; Dec. Dig. § 978.*]

4. CARRIERS (§ 19*)—REGULATION—DISCRIMINATION.

In an action against a railroad for refusing a siding to a coal property, evidence of the sale of cars by defendant to individual shippers and as to the loading of cars from wagons is irrelevant.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 33-49; Dec. Dig. § 19.*]

5. CARRIERS (§ 19*)—REGULATION—DISCRIMINATION.

In an action against a railroad for discrimination, there was no error in not distinguishing between interstate and intrastate commerce it not being incumbent upon plaintiffs to show what proportion of their total tonnage would have been sold within the state.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 33-49; Dec. Dig. § 19.*]

6. CARRIERS (§ 19*)—REGULATION—DISCRIMINATION—TREBLE DAMAGES—QUESTION FOR COURT.

Where the verdict clearly appears to be for single damages for discrimination by a carrier, it is for the court to say whether the damages shall be trebled.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 33-49; Dec. Dig. § 19.*]

Appeal from Court of Common Pleas, Dauphin County.

Action of trespass by D. W. Cox and another against the Pennsylvania Railroad Company for damages for refusing a siding to a coal property. From a judgment for plaintiffs, defendant appeals. Affirmed.

At the trial the court admitted under objection and exception evidence as to a number of cars sold by the defendant to individual operators along its line, and also evidence as to the amount of coal hauled with teams and placed on cars at Madera Station from which station the plaintiffs desired a siding.

Defendant presented these points:

"(13) If the jury shall be of opinion that the White Oak Coal Company was the owner of the leasehold properties in respect to which siding connections were by the plaintiffs asked and refused, the plaintiffs cannot recover in this action against the defendant, and in reaching such conclusion as to the ownership of said leasehold properties the jury must consider the tax reports made to the Auditor General of this commonwealth by the White Oak Coal Company, of which the plaintiffs were, respectively, the president and treasurer. Answer: Being of opinion, as stated in our general charge, that the plaintiffs, for the purposes of this action, are

the owners of the leasehold properties in question, we decline to affirm this point."

"(7) The conditions existing on the defendant's railroad at the time the plaintiffs applied for their siding connection and the great demand at that time on the part of the public for a supply of coal, as established by the evidence, which is not disputed, which conditions continued at least until the spring of 1903, created, during that time, a dissimilarity in circumstances and conditions from those prevailing before and after that period as to justify the defendant in refusing during such period to put in any siding connections. Its failure, therefore, to put in a connection for the plaintiffs, was not a violation of any duty owed by it to the plaintiffs, and there is no evidence in the case which would warrant the jury in finding that in refusing to put in the connection it was guilty of discrimination against the plaintiffs. Answer: The traffic conditions existing as stated in this point did not relieve the defendant from the performance of its duty as a common carrier to furnish equal facilities for transportation to all shippers, and we therefore decline to affirm this point."

"(9) If the jury believe that the circumstances under which the defendant declined to permit the plaintiffs to make a siding connection with its railway were, on account of its congested condition, unlike those under which it granted any producer or shipper of coal a siding connection with its railway, the defendant had the legal right to refuse a siding connection to the plaintiffs until the congested condition of its railway ended, and such refusal would not entitle the plaintiffs to recover damages against it under the act of June 4, 1883, under which this action has been brought against the defendant. Answer: Refused.

"(10) If the defendant refused to grant the application of plaintiffs for a siding connection, which had been made at a time when defendant's railroad was overcrowded with traffic and its resources were inadequate to furnish transportation for all freight that was offered, the fact that applications for siding connections were granted before and after this extraordinary pressure of traffic would not constitute undue and unreasonable discrimination, under like conditions, similar circumstances, and during the same period of time, between the siding applications as aforesaid, which were granted, and plaintiffs' siding application, which was refused. Answer: For the reasons referred to in our last preceding answers, we decline to affirm this point.

"(11) If the jury believe that in September, 1902, the transportation capacity of the railway of the defendant had become overtaxed and it was unable to meet in a normal manner the transportation demands made upon it, the defendant had the right to refuse

to grant any new application for siding connection, by whomsoever made, and to continue so to refuse any such application until it was able to meet such transportation demands in a normal manner, and such refusal, and continuance thereof, upon its part, were not undue or unreasonable discrimination against the plaintiffs which would entitle them to recover damage against the defendant in the present action. Answer: For the reasons given in our previous answer, as also in our general charge, we decline to affirm this point."

The court charged in part as follows:

"There were undoubtedly unusual traffic conditions, or perhaps we should rather say that the traffic conditions at that time were such as to tax the carrying capacity of the defendant to its utmost power. Large quantities of merchandise of all kinds were awaiting shipment to market; the cars of the company were in constant demand; the tracks of the company were crowded with trains; the yards of the company, for classification and distribution, were filled with cars which had been placed there to such an extent that trains coming along the main road could not be admitted to the yards. These were conditions which taxed the officers of that company to a very great extent. They had a very difficult task to perform in order to meet the demands of the trade; but the existence of those traffic conditions, gentlemen, did not relieve the defendant from the duty imposed upon it by the Constitution and the law to furnish equal facilities for transportation to all shippers who desired to make use of the company's lines."

"It has been suggested, also, and testimony has been offered, as to the necessity imposed upon the railroad company to obtain fuel supply for its own use; and it has been suggested that in the allowance of one of these sidings at least it was done in order that the railroad corporation might have for itself a proper supply of coal. The supply of coal to move its engines was, of course, necessary. The railroad company had an undoubted right, and it was its duty as well, to obtain for itself a proper coal supply, and it might properly grant a siding to a mine which was to furnish the corporation with coal for its engines. But that did not relieve it from the duty imposed upon it of granting to shippers of coal, who desired to send their coal to market, equal facilities of transportation if at the time it could reasonably and properly be done. While the corporation had this right to provide for its own fuel supply, it was bound to so exercise that right as not to interfere with the rights of shippers, along its line, to have an equal distribution of cars and facilities for transportation to transport the coal which they desired to have sent to the marts."

"It is your duty to determine from the weight of the evidence whether or not in

refusing this application there was undue and unreasonable discrimination as against these plaintiffs. The letter of the General Superintendent states that it is not desirable to 'divert a portion of the coal industry, taking it away from the older ones.' This defendant, gentlemen, had no concern for the older operators upon the line which it could carry out to the disadvantage of others. It was a matter of no importance to the railroad company whether the opening of a new operation would divert coal from the older operators. The defendant had no right to do that which would protect the older operators upon its line, and in violation of the rights of those who might desire to begin the shipping of coal; and we say to you, gentlemen, as matter of law, that if, after considering all this testimony as to crowded traffic conditions, as to coal supply, and the other reasons which have been suggested by the defendant in support of its refusal, if after considering all the testimony you are satisfied from the weight of the evidence that the true and real reason for refusing this application is to be found in these letters written at the time, then we say to you as matter of law that these letters disclose no good, sufficient, or legal reason for the refusal of the application, and indicate a refusal of it in such a way as would amount to an undue and unreasonable discrimination as against these plaintiffs. These letters refer to matters with which the railroad company as a common carrier has no concern. It was charged with the duty of furnishing equal facilities of transportation to all persons who desire it under like circumstances and during the same period of time. That the opening of a new operation might divert a portion of the coal supply, might enable some operator to send additional coal to market, and lessen the amount which some old operator could mine and ship, was no proper concern for this defendant company; and if after considering all the testimony you are satisfied from the weight of the evidence that the true and real reason for declining this application is to be found in these letters, which you will have with you, we say to you as matter of law that it is your duty to find that there was undue and unreasonable discrimination in the refusal of this application; and we suggest to you that the true and real reason for the refusal of the application is perhaps most likely to be found in the letters written at the time."

"Now upon the subject of how much coal could have been mined and shipped there is a wide difference of opinion between the witnesses for the plaintiff and for the defendant. Mr. Lawton, as we have already stated, has given you his estimate as to the quantity of coal which could have been mined and shipped had they been given the siding connection. Mr. Quinn, also a mining engineer who has given the subject very considerable attention,

says he has made an estimate and that he regards Mr. Lawton's estimate as fair and conservative. Mr. Womelsdorf, upon the other hand, a mining expert of recognized ability and fairness, has made an estimate, and he puts it at very much less. You will have to determine which of these estimates is correct. You must satisfy yourselves from the evidence upon this subject, with reasonable certainty the quantity of coal which might have been mined and shipped, considering all the existing conditions, the difficulties of mining, the water, the rolls in the vein of coal, which would delay and make mining expensive, and the difficulty in obtaining car supply; you must satisfy yourselves from all the evidence with reasonable certainty as to the quantity which might have been mined and shipped during that period."

"Your next inquiry will be as to the loss occurring after that time, i. e., the refusal of the plaintiffs' application for a siding connection; as to the gains which, with reasonable certainty, you may be able to ascertain from all the evidence, would have been the plaintiffs' if they had had during all the period of this refusal the siding connection and the facilities for shipment which they allege were improperly denied them; as to that you will have to carefully consider the testimony. Mr. Lawton testifies that in his opinion, as mining expert of very considerable experience, as appears from his testimony, they could have mined and shipped from that mine during that period something like 140,000 tons of coal. We are not accurate in our recollection, gentlemen, but something in that neighborhood was his estimate of the quantity of coal which could have been shipped by months, and you will have with you a statement showing what he claims with respect to that. You will also have with you statements showing the average prices of coal during the times when these plaintiffs claim they ought to have been permitted to ship it, and the market prices during the months when by putting in the siding they were enabled to get transportation for their coal to market. It will be your duty to ascertain with reasonable certainty the quantity of coal, considering all the conditions of mining and of getting car supply, they might have been able to put upon the market during the period of this refusal, and ascertain what the difference in price for that coal was between the time when they might have put it upon the market, had they had the siding connection, and the time when they were able to market it during the same period after the connection was granted, and the gain which they might have made, if you ascertain it with reasonable certainty from all the testimony would be the measure of compensation to which the plaintiffs are entitled."

"We will submit to you two forms of verdict, one of which you will use in case you conclude that there has been no discrimina-

tion, and if such conclusion is reached by you you will, of course, render a general verdict for the defendant. We will submit another form of verdict which may be used by you in case you conclude that there was undue and unreasonable discrimination. In that form of verdict you will write down the actual amount of injury sustained by these plaintiffs as you ascertain it to be from the evidence and render a verdict for that amount in single damages.

"By Mr. Gilbert: The defendant specially objects to the preparation of a form of verdict by the court for submission to the jury.

"The Court: It may be so noted. Exception to the defendant."

Verdict for plaintiff for \$34,814.50, which was reduced by remittitur filed to \$27,851.60, which was then trebled by the court, and judgment entered for \$83,554.80. Defendant appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

C. H. Bergner and Lyman D. Gilbert, both of Harrisburg, for appellant. C. L. Bailey, of Harrisburg, for appellees.

STEWART, J. The action was for the recovery of treble damages under the Act of June 4, 1883 (P. L. 72), for injury alleged to have been sustained in consequence of the defendant's refusal to furnish a siding connection with a coal mine operated by plaintiffs under a lease. Application for the siding connection was made September 11, 1902. Some time thereafter the defendant submitted to the plaintiffs a plan, dated October 4, 1902, showing a proposed siding, which, so far as appears, was acceptable to the plaintiffs. Plaintiffs were proceeding with the opening of the mine, when, on the 14th of November, they were notified by the defendant that their application for a siding connection was declined. The claim was for damages sustained between January, 1903, when plaintiffs were prepared to ship coal, and August, 1904, when the New York Central Railroad Company by right of eminent domain appropriated the land which plaintiffs had intended for their siding. A verdict resulted to the plaintiffs in the sum of \$34,814.50, single damages, afterwards reduced by remittitur to \$27,851.60, and then trebled by the court. The appeal is from the judgment so obtained.

[1] It is complained first of all that the court held as a matter of law that the right of action was in the plaintiffs. That plaintiffs were the original lessees of the mine was undisputed. Subsequent to the demand for a siding connection, the White Oak Coal Company, a corporation, was created, in which these plaintiffs were the principal shareholders; and November 5, 1902, a verbal agreement was entered into providing that, when two drifts in the mine were open-

ed to marketable coal, plaintiffs were to transfer the lease to the corporation for the consideration of \$10,000 in the capital stock of the corporation. It was not until January 12, 1905, that the contract was fully performed by the transfer of the lease and the payment of the purchase price. Meanwhile the corporation in its returns to the Auditor General of the state, during the years in which one of the plaintiffs was president of the corporation and the other its treasurer, the reports being certified by them as such officers, represented that the mine was the property of the corporation. Appellant contends that on this evidence it should have been submitted to the jury to determine where the ownership of the mine was during the period for which damages were claimed. Manifestly the defendant had no other concern with respect to the question sought to be raised than to protect itself from a second suit for the same cause of action. It is not disputed that up until January 12, 1905, no matter what control meanwhile the corporation exercised over the mine, and however it made its reports to the Auditor General, the legal title to the mine was in the plaintiffs. No assignment or transfer of the lease until then had been made and no part of the purchase price had been paid. This being so, the defendant was without reason to be concerned. A recovery by plaintiffs on their legal title would have been a conclusive bar to another action by any one. The law applicable to such case is very clearly stated in *Armstrong v. Lancaster*, 5 Watts, 68, 30 Am. Dec. 293. Gibson, C. J., there says: "A legal title is certainly sufficient for the maintenance of an action, excepting, perhaps, where the commonwealth stands as a trustee in an official bond; and there it may be necessary to show a particular injury as a title to her interference, in order to secure the obligor from an officious intermeddling. * * * The court will undoubtedly search out the actual plaintiff, where it is necessary, and fix on him the responsibility of a party, by subjecting him to costs, a plea of set-off, or any other liability that may be necessary to protect the defendant; but here, where a recovery on the naked legal title would have been a conclusive bar to another action by any one, to set out the equitable title in the declaration was unnecessary. The equitable owner of a right of action can recover on the legal title only, and any one attempting to use it a second time would be repulsed at once by a plea of former recovery. Of all the parties concerned the ostensible defendant had least to do with the equitable ownership. But there may be adverse claimants of it, and how are the rights of a party not named in the record to be protected? Certainly not by preventing a recovery and extinguishing the expectations of himself and every one else. If this judgment were affirmed, the party who maintained the contest, under the

defendant's shield, would have excluded himself, as well as his competitor. What, then, was his most available course? Obviously to lie by till recovery or to promote it; then to arrest the money in the sheriff's hands by notice not to pay it over, rule it into court, and move for leave to take it out. This done, the pretensions of the claimant could be determined by the court, or a jury, under an issue, as the case might require."

The action of the court in refusing to sustain defendant's contention with respect to this feature of the case stands clear of error.

[2] That the refusal to allow plaintiffs a siding connection was an undue and unreasonable discrimination against them was too clearly established to admit of question. The congested condition of traffic on defendant's road, which was offered in explanation, afforded neither excuse nor extenuation. The means of protection against such condition was in defendant's own hands. It was under no duty to haul more coal than could safely and conveniently be transported over its line; but a bounden duty did rest upon it, in limiting the amount to be accepted by it, because of extraordinary conditions, to show no preference as between shippers, and to treat all alike on some equitable basis. It was a period of shortage of car supply, and the defendant had adopted a basis of car distribution, a pro rata, based on the productive capacity of the mines. To prevent the opening up of additional mines from increasing the total traffic, a simple reduction of the rate would have been entirely sufficient to that end, and all that plaintiffs were entitled to was to share ratably with others similarly situated in the rate so established. Several points were submitted on behalf of the plaintiffs, asking for instructions to the contrary of the view here expressed. The refusal of these points has been made the subject of several assignments of error. Further discussion of them is unnecessary. They are overruled.

[3] The facts of the case indicated very clearly the true measure of damage. During the period for which damages were claimed plaintiffs' mine was idle, and wholly unproductive because of the denial of siding connection. In January, 1905, the White Oak Coal Company then being in possession of the mine, a siding connection was furnished, and the latter company then began and continued its operation of mining and marketing the coal from the mine. The plaintiffs offered evidence to show: First, the productive capacity of the mine; second, what the market price of the coal was month by month during the period of their trial of it; and, third, the market price for a corresponding period of 17 months next following when operated by the White Oak Coal Company. By this showing, the price had gradually declined, and the claim was for the difference in market price. Had this measure been strictly observed, there would have been but

little ground left for contention. The court's instructions to the jury on this branch of the case were as follows: "Now, upon the subject of how much coal could have been mined and shipped, there is a wide difference of opinion between the witnesses for the plaintiff and for the defendant. * * * You must satisfy yourselves from the evidence upon this subject with reasonable certainty as to the quantity of coal which might have been mined and shipped, considering all the existing conditions, the difficulties of mining, the water, the rolls in the vein of coal which would delay and make the mining expensive, and the difficulty in obtaining car supply; you must satisfy yourselves from all the evidence with reasonable certainty as to the quantity which might have been mined and shipped during that period. * * * You may be aided in that inquiry, gentlemen, by the rating placed upon the capacity of this mine by the defendant company. You will have a tabulation of the rating of the mine at different periods with you. At an early period in the history of the mine, as we recall it, it was rated as having a capacity of three cars a day; you will consider that in ascertaining the quantity which might have been mined and shipped from this mine. You will consider the market price prevailing during the various months when the plaintiffs claim they could have mined and shipped this coal if the siding had been allowed them and the market price prevailing after the time when the sidings were made and shipments were actually permitted, and the difference in the market price upon that quantity of coal would be the measure of compensation to which these plaintiffs are entitled, in case you find there was an undue and unreasonable discrimination which they allege."

How widely the jury departed from the measure here given them is made very apparent by the learned trial judge in his opinion overruling defendant's motion for a new trial, on condition of a remittitur being filed by plaintiffs. He there demonstrates how the jury arrived at their estimate of plaintiffs' loss by taking as a factor the productive capacity of the mine instead of the amount of coal they could have marketed therefrom. He says: "The uncontradicted testimony in this case shows that in this region there has always been an insufficient car supply even when the coal trade was in normal condition. This arose, not from any discrimination in car distribution, but from an insufficient number of cars to meet the demands and rated capacity of the mines. There is neither allegation nor proof of discrimination against the plaintiffs in the distribution of the cars. It seems to us therefore that it is reasonably certain that plaintiffs would not have been able in 1903 and 1904 to secure sufficient cars to carry to market Mr. Lawton's estimated quantity of

coal, and thus the plaintiffs' estimated sales would have been further diminished. The jury does not appear to have made any deduction whatever from Mr. Lawton's estimation either for reasonably certain delays and difficulties in mining, nor for the reasonably certain impossibilities of procuring the cars necessary to carry the estimated mine product."

The verdict was for single damages. The court directed that, upon plaintiffs' filing a remittitur of all excess over \$27,851.60, the rule for a new trial should be discharged; and this was accordingly done. This action of the court is assigned as error, and it is contended that the verdict even as reduced by the remittitur is excessive. That the verdict as rendered was in excess of the plaintiffs' just demands was fully demonstrated by the learned trial judge in his opinion refusing a new trial. In view of this fact, but for the correction in the verdict made by the court, we would feel compelled to reverse the judgment entered thereon. It would seem the better practice in cases of this kind, when it clearly appears that the jury in reaching its verdict overlooked items or circumstances making in relief of the defendant, *pro tanto*, and which they were directed by the court to consider, but which in themselves furnished no fixed standard for admeasurement as to value, to grant a new trial; but we have no fixed rule requiring it. It is within the discretion of the court to adopt either of two methods of correction: It may grant a new trial outright, or it may grant it on condition that plaintiff refuses to remit so much of the verdict as the court concludes is excessive. Here the latter course was adopted, the court fixing the amount to be remitted which it estimated to be the full equivalent of those matters making in relief of defendant which had been overlooked. This was no more than saying that, had the verdict been for this reduced sum, the court would have approved it, and a new trial would have been refused. Plaintiffs filed the remittitur, and defendant was protected to that extent by the interference of the court. Whether it was greater or less than a jury would have allowed, we have no way of determining. It is enough to know that as the case is presented it is not of that exceptional character where the injustice done through an excessive verdict is too plain to be mistaken. It is only in such cases that this court will interfere where the matter has been passed upon by the lower court. This assignment is overruled.

[4] The evidence with respect to sale of cars by defendant to individual shippers had no relevancy to the issue being tried. No more had the evidence with respect to the loading of cars from wagons. All of this evidence should have been excluded, but it is impossible to see how it in the remotest way

entered into the final conclusion. Otherwise, it would be ground for reversal.

[5] There was no error in not distinguishing between interstate and intrastate commerce in this case. It was not incumbent upon the plaintiffs to show what proportion of total tons they would have sold within the state. The case called for no such distinction.

[6] The case of *Robbins v. Farwell*, 193 Pa. 37, 44 Atl. 260, furnished a complete answer to appellant's contention that it was not for the court but for the jury to say whether there should be a recovery for treble damages. Here they were trebled upon a rule to show cause. No question is made as to the verdict having been for single damages strictly as directed by the court. This was exactly the situation in the case above cited, where, in affirming the action of the court in trebling damages upon rule, this court said, speaking by Dean, J.: "Ever since *Welsh v. Anthony*, 16 Pa. 254, decided in 1851, the trial courts have exercised the power of doubling or trebling the damages, or refusing so to do, when it clearly appeared but single damages only were found by the jury, and this court has in a number of cases since *Welsh v. Anthony* recognized the authority."

The verdict for single damages was conclusive as to the question of undue and unreasonable discrimination. This left nothing to be considered by the jury in connection with the trebling of the damages. The statute made provision for that.

The assignments of error are overruled, and the judgment affirmed.

SELTZER v. FERTIG.

FERTIG v. SELTZER.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

1. CLERKS OF COURTS (§ 6*)—REMOVAL—"APPOINTED OFFICERS."

Assistant clerks of the orphans' court are "appointed officers," within Const. art. 6, § 4, authorizing the removal of appointed officers at the pleasure of the power by which they shall have been appointed.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. §§ 12-20; Dec. Dig. § 6.*

For other definitions, see *Words and Phrases*, vol. 1, p. 461.]

2. CLERKS OF COURTS (§ 6*)—REMOVAL—AUTHORITY OF APPOINTING OFFICER.

Under Const. art. 6, § 4, authorizing the removal of appointed officers at the pleasure of a power by which they shall have been appointed, assistant clerks of the orphans' court appointed under Const. art. 5, § 22, by the register of wills with the consent and approval of the court, may be removed by the register of wills without the consent of the court.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. §§ 12-20; Dec. Dig. § 6.*]

Appeal from Orphans' Court, Schuylkill County.

A petition to confirm appointment of Thomas A. McCarthy, as assistant clerk of the

orphans' court. From orders enjoining the removal of John H. Fertig, as assistant clerk of the orphans' court, and directing the attestation of salary bill, H. H. Seltzer appeals. Reversed.

From the record it appeared that on January 1, 1912, H. H. Seltzer, who had been elected to the office of the register of wills, filed a paper in the orphans' court setting forth the fact that he had removed J. H. Fertig as first assistant clerk of the orphans' court, and had appointed Thomas A. McCarthy in his place. The paper requested the approval of the appointment of McCarthy.

The court made the following order: "And now, March 4, 1912, it is ordered and directed that H. H. Seltzer, register of wills, acting as clerk of the orphans' court, permit John H. Fertig, the first assistant clerk of the orphans' court, to perform his duties in said office, and he is enjoined from further interfering with the said John H. Fertig, in the performance of his duties as first assistant clerk of this court, either by force or in any manner whatsoever." And now, March 4, 1912, H. H. Seltzer, register, acting as clerk of the orphans' court, is ordered and directed to attest the bill of John H. Fertig for the sum of \$208.33, the salary due him for the month of January, 1912, so that the same may be countersigned by this court in the orderly and legal manner required by the act.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Otto E. Farquhar, Carl H. Wagner, and Guy E. Farquhar, all of Pottsville, for appellant Seltzer. T. H. B. Lyon, of Mahanoy City, and M. H. Spicker, of Pottsville, for appellee Fertig.

POTTER, J. [1] The question involved in this controversy is whether the register of wills, who is ex officio clerk of the orphans' court, has power to remove from office an assistant clerk of the orphans' court without the consent of that court. It is contended on behalf of the appellant that the register of wills has the power of appointment and can remove his appointees at will. The court below held that the appointing power is the register of wills in conjunction with the court, and that therefore the power of removal is only to be exercised with the consent and approval of the court. Article 6, § 4, of the Constitution, provides that "appointed officers * * * may be removed at the pleasure of the power by which they shall have been appointed." If, then, assistant clerks are "appointed officers" within the meaning of this clause of the Constitution, they may be removed at the will of the appointing power. That they are properly to be classed as appointed officers seems clear from the language of article 5, § 22, of the

Constitution, which says that the register of wills as clerk "may appoint assistant clerks," thus recognizing them as constitutional officers. It appears from the opinion that the court below regarded the decision in *Com. v. Black*, 201 Pa. 433, 50 Atl. 1008, as authority for classifying an assistant clerk of the orphans' court as a petty officer, not to be properly included within the term "appointed officers" as used in the Constitution. We are unable to agree with this conclusion. In the case last cited, it appeared that an act of Assembly in providing for the government of cities of the third class gave to the mayor the power to nominate, and, by and with the advice and consent of the select council, to appoint, suspend, or dismiss, policemen. By the express terms of the act of Assembly the mayor was permitted to exercise the power of removal, only with the consent of council. The court there held that a policeman was a petty officer, not intended to be included in the constitutional provision, and therefore he was subject, as to appointment and removal, to legislative regulation. But in the present case there is no legislative enactment attempting in any way to interfere with the power of removal of appointed officers, as set forth in the Constitution. Nor are we able to regard an assistant clerk of the orphans' court as a mere petty officer. The office is expressly recognized by the Constitution, and its duties involve the keeping of the records of the court, the handling of public moneys, the granting of marriage licenses, and the issuing of process in the name of the court. The proper discharge of these duties calls for the exercise of prudence and discretion. In our opinion, assistant clerks of the orphans' court are properly to be regarded as appointed officers within the meaning of the Constitution, and as such it follows that they "may be removed at the pleasure of the power by which they shall have been appointed."

[2] The present contention will therefore be determined by ascertaining in whom the power of appointment is vested. The constitutional provision in this respect is (article 5, § 22): "He (the register of wills acting in his capacity as clerk) may appoint assistant clerks, but only with the consent and approval of said court." The provision is quite similar to that which was under consideration in the case of *Lane v. Com.*, 103 Pa. 481. In article 4, § 8, of the Constitution, it is provided that the Governor "shall nominate, and by and with the advice and consent of two-thirds of all the members of the Senate appoint, * * * such other officers of the commonwealth as he is or may be authorized by the Constitution or by law to appoint." The act of Assembly of April 18, 1878 (P. L. 26), section 1, provided that "recorders of cities of the first class shall be appointed by the Governor by and with the advice and consent of the Senate." In the case cited it was held that by virtue of the

provision of section 4 of article 6 of the Constitution (which is that which we are now considering) the Governor might lawfully remove a recorder appointed under the act of 1878, and that the consent of the Senate to such removal was unnecessary. Mr. Chief Justice Mercur said (103 Pa. 485): "As already shown, the Constitution declares in section 8, cited, the Governor shall nominate and he shall appoint. Before he completes the appointment the Senate shall consent to his appointing the person whom he has named. It may prevent an appointment by the Governor, but it cannot appoint. It may either consent or dissent. That is the extent of its power. There its action ends. It cannot suggest the name of another." And further on it is said (103 Pa. 487): "As we have shown, the letter and the spirit of the Constitution both unite in declaring this power to be in the Governor. It necessarily follows that officers appointed by him, other than those excepted, may, in the language of the Constitution, be removed at his pleasure."

In like manner the register of wills is empowered by the Constitution to "appoint assistant clerks * * * with the consent and approval of said court." And, following the reasoning in the opinion in *Lane v. Com.*, supra, the power of the register in making the appointment is substantially like that of the Governor in the instance noted, and the court in bestowing or withholding its consent and approval performs a function similar to that of the Senate. It may prevent an appointment by the register, but it cannot appoint. It may either consent or dissent. That is the extent of its power, and there its action ends. The appointing power is that of the register, and therefore the power of removal remains in him alone. This conclusion is consistent with the decision in *Reid v. Smoulter*, 128 Pa. 324, 18 Atl. 445, 5 L. R. A. 517, where, speaking of the right of the register to appoint, Mr. Justice Clark said (128 Pa. 335, 18 Atl. 446, 5 L. R. A. 517): "This right was vested in him by the very terms of the Constitution. * * * It will not be seriously contended that the Legislature had any power to pass upon the necessity for the appointment, for this discretion is expressly committed to the clerk, who is to act with the consent and approval of the court." In the opinion the further statement is made (128 Pa. 335, 18 Atl. 446, 5 L. R. A. 517): "There was no power competent to remove him, save the tribunal which conferred the appointment." In the present case the court below lays some stress upon the use of the word "tribunal" as necessarily involving action by the court. But it is evident that the phrase "tribunal which conferred the appointment" is merely used as an equivalent to the constitutional phrase "the power by which they shall have been appointed." No other or additional signif-

cance can fairly be attached to the words. Our conclusion is therefore that, while the register may appoint an assistant clerk only with the consent and approval of the court, yet the power of removal is in the register alone. The court below was therefore without authority to make the order enjoining the register of wills from removing the former appointee from office, or the order directing that the bill be attested for the payment of his salary.

Appeals from each of the separate orders of the court below were here presented and argued together, and they will be disposed of together. In the appeal at No. 125, January term, 1912, the assignment of error is sustained; and in the appeal at No. 126, January term, 1912, the fourth assignment is sustained. The decree of the court below in each case is reversed.

ZIMMERMAN et al. v. MILLER et al.

(Supreme Court of Pennsylvania. Nov. 7, 1912.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 80*)—CONTRACTS—ERECTION OF SCHOOL BUILDINGS.

A school board having advertised that sealed proposals for the erection of a schoolhouse would be received until a certain day and hour, all bids to be accompanied by a certified check for a named amount, where a contractor puts in a bid with a certified check, and on the day after the date mentioned in the advertisement, but before the opening of any of the bids, he puts in a corrected bid, making him the lowest bidder, the school board should not reject the corrected bid merely because it was not in time, nor because it was not accompanied by the certified check; the certified check previously deposited applying to the corrected bid.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 191-194; Dec. Dig. § 80.*]

2. COSTS (§ 96*)—PERSONS LIABLE—SCHOOLS.

Where a school board acted under a mistake of law and not in bad faith in rejecting a bid for the erection of a school building, the costs of a suit in equity to compel them to accept the bid will not be imposed upon the board personally, but upon the school district.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 380; Dec. Dig. § 96.*]

Appeal from Court of Common Pleas, Somerset County.

Bill in equity by D. B. Zimmerman and others against Pierce Miller and others for an injunction. From a decree for plaintiffs, defendants appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Norman T. Boose and Virgil R. Saylor, both of Somerset, for appellants. Edmund E. Kiernan. Francis J. Kooser, Ernest O. Kooser, John S. Miller, and W. Curtis Truxal, all of Somerset, for appellees.

MOSCHZISKER, J. Counsel for the appellant urges but one point for our determination: Was error committed in restraining the defendant school board from awarding the contract for the erection of the contemplated school building, under the facts in this case?

[1] The court below found that the school board advertised that sealed proposals for the erection of the schoolhouse would be received until 1 p. m. on June 14, 1912, all bids to be accompanied by certified check in the sum of \$500; that "on the 14th day of June, 1912, three bids were handed to the directors, one by S. F. Lawrence, one by W. M. Johnson, and one by Granger & Auman; and that on the 15th day of June, at about 11 o'clock a. m., a second or corrected bid was handed the secretary by W. M. Johnson;" that the last-mentioned bid was in the form of a correction of the total of Johnson's former one, and was the lowest of the lot, it being about \$900 lower than that of the successful bidder; that the board rejected it, "on the ground that the second bid was illegal, first, because it was not in time; and, second, because it was not accompanied by a certified check; but some of the individual members of the board were averse to awarding the contract to Johnson, on the ground, first, that the work he had done at the County Home * * * was not in accordance with the contract and not satisfactory; and, second, that there was undue delay in prosecuting the work; but the court finds as a fact that these reasons are not sustained by the evidence." The court further found that there was no evidence that the defendants had acted fraudulently or in bad faith, stating: "It is manifest that the directors, as a body, labored under a wrong impression as to their rights and duties in reference to the bids. They seem to have thought that they had no right to consider any bids which did not come before them at the time appointed in their notice to bidders; and they also seem to have been under the impression that the last bid of Mr. Johnson's should have been accompanied with a certified check. In both these positions the directors were in error. * * * I do not mean to intimate that they were bound to accept a bid simply because it was lower than other bids. It was their duty, in the exercise of a sound discretion, to investigate as to the character and responsibility of bidders, and to consider the question of competency, skill, and the like in connection with the price and other matters, and then award the contract after having fully considered all questions. But the board, by its action on its minute, shows that the lowest bid was turned down for reasons that are not legal. * * * It may be that the board, after due consideration, will be justified in excluding the bid of Mr. Johnson, or any

other bid received under like circumstances; but the evidence in this case does not justify the conclusion arrived at by the board." After reading the evidence we cannot say that the learned court below was wrong in its understanding of the facts, or in its conclusions therefrom. The second bid of Johnson was merely a correction in the amount of his former one. It was in the hands of the board some time prior to the opening of any of the bids, and the certified check previously deposited applied thereto.

[2] This is not a case where the court attempted to interfere with an exercise of duty deliberative or discretionary in character; and therefore it does not fall within the line of authorities cited by the appellant. It is an instance of mistaken procedure on the part of a school board under a misapprehension of the law, and falls rather within the line of cases typified by *Louchheim v. Philadelphia*, 218 Pa. 100, 66 Atl. 1121. We are not convinced of any error in the part of the decree complained of; but, since the court below has expressly found that the defendants acted under a mistake of law and not in bad faith, they should not be taxed with the costs.

The assignments of error raising the question which we have discussed are overruled, and the others are dismissed.

The decree is affirmed; the school district to pay the costs.

IN RE BROWN'S NOMINATION PAPERS.

(Supreme Court of Pennsylvania. Oct. 28, 1912.)

ELECTIONS (§ 154*)—NOMINATIONS—BURDEN OF PROOF.

Where there are four candidates of a party for the district entitled only to three representatives, and the nomination papers of three have priority over the fourth in point of time, and are regular in form, the burden is on the fourth candidate to establish the invalidity of the papers of the other candidates.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 136; Dec. Dig. § 154.*]

Appeal from Court of Common Pleas, Dauphin County.

In the matter of the nomination of Andrew F. Brown, candidate of the Washington Party for the Legislature. From an order upon objections to nomination papers, Cox and others appeal. Reversed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

John R. Geyer and John E. Fox, both of Harrisburg, for appellants. Uteley E. Crane, of Philadelphia, for appellee.

PER CURIAM. There cannot be two candidates of the same party for the same office at the same time. Wakefield's Appeal, 229 Pa. 585, 79 Atl. 117. In the present case there are four candidates of the Washington

party for the same office in a district only entitled to three representatives. Such a result should be avoided in the orderly conduct of elections, and in the case at bar it can be avoided by giving to the nomination papers of Cox, Sherwood, and Wilson their prima facie value. These nomination papers are regular in form, and have priority in point of filing. They are signed by a sufficient number of the electors of the district, and have the approval of five pre-emptors of the party name. In the preparation, signing, and filing of the nomination papers in question, the requirements of the law have been met. This makes out a prima facie case in favor of the validity of these nomination papers. Wakefield's Appeal, 229 Pa. 581, 79 Atl. 117. The burden was therefore upon Brown to establish the invalidity of the nomination papers of Cox, Sherwood, and Wilson, which were regular in form and prior in point of time. This, as the record discloses, he failed to do; and, having failed to establish the invalidity of the papers first filed, he is not in position to claim a nomination for the same office under a nomination paper subsequently filed.

It therefore follows that the nomination papers of Cox, Sherwood, and Wilson, as the candidates of the Washington party for the Fifth legislative district, under the facts of the present case, are valid, and should be so certified by the Secretary of the Commonwealth, and that the objections to the nomination paper of Brown should have been sustained; and it is so ordered. The prothonotary is directed to certify this order to the Secretary of the Commonwealth, so that the names of Cox, Sherwood, and Wilson may appear upon the official ballot for the Fifth legislative district as the candidates of the Washington party for the Legislature in that district at the election to be held on Tuesday, November 5, 1912.

WEIKEL v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

RAILROADS (§ 350*)—ACCIDENT AT CROSSING—EVIDENCE.

In an action to recover for the death of plaintiff's husband at a railroad crossing at 6 o'clock on a clear evening, where there was an unobstructed view of the railroad for nearly 5,000 feet, binding instructions for defendant should have been given.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

Appeal from Court of Common Pleas, Union County.

Action by Cora Welkel against the Philadelphia & Reading Railway Company. Verdict for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Cloyd Steininger and Frederic E. Bower, both of Lewisburg, for appellant. Andrew A. Leiser, Erwin M. Beale, and Andrew A. Leiser, Jr., all of Lewisburg, for appellee.

POTTER, J. The plaintiff here sought to recover damages for the death of her husband, which resulted, as she alleged, from the negligence of the defendant company. The accident occurred at a grade crossing, known as the Mertz crossing, in the open country, at 6 o'clock, upon a clear evening in December. The situation of the crossing afforded an unobstructed view of the track, in the direction from which the train was approaching, for a distance of about one mile. The plaintiff's husband, Earnest Weikel, and a companion, were riding in a one-horse wagon upon a public highway, which ran almost parallel with and near the railroad tracks for a considerable distance before the crossing was reached. Weikel and his companion Keiffer were well acquainted with the neighborhood and with the running of the trains. They were driving southward, and came upon the Mertz crossing from the east side, or upon the north-bound track. The train which struck them was upon the western track, south bound. There were three railroad tracks at the place in question, which the highway crossed diagonally, extending about 77 feet from outside to outside.

Upon the trial, at the close of the testimony, the trial judge gave binding instructions to the jury to render a verdict for the defendant upon the ground that the decedent was guilty of contributory negligence. Whether or not the court below erred in so doing is the single question here raised by the three assignments of error. The trial judge thought the conclusion was irresistible, from the testimony, that the young men drove negligently into an obvious danger. In his opinion refusing the motion for a new trial, he says: "At any point on the highway between the culvert and the crossing, a distance of 550 feet, there is an unobstructed view of the railroad tracks, from the cross-over switch, down to the Mertz crossing, a distance of 4,558 feet, without even a tree or bush to prevent a traveler from seeing, or hearing an oncoming train. We know of no crossing where a better opportunity is afforded the driver of a wagon to acquaint himself with the approach of a train before committing himself to the crossing. It is absolutely impossible for Keiffer and Weikel to have been upon the crossing, with too short a time to get off, before the train came in sight. This moving train could have been seen, had they looked, not only at the point 40 feet from the track, where Keiffer said they stopped, looked, and listened, but it was in plain view all the way from that point to the crossing." We think this statement of what, in substance, was shown by the undisputed testi-

mony justified the conclusion reached by the court below. The witness Harbeson testified that he was driving along behind the wagon in which Weikel and Keiffer were, and he saw the train coming and stopped before reaching the crossing. He testified that he saw the train approaching, with headlight burning, and coaches lighted. Counsel for appellant argue that there may have been some confusion between certain switch lights and those on the locomotive. But these switch lights, as appears from the undisputed testimony, were more than three-quarters of a mile away, leaving a space of that length without room for confusion. The trial judge disposes of this feature by saying, in his opinion: "It is said the switch lights were confusing; but the nearest light is 4,353 feet from the crossing, and from the time, the train passed this light until it struck the wagon a full minute must have elapsed, time enough for a horse to walk over the crossing and back again."

The case of *Howard v. B. & O. R. R. Co.*, 219 Pa. 358, 68 Atl. 848, is cited as authority for the proposition that this case should have been submitted to the jury. The point of that decision lay in the fact that the view along the track, in the direction from which the train came, was limited to a distance of about 600 feet. So that, having looked as far as possible, and seeing no train approaching, and then starting over, one might have been caught without fault of his own. In the *Howard Case*, the limited distance for which the track could be seen might readily have rendered useless the precaution of looking. Hence, in that case, we held that the court could not say, as a matter of law, that the fact of the collision made the inference of contributory negligence unavoidable. But, in the present case, the long stretch of track, without any obstruction to the view, over which an approaching train must pass, made it idle to say that the train which struck the men, while crossing the track, was not in plain sight when they started to cross. The conclusion that the men drove negligently into obvious danger seems to us, as it did to the court below, to be the only reasonable inference which could have been drawn from the testimony.

The assignments of error are overruled, and the judgment is affirmed.

IN RE WASHINGTON PARTY NOMINATIONS.

(Supreme Court of Pennsylvania. Oct. 17, 1912.)

1. ELECTIONS (§ 154*)—LEGALITY OF NOMINATION PAPERS—RIGHT OF APPEAL.

A proceeding in the common pleas to determine the legality of nomination papers is purely statutory, and is not appealable.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 136; Dec. Dig. § 154.*]

2. CERTIORARI (§ 64*)—EXTENT OF REVIEW. On certiorari under the general supervisory powers of the Supreme Court, its jurisdiction is limited to an inspection of the record to determine whether there are substantial irregularities or defects in jurisdiction.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 174, 175, 183, 184; Dec. Dig. § 64.*]

Appeal from Court of Common Pleas, Dauphin County.

In the matter of Nomination Papers of the Washington Party. From orders of the county court, certain members of the Washington Party appeal. Affirmed.

At the hearing before McCarrell, J., the petitioner made the following offer: "Mr. Bergner: We propose to prove by the witness on the stand, and by other witnesses who will follow him, that they are members of the Washington party, and have been members of the Washington party from a date prior to August 1st, being members of a political organization intending to support a certain man, Theodore Roosevelt, for President of the United States, but not then having a name; that they continued members of that political organization after the 1st of August, when the name Washington was adopted to denominate that party or policy, and are still members of that party; that that party, by nomination papers regularly and properly filed on the 17th day of August, 1912, nominated George M. Wertz for Senator in the Thirty-Fifth senatorial district, Jesse L. Hartman for Congress in the Nineteenth congressional district, and D. P. Welmer and Dr. Blair for members of the lower house in the Legislature of Pennsylvania from the Second legislative district of Cambria county; that such nominations were made by nomination papers bearing much more than the requisite number of signatures, all of which signatures are the signatures of bona fide members of the Washington party, and who have been members of the Washington party since its formation; that the signatures to these papers are much larger in number than the signatures to the papers nominating the contesting candidates; that said nomination papers were circulated and signed after meetings held and organization formed through and by members of the Washington party, at which meetings the nominations of the persons named were made, and the persons present instructed to have the papers properly signed; all this to show that the Washington party, as the same, on the 17th day of August, existed in Cambria county, and as it now exists, nominated Wertz for Senator in the Thirty-Fifth senatorial district, Hartman for Congress in the Nineteenth congressional district, and Welmer and Blair in the Second legislative district, as candidates of the Washington party of Pennsylvania. Mr. Snodgrass: Objected to for the same reason

as heretofore stated—no pretense to connect that with the affidavits filed, upon which this party rests. It is not proposed to do that no connection with the affidavits at all. The Court: The offer is excluded and an exception noted."

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. W. Storey, of Johnstown, for appellants. Robert Snodgrass and Homer Shoemaker, both of Harrisburg, and John E. Evans, of Ebensburg, for appellees.

PER CURIAM. [1] A proceeding in the common pleas to determine the legality of nomination papers is purely statutory and without appeal. The findings of fact and the merits of the case are not subject to review.

[2] On certiorari under the general supervisory powers of this court, our jurisdiction is limited to an inspection of the record to determine whether there are substantial irregularities or defects of jurisdiction. *Robb's Nomination*, 188 Pa. 212, 41 Atl. 477; *Independence Party Nomination*, 208 Pa. 108, 57 Atl. 344; *Von Moss' Election*, 219 Pa. 453, 68 Atl. 1019. The only assignment of error relates to the overruling of an offer of testimony, and it does not present a question that we have jurisdiction to consider.

The appeals are dismissed, and the order of the court of common pleas of Dauphin county is affirmed.

GOUGHNOUR et al. v. ZIMMERMAN et al.
(Supreme Court of Pennsylvania. Nov. 7, 1912.)

1. BASTARDS (§ 11*)—LEGITIMATION—STATUTORY PROVISIONS.

Act April 27, 1855 (P. L. 368), did not legitimate illegitimate children, but merely gave to the mother and illegitimate children the capacity to inherit from each other.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 13; Dec. Dig. § 11.*]

2. BASTARDS (§ 100*)—PROPERTY RIGHTS—INHERITANCE.

Where an illegitimate child dies before the passage of Act June 5, 1883 (P. L. 88), intestate, leaving neither mother nor issue, her surviving illegitimate brothers and sisters do not inherit her real estate, though derived from the mother by will.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 250, 256; Dec. Dig. § 100.*]

Appeal from Court of Common Pleas, Cambria County.

Ejectment by George W. Goughnour and others against Eugene Zimmerman and others. From a judgment for defendant non obstante veredicto, plaintiffs appeal. Affirmed.

At the trial it appeared that Susan Horner died on February 19, 1881, seised of a tract of land, which by will she devised to her three illegitimate children, and the issue of a de-

ceased illegitimate child. The land was partitioned, and the tract in dispute was allotted to one of the illegitimate children, Mary Zimmerman. Mary Zimmerman died on September 2, 1882, intestate, without issue, but leaving to survive her a husband, Charles Zimmerman. Zimmerman died on December 4, 1899, leaving a will by which he bequeathed the land in question to his son and daughter, the defendants. At the trial, the jury rendered a verdict for plaintiffs, the illegitimate brothers and sisters of the decedent. Subsequently the court entered judgment for defendants non obstante veredicto.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Donald E. Dufton, of Ebensburg, and R. Edgar Leahey, of Johnstown, for appellants. H. S. Endsley, Jacob Zimmerman, J. C. Davies, and Tillman K. Saylor, all of Johnstown, for appellees.

FELL, C. J. The plaintiffs are brothers and sisters of Mary Zimmerman, who was one of four illegitimate children. The land for which ejectment was brought was devised to her by her mother in 1881. She died intestate in 1882, leaving to survive her a husband, whose claim of title under the intestate act of June 5, 1883 (P. L. 88), was undisputed during his life, and who devised the land to the defendants, who are his children by a subsequent marriage.

[1] All of our decisions hold that the act of April 27, 1855 (P. L. 368), did not legitimate illegitimates, but gave to the mother and illegitimate children the capacity to inherit from each other only. Grubb's Appeal, 58 Pa. 55; Steckel's Appeal, 64 Pa. 493; Woltemate's Appeal, 86 Pa. 219; Neil's Appeal, 92 Pa. 193; Tennent's Appeal, 166 Pa. 498, 31 Atl. 254. This, as was said in Woltemate's Appeal, supra, is the extent to which the Legislature had opened the door to illegitimates.

[2] The right of illegitimates to inherit has since been enlarged by statute; but, as the law stood at the death of Mary Zimmerman, there was no relationship between her and the plaintiffs, through which her estate could pass to them. It follows that judgment non obstante veredicto was properly entered for the defendants.

The judgment is affirmed.

COMMONWEALTH v. HARRIS.

(Supreme Court of Pennsylvania. Nov. 7, 1912.)

1. HOMICIDE (§ 282*)—DEGREE OF CRIME—QUESTION FOR JURY.

On trial for murder the question of degree is for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 574; Dec. Dig. § 282.*]

2. HOMICIDE (§ 308*)—INSTRUCTIONS—DEGREE OF CRIME.

An instruction that, under the testimony and according to the theory of the commonwealth, the crime with which defendant is charged is willful, premeditated killing, and it is necessary for the jury to understand what is meant thereby, followed by clear instructions and a charge that it was the jury's duty to fix the degree, did not take the degree from the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 642-647; Dec. Dig. § 308.*]

3. HOMICIDE (§ 332*)—APPEAL—REVIEW.

Under Act March 15, 1870 (P. L. 15), the Supreme Court, on appeal from a conviction of murder of the first degree, is limited, on review of the evidence, to the inquiry whether competent evidence to sustain a conviction was presented to the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 699-704; Dec. Dig. § 332.*]

Appeal from Court of Oyer and Terminer, Fayette County.

John Harris was convicted of murder in the first degree, and appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

George Patterson, of Uniontown, for appellant. S. Ray Shelby, Dist. Atty., and S. John Morrow, Asst. Dist. Atty., both of Uniontown, for the Commonwealth.

FELL, C. J. [1] On a trial for murder the question of degree is always for the jury. It goes to them with the question of guilt, and an instruction that withdraws it is erroneous. Commonwealth v. Sheets, 197 Pa. 69, 46 Atl. 753; Commonwealth v. Kovovic, 209 Pa. 465, 58 Atl. 857; Commonwealth v. Frucci, 216 Pa. 84, 64 Atl. 879. In the case last cited a reversal was had because of the instruction in the charge, "You will have to do in this case with the kind of murder stated in the statute as willful, deliberate, and premeditated murder," and in the answer to the request of the jury to again define to them murder of the first degree, murder of the second degree, and manslaughter, "It is the willful, deliberate and premeditated killing that you are to deal with in this case." These expressions were held to be equivalent to an instruction that the crime committed was murder of the first degree, and to take from the jury the right to fix the degree.

[2] In the case at bar the instruction complained of was: "The crime with which you have to do in this case, under the testimony and according to the theory of the commonwealth, is the kind known as a willful, deliberate, and premeditated killing." It is argued that this instruction, under the ruling in Commonwealth v. Frucci, supra, entitled the appellant to a reversal. This expression, standing alone, is not free from criticism, but considered in the connection in which it was used it is not open to the objection urged against it. It was followed by the statement, "It is therefore necessary that you should

have a distinct understanding as to what is meant by 'willful, deliberate, and premeditated killing,' and by clear instructions on the subject, and the jury were repeatedly told that it was their duty to fix the degree. Considering the whole charge, the jury must have understood that it was the commonwealth's theory, based on its testimony, to which the court referred.

[3] We have reviewed the testimony in the case, as required by the act of February 15, 1870 (P. L. 15), "to determine whether the ingredients necessary to constitute murder of the first degree shall have been proved to exist." This review is limited to the inquiry whether competent evidence to sustain a conviction was presented by the commonwealth. *Grant v. Commonwealth*, 71 Pa. 495; *Commonwealth v. Garrito*, 222 Pa. 304, 71 Atl. 20; *Commonwealth v. De Masi*, 234 Pa. 570, 83 Atl. 430. We find that it was, and that under the commonwealth's testimony the murder was willful, deliberate, and premeditated. With this our duty ends. The credibility of the witnesses was for the jury. The remaining assignments of error call for no discussion. A number of them are not based on exceptions, and those that are are without merit.

The judgment is affirmed, and the record is remitted for the purpose of execution.

COMMONWEALTH ex rel. DUFF et al. v. BAILEY et al.

(Supreme Court of Pennsylvania. Nov. 7, 1912.)

PAUPERS (§ 5*)—OVERSEERS OF THE POOR—TERMS OF OFFICE.

The terms of office of overseers of the poor, elected at the February election, 1910, expired, under the constitutional amendment of 1909, the first Monday of December, 1911, and were not extended by Act June 19, 1911 (P. L. 1052), changing the terms of overseers from two to four years.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. §§ 12, 13; Dec. Dig. § 5.*]

Appeal from Court of Common Pleas, Armstrong County.

Quo warranto by the Commonwealth on the relation of J. O. Duff and George Aye against W. C. Bailey and David Schrecengost. Judgment for plaintiffs, and defendants appeal. Affirmed.

Patton, P. J., filed the following opinion in the court of common pleas:

"Under the act of April 22, 1903 (P. L. 246), the electors of Manor township were entitled to elect two overseers of the poor on the third Tuesday of February, 1910, and had not the Constitution of Pennsylvania been amended under the above-mentioned act, and the act of June 4, 1879 (P. L. 94), their term of office would have expired on the first Monday of March, 1912, and their successors would have been elected on the third Tues-

day of February, 1912. But the people of Pennsylvania, seeing the unnecessary trouble and expense of holding municipal elections every year, amended their Constitution on the 2d day of November, 1909, thereby providing that municipal elections, with certain exceptions, should only be held in odd-numbered years. In order that no inconvenience might arise from this change, and in order to carry it into complete operation, the schedule for the amendments provided, *inter alia*: 'In the year one thousand nine hundred and ten the municipal election shall be held on the third Tuesday of February as heretofore; but all officers chosen at that election, to an office the regular term of which is two years, shall serve until the first Monday of December, in the year one thousand nine hundred and eleven.'

"W. C. Bailey and David Schrecengost were elected overseers on the third Tuesday of February, 1910; and, by the express terms of the schedule above quoted, their office would have expired on the first Monday of December, 1911. In the absence of further legislation as to when their successors should assume the duties of the office, this would have allowed a vacancy in the office of the overseers of the poor from the first Monday of December, 1911, to the first Monday of March, 1912. To remedy this oversight, the act of March 2, 1911 (P. L. 9), was passed, which provided, in the second proviso of section 5: 'That the terms of the successors (that is, Duff and Aye) to officers whose terms expire in the year 1911, shall begin on the first Monday of December in that year and shall be extended as follows: The two year term until the first Monday of January, 1914.' This legislation gave the overseers elected in November, 1911, terms of two years and one month. This then closed the hiatus between the terms, and allowed the successors to take office the same day as the terms of their predecessors expired.

"Then, to further carry out the will of the people as to the extension of the duration of offices, the act of June 19, 1911 (P. L. 1052), was passed, extending the term of the overseers of the poor from a two-year term to a four-year term. We cannot see how that act can help the respondents. By the express condition of the schedule to the Constitution, overseers of the poor, elected in 1910, should serve until the first Monday of December, 1911. The respondents were elected in February, 1910. Their contention is that they hold office until the first Monday of January, 1914. But the act of June 19, 1911, provides that overseers 'elected on the municipal election day'—that is, in November, 1911—shall hold office for the term of four years; that is, Duff and Aye, who were elected in November, 1911, will hold their office until the first Monday of January, 1916. But where is there any provision in the Constitution, its

schedule, or the acts of assembly, that extends the term of Bailey and Schrecengost from the first Monday of December, 1911, to the first Monday of January, 1914. This, in our opinion, they cannot do. Even if their case falls within the provisions of that act, it, being in conflict with the Constitution, must yield.

"The second section of the act of June 19, 1911, cannot apply in this case, for, as we have seen, the terms of Bailey and Schrecengost did not expire under existing laws upon any day after the first Monday of January in an even-numbered year."

"And now, March 2, 1912, the defendants, W. C. Bailey and David Schrecengost, are adjudged guilty of unlawfully holding and exercising the office of overseers of the poor of Manor township, and judgment is now entered against them that they be ousted and excluded from such office, and that the petitioners recover their costs from the respondents."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Floy C. Jones and Guy C. Christy, both of Kittanning, for appellants. W. L. Peart, of Kittanning, and J. P. Golden, of Ford City, for appellees.

PER CURIAM. The judgment is affirmed, for the reasons stated in the opinion of the learned judge of the common pleas.

REICHNER v. REICHNER (CADWALADER, Garnishee).

(Supreme Court of Pennsylvania. Oct. 14, 1912.)

1. APPEAL AND ERROR (§ 733*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error in refusing a motion for judgment non obstante veredicto is defective where neither the motion nor the order of court is given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3025-3027; Dec. Dig. § 733.*]

2. JUDGMENT (§ 199*)—TRIAL OF ISSUES—JUDGMENT NON OBSTANTE VEREDICTO.

Under Act April 22, 1905 (P. L. 286), a party has the right to move for judgment non obstante veredicto on the whole record only when he has presented a point, in writing, requesting, binding instructions; an oral motion being insufficient.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

3. GARNISHMENT (§ 127*)—DEFENSES BY GARNISHEE—SUFFICIENCY.

The garnishee in an attachment execution may make any defense against the plaintiff that he could have made against his original creditor, since the judgment in the attachment establishes only the existence of the debt due plaintiff by his immediate debtor, and the plaintiff stands in no better position as to the property attached than his debtor.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 252; Dec. Dig. § 127.*]

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 11*)—ACTS CONSTITUTING—AGREEMENT BETWEEN DEBTOR AND CREDITOR.

An agreement in writing by a debtor to apply the funds due the creditor to the payment of indebtedness to a third party, for which the creditor is primarily liable and the debtor secondarily liable, does not constitute an assignment by the creditor for the benefit of his creditors.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 14; Dec. Dig. § 11.*]

5. EXECUTORS AND ADMINISTRATORS (§ 237*)—ALLOWANCE OF CLAIMS—JUDGMENT—CONCLUSIVENESS—DECREE OF ORPHANS' COURT.

An orphans' court decree, awarding to a creditor his claim against the decedent's estate, is prima facie evidence in other proceedings of the correctness of the claim.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 843; Dec. Dig. § 237.*]

Appeal from Court of Common Pleas, Philadelphia County.

Attachment execution by Winfield K. Reichner against Samuel K. Reichner, defendant, and Richard M. Cadwalader, garnishee. From a judgment for the garnishee, plaintiff appeals. Affirmed.

From the record it appeared that on October 25, 1907, Winfield K. Reichner entered judgment, in the court of common pleas No. 4 of Philadelphia county, against Samuel K. Reichner upon a judgment note for \$7,700, dated August 8, 1905, and payable one day after date. The same day damages were assessed at \$9,470, and an attachment execution issued against Richard M. Cadwalader and three other persons as garnishees. Subsequently rules were taken to dissolve the attachment and to open the judgment, but were discharged. Interrogatories and answers were filed, and a rule for judgment against Richard M. Cadwalader was entered and discharged. Cadwalader filed a plea, but appellant failed to print it in his paper book. In his abstract of proceedings he says that "an issue was framed upon the usual general issue pleas being filed."

The case was called for trial February 7, 1912, before Audenried, J., and resulted in a "verdict for the defendant in the issue, i. e., for garnishee, Cadwalader." Plaintiff moved for a new trial and for judgment non obstante veredicto; but both motions were dismissed, and judgment was entered on the verdict. Plaintiff appealed.

Upon the trial plaintiff showed that garnishee, who is a member of the bar, had been attorney for Mrs. Caroline Vautier in four suits brought against her by the defendant, Samuel K. Reichner, one of which had been marked to the use of the plaintiff, Winfield K. Reichner. On February 1, 1907, while these suits were still pending, an agreement was entered into between the parties to them and their respective attorneys, as follows:

"It is hereby agreed between George Brad-

ford Carr, attorney at law, as counsel for Samuel K. Reichner and Samuel K. Reichner individually, and Winfield Reichner, assignee of the said Samuel K. Reichner, by a certain assignment bearing date May 8, 1906, as parties of the first part, and Richard M. Cadwalader, attorney at law, for Caroline Vautier, and Caroline Vautier individually, that the case of Samuel K. Reichner against Caroline Vautier in court of common pleas No. 1, March term, 1906, No. 3,767, and the case of Samuel K. Reichner against Caroline Vautier, instituted in common pleas court No. 2, March term, 1906, No. 3,768, but since transferred to court No. 1 and the case of Samuel K. Reichner against Caroline Vautier, instituted in the court of common pleas No. 5, March term, 1906, No. 3,769, but since transferred to court No. 1, and the case of Samuel K. Reichner to use of Winfield Reichner, against Caroline Vautier, in the court of common pleas No. 5, June term, 1906, No. 4,772, shall be settled on the following terms and conditions:

"The sum of \$2,500 to be paid by the said Caroline Vautier in settlement of the above cases and all and any claims against her, subject to the judgment of Frank A. Barnett against Samuel K. Reichner and Caroline Vautier, garnishee, C. P. No. 4, March term, 1906, No. 2,448 together with interest and costs subject, also, to all the claims and demands of the creditors of the estate of Charles Reichner in the orphans' court, October term, 1903, No. 541, of which the said Samuel K. Reichner was administrator, and now is under order of said court to file his account. The said Caroline Vautier also to be released from her bond of \$2,000, entered in the office of the register of wills as security for Samuel K. Reichner for the faithful performance of his duty upon taking out letters of administration upon the estate of Charles Reichner, deceased. Also it is especially understood and agreed that after all costs, interest, and claims above mentioned, including the cost of taking depositions, are met that all the above-named cases shall be discontinued and marked on the docket settled and ended, and all judgments against the said Caroline Vautier, where Samuel K. Reichner is the judgment creditor, marked satisfied. And the balance in hand, if any, paid to the said George Bradford Carr, counsel for the said Samuel K. Reichner, and his formal receipt given therefor."

In pursuance of the above agreement Mrs. Vautier placed in the hands of Mr. Cadwalader the \$2,500, which appears, according to his testimony, to have been actually paid him by Mr. Reichner. At the time the attachment was served on him, he had made payments under the agreement, which reduced the amount in his hands to \$1,533.76. He had paid none of the claims of the creditors of the estate of Charles Reichner, de-

ceased, which, according to the adjudication of the orphans' court, amounted to \$1,701.18. Mr. Cadwalader testified, under objection, that none of these claims had been paid at the time of the trial, and that, when they should be paid, there would be nothing left from the fund for Samuel K. Reichner, the defendant.

Plaintiff claimed that he was entitled to a verdict against the garnishee for the balance of \$1,533.76 remaining in his hands; but the trial judge held that the claims of the creditors of Charles Reichner were first entitled to be satisfied out of the fund, and instructed the jury that, if they believed from the testimony that those claims had not been satisfied, they should find for the garnishee. If they believed that they had been paid, their verdict should be for the plaintiff for the amount of the unpaid balance. The jury found a verdict for the garnishee, upon which judgment was entered.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Jay R. Grier, of Philadelphia, for appellant. Clarence E. Kuemmerle, of Philadelphia, Thomas Cadwalader and William D. Nellson, both of Philadelphia, for appellee.

POTTER, J. [1, 2] The assignments of error in this case are drawn in disregard of the rules, and they are without merit as to substance. In the eleventh assignment it is alleged that the court below erred in refusing plaintiff's motion for judgment non obstante verdicto. Neither the motion nor the order of court is given, but reference to the appendix shows that the motion was made under the act of April 22, 1905 (P. L. 286). That act gives the right to move for judgment non obstante verdicto upon the whole record only to a party who has presented a point requesting binding instructions, which has been reserved or declined. It does not appear that any such point was presented in this case. The record shows that counsel for appellant made an oral motion for binding instructions, which was refused, and no exception was taken to the refusal. The act of 1905 evidently refers to points presented under the act of March 24, 1877 (P. L. 38) § 1, which requires such points to be "drawn up in writing and handed to the court before the close of the argument to the jury." An oral motion is not such a point. Where no request for binding instructions has been made or question of law reserved, judgment non obstante verdicto cannot be entered. *Sulzner v. Cappeau-Lemley & Miller Co.*, 234 Pa. 162, 83 Atl. 103, 39 L. R. A. (N. S.) 421.

[3] Upon the question of the liability of a garnishee, one of the later cases is *Willis v. Curtze*, 203 Pa. 111, 113, 52 Atl. 5, where the present Chief Justice said: "Generally the garnishee in a foreign attachment may make any defense against the plaintiff in the writ that he could make against his original cred-

itor. The judgment in the attachment establishes only the existence of the debt due the plaintiff by his immediate debtor. The plaintiff stands in no better position as to the thing attached than does his debtor, and any defense good against the latter will prevent a recovery against the garnishee." The rule is the same in foreign attachment and attachment execution. The act of June 16, 1836 (P. L. 767) § 35, provides: "In the case of a debt due to the defendant, or of a deposit of money made by him, or of goods or chattels pawned, pledged, or demised, as aforesaid, the same may be attached and levied, in satisfaction of the judgment, in the manner allowed in the case of a foreign attachment." In the present case, therefore, the plaintiff is not entitled to recover, unless it appears that Samuel K. Reichner could have maintained an action against the garnishee, Richard M. Cadwalader, to recover the balance of \$1,533.76 in his hands when the judgment was served upon him. Under the terms of the agreement it is clear that Reichner could not have maintained such an action without first showing that the creditors of Charles Reichner deceased, whose claims were allowed by the orphans' court, had been paid. The fund in the hands of Mr. Cadwalader belonged to Caroline Vautier. It was placed in his hands for the purpose of carrying out the terms of the agreement of settlement. Mr. Cadwalader was acting for Mrs. Vautier in the transaction, for the purpose of protecting her interests under the terms of the agreement. Reichner had no interest in the fund until all the stipulated payments had been made, and the balance, if any, ascertained.

[4] We see no grounds upon which can be sustained the contention of counsel for appellant that the agreement of February 1, 1907, amounts to an assignment for the benefit of his creditors by Samuel K. Reichner. It does amount to an admission on the part of Mrs. Vautier that she owed Reichner \$2,500; and it sets forth his willingness that she should make payment in discharge of her liability to other parties on his account, before paying over to him any part of it. That Samuel K. Reichner consented to the application of the proceeds of the settlement by Mrs. Vautier to the payment of indebtedness for which he was primarily liable, and he secondarily, did not make of the agreement an assignment for the benefit of his creditors. See *Miners' National Bank's Appeal*, 57 Pa. 193; *Wood v. Kerkeslager*, 227 Pa. 536, 76 Atl. 425.

[5] Counsel for appellant also contend that it was error to admit in evidence the record of the orphans' court showing the decree by which the sum of \$1,701.18 was awarded to the creditors of Charles Reichner. A decree of the orphans' court, awarding to a creditor his claim against a decedent's estate, is prima

facie evidence of the correctness of the claim in other proceedings. *Phillips v. Allegheny Valley R. R.*, 107 Pa. 465. In the present case the amount of Mrs. Vautier's liability on the administration bond was fixed by the decree. The adjudication of the orphans' court was made within four years of the date of the trial of this case, so that no presumption of payment of the awards had arisen. The record showing them unpaid made out a prima facie case without the testimony of Mr. Cadwalader. His testimony was, however, explicit, and was not contradicted in any way.

The assignments of error are dismissed, and the judgment is affirmed.

ROBINSON v. HARRISON.

(Supreme Court of Pennsylvania. Nov. 7, 1912.)

1. FIXTURES (§ 15*)—LANDLORD AND TENANT—TRADE FIXTURES.

The casing in an oil well on a leasehold, and the other necessary appliances and machinery for pumping the well, are trade fixtures, removable by the owner during the term of the lease.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 23-29; Dec. Dig. § 15.*]

2. FIXTURES (§ 31*) — TRADE FIXTURES — RIGHTS OF LANDLORD TO REMOVE.

The right of a tenant to remove trade fixtures arises from an implied grant that they were placed on the leased premises to enable the lessee to use them during the term, and then remove them.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. § 62; Dec. Dig. § 31.*]

3. FIXTURES (§ 32*)—TRADE FIXTURES—RIGHT OF TENANT TO REMOVE.

Where a tenant having trade fixtures on premises secures an extension without reservation of right to remove the fixtures, the landlord has no right to restrain their removal before the expiration of the second lease.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 63, 65; Dec. Dig. § 32.*]

Appeal from Court of Common Pleas, Armstrong County.

Action by C. P. Robinson against J. M. Harrison. Judgment for defendant, and plaintiff appeals. Affirmed.

On motion for a new trial, Patton, P. J., filed the following opinion in the court of common pleas:

"On the 15th day of August, 1895, the plaintiff leased to the defendant a tract of land in Hovey township, Armstrong county, for the term of 15 years, for the purpose of producing oil. For the purpose of carrying out the terms of the agreement, the lessee erected derricks, drilled wells, tubed and cased them, and furnished the necessary appliances and machinery to pump them, and produced oil therefrom until the 3d day of August, 1910, when, on account of some misunderstanding with his landlord, he pulled

the tubing and casing, plugged the wells, and removed all his fixtures and machinery from the leasehold. All this was done prior to the expiration of the lease, to wit, before August 15, 1910.

"This action was instituted by the plaintiff to recover damages alleged to have been sustained by him for the above-mentioned grievances. We held at the close of the testimony, and are still of the opinion, that, under the principles of elementary law and the authorities of our appellate courts, the plaintiff was not entitled to recover.

[1, 2] "While, under the common law, whatever was annexed to the freehold became, in legal contemplation, a part of it, the development of manufacturing required the rule to be relaxed; and it is now the well-settled law that the tenant for years, who erects fixtures for the benefit of his trade or business, may at any time during the term remove them from the demised premises. This principle is one of public policy, and has its foundation in the interests which society has that every person shall be encouraged to make the most beneficial use of his property. But we need not generalize. We have decisions directly upon the point now before us. In *Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95, Judge McIlvaine, in a case affirmed per curiam by the Supreme Court, said: 'I do not think there can be any doubt that the casing in an oil or gas well, the derrick, and other appliances used in operating it are trade fixtures, and can be removed by the owner or lessee during the term of the lease.' In *Titusville Novelty Iron Works' Appeal*, 77 Pa. 103, a levy on the lessee's interest in the derrick, boiler and tubing, casing, etc., was held to be good. In *Thornton on Oil and Gas*, § 576, citing as authority *Siler v. Globe Window Glass Co.*, 21 Ohio Cir. Ct. R. 284, 'a lessee of land to bore for oil, who does not find any oil, has the right to remove, not only the machinery used in sinking the wells, but also the casing in the wells, unless there is a contract to the contrary concerning their removal.'

"I think the law is clear that, in the absence of an express contract, as to such trade fixtures as are involved in this case, there is an implied contract that the tenant may remove them, if done at a proper time and in a proper manner. The proper time is before the expiration of the lease, and the proper manner, so far as the tubing and cas-

ing is concerned, is as provided by the act of assembly of June 10, 1881 (P. L. 110), all of which was done in this case. To reach any other conclusion would be contrary to the settled custom and usages of the oil trade.

"The plaintiff seeks to evade the force of the above decisions and principles by arguing that that portion of the agreement of June 1, 1895, that provides 'that all rights and privileges not expressly granted in this lease are reserved and excepted therefrom' restrains the defendant from removing the fixtures. But, as we have already seen, the right of the tenant to remove the trade fixtures does not arise from an express grant, but from an implied one that the fixtures were placed on the leased premises to enable the lessee to use and enjoy them during the term, and then to remove them.

"The case of *Jermyn v. Dickson*, 3 Luz. Leg. Reg. 100, does not apply to the facts of this case. In that case it is stated by the learned judge who wrote the opinion that it 'must be ruled by the special contract between the parties, and does not present the ordinary case of fixtures put in by a tenant.'

[3] "Nor do we think the plaintiff can rely upon the fact that the defendant originally entered into possession of a part of the premises under a former lease. In *Radey v. McCurdy*, 209 Pa. 306, 58 Atl. 558, 67 L. R. A. 359, 103 Am. St. Rep. 1009, it is held: 'When a tenant having trade fixtures on the premises secures a new lease in the nature of an extension of the old lease, and the new lease contains no reservations of the right to remove the fixtures, the tenant may keep the fixtures on the premises, without giving the landlord the right to restrain their removal at or before the expiration of the second lease.'

"And now, February 7, 1912, the motion for a new trial is refused, and judgment directed to be entered upon the verdict upon payment of jury fee."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

C. P. Robinson and Orr Buffington, of Kittanning, for appellant. C. E. Harrington and J. H. Painter, both of Kittanning, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the learned judge of the common pleas.

STATE v. DRESSNER.

(Court of General Sessions of Delaware. Kent. Feb. 19, 1913.)

HAWKERS AND PEDDLERS (§ 3*)—WHO ARE "PEDDLERS"—STATUTORY REGULATIONS—"PEDDLING."

An agent of a merchant having a permanent place of business in a town in the state, who solicits orders for merchandise from various persons in another town, and who forwards the orders to the merchant, who forwards the orders filled to the agent to distribute them to the purchasers at their residences and collects the price, is not a "peddler" within Rev. Code 1852, amended to 1893, p. 548, c. 68, § 3, defining a peddler to be a person who drives a vehicle from which personal property is retailed, or carries a pack from which personal property is retailed, and requiring a license from peddlers; the distinctive feature of "peddling" consisting in the fact that the peddler goes from house to house carrying his merchandise with him, and concurrently sells and delivers it.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Cent. Dig. §§ 3-6; Dec. Dig. § 3.*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5260-5267; vol. 8, p. 7750.]

Leonard Dressner was indicted for peddling without a license. Adjudged not guilty.

Argued before PENNEWILL, C. J., and CONRAD and WOOLLEY, JJ.

W. Watson Harrington, Deputy Atty. Gen., for the State. Robert H. Richards, of Wilmington, and Arley B. Magee, of Dover, for defendant.

Court of General Sessions, Kent County, February Term 1913. Indictment (No. 7 July Term 1912) for peddling without a license. Submitted to the Court on an agreed statement of facts, which facts appear in the opinion of the Court:

PENNEWILL, C. J. By agreement of the parties the above case was submitted to the Court upon the following statement of facts, viz.:

"First: That at the July Term of the Court of General Sessions of the State of Delaware, in and for Kent County, A. D. 1912, an indictment was found against the said Leonard Dressner in the following words and figures, to wit:

"Kent County, ss.: July Term 1912.

"The Grand Inquest for the State of Delaware,

and the body of Kent County, on their oath and affirmation respectively, do present, That Leonard Dressner, late of East Dover Hundred, in the County aforesaid, on the first day of July in the year of our Lord one thousand nine hundred and twelve, with force and arms at East Dover Hundred, in the County aforesaid, without having first obtained proper license for peddling according to law did then and there of his own proper authority unlawfully deal and traffic as a peddler against the form of the Act of the

General Assembly in such case made and provided, and against the peace and dignity of the State.

"Andrew C. Gray, Attorney General,

"By Wm. Watson Harrington, Dep'y Atty Gen'l."

"Second: That on the first day of July, A. D. 1912, the said Leonard Dressner was in the employ of The Great Atlantic and Pacific Tea Company.

"Third: That the said The Great Atlantic and Pacific Tea Company was then engaged in the general mercantile business and dealt, amongst other things, in teas, coffees and other groceries; that it maintained a store or place of business in the City of Wilmington, New Castle County and State of Delaware; that the said The Great Atlantic and Pacific Tea Company was regularly licensed to do business by the Clerk of the Peace in and for New Castle County; that it was the duty of the said Leonard Dressner, in the course of his employment, and he did solicit orders for teas, coffees, etc., from various persons, at their residences, in the town of Dover, Kent County, Delaware; that upon the receipt of such orders the said Leonard Dressner would forward such orders to the store of the said The Great Atlantic and Pacific Tea Company in Wilmington, Delaware, where such orders were either accepted or rejected; that if such orders, or any of them, were accepted by the said The Great Atlantic and Pacific Tea Company they were then filled at the said Wilmington store and such orders were made up in individual packages and the name of the purchaser marked thereon; that such packages, with the names of the respective purchasers marked thereon, were then forwarded to Dover, Delaware, to the said Leonard Dressner, the agent of the said The Great Atlantic and Pacific Tea Company, who would receive same and distribute same to and among the respective purchasers, at their residences, and collect the price charged by the said The Great Atlantic and Pacific Tea Company therefor and remit said moneys to the said Company.

"Fourth: If the Court shall be of the opinion that the said acts of the said Leonard Dressner constitute the offence of peddling without a license within the meaning of the statutes of the State of Delaware, then the said Leonard Dressner shall be found guilty of the offence charged, otherwise the said Leonard Dressner shall be found not guilty."

The indictment does not designate the particular statute or statutes alleged to have been violated, but we assume that it is founded upon Section 3 of Chapter 68 of the Revised Code of 1893 because there does not appear to be any other statute upon which it could have been based.

The provisions of said section which are pertinent to this case are the following, viz.:

"Any person who shall drive a carriage,

wagon, cart or other vehicle, from which personal property is retailed, or shall carry a pack from which personal property is retailed, shall be considered a peddler within the meaning of this section.

"A license procured under this section shall be in the name of such person. * * * Peddlers shall pay for such license as follows: * * * For a license to sell clocks, coffee or tea, fifty dollars in addition to the above license fees, and a special license to deal in those articles shall be issued to each peddler or driver of a vehicle, as above, who desires to sell such articles, or any of them."

The statute, it will be observed, defines the person who shall be regarded as a "peddler," as one who "shall drive a wagon, carriage or cart, or other vehicle, from which personal property is retailed, or shall carry a pack from which personal property is retailed."

According to the case stated the defendant, as agent, solicited orders for tea, coffee, &c., from various persons, at their residences, in Dover; that upon the receipt of such orders he forwarded them to the store of his principal, The Great Atlantic and Pacific Tea Company in Wilmington, where they were accepted or rejected; that such orders as were accepted by the said company were filled at the store in Wilmington, and after being made up in individual packages and the names of the purchasers marked thereon, were forwarded to the defendant at Dover; that the defendant after receiving the packages delivered the same to the respective purchasers at their residences, collected the price charged by the company therefor, and remitted the moneys to the company.

The question for determination, is whether the acts performed by the defendant, as the agent of the company, constituted him a peddler within the meaning of the law, and subject to the penalties imposed thereby.

The statute above mentioned is a very old one, and substantially the same as the act of 50 Geo. III, c. 31, which imposed a penalty on "any hawker, peddler, petty-chapman or any other trading person or persons going from town to town, or from other men's houses, and traveling either on foot or with horse or horses exposing to sale, or selling goods, wares or merchandise by retail."

Bouvier's Law Dictionary defines a peddler to be "A person who travels about the country with merchandise for the purpose of selling it."

It has been held by many courts in this country in construing statutes substantially similar to our own, that a peddler is an itinerant who has no permanent place of business, and who goes from place to place and from house to house exposing to sale the merchandise he carries; that he generally deals in such articles as he can conveniently carry in a cart or on his person. The primary idea is that of a traveling trader who carries goods

about in order to sell them, and who does actually sell them, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. *Commonwealth v. Farnum*, 114 Mass. 267; *In re Wilson*, 8 Mackey (D. C.) 341, 12 L. R. A. 624; *Commonwealth v. Ober*, 12 Cush. (Mass.) 493 (Chief Justice Shaw delivering the opinion); *Potts v. State*, 45 Tex. Cr. R. 45, 74 S. W. 31, 2 Ann. Cas. 827; *Brenner v. Commonwealth*, 9 Ky. Law Rep. 289; *Hewson v. Englewood*, 55 N. J. Law, 522, 27 Atl. 904, 21 L. R. A. 736; *Stamford v. Fisher*, 140 N. Y. 187, 35 N. E. 500; *State v. Ninstein*, 132 N. C. 1039, 43 S. E. 936; *Commonwealth v. Eichenberg*, 140 Pa. 158, 21 Atl. 258; *Ballou v. State*, 87 Ala. 144, 6 South. 393; *Radebaugh v. Plain City*, 11 Ohio Dec. 612; *In re Flinn (C. C.)* 57 Fed. 496; *Emmons v. Lewistown*, 132 Ill. 380, 24 N. E. 58, 8 L. R. A. 328, 22 Am. St. Rep. 540; *Cerro Gordo v. Rawlings*, 135 Ill. 36, 25 N. E. 1006; *Spencer v. Whiting*, 68 Iowa, 678, 28 N. W. 13; *Davenport v. Rice*, 75 Iowa, 74, 39 N. W. 191, 9 Am. St. Rep. 454; *Commonwealth v. Jones*, 7 Bush (Ky.) 502; *St. Paul v. Briggs*, 85 Minn. 290, 88 N. W. 984, 89 Am. St. Rep. 554.

In *State v. Wells*, 69 N. H. 424, 45 Atl. 143, 48 L. R. A. 99, it was held that "the agent of a company having a permanent place of business within the state, who goes about from town to town soliciting orders and subsequently delivering goods, is not a hawker or peddler within the meaning of the statute in relation to hawkers and peddlers."

A similar decision was made in *Harkins v. State* (Tex. Cr. App.) 75 S. W. 28, the court saying, "A person acting as manufacturer's agent, taking orders for stoves to be shipped from the factory is not engaged in peddling stoves, within the statute."

To the same effect is *Wausau v. Heldeman*, 119 Wis. 244, 96 N. W. 549, in which it was held that, "A municipal ordinance providing that 'no transient merchant, trader or dealer who shall bring into the city any goods, for the purpose of selling the same from house to house, shall be permitted to sell or expose for sale, barter or exchange by sample or otherwise, at retail or to customers, any such goods,' &c., without having first obtained a license therefor, is not applicable to a traveling agent for a mercantile establishment located in another city, who carries with him no goods for sale but merely solicits orders by sample, to be filled, if accepted, out of the stock of his principal in the other city and sent to the purchaser by the ordinary methods of transportation."

One of the clearest and most satisfactory cases on the subject and in which the facts were strikingly similar to those in the present case, is that of *The Great Atlantic and Pacific Tea Company v. Village of Tippecanoe*, 85 Ohio St. 120, 96 N. E. 1092, in which the court said:

"It (the company) has a fixed place from

which it does business; does not carry about the merchandise which it offers for sale; it does not sell at the time it offers for sale; but enters into contracts for future sales; it does not carry on negotiations or any part of its business upon the streets, highways or public places, but at the residences of its customers. That these features broadly and substantially distinguish its business from that carried on by hawkers, peddlers and hucksters, is made clear by the dictionaries and the numerous cases cited in the briefs."

The question raised in that case, was whether the defendant, the agent of the company, was required to take out a license.

After a careful examination of the statutes of the different states respecting peddlers, which are very similar in their essential features; and an examination of the decisions based thereon, we are constrained to believe that the courts have been practically unanimous in holding that the doing of such things as the defendant in this case is alleged and admitted to have done, would not make one a peddler within the statutory meaning and intent. According to the authorities the distinctive feature of peddling "consists in the fact that the peddler goes from house to house or place to place *carrying his merchandise with him; and concurrently sells and delivers it.*"

It is manifest that such is the meaning of the statute of this State, because in order that a person shall be considered a peddler under its provisions, he must drive a vehicle, or carry a pack, from which personal property is retailed. It is not claimed by the State that this was done by the defendant; in fact it is admitted that the personal property was forwarded to the respective purchasers by the company from its store in Wilmington, through the medium of the defendant, its agent, after he had taken the orders therefor and they had been accepted by the company.

We are clearly of the opinion that such acts did not constitute the offence of peddling without a license within the meaning of the statutes of the State of Delaware; and are convinced that such conclusion is fully supported by sound reason as well as authority.

Such being the opinion of the court, it is ordered, in conformity with paragraph four of the case stated, that the following entry be made in the case, viz.: The defendant is found not guilty.

STATE v. JOHNSON.

(Court of General Sessions of Delaware. New Castle. Nov. 15, 1912.)

1. CRIMINAL LAW (§ 400*)—EVIDENCE—BEST AND SECONDARY EVIDENCE—CONTRADICTION OF WITNESS.

Defendant was not entitled, after handing a paper to the prosecuting witness for identification of her signature only, to ask, for the

purpose of contradicting her, whether she did not sign a paper or statement in the presence of another and swear that what was contained in the paper was true, etc., or embody in a question the contents of the alleged affidavit, since, if the paper was admissible, it was the best evidence of its contents.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-888, 1208-1210; Dec. Dig. § 400.*]

2. CRIMINAL LAW (§ 730*)—TRIAL—ARGUMENT OF COUNSEL—DEFENDANT'S FAILURE TO TESTIFY.

A remark by the Attorney General to the jury that defendant did not go on the stand and deny a certain fact, though erroneous as a comment on defendant's failure to testify, in violation of Rev. Code 1852, amended to 1893, p. 798 (19 Del. Laws, c. 777) § 1, was cured by its immediate withdrawal by the attorney and exclusion by the court, and by the charge that defendant's failure to testify should not influence the jury in any degree in reaching a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

Indictment of William J. Johnson for selling liquor without a license. Verdict guilty, and motion for new trial denied.

Argued before BOYCE and RICE, JJ.

Andrew C. Gray, Atty. Gen., for the State. Lilburne Chandler and J. Frank Ball, both of Wilmington, for defendant.

Court of General Sessions, New Castle County, November Term, 1912.

Indictment (No. 62, September Term, 1912), charging "that William J. Johnson, late of Wilmington Hundred, in New Castle County, on the twenty-fifth day of August, 1912, with force and arms at Wilmington Hundred in the County aforesaid, in a certain house there situate to wit, in the City of Wilmington, County aforesaid, on Walnut Street between Ninth and Tenth Streets in said city, known as 909 Walnut Street, and in which said house the business of selling intoxicating liquors was then and there carried on; he the said William J. Johnson did then and there unlawfully sell intoxicating liquor, to wit, lager beer, to one Elizabeth Burton, he the said William J. Johnson not then and there having a proper license to sell intoxicating liquor according to law, against the form of the Act of the General Assembly," etc.

[1] At the trial, Mr. Ball, of counsel for defendant, after handing a paper to the prosecuting witness, for the identification of her signature thereto only, asked the witness the following questions:

"I will ask you if you did not, on the twenty-first of September last, in your room on Walnut Street, in this city, sign a paper or statement in the presence of Mr. Lattomus, and swear that what was contained in that paper was true."

BOYCE, J.: You have not shown the paper to the witness for identification. If the paper is admissible in evidence it will speak

for itself. We will not permit this question.

Q. Did you, in your room at 911 Walnut Street, in this city, on the twenty-first of September last, sign a paper containing a statement setting forth what was the truth or falsity in regard to your testimony before the Grand Jury on August twenty-fifth last, in reference to the purchase of beer from William J. Johnson, and did you not swear before Mr. Lattomus that what was contained in the paper was true?

(Objected to by the Attorney-General. The objection is sustained.)

Q. I ask you if you did not, in your room at 911 Walnut Street, this city, before Mr. Lattomus, make an oath that what you had said before the Grand Jury as to your buying beer from William J. Johnson was not true and that you had never purchased any lager beer from William J. Johnson on August twenty-fifth, 1912, or any other day or time?

(Objected to by the Attorney-General.)

BOYCE, J.: Thus far you have only asked the witness whether the paper which you now hold bears her signature. This course of examination is irregular. The objection is sustained.

Mr. Ball: The question is asked the witness solely for the purpose of contradiction, and for no other purpose.

BOYCE, J.: By the ordinary rules of evidence the contents of a written paper are proved by the paper itself. Your method of examining this witness is irregular. The rules of evidence will not permit you to represent, in the statement of your question, the contents of that paper without first showing it to the witness, and asking her (if it is an affidavit) if she made the affidavit? If she is given an opportunity to examine it, and admits making it, then there is a regular course of procedure; but different from that which you are pursuing.

Q. Did you not in your room at 911 Walnut Street, in this city, swear before Mr. James W. Lattomus—

BOYCE, J.: (Interrupting) You cannot disclose the contents of that paper to the jury.

Mr. Ball: No, sir.

Q. (continuing) a Notary Public, that you did not purchase any lager beer from William J. Johnson on August twenty-fifth, 1912, or on any other day or time?

(The Attorney-General objected to the question for the reason suggested by the court, and further that the word "swear" was misleading.)

Mr. Ball: This question is asked for the purpose of contradiction only.

BOYCE, J.: We sustain the objection. This is practically the same question ruled upon before.

Q. Did you in your room, in this city, on September twenty-fifth last, sign a paper and swear to it, and if so will you look at that

paper (handing same to witness) and say whether or not that is the paper that you signed and swore to?

A. I have seen that paper. I seen it but I did not understand it when I signed it. He begged me to do it and I did it. I will acknowledge that that is my handwriting; and my name, and he (Mr. Lattomus) signed something and told Johnson that it was all right now.

Q. Is that the paper you signed and swore to?

A. Yes, sir, that is my handwrite. I did that.

Q. I will ask you whether Mr. Lattomus, this gentleman sitting here, did not read over to you this paper at least twice before you signed it and if he did not ask you whether it was true or not?

A. He did, and I told him I did not understand it, but by his begging me to sign it I did it, but I know nothing of it. I don't know the meaning of it. Mr. Johnson said if I signed it it would clear him, in the presence of that gentleman (Mr. Lattomus), and he handed it to him and told Johnson it was all right now, but he signed something after I did.

[2] At the close of the testimony, and arguments of counsel to the jury, the court gave the usual charge to the jury as in similar cases, and the jury returned a verdict of guilty. Counsel for defendant moved for a new trial and in arrest of judgment, and filed several reasons therefor. The only reason relied upon was that the Attorney-General in his argument to the jury, in the presence of the court, made use of the following language: "The defendant did not go on the stand and deny that he gave the receipt to her, Lizzie Burton."

It was urged that this comment was in direct violation of chapter 777, vol. 19, Laws of Delaware, Revised Code, p. 798, which extends to accused persons the right to testify in their own behalf, but provides "that a refusal or failure to testify shall not be construed or commented upon as an indication of guilt." It was insisted that the remark was prejudicial to the defendant and against the express policy of the statute. The cases of *Austin v. People*, 102 Ill. 261, and *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81, were relied upon in support of the motions.

BOYCE, J.: Immediately upon the remark being made, which is relied upon in support of the motions, one of counsel for the defendant objected, and the Attorney-General withdrew the same as an inadvertence, and requested the jury to disregard it wholly in the consideration of the case. The court then and there instructed the jury to the same effect. Again, in charging the jury after the close of the testimony, and arguments of counsel, the court expressly direct-

ed the jurors' attention to the said statute and instructed them that the failure of the defendant to testify should not influence them in any degree in reaching their verdict, as under the statute a refusal or failure to testify could not be construed or commented upon as an indication of guilt.

We think the cases cited by counsel for the defendant are inapplicable to the facts in this case. We heard the evidence and we are clearly of the opinion that it warranted the verdict of guilty. The Supreme Court of this State, on the writ of error, in the case of *Fisher v. State*, 1 Pennewill, 388, 41 Atl. 184, refused to reverse the judgment of the court below, because they did not find the admission of the evidence objected to was prejudicial to the defendant below. We think in this case that the remark of the Attorney-General, having been expressly withdrawn immediately after it was made and the jury being cautioned not to consider it in their determination of the case, was not prejudicial to the defendant under all the circumstances. Being convinced as we have already stated that the evidence warranted the verdict, we do not think it should be disturbed. The motions are therefore denied.

ICKES v. ICKES.

(Supreme Court of Pennsylvania. Nov. 7, 1912.)

1. HUSBAND AND WIFE (§§ 333, 335*)—ALIENATION OF AFFECTIONS—ACTIONS—BURDEN OF PROOF.

In an action by a wife against her father-in-law for the alienation of her husband's affections, the measure of proof required is greater than it would be against a stranger, since the father has the right to counsel and advise his son in good faith as to the position in which the son finds himself as the result of an unfortunate marriage, but, if there is evidence sufficient to sustain a verdict for plaintiff, the case must be given to a jury.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1124, 1126; Dec. Dig. §§ 333, 335.*]

2. APPEAL AND ERROR (§ 261*)—PRESENTING QUESTIONS IN TRIAL COURT—REMARKS OF COUNSEL.

An assignment of error to improper remarks of counsel must show a request for the withdrawal of a juror and continuance, a refusal of such request, and an exception granted by the trial judge; a mere objection to the remarks and exception noted being insufficient.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1500; Dec. Dig. § 261.*]

3. EVIDENCE (§ 269*)—DECLARATIONS—INTENT.

Where a person's state of mind or the reason why he did an act is a relevant principal fact to be determined, his statements concerning it are usually the best and only evidence obtainable on the subject, but the proofs must be restricted to declarations indicating the state of mind at the time of their utterance.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1063-1067; Dec. Dig. § 269.*]

4. EVIDENCE (§ 313*)—DECLARATIONS—INTENT.

When evidence of declarations of a person is produced sufficient to show a then present intention or state of mind, it may be assumed to continue and form the motive controlling a subsequent act following closely thereafter, if one would naturally associate the two under all the circumstances, and it is for the jury to draw the conclusion.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1166, 1167; Dec. Dig. § 313.*]

5. HUSBAND AND WIFE (§ 333*)—ALIENATION OF AFFECTIONS—EVIDENCE—DECLARATIONS—INTENT.

In an action by a wife against her father-in-law for the alienation of her husband's affections resulting in desertion of plaintiff, testimony that eight or ten days before the husband's departure the witness heard him accuse his wife of infidelity, and her confession that the child she was then carrying was not the offspring of her husband, and that the day before the husband left he told witness he was about to do so because he was not the father of the child, is competent.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1124; Dec. Dig. § 333.*]

6. TRIAL (§ 48*)—RECEPTION OF EVIDENCE—OFFER OF PROOF—EVIDENCE INADMISSIBLE IN PART.

Where admissible evidence is included in the same offer with irrelevant and inadmissible evidence, the whole offer may be rejected; the judge not being bound to separate the good from the bad.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 120; Dec. Dig. § 48.*]

7. HUSBAND AND WIFE (§ 333*)—ALIENATION OF AFFECTIONS—ACTIONS—EVIDENCE.

In an action by a wife against her father-in-law for the alienation of her husband's affections, resulting in his deserting her, evidence on behalf of plaintiff of efforts by her and of expenses incurred to support her child after the desertion, and cross-examination of defendant as to authority given to him by plaintiff's husband to collect the latter's wages after he left his wife, and as to the amount the defendant had received from such wages, was inadmissible.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1124; Dec. Dig. § 333.*]

8. APPEAL AND ERROR (§ 1057*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action for the alienation of the affections of plaintiff's husband, where a witness for defendant swears that he knew plaintiff by sight, and identifies her in the courtroom as the woman he had seen plaintiff's husband talking to, an assignment of error to the refusal to permit the witness to testify that the husband had said to him that the woman with whom he was talking was his wife will not be sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.*]

Fell, C. J., and Brown and Stewart, JJ., dissenting in part.

Appeal from Court of Common Pleas, Blair County.

Action by Mary M. Ickes against George A. Ickes. From a judgment for plaintiff, defendant appeals. Reversed, with venire facias de novo.

Trespass to recover damages for the alleged alienation of the affections of plain-

tiff's husband. At the trial it appeared that on April 19, 1905, Mary M. Kinney, the plaintiff, was married to George L. Ickes, defendant's son, who was then 19 years of age. The plaintiff was 25 years of age and pregnant at the time of her marriage. On May 27, 1905, young Ickes enlisted in the United States Navy. Plaintiff claimed that the defendant had alienated his son's affection from his wife resulting in the desertion.

When the plaintiff was on the stand, she was asked this question:

"Q. While your husband has been away have you been able to support yourself and child? (Objected to. It is irrelevant and immaterial. The issue involved is the alienation of the affections of her husband by the defendant, not the manner in which she has been supported.) By the Court: We will allow the question to be put, and seal a bill for the defendant. A. Well, when he was a little baby, six weeks old, I worked by the week a couple months, and after I worked by the day and paid for the baby. Q. What do you pay for the support of your child? (Objected to as irrelevant and immaterial.) By the Court: We will overrule the objection and seal a bill for the defendant. A. Ten dollars a month."

Dr. G. A. Ickes, being under cross-examination, was asked: "Q. Have you lodged a copy of that power of attorney in the treasury department at Washington? A. Not as I know of. Q. Did you ever have a power of attorney from your son on record in the treasury department at Washington? (Objected to.) Q. State what you drew of your son's wages in 1906? (Objected to as irrelevant and immaterial.) By the Court: We will allow it to be put, and seal a bill for the defendant. A. I never drew any of his wages. Upon his own authority he sent me money. Q. I asked you the amount, what amount did he send you? (Objected to.) Q. How long did you draw wages? (Objected to as irrelevant and immaterial.) By the Court: We will allow it to be asked, and seal a bill for the defendant. Q. How much money did you draw from the treasury department on account of the wages of your son? (Objected to.) By the Court: The objection is overruled, and note an exception for defendant."

G. H. Carr, a witness for defendant, having testified that he saw Mr. and Mrs. Ickes together about eight or ten days before the former left Altoona, testified as follows: "A. I stopped right in the shade of the telegraph pole, and I listened, and I heard him say, 'Now, Margaret, you might as well acknowledge to me all about it, because, by God, if you don't there will be trouble for you,' and she says, 'George,' she says, 'it doesn't belong to you.' He says, 'It don't,' he says, 'you are too far gone.' She says, 'No, I am not; I am only about two months gone.' He says, 'By

God, you can't fool me, you are too big,' and he says, 'You might as well acknowledge the corn right here,' so she busted out in a cry, and she acknowledged to it that it didn't belong to him. Q. Did you recognize the man? A. Why certainly I did. My time was getting a little bit short, and I picked up and passes right by them. Q. How close did you pass to them? A. They were up against the fence, and I walked right along the sidewalk about the center of the walk, I was. There was no board walk there. It was just an ash walk at that time. Q. Did you speak to either of the parties? A. I spoke to George as I went by. Q. And you say this was just about eight or ten days before George— (Objected to.) A. Along about eight or ten days as I have previously said. Q. Did you see George Ickes after this? A. I did. Q. When? A. If my mind serves me right, it was the Thursday before he left. I saw him coming up from his father's yard with his bucket in his hand, and, when he was just about the dining room door, I stepped out on my porch, and whistled and called him up— (Objected to, that statements made the day before the husband left are not part of the res gestæ, and are irrelevant and immaterial.) By the Court: The objection is sustained, and seal a bill for the plaintiff. (Counsel for defendant also offers to show by C. H. Carr, the witness on the stand, that the day before George Ickes left he had a conversation with this witness, in which he told the witness that he had trouble with his wife, and was going to leave, and that the witness told him, 'I know all about it. I overheard the conversation.' And he then and there told this witness that his reason for leaving was that his wife was in the family way, and that he was not the father of the child. This happened the day before he left, and is offered for the purpose of showing his reason for leaving. Objected to as too remote from the time of the leaving to be a part of the res gestæ, and is irrelevant and immaterial.) By the Court: The objection is sustained, and seal a bill for the defendant. By Mr. Vaughn: Q. When did you find out that this lady, the plaintiff, that George Ickes was talking to was his wife? A. I think it was on Thursday before he went away when I called him up to the fence and he acknowledged it, the whole thing. (Objected to and asked to be stricken out.) By the Court: What George said can be stricken out. (Counsel for defendant offers to show by this witness that the Thursday before George Ickes left the witness, who lived practically next door to Ickes, had a conversation with George Ickes, in which George Ickes said to him that the woman he was talking with that evening was his wife. Objected to.) By the Court: Exception noted for defendant and bill sealed. Q. Do you recognize the plaintiff as the woman who was there that evening? A. I took her to be this lady."

Verdict and judgment for plaintiff for \$3,500. Defendant appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. Frank Vaughn and Thomas H. Greevy, both of Altoona, and E. G. Brothertlin, of Hollidaysburg, for appellant. R. A. Henderson and W. C. Fletcher, both of Altoona, for appellee.

MOSCHZISKER, J. The plaintiff brought an action of trespass against the defendant, her father-in-law, alleging that he had alienated the affections of her husband and induced him to leave her and join the United States Navy. She recovered a verdict upon which judgment was entered, and the defendant has appealed.

[1] The appellant contends that the plaintiff did not produce evidence sufficient to sustain the verdict, and that judgment should have been entered in his favor. The plaintiff had lived as a servant in the defendant's family, and had subsequently married his son, who was then 19 years of age, 6 years her junior, and earned only 77 cents a day. After this young man had thus improvidently become a husband and undertaken the support of a wife, who shortly expected a child, it was the right of the defendant, without incurring any liability to his daughter-in-law, to counsel with his boy and advise him in good faith as to the position in which he was placed; and in regard to any advice the father may have given his motives would be presumed to be good. While the law would not permit him maliciously to break up the marriage, yet, since the defendant was the father of the plaintiff's husband, the measure of proof required was greater than it would have been had he been a mere intermeddling stranger. *Gerner v. Gerner*, 185 Pa. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646. But, after a review of all the evidence, we cannot say that the plaintiff's proofs, if believed, were insufficient to sustain a verdict in her favor. Hence the case could not have been withdrawn from the jury, and assignments 1½, 2, 3, and 4, complaining of the refusal of certain points for charge presented by the defendant, which, as drawn, amounted to requests for binding instructions, cannot be sustained. These, with assignment 27, which complains of the failure to enter judgment non obstante veredicto, are overruled.

[2] The first assignment does not cover anything done by the court below. It complains of certain remarks of plaintiff's counsel in his opening address to the jury. An objection was made at the time and an exception noted, which was all that was asked. Had a request for the withdrawal of a juror and a continuance of the case been made and refused, and an exception granted, the incident would have been reviewable here; but, as it is, nothing is before us, and the

assignment is dismissed. *Brown v. Central Pa. Traction Co.*, 237 Pa. 324, 85 Atl. 362.

The twenty-third and twenty-fourth assignments suggest a most interesting point. C. H. Carr, a witness for the defendant, had testified that he knew both the plaintiff and her husband; that about the 18th of May, 1905, eight or ten days before the latter had left his home, the witness had seen the couple together on the street and overheard a conversation between them in which the wife had confessed to her husband that the child about to be born was not his. At this point the following offer was made: "Counsel for defendant also offers to show by C. H. Carr, the witness on the stand, that the day before George Ickes left he had a conversation with this witness, in which he told the witness that he had trouble with his wife and was going to leave, and that the witness told him 'I know all about it. I overheard the conversation.' And he then and there told the witness that his reason for leaving was that his wife was in a family way, and that he wasn't the father of the child. This happened the day before he left, and is offered for the purpose of showing his reason for leaving." This was objected to as "too remote from the time of the leaving to be a part of the *res gestæ*," and for other reasons. The objection was sustained and the appellant now assigns the rejection of the offer as error.

[3] The plaintiff's contention was that the defendant had so worked upon the mind of his son as to cause him to leave her and join the navy. The defense's reply was that the husband had left, not because of any advice or persuasion of his father, but as the result of other moving causes operating upon his mind at the time, the chief of which was the alleged unfaithfulness of his wife. This raised an issue as to the motive which caused George Ickes to leave, which involved his state of mind as a principal fact in the case. How could this be proved? When Ickes was called, his testimony was objected to and refused because he was the husband of the plaintiff. The only way that his state of mind could possibly be shown was by proof of things that he said and did at the time; but this does not necessarily mean at the very moment of his departure. In the present case, as in many other cases in the books, confusion has been caused by losing sight of the distinctions between contemporaneous spontaneous exclamations growing out of and explanatory of an event, or other declarations directly connected with and forming part of the *res gestæ*, and declarations relied upon solely to show an existing intention or state of mind. When the court determines in any case that a man's state of mind, or the reason why he did a certain act, is a relevant principal fact to be ascertained, that is the particular thing under immediate investigation, and what he may

have said concerning it is usually the best and only evidence that can be obtained on the subject; but the proofs must always be restricted to declarations indicating the state of mind at the time of their utterance.

[4] When evidence of this character is produced sufficient to show a then present intention, or state of mind, it may be assumed to have continued and formed the motive which controlled the doing of a subsequent act following closely thereafter, if, under all the surrounding circumstances, one would naturally associate the two together; and it is for the jury to draw the conclusion.

[5] With this understanding of the principles just adverted to, we take up the assignments under consideration and find that eight or ten days before the departure of George Ickes the witness had heard him accuse his wife of infidelity, and the latter's confession that the child she was then carrying was not the offspring of her husband, and that only the day before Ickes left he had said to this witness that he was about to do so because he was not the father of the child. What better character of proof was it possible to obtain in support of the defendant's contention concerning the motive which induced his son to leave the plaintiff and join the navy? The testimony offered might not have convinced the jury, but it was competent evidence of a relevant fact under the established rules which deal with declarations indicating intention or state of mind. The general principle is well stated in *Sugden v. St. Leonards*, 1 P. D. 154, where Mellish, L. J., said: "Whenever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were."

Commonwealth v. Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235, is a leading American case upon the point. The defendant was charged with murder, and it was the theory of the defense that the alleged victim had committed suicide. The defendant's counsel offered a witness to prove that the deceased had come to her (the day before she left her home and about three weeks before her dead body was found in a river), and stated that she was five months pregnant with child, and that she was going to drown herself. The offer was refused, and on appeal this ruling was reversed; the court saying: "When evidence of the declarations of any person is offered for the purpose of showing the state of mind or intention of that person at the time the declarations were made, the declarations undoubtedly may be so remote in point of time, or so altered in import by change in the circumstances of the maker, as to be wholly immaterial, and wisely to be rejected. * * * The counsel for the defendant concede that the declaration in this case is not, under our decisions, admissible as a part of what has been called

the *res gestae*, although some courts have admitted similar declarations on this ground, and they also concede that, to make a declaration admissible on this ground, it must accompany an act which directly or indirectly is relevant to the issue being tried and must in some way qualify, explain, or characterize that act, and be in a legal sense a part of it. * * * They contend that the declaration is some evidence of the state of mind or intention of the deceased at the time she made it; that the intention which it tends to prove is a material fact, which in connection with other facts proved tends to support the theory of suicide; and that the state of mind or intention in the mind of a person, when material, can be proved by evidence of his declarations, as well as of his acts, particularly when the person * * * cannot be called as a witness. * * * The fundamental proposition is that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech, and that proof of either or all of these for the sole purpose of showing state of mind or intention of the person is proof of a fact from which state of mind or intention may be inferred."

In *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, 633, another murder case, it was contended at trial that the defendant had induced the deceased to come to his house to collect some money on the evening of the homicide. On appeal, the court said: "The appellant also complains of the action of the court in permitting, over the objection of the defense, the wife of the deceased to testify that after supper, on the night of the homicide, as her husband was leaving the house, he closed the door, and said to her: 'I am going over to Peter's (the defendant's) for a few minutes to collect some money. I will be back soon.' * * * They are declarations of the intention and purpose of the deceased to meet the defendant, and were admissible, as original evidence, under one of the exceptions to the rule of hearsay. Some courts admit such declarations as a part of the *res gestae*, but we think that they more properly come under the exceptions to the rule against hearsay evidence. The evidence of these declarations was not admitted for the purpose of showing that the deceased was actually at the house of the defendant, but to show what was in his mind—what his intentions were—at the time of the utterance. Evidence of what a person's intentions were is relevant circumstantially to show that he afterwards carried out his designs. * * * These declarations, as appears, were made in a natural way, and not under circumstances of suspicion, and therefore proof of them was admissible not only to show the intentions of the deceased, but also as showing his intention of going to the house of the defendant for a legitimate purpose."

Rens v. Mutual Relief Ass'n, 100 Wis. 266, 75 N. W. 991, is another illustrative case. It was an action on a life insurance policy which did not cover death by suicide. The defense was that the insured had committed suicide, and a witness was permitted to testify to declarations by the insured within 24 hours prior to his death to the effect that he intended to kill himself. In sustaining this the appellate court said: "The evidence of the declarations of the deceased within 24 hours preceding his death, tending to show an intention to commit suicide, was properly admitted. The question was as to the intention of Rens, the insured, in firing the shot which resulted in his death, and, when such is the question, declarations of the party which are so close in point of time to the act as to justify a reasonable probability that he carried his declared intention into execution are admissible as original evidence, providing they are made under circumstances precluding the idea of misrepresentation or bad faith." Also see *Hale v. Life Indemnity & Ins. Co.*, 65 Minn. 548, 68 N. W. 182; *Sharland v. Washington Life Ins. Co.*, 101 Fed. 206, 41 C. C. A. 807; *Powell v. Olds*, 9 Ala. 861; *Viles v. Waltham*, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311; *Hodge v. State*, 26 Fla. 11, 7 South. 593; *State v. Hayward*, 62 Minn. 474, 65 N. W. 63; *Worth v. Chicago, etc., Ry. Co.* (C. C.) 51 Fed. 171; *Conn. Mut. Life Insurance Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706; *State v. Davis*, 69 N. H. 350, 41 Atl. 267; *Folks v. Burnett*, 47 Mo. App. 564; *State v. Power*, 24 Wash. 84, 63 Pac. 1112, 63 L. R. A. 902; and *Seifert v. State*, 160 Ind. 464, 67 N. E. 100, 98 Am. St. Rep. 340. While we cite no Pennsylvania case, we find none adverse to the doctrine here stated, and we have *Gilchrist v. Bale*, 8 Watts, 355, 34 Am. Dec. 469, where, under circumstances somewhat like those of the case at bar, testimony of similar import was admitted, although, on the facts peculiar to that case, upon a different theory.

[6] That the greater part of the testimony called to our attention in the present assignments was admissible upon the theory which we have elaborated is amply sustained by the above line of cases, and other like authorities, such as 3 Wigmore on Evidence, § 1725, and its admissibility was not at all dependent upon the authorities on contemporaneous spontaneous declarations connected with or induced by the happening of an event. But part of the testimony offered, as presented, was irrelevant and inadmissible, viz., the tender of proof that the witness had said to George Ickes, "I know all about it. I overheard the conversation." While it may be that the admission of this testimony would not have been cause for a reversal, yet we cannot say that its refusal was error; and, when an offer containing relevant and irrelevant matters is made as a whole, the trial judge is not bound to separate the good

from the bad, but may reject it all. *Sennett v. Johnson*, 9 Pa. 335; *Wharton v. Douglass*, 76 Pa. 273; *Smith v. Arsenal Bank*, 104 Pa. 518; *Citizens' & Miners' Savings Bank & Trust v. Gillespie*, 115 Pa. 564, 9 Atl. 73; *Evans v. Evans*, 155 Pa. 572, 26 Atl. 755; *Mundis v. Emig*, 171 Pa. 417, 32 Atl. 1135; *Mease v. United Traction Co.*, 208 Pa. 434, 57 Atl. 820. Under the circumstances, taking the offer as a whole, it cannot be held that error was committed in the rulings complained of, and the assignments will have to be dismissed. We have, however, treated the subject fully, because, on other assignments which we are about to discuss, the case must go back for a retrial.

[7] The fifth and sixth specifications assign for error the admission of certain testimony by the plaintiff concerning efforts made and expenses incurred to support her child after the alleged desertion, and the eleventh, twelfth, and thirteenth complain of parts of the cross-examination of the defendant, permitted under objection and exception, in which he was interrogated concerning an authority given to him by his son to collect the latter's wages as a member of the navy and as to the amounts he had received therefrom. None of the matters covered by the testimony called to our attention in these assignments was relevant to the issues being tried, and its effect must have been to prejudice the jury against the defendant and swell the damages in favor of the plaintiff. In a case of this kind, where human sentiment is apt to play a leading part, the trial judge should be most cautious not to admit evidence which might have a tendency to bias the jury against either side, unless clearly relevant and competent; and this is particularly so where the action is against a father, for there a clear case of want of justification must be shown before he can be held responsible. *Gerner v. Gerner*, 185 Pa. 233, 237, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646. These assignments are sustained.

[8] The twenty-fifth assignment complains of the refusal to admit in evidence testimony by Carr to the effect that George Ickes had said that the woman with whom the witness had heard him talking was his wife. As to this, it is sufficient to say that the testimony was entirely unnecessary, since Carr had previously sworn that he knew the plaintiff by sight, and had identified her in the courtroom as the woman he had seen Ickes talking to. This assignment is overruled. We have examined all the remaining assignments. They have no merit, and may be dismissed without further comment.

The judgment is reversed with a venire facias de novo.

FELL, C. J., and BROWN and STEWART, JJ., concur in the reversal of this judgment, but dissent from so much of the opinion of

the majority of the court as sustains the twenty-third and twenty-fourth assignments of error.

McCUNE et al. v. BERRY et al.
(Supreme Court of Pennsylvania. Oct 21, 1912.)

1. BRIDGES (§ 22*)—RECONSTRUCTION—STATUTORY PROVISIONS.

Upon the abandonment and destruction by a bridge company of a bridge across a navigable river, which is the dividing line between two counties in compliance with an order of the Secretary of War, proceedings by the two counties to construct a new bridge in substitution for the old one must be under act May 6, 1897 (P. L. 46), as amended by acts May 13, 1901 (P. L. 191), and April 25, 1907 (P. L. 119).

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 56-59; Dec. Dig. § 22.*]

2. BRIDGES (§ 22*)—CONSTRUCTION—STATUTORY PROVISIONS—"OTHERWISE."

In act May 6, 1897 (P. L. 46), authorizing the county commissioners of the several counties to rebuild bridges on sites owned by corporations or private persons over any stream or river forming the boundary between two counties, where they have been destroyed by ice, flood, or otherwise, the word "otherwise" does not mean some casualty ejusdem generis with ice and flood, but means some greater power which is as effective in destroying the bridge.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 56-59; Dec. Dig. § 22.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5105-5113.]

3. BRIDGES (§ 22*)—CONSTRUCTION—AUTHORITY OF COUNTIES.

It does not follow, because a bridge company has not rebuilt its bridge on another location, that a bridge, about to be built by adjoining counties over the river forming their boundary, is not within the description of bridges which act May 6, 1897 (P. L. 46), authorizes county commissioners to take charge of and rebuild, it being sufficient if the bridge company abandoned the reconstruction, and the traveling public is to be deprived of a bridge at that point, and the bridge is necessary.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 56-59; Dec. Dig. § 22.*]

4. BRIDGES (§ 22*)—CONSTRUCTION—STATUTORY PROVISIONS.

Where county commissioners have a right to reconstruct a bridge previously owned by a bridge company, which has been destroyed by some greater force, such as would be equal to that of an extraordinary ice or flood, and the United States government requires the elevation of the bridge to be such as to require more extended approaches, the act of the commissioners in taking additional ground for an approach, and the consequent injury to private property, does not make their action in building the bridge illegal.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 56-59; Dec. Dig. § 22.*]

5. BRIDGES (§ 5*)—CONSTRUCTION—STATUTORY PROVISIONS.

Act May 6, 1897 (P. L. 46), as amended by acts May 13, 1901 (P. L. 119), authorizing county commissioners of the several counties to rebuild bridges on sites owned by corporations or private owners, or built by public subscription over a stream forming the boundary between two counties, which have been destroyed by ice, flood, or otherwise, or which may be

abandoned by the owners and rebuilt on another site, is not unconstitutional.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 5; Dec. Dig. § 5.*]

Appeal from Court of Common Pleas, Washington County.

Bill in equity by Thomas A. McCune and others, taxpayers of Washington County, against John A. Berry and others, Commissioners of Washington County, to restrain the construction of a bridge across the Monongahela river. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

McIlvaine, P. J., filed the following opinion in the court of common pleas:

"The court in this case, from the testimony, pleadings, admissions made at the trial, and from facts judicially within its own knowledge, ascertained in litigation upon the same subject-matter, find the facts to be as set out under the subheads, 'Direct findings of fact' and 'Collateral findings of fact.'

"1. Direct Findings of Fact.

"Under this head we have adopted the findings of fact which the plaintiffs requested us to make, which are as follows:

"(1) The former bridge over the Monongahela river between West Brownsville, in Washington county, and South Brownsville, in Fayette county, erected by the bridge company chartered under the act of March 16, 1830 (P. L. 102), was by said bridge company maintained and operated as a toll bridge, under its charter franchise, until the fall of the year 1910, at which time said bridge company closed it to travel, and thereafter said company caused said bridge to be torn down and removed. The said bridge has not been rebuilt or replaced, either by the bridge company or by any one else, upon another site.

"(2) From the Fayette county terminus of said former bridge, a street of the borough of South Brownsville, known as Bridge street, 50 feet wide, runs eastwardly to a connection with a street running in the same general direction as the Monongahela river, called High street. Between High street and said former bridge terminus, and near to the latter, Bridge street intersects another street substantially parallel at this point with the river, known as Water street.

"(3) The defendants intend, in conjunction with the county commissioners of Fayette county, to build a new bridge across the aforesaid river, at the point where it was crossed by the said former bridge, and to carry the structure, so to be built, beyond what was the South Brownsville terminus of said former bridge, by means of a viaduct built upon and along Bridge street, in the borough of South Brownsville, for a distance of about 340 feet to a point about 15 feet west of the property line of High street, and to pay out of the treasury of Washing-

ton county a share of the cost thereof, to be fixed by the proportion that the population of said county bears to that of Fayette county.

"(4) The said viaduct is designed to be 36 feet in width in all, and will occupy the entire width of the cartway of Bridge street. The surface of the roadway to be carried by said viaduct will be more than 20 feet above the present level of Bridge street at its western end, and at its intersection with Water street, but will meet the present surface of High street at the aforesaid point, 15 feet west of High street.

"(5) The result of the construction of said viaduct will be to absolutely prevent teams and vehicles coming along Water street from turning into and traveling along Bridge street in order to reach High street, as they may now do, and vice versa.

"(6) There are valuable private properties located on either side of Bridge street; and the result of building said proposed viaduct upon said street will be that the owners of such properties will be entitled to substantial damages for injuries thereby caused to their properties. The defendants intend to pay, out of the treasury of Washington county, when such damages are assessed and ascertained, a share thereof, proportioned to the relative population of said county.

"2. Collateral Findings of Fact.

"(1) Nearly a century ago the national government constructed a turnpike road from Cumberland to the West, crossing the Monongahela river at Brownsville and the Ohio river at Wheeling. Some years ago this road within its boundaries, by act of Congress, was turned over to the care of the state of Pennsylvania, and was, at the time of the filing of this bill, under the supervision of the commissioner of highways of this state, and is perhaps, the most traveled of any highway in the counties of Fayette and Washington.

"(2) At the point where this road crosses the Monongahela river, two towns are located, one on the east bank of the river in Fayette county, known generally as Brownsville, although composed of different sections, known as Bridgeport, South Brownsville, and Brownsville proper; on the west bank of the river, in Washington county, is located the town of West Brownsville and its suburbs. These towns, each having a large population, extend up and down the river, opposite each other, for considerable distance, perhaps a mile or more.

"(3) For a long number of years the only way that the citizens of West Brownsville, in Washington county, crossed the river to Brownsville, in Fayette county, was over a bridge across the river on the line of this national turnpike, and which was used to connect the termination of the national pike on the east bank of the river with the termination of the national pike on the west bank of

the river. After this bridge was destroyed, as hereinafter found, the citizens of Washington county and the citizens of Fayette county have had no way of crossing the river between these two towns, except by a ferry operated by a company incorporated for that purpose at a point near the site of the bridge. This bridge was erected by a corporation chartered under an act of assembly approved March 18, 1830 (P. L. 102), in the year 1836, and it operated said bridge from the time of its construction up until the fall of 1910, charging toll for all who passed over it, as was permitted by its charter.

"(4) The Monongahela river is a navigable stream over which the United States government has control for the purposes of navigation; and some time prior to 1910 the Secretary of War, under authority given him by an act of Congress, declared this bridge to be an unreasonable obstruction of navigation upon said river, and ordered that the said bridge be raised and remodeled so as not to obstruct navigation, requiring the length of the channel span to be 390 feet, and its elevation so as to give a clearance of 52 feet above the level of the water of the fourth pool of the Monongahela river, and in default of such remodeling ordered the bridge to be torn down.

"(5) The company decided that they would not remodel the bridge as required by the United States government, but accepted the alternative, and tore it down in September, 1910. Since that, the ferry has been used by those who wish to cross the river.

"(6) There being a universal demand by the citizens both of Washington and Fayette counties for a free bridge across the river between these two towns, proceedings were started in both counties having in view the erection of a free bridge by the two counties. The proceeding in both counties was started under the act of June 13, 1836 (P. L. 551), as amended by the act of April 23, 1903 (P. L. 289), which required the court of quarter sessions of each of the counties, upon proper petitions being presented, to appoint three viewers from each county, and these six viewers to act jointly and report to the court of quarter sessions of the two counties. Viewers were appointed and acted and reported in favor of a free bridge over the Monongahela river, and they designated, as the site for the new bridge, the site of the old bridge. The bridge company at that time had previously abandoned that site and conveyed away their title to the land they owned at the approaches of their bridge on either side of the river. The report of viewers was by the court of quarter sessions of both counties laid before the next grand jury of the respective counties, and by said grand juries approved. This approval was reported to the courts, and by them respectively approved nisi. The bridge company, before the approval of the court became absolute,

filed exceptions to the report of the viewers, and these exceptions were argued before the two judges of Fayette county and the two judges of Washington county by agreement sitting together to hear the argument; and, after argument and joint consideration of the facts and arguments, the courts of each of the counties filed opinions sustaining the exceptions of the bridge company. The thirteenth exception was in these words: 'That the act of May 6, 1897 [P. L. 46], as amended by the act of May 13, 1901 [P. L. 191], and as further amended by the act of April 25, 1907 [P. L. 119], is the only method by which a bridge can be constructed by the counties of Washington and Fayette at the site of the proposed bridge, as recommended by the viewers.' The decree of this court filed July 17, 1911, is in these words: 'And now, July 17, 1911, the exceptions herein filed to the report of viewers came on to be heard and were argued by counsel before Umbel, P. J., and Van Swearingen, J., of the court of quarter sessions of Fayette county, and McIlvaine, P. J., and Taylor, J., of the court of quarter sessions of Washington county, sitting jointly; whereupon, upon due consideration, it is ordered, adjudged, and decreed by this court that exception 13 herein filed be, and the same is, sustained, and the report of viewers under the act of 1836 is set aside, and it is recommended that the county commissioners of the two counties proceed to rebuild the bridge in question under the act of May 6, 1897, as amended by the act of May 13, 1901, as further amended by the act of April 25, 1907, as set out in opinion of Van Swearingen, J., herein filed in Fayette county court of quarter sessions to No. 2 September term, 1910, road docket, in that county.'

"(7) To No. 1,076, February term, 1912, in the court of common pleas of Washington county, a mandamus proceeding was started by a number of citizens of Washington county against the present defendants, and an alternative writ of mandamus was issued against them, directing them, in conjunction with the commissioners of Fayette county, to proceed to erect a bridge on the site of the old bridge and to take its place, complying with the requirements of the act of Congress. That mandamus proceeding was proceeded in, and a peremptory mandamus, before the filing of this bill, was issued against the commissioners, and like proceedings were had, with like results, in Fayette county; and, in pursuance to a joint action taken by the two boards, they resolved to proceed to erect a bridge on the site of the old bridge, as set forth in the direct findings of fact.

"(8) Opposition to the location of the bridge on the old site was first manifested at the time the viewers had the matter under consideration; and, when the mandamus proceeding in this county was started, a number of citizens, who opposed (not the

bridge, but the building of it on that location), asked to intervene as defendants, and this court held that they had no right. After the court so held, the plaintiffs, who are also opposed to the building of the bridge on this location, but desire the county commissioners to build a free joint bridge at another location more convenient for them, filed the bill in this proceeding.

"Conclusions of Law.

"The conclusions of law upon the facts found in this case are given under the two heads, 'Affirmative Conclusions of Law,' and 'Negative Conclusions of Law.'

"1. Affirmative Conclusions of Law.

[1] "(1) The only method by which a bridge can be built on the old site owned by the bridge company, by the joint action of the two counties, is by the commissioners proceeding under the act of May 6, 1897 (P. L. 46), as amended by the act of May 13, 1901 (P. L. 191), as further amended by the act of April 25, 1907 (P. L. 119).

"(2) The plaintiffs, on the facts found, are not entitled to an injunction against the defendants restraining them from joining in the building of the bridge proposed by them to be built, as set forth in their bill, nor are they entitled to an injunction restraining them from paying, or causing to be paid, out of the county treasury of the county of Washington, any part of the cost and expenses of building such bridge, or any part of the damages caused to private property by the building thereof.

"2. Negative Conclusions of Law.

[2] "(1) The word 'otherwise' in the act of May 6, 1897, does not mean some casualty ejusdem generis with ice and flood, but means some other greater power that is as effective in destroying the bridge as an extraordinary flood of water and ice would be.

[3] "(2) It does not follow, because the bridge company has not rebuilt their bridge on some other location, that therefore the bridge about to be built by the defendants is not within the description of bridges which the act of 1897, as amended, authorizes the county commissioners to take charge of and rebuild. It is sufficient, if it appears that they have abandoned the reconstruction of their bridge, and that the traveling public are to be deprived of a bridge at that point, and such a bridge is necessary.

[4] "(3) If the county commissioners have a right to reconstruct this bridge because it has been destroyed by some greater force, such as would be equal to the force of an extraordinary ice or flood, and the United States government requires the elevation of the bridge to be such as to require more extended approaches, then the act of the commissioners, in taking the additional ground

for an approach on Bridge street, and the consequent injury caused thereby to private property, does not make their action in building the bridge illegal.

[5] "(4) The act of May 6, 1897 (P. L. 46), as amended by the subsequent act, is not unconstitutional."

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James I. Brownson and A. G. Braden, both of Washington, Pa., for appellants. R. W. Irwin and I. W. Baum, both of Washington, Pa., E. H. Reppert, of Uniontown, and Jas. A. Wiley, of Washington, Pa., for appellees.

PER CURIAM. The decree is affirmed, at the cost of the appellant, on the findings of fact and conclusions of law by the learned president judge of the common pleas:

LUNN et al. v. CITY OF AUBURN et al.
(Supreme Judicial Court of Maine. Feb. 17, 1913.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 71*)—CONSTRUCTION OF BUILDINGS—"CARE AND MANAGEMENT."

Under the Auburn City Charter, § 6, providing that the school committee shall perform all the duties as to the care of the schools now conferred upon school committees by law, except as otherwise provided in the act, and section 7 providing that all powers and duties in regard to the public schools not conferred and imposed on the committee by the act are vested in the city council, and Pub. Laws 1909, c. 88, § 2, providing that, where plans and specifications prepared by the state superintendent of public schools are not used, all school committees of towns in which new schoolhouses are to be erected shall make suitable provision for the heating and hygienic conditions thereof, and that all plans for any such building shall be submitted to the state superintendent and the state board of health before they shall be accepted by school committee, the city council cannot erect a schoolhouse until the plans have been approved by the school committee, since the words "care and management," in view of the general scope of the enactment, continued in the school committee the duty of improving plans then vested in school committees by general laws, and section 7 of the charter merely authorized the council to supplement the committee in any unimportant matters inadvertently left out in enumerating duties of the committee, and, even if the committee did not have such power under the charter, the Legislature could confer such power on it as it did by Pub. Laws 1909, c. 88.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 176; Dec. Dig. § 71.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 971-973; vol 8, p. 7596.]

2. WORDS AND PHRASES—"HYGIENE"—"HYGIENIC."

"Hygiene" is a system of principles or rules designed for the promotion of health, and "hygienic" means "pertaining to health or the science of health."

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 4, p. 3376.]

Appeal from Supreme Judicial Court, Androscoggin County, in Equity.

Bill in equity by Ralph M. Lunn and others against the City of Auburn and others. From a decree overruling a demurrer to the bill and granting a temporary injunction, defendants appeal. Bill sustained, and temporary injunction made permanent. Argued before WHITEHOUSE, C. J., and SPEAR, CORNISH, KING, and HALEY, JJ.

Seth May, of Auburn, for appellants. Henry W. Oakes, of Auburn, and Enoch Foster, of Portland, for appellees.

SPEAR, J. This is a bill in equity brought by the taxpayers of the defendant city to restrain the defendants from erecting a schoolhouse without the approval of the plans by the superintending school committee of the city. A demurrer to the bill was filed, the demurrer overruled, and an injunction issued. The case comes here on appeal from this decree.

[1] As stated by defendants' counsel: "The fundamental issue in this case is whether the city council of the city of Auburn may lawfully proceed to erect a schoolhouse in said Auburn, and whether the city through its treasurer may lawfully pay out public money for the purpose; the plans for said schoolhouse not having been approved by the 'Superintending School Committee of the City of Auburn.'" This issue is to be solved by an interpretation of certain sections of the charter of the city of Auburn, with reference to what extent these sections were intended to reserve to the city council the powers and duties which would otherwise belong to the superintending school committee of that city, and also with reference to the effect of chapter 88, Public Laws 1909, upon the reservation in the city charter, even upon the assumption that the theory of the defendants is right. It may be more consistent with orderly arrangement to consider the last proposition first. Section 1, c. 88, Public Laws 1909, imposes upon the state superintendent of public schools the duty of procuring plans to be loaned to the local school committee for proposed school buildings not exceeding four rooms. Section 2 provides what shall be done when the state plans and specifications are not used, and applies to a house of any number of rooms. It reads as follows: "Sec. 2. Where the plans and specifications prepared by the state superintendent are not used, all superintending school committees of towns in which new schoolhouses are to be erected, shall make suitable provision for the heating, lighting, ventilating and hygienic conditions of such buildings, and all plans and specifications for any such proposed school building shall be submitted to and approved by the state superintendent of public schools and the state board of health before the

same shall be accepted by the superintending school committee or school building committee of the town in which it is proposed to erect such building." Hereafter allusion to section 2 means this section.

In applying section 2, it is important to note that the Auburn school committee, in all respects not modified by the city charter, which was granted in 1883, are affected in precisely the same way by the public statutes, as are all the other municipal school boards in the state; that is, outside the charter, the general laws impose upon the Auburn school board the same duties, and confer upon them the same powers, as if no charter existed. If, then, the duties and powers prescribed by section 2 are embraced in the terms of the charter and lodged in the city council, they are withheld from the Auburn school committee. If not, this section vests in the latter board all the powers and duties therein enumerated. What does the charter reserve? Section 6 provides: "Said committee shall have all the powers and perform all the duties in regard to the care and management of the public schools of said Auburn which are now conferred and imposed upon superintending school committees by the laws of this state, except as otherwise provided in this act." By section 7 "all powers, obligations and duties in regard to said public schools not conferred and imposed upon said committee by the provisions of this act, shall be and are hereby vested in the city council of said city." The defendants' broad interpretation of these sections is found in the following paragraph of their brief: "As a whole this act while creating the superintending school committee contains two specific grants of power; the first, the care and management of schools as contained in the general laws at that time is to the school committee; the second, all powers and duties other than those denoted by the terms care and management of schools are vested in the city council."

The general law upon this point in 1883, when the Auburn charter was granted, was as follows: "A plan for the erection or reconstruction of a schoolhouse voted by a town or district, shall first be approved by the superintending school committee."

It will be conceded that the city council is in no sense a school committee, and can perform none of the functions of that body, except by special grant of the Legislature. Accordingly any new powers or duties bestowed upon the city council must be by amendment of the charter by special act, while new powers and duties are conferred upon the school committees by public acts. It therefore follows that the provisions of section 2 apply to the superintending school committee of Auburn, a public body, but not to the city council, a chartered body. Their powers and duties are not in the least enlarged by this section, while upon the school

committee of Auburn is conferred all the additional powers and duties prescribed therein. In other words, the city charter of 1883 had to do only with the powers the Legislature had seen fit to confer up to that time. The Legislature still had the right to confer such additional powers as it might see fit, at any time, and upon such board as it might see fit. The act of 1909 did confer additional powers upon the school board, and not upon the city council.

[2] But what is the construction of the act of 1909 respecting the present issue, assuming that the charter in 1883 then reserved the power of approval to the city council? Where the plans and specifications prepared by the state superintendent are not used, the school committee, when new schoolhouses are to be erected, shall make suitable provision for the "heating, lighting, ventilating and hygienic conditions of such buildings." An analysis of these four requirements of section 2 emphasizes their paramount importance in the composition of any plan for the erection of a modern schoolhouse. Before section 2 was enacted, the statute, for over 50 years, had required the approval of plans by the school committee. This was undoubtedly based upon the presumption that approval would embrace these important features. But the presumption became a myth in the progress of sanitation; consequently section 2 was enacted to make imperative what before was presumed. "Hygienic conditions" have become, under modern requirements of sanitation, vital and indispensable features of plans and specifications intended for the erection of a schoolhouse at the present time. The Legislature insisted by the language used that they should. The word "hygienic" takes the work of the committee into the domain of medical science. Hygiene is defined: "A system of principles or rules designed for the promotion of health." "Hygienic: Pertaining to health or the science of health." Century Dictionary. To insure efficient action the plans must be approved, not only by the state superintendent, but by the board of health, composed partly of medical men. Thus important did the Legislature wisely regard the care and health of our school children.

None of these powers and duties can be exercised in the first instance by the city council, state superintendent, or board of health. But they must be exercised by the superintending school committee before any schoolhouse can be built. The statute so provides. Hence a reasonable and consistent interpretation of section 2 requires that the plans should contain these provisions, before their submission to the state departments. Otherwise the plans would go to the departments with the most essential features left out. This is the only practical, logical thing to be done, so that, when the plans go to the departments, they may contain, as fully as

possible, all the details of these imperative requirements, and when returned be in form to enable immediate progress upon the work. Otherwise any plan first approved by these departments would then have to be submitted to the school committee, as to the requirements of section 2. If they disapproved, or saw fit to make changes, as they have the unquestioned right to do, then the plans must again go to the state departments. If not approved by them, or changed, then back to the school committee again, and so on. We cannot believe the Legislature ever intended to make any such shuttlecock of the law. A mutual agreement between the school committee and the state departments is contemplated at some time before a plan can be used, and practical common sense, if not strict construction, requires approval in the first instance by the committee.

It may be suggested that section 2 does not apply until the schoolhouse is completed. But the language "to be erected" seems to have been employed to meet the very objection that a completed house might be so constructed as to prevent any effective application of this section. Upon this interpretation of section 2, it then follows, whatever the order of approval by the different departments, that, before any schoolhouse can be erected, its plans, in the particulars named in section 2, must first be approved by the superintending school committee. And as none of the powers and duties in section 2, in these particulars, have ever been conferred upon the city council of the city of Auburn, but have been conferred upon the superintending school committee of that city, it equally follows that the city cannot erect a school house without their approval in these respects, which, as we have seen, now constitute the vital requirements of a plan. With this interpretation of the Laws of 1909, it would hardly seem possible that there could be left enough substance in the contention of the city council to warrant the continuation of a controversy which may do harm to the public welfare.

For the purpose of construing section 2 as to its effect upon the charter, we have proceeded upon the assumption that the right to approve the plan required in 1883 was reserved to the city council. But this assumption is by no means conceded. The defendants, in the able and exhaustive argument of their counsel, contend that the reservation in the city charter contravenes the general laws of the state upon this subject. The plaintiffs contend that the scheme of the laws, giving the superintending school committee the control, care, and management of the public schools, including the approval of plans for the erection of schoolhouses, has been the consistent and unvarying policy of the state for more than half a century. The defendants concede this, but claim that the language of the city charter must be so construed as to eliminate the purpose and intent

of the general statutes in their application to the city of Auburn with respect to the approval of plans.

We are of the opinion that this contention cannot prevail.

Before proceeding to a comparison of the various statutes touching the matters under consideration, it may be observed that the city charter provides for a superintending school committee of ten besides the mayor, as ex-officio chairman, instead of three as specified in the general law. In all other respects, except as modified by the charter, this committee comes within the provisions of the general law. The general scheme is found in the following statutes: R. S. 1841, c. 17, § 41, par. 3, invested the school committee with authority "to direct the general course of instruction, and what books shall be used in the respective schools." These were then the broadest powers conferred upon the committee. In 1857 this paragraph is still found, in addition to which specifically appears section 30 of chapter 11. "A plan for the erection or reconstruction of a schoolhouse voted by a district, shall first be approved by the superintending school committee." In 1871 this section appears unchanged. In 1883 it is found in the same language, except the omission "voted by a school district." Other statutes, all calculated to augment the efficiency of our schools, have been enacted since 1883 to the present time. Without further allusion to the statutes, it is not difficult to perceive that it is the settled policy of the state, as manifested by the progressive scheme of its laws, that the school committee were intended to be invested with the amplest powers concerning schools.

As before said, the functions of the city council are in no way related to those of the superintending school committee. Nor are the functions, which it is claimed the council are authorized to perform, conferred upon them in express words. They are reserved in general terms only as a supplement to the powers and duties, conferred in express terms, and by the general law, upon the committee. The reservation in the city charter, as well as the section relating to the school committee, has already been quoted. We think it important to now discover the intention of the Legislature, for the intent of the Legislature is the law. *Carrigan v. Stillwell*, 99 Me. 434, 59 Atl. 683, 68 L. R. A. 386; *Orono v. B. R. & E. Co.*, 105 Me. 428, 74 Atl. 1022. To do this these two sections must be considered together. What did the Legislature intend by the reservation? We have seen that the policy of the legislation has been to place increased power in the hands of the school committee. This is in harmony with wise practice and long experience. The common schools are our most cherished institutions. Our people, through their representatives, have recognized this fact by generous and progressive laws. No

department of our state government requires officials to be selected with greater care. It is the purpose of the laws, and has been from our earliest history, to place in office competent officials for the management of our schools. These officials are presumed to be chosen for their peculiar qualifications.

In view, then, of this long settled policy and demanded fitness of school officials, can it be contended that the Legislature in 1883 intended to deprive the city of Auburn of the services of a specially selected board and confer their duties upon a promiscuous board? Can it be that it intended to constitute a regular school committee, and confer its important functions upon the city council? Can it be presumed that they intended to confer dual power? If so, it was an inconsistent act, and sooner or later was almost certain to result in a conflict of authority; and what should have been anticipated has actually happened. But it cannot for a moment be conceded that the Legislature ever intended to divide these powers and duties between two incongruous boards.

It is accordingly evident that the reservation in the city charter was intended to authorize the council to supplement the committee, in any unimportant matters that might have been inadvertently left out, in enumerating the powers and duties of the committee. Further, if the Legislature had intended to confer upon the city council the power it now claims, it certainly would have done so by express grant, and not by inference from general terms. The intention of the Legislature being established, will the language of the statute, creating the school committee, permit it to be carried into effect? The committee shall "have all the powers and perform all the duties in regard to the care and management of the public schools of said Auburn which are now conferred and imposed upon superintending school committees by the laws of this state, except as otherwise provided in this act."

It is contended by the defendants that the words "care and management" do not confer upon the committee the right to insist upon the approval of plans. If these words were used only in this section, without reference to other statutes, this contention would be entitled to but little weight. The word "management" would confer all the power accorded to the committee by the defendants. The word "care" therefore must be accorded some meaning. It is a word of broad comprehension, and, in the connection in which it is used, can be construed without violence to the language to convey the power of approving of the plans. But statutes are always construed in *pari materia*. It is obvious that this must be done in order to give consistency of construction. Otherwise statutes would become feles do so. Accordingly, we must determine,

not what the words "care and management" by themselves mean, but what the Legislature intended them to mean, when interpreted with reference to other statutes, relating to the same subject-matter, and in view of the general scope, purpose, and subject-matter of the enactment. Construed by this general and universal rule, our conclusion is that the words "care and management," as used in the city charter, continued, in the superintending school committee of the city of Auburn, the power and duty of approving the plans for any schoolhouse to be erected in that city.

It may be further observed that section 2 already construed is in harmony with this interpretation. And, while a subsequent expression of the Legislature may not be final as to the construction of an earlier one, it is yet entitled to much respect when consistent with the object and intent of the earlier legislation.

Bill sustained, with costs.

Temporary injunction made permanent.

DOW v. BRADLEY.

(Supreme Judicial Court of Maine. Feb. 22, 1913.)

1. MONEY RECEIVED (§ 1*) — NATURE AND SCOPE OF REMEDY.

The action for money had and received is comprehensive in its scope, equitable in spirit, although legal in form, and is favored by the courts, and is maintainable when the defendant has money which in equity and good conscience belongs to plaintiff.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. MORTGAGES (§ 599*)—REDEMPTION—EXTENSION OF TIME.

The right to redeem mortgaged real estate may be kept open by the express agreement of the parties or by facts and circumstances from which an agreement may be inferred, although it would be foreclosed except for such agreement.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1733-1741; Dec. Dig. § 599.*]

3. FRAUDS, STATUTE OF (§ 129*)—REDEMPTION—EXTENSION OF TIME.

An oral agreement between a mortgagee and mortgagor to extend the time of redemption, supported by no consideration except the promise of the redemptioner, when acted upon so that the parties cannot be placed in statu quo, is not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-292; Dec. Dig. § 129.*]

4. FRAUDS, STATUTE OF (§ 56*)—REDEMPTION—EXTENSION OF TIME.

A contract to extend the time for redemption of a mortgage between a mortgagee and one having no legal or equitable interest in the equity of redemption is within the statute of frauds and unenforceable unless in writing and supported by a valuable consideration.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. BANKRUPTCY (§ 150*)—TITLE OF TRUSTEE—ABANDONMENT.

While a trustee in bankruptcy is vested in a qualified sense with all the assets of the bankrupt, he may decline to take such property as he deems burdensome and worthless, and title thereto remains in the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 228; Dec. Dig. § 150.*]

6. FRAUDS, STATUTE OF (§ 56*)—TITLE OF TRUSTEE—ABANDONMENT.

A bankrupt mortgagor had a right to redeem the mortgage subject only to the superior right and title of the trustee in bankruptcy, and hence an oral agreement to extend the time for redemption was not invalid on the ground that it was made with a person having no legal or equitable interest in the equity of redemption.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.*]

7. MONEY RECEIVED (§ 8*)—EXTENSION OF TIME TO REDEEM—SALE—REMEDY.

Where a mortgagee, in violation of his oral agreement to extend the right to redeem, sold the land to a bona fide purchaser, the mortgagor could sue for the surplus of the purchase price above the mortgage debt and costs and expenses as for money had and received and was not limited to a bill in equity to redeem.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 6; Dec. Dig. § 3.*]

Report from Supreme Judicial Court, Piscataquis County, at Law.

Action by Orman P. Dow against Ralph Bradley. On report from the trial court. Judgment for plaintiff.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Henry Hudson and James H. Hudson, both of Guilford, for plaintiff. Charles W. Hayes, of Foxcroft, for defendant.

KING, J. This case comes up on report. On June 30, 1910, the defendant began foreclosure proceedings, by publication, of a real estate mortgage given to him by the plaintiff, the equity of redemption of which would expire on June 30, 1911. In April, 1911, the plaintiff solicited of the defendant an extension of the equity of redemption, and we think the evidence fully justifies the conclusion that the defendant then verbally agreed with the plaintiff to give him a reasonable time, after the date when the equity of redemption would otherwise expire, to pay the amount due under the mortgage. That agreement, however, the defendant violated by a sale and conveyance of the property to an innocent third party on the morning of July 1, 1911. The plaintiff claims that the defendant sold the property for \$500 in excess of the amount then due under the mortgage, and this action of assumpsit, containing a count for money had and received, is brought to recover such excess.

[1] In the very recent case, Dresser v. Kronberg, 108 Me. 423, 81 Atl. 487, 36 L. R. A. (N. S.) 1218, this court again stated the

well-established doctrine that the action for money had and received "is comprehensive in its reach and scope," and, "though the form of the procedure is in law, it is equitable in spirit and purpose, and the substantial justice which it promotes renders it favored of the courts." And it is familiar law that an action for money had and received is maintainable when the defendant has in his possession money which in equity and good conscience belongs to the plaintiff, Dresser v. Kronberg, supra; Pease v. Bamford, 96 Me. 23, 51 Atl. 234. The fundamental question therefore here presented is whether this doctrine is applicable in the case at bar. Is it satisfactorily established that the defendant has in his possession money which in equity and good conscience belongs to the plaintiff?

If, at the time the defendant sold the property, the right to redeem the same belonged to the plaintiff, then it would seem to follow as a logical conclusion that so much of the proceeds of the sale as is shown to be in excess of the defendant's mortgage claim, and his expenses, is money in his hands which in equity and good conscience belongs to the plaintiff, because it was received for his interest in the property which the defendant wrongfully sold.

[2] The right to redeem mortgaged real estate may be kept open by the express agreement of the parties, or by facts and circumstances from which an agreement may be satisfactorily inferred, when it would be foreclosed were it not for such agreement. Fisher v. Shaw, 42 Me. 32, 39; Chase v. McLellan, 49 Me. 375; Stetson v. Everett, 59 Me. 376; Brown v. Lawton, 87 Me. 83, 32 Atl. 733.

[3] And it is undoubtedly the law that an agreement between mortgagee and mortgagor, or those holding their respective interests, to extend the time of redemption, although not in writing, nor supported by any other consideration than the promise of the redemptioner, when such an agreement has been acted upon so far that the parties cannot be placed in statu quo, is not within the statute of frauds, and is binding upon the parties. If within the period of extension the mortgage debt is paid, or tendered, it has the same effect as if done prior to the time the equity would have otherwise expired. Brown v. Lawton, supra.

In Schroeder v. Young, 161 U. S. 334, 344, 16 Sup. Ct. 512, 516 (40 L. Ed. 721), the Supreme Court of the United States, speaking by Mr. Justice Brown, say: "Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that, before the time had expired to redeem the property, the plaintiff was told by the defendant Stephens that he would not be pushed, that the stat-

utory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security."

The learned counsel for the defendant does not question this principle that a verbal agreement to extend the time for the redemption of a mortgage is not within the statute of frauds, but he contends that, if such a verbal contract is made between the mortgagee and one who at the time is not the owner of the equity of redemption, such contract is within the statute, and is not enforceable unless in writing and supported by a valuable consideration. And he claims that, at the time the defendant agreed with the plaintiff to extend the equity, the plaintiff had no right or title in the mortgaged premises, having been divested thereof by his bankruptcy proceedings instituted in 1910, under which a trustee was chosen and settled his estate.

[4] We think the proposition of law which the defendant invokes is correct. We have no doubt that a verbal contract to extend the equity of redemption of a mortgage of real estate, entered into by the mortgagee with one who at the time has no legal or equitable interest in that equity of redemption, would be within the statute of frauds, and not enforceable unless in writing and supported by a valuable consideration. But we do not think that the defendant's contention, that the plaintiff had no such interest in this equity of redemption at the time the agreement for its extension was made with him, is tenable under the facts disclosed in this case.

[5] While, under the provisions of the bankrupt act, the trustee thereunder is undoubtedly vested, in a qualified sense, with all the assets of the bankrupt, yet it is the well-recognized doctrine that he may decline to take such property as he deems burdensome and worthless. This doctrine was fully discussed and laid down in *Lancey v. Foss*, 88 Me. 215, 218, 33 Atl. 1071, 1072. It was there said:

"The assignee of a living bankrupt, however, may decline to take or interfere with such property as he deems onerous or worthless. The property so rejected by the assignee does not thereby become derelict, to vest in the first appropriator. The rights and obligations which the assignee declines to enforce, or notice, do not thereby vanish into nothingness.

"Such items of estate, corporeal or incorporeal, as the assignee declines to appropriate or utilize, remain the property of the bankrupt, subject always to the superior

right and title of the assignee. Notwithstanding the adjudication and assignment under the bankrupt act, there is left in the bankrupt a right which makes a title good against all the world except his assignee and creditors. These may appropriate the entire title and interest, and so divest the bankrupt completely; but what they decline to appropriate remains with the bankrupt. The title does not fall to the ground between the two. If the assignee or creditors will not take it, no one else can appropriate it. The bankrupt can defend or enforce it against all others." See, also, *Fleming v. Courtenay*, 98 Me. 401, 57 Atl. 592, 99 Am. St. Rep. 414.

[6] In the case at bar it conclusively appears that the trustee, after making an unsuccessful effort to find some available value in the bankrupt's equity to redeem this real estate, decided that it was worthless and elected not to take it. In his petition to have his final account allowed, and to be discharged, filed June 20, 1911, he alleged that he "was unable to obtain an offer for the equity" in the real estate, and asked authority to disclaim it. Such authority was not a prerequisite to his election to abandon it. It was rather a precautionary matter of practice, so that he might have a formal ratification by the court of his election not to take it. He evidently found that it was worthless as an asset soon after he began the settlement of the estate, for it appears that in November, 1910, he wrote the defendant in a futile effort to get an offer for this equity from him, and stated in that letter that the party who held the second mortgage on the same property did not want anything to do with it. It may be a reasonable and fair inference that the trustee decided not to take this equity of redemption as an asset of the bankrupt's estate as soon as he found it to be worthless to him, which was doubtless prior to April, 1911. But whether his decision not to take it was made before or after the agreement for extension was made is of no material consequence. This right of redemption, notwithstanding the bankruptcy proceedings, remained the property of the bankrupt, the plaintiff, subject always to the superior right and title of the trustee to take it. The plaintiff's title to it was good against all the world except his trustee and creditors. *Lancey v. Foss*, *supra*. And in fact the trustee expressly elected not to take it, because it was worthless to him, and did not take it. The plaintiff therefore was not a stranger to the title to the equity of redemption at the time the defendant agreed with him to extend it. On the other hand, he was the owner of it, subject only to the superior right in his trustee in bankruptcy to take and appropriate it as an asset of his estate, which right, however, the trustee abandoned.

[7] It is further contended by the defendant that the plaintiff's only remedy, if he has

any, is in equity. He claims that, if a valid contract to extend the time of redemption was made, then the plaintiff's right to redeem still existed notwithstanding the defendant had sold the property. It may be conceded that the plaintiff might have brought a bill in equity to redeem, under which, the property having been previously sold by the defendant, the only judgment recoverable would have been for damages. But why should he be limited to an equity proceeding? The procedure in equity would have afforded him no more efficient remedy than this action at law. He seeks only a judgment against the defendant for the payment of money. The right he contends for will be fully secured to him by such judgment. He does not ask for, and does not need, such peculiar and special relief as a court of equity can only afford.

We think the plaintiff's action at law, for money had and received, is appropriate and maintainable under the facts of this case. We have found that the plaintiff was the owner of the equity of redemption at the time the defendant sold the mortgaged property. It was therefore the defendant's duty, after deducting from the proceeds of the sale the amount of his mortgage debt, with the costs and expenses of the sale, to pay the surplus remaining in his hands to the plaintiff. Such surplus belonged to the plaintiff as the proceeds of the sale of his interest in the property and the defendant is liable to him for it in the ordinary action for money had and received. *Cook v. Basley*, 123 Mass. 396; *Mattel v. Conant*, 156 Mass. 418, 31 N. E. 487; *Knowles v. Sullivan*, 182 Mass. 318, 65 N. E. 389.

The only remaining question to be determined is the amount of the surplus of the proceeds of the sale remaining in the defendant's hands, after the payment of his mortgage debt and his expenses of the sale. From a careful examination of the evidence contained in the report we are of the opinion that there is not sufficient data presented from which the court can safely determine this question, and that the case should be remanded to nisi prius for the determination of the amount of the damages only. Accordingly the entry will be:

Judgment for the plaintiff.

Damages to be assessed at nisi prius.

STATE v. NORMAND et al.

(Supreme Court of New Hampshire. Hillsborough. Jan. 7, 1913.)

1. CRIMINAL LAW (§ 1050*)—EXCEPTIONS—COMPLAINT.

Where no exception is taken to the form of a complaint, its sufficiency in that respect must be assumed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2656, 2658, 2660; Dec. Dig. § 1050.*]

2. FOOD (§ 1*)—POLICE POWER—REASONABLENESS OF REGULATIONS.

The mere fact that the wrapping of loaves of bread in paper before they are offered for sale, as required by statute, is attended with some expense, does not prove that the requirement is unreasonable.

[Ed. Note.—For other cases, see *Food*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

3. CONSTITUTIONAL LAW (§ 81*)—POLICE POWER.

The Legislature, in the exercise of the police power, may regulate, restrain, and prohibit whatever is injurious to the public health and morals, and, if upon a reasonable construction of the act there appears to be some substantial reason why such regulations will promote the public health, they will be sustained as a valid exercise of the police power.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 148; Dec. Dig. § 81.*]

4. FOOD (§ 1*)—REGULATIONS AND OFFENSES—CONSTITUTIONALITY.

Laws 1911, c. 15, § 1, forbidding the existence or maintenance of unclean, unhealthful, or unsanitary condition in any place where food is produced, stored, or sold, by section 2, providing that such conditions shall be deemed to exist if food in the process of production, storage, or sale is unnecessarily exposed to flies, dust, or dirt, is within the police power of the Legislature so far as its purpose to secure greater cleanliness in food is concerned.

[Ed. Note.—For other cases, see *Food*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

5. CONSTITUTIONAL LAW (§ 62*)—LEGISLATIVE POWERS—DELEGATION OF POWERS—STATE BOARD.

Laws 1911, c. 14, § 1, forbidding the existence or maintenance of any unhealthful or unsanitary condition in any place where food is produced, stored, or sold; section 2, defining such conditions to exist where food is unnecessarily exposed to flies, dust, or dirt; section 3, authorizing the state board of health to enter and inspect any place used for the production, storage, or sale of food, and on violation found to issue an order for the abatement of the condition; section 4, empowering the state board of health to make all necessary rules and regulations for the enforcement of the act; and section 5, imposing a penalty for failure to comply with its orders—was complete in itself, and hence an order of the board that all bread before removal from the baking room should be wrapped in clean, unused paper, was not invalid as an exercise of delegated legislative power, as the board in making the order was not legislating, but merely exercising a power conferred upon it as an administrative board.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 94-102; Dec. Dig. § 62.*]

6. CONSTITUTIONAL LAW (§ 62*)—LEGISLATIVE POWER—DELEGATION OF POWER.

Where a statute is incomplete as legislation and authorizes an executive board to decide what shall and what shall not be an infringement of the law, or where its authorization is general and the board makes a rule which conflicts with other statutory or constitutional rights, the action of the board cannot be sustained.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 94-102; Dec. Dig. § 62.*]

Exceptions from Superior Court, Hillsborough County; Wallace, Judge.

Aimé Normand and another were convicted of a statutory offense, and they except. Exceptions overruled.

Defendants were convicted in the police court of the city of Manchester under a charge of violating chapter 15, Laws of 1911, in not complying with a rule of the state board of health requiring loaves of bread exposed for sale to be wrapped in paper. The case was tried without a jury. The court found upon the evidence submitted that the rule of the board of health regarding the wrapping of bread is a practicable one and is necessary and reasonable. Defendants excepted to the conviction and to the ruling that the board was legally authorized to make the rule in question.

James Patterson Tuttle, Atty. Gen., and Patrick H. Sullivan, County Solicitor, both of Manchester, for the State. Thorp & Abbott, of Manchester, for defendants.

WALKER, J. Section 1, c. 15, Laws 1911, provides: "The existence or maintenance of any unclean, unhealthful, or unsanitary condition or practice in any establishment or place where food is produced, manufactured, stored, or sold, or of any car or vehicle used for the transportation or distribution thereof, is forbidden." In section 2 it is provided that "unclean, unhealthful, or unsanitary conditions or practices shall be deemed to exist * * * if food in the process of production, storage, sale, or distribution is unnecessarily exposed to flies, dust, or dirt, or to the products of decomposition or fermentation incident to such production, storage, sale, or distribution, * * * or if there is any other condition or practice which shall be deemed as endangering the wholesomeness of food." Section 3 gives to the state board of health, or its inspectors or agents, "full power and authority at all times to enter and inspect every building, room, or other place occupied or used for the production, storage, sale, or distribution of food, and all utensils and appurtenances relating thereto. And if any person, firm, or corporation is found to be violating any of the provisions of this act, then the state board of health shall issue an order to the aforesaid to abate the condition or practice in violation, within such time as may be deemed reasonably sufficient therefor." Section 4 empowers the state board of health "to make all necessary rules and regulations for the enforcement of this act." A penalty is imposed in section 5 for the violation of "any of the provisions of this act," or for the failure of any one "to comply with the lawful orders and requirements of the state board of health duly made and provided in sections 3 and 4 of this act."

[1, 2] Under this statute the state board of health adopted certain rules and regulations designed to carry out the purpose of the statute, among which is the following: "Whereas, bread is an article eaten without being subjected to any preparation, and commonly undergoes frequent and objectionable handling and exposure in connection with its

distribution, sale, and delivery from bakeries, stores, and wagons, it is ordered that all bread loaves, before removal from the baking room, shall be wrapped in clean, unused paper, unprinted or printed on one side only. The use of newspapers or of any unclean paper for the wrapping of any articles of food is prohibited." The defendants, although requested to do so, refused to comply with this order of the board of health, and, being prosecuted under the statute, were found guilty. No exception was taken to the form of the complaint, and its sufficiency in this respect must be assumed. Nor is the defendants' exception to the finding that the rule regarding the wrapping of bread is a practicable, necessary, and reasonable one, on the ground that it is not supported by the evidence, entitled to much consideration. Much evidence was presented upon the question of the reasonableness of the rule in its application to the bakery business, and the finding or ruling of the court upon that issue seems to be amply justified. The mere fact that the wrapping of the loaves of bread in paper before they are offered for sale is attended with some expense does not prove that the rule is unreasonable. Health Department v. Rector, 145 N. Y. 32, 40, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 573. Evidently the expense is very small in view of the object which the rule was intended to subserve. It is not apparent how that object could be attained at less expense. The wrapping of bread in paper when exposed for sale would seem to be the most feasible way of protecting it from the contamination caused by handling and by the presence of dust and flies and perhaps other noxious insects. If the board had the legal authority to make regulations in respect to this subject, the rule in question does not appear to be unreasonable.

[3] But the defendants insist that, as the Legislature cannot delegate to individuals the power to legislate (*State v. Hayes*, 61 N. H. 264), it could not for that reason authorize the board of health to decide that such a rule was desirable and to impose its observance upon the people of the state. It is claimed that such procedure is an attempt to delegate legislative power. If that position is sound, the rule is invalid, and the defendants were illegally convicted. If the Legislature had incorporated in the statute the substance of the rule requiring bakers to wrap their bread in paper before offering it for sale, the statute would have been a constitutional exercise of the police power for the protection of the public health. Unless it is clear that a statute purporting to have been enacted for the protection of the public health and public morals has no relation to those objects, it cannot be set aside as unconstitutional and void. *State v. Roberts*, 74 N. H. 476, 479, 69 Atl. 722, 724 (16 L. R. A. [N. S.] 1115). It is said in that case that the power of the Legislature "to regu-

late, restrain, and prohibit whatever is injurious to the public health and morals is universally recognized, and nowhere more distinctly than in this state." If upon a reasonable construction of the act there appears to be some substantial reason why the observance of its provisions will promote the public health, it will be sustained as a valid exercise of the police power. *State v. Ramseyer*, 73 N. H. 31, 36, 58 Atl. 958, 6 Ann. Cas. 445. "The constitutional authority of the Legislature, in the exercise of the police power of the state, to enact such regulations as are deemed reasonably necessary for the security and protection of the lives and health of all persons within the state, is unquestioned." *State v. Forcier*, 65 N. H. 42, 17 Atl. 577. For other illustrations of the recognized extent of the police power, see *State v. White*, 64 N. H. 48, 5 Atl. 828; *State v. Campbell*, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419; *State v. Marshall*, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51; *State v. Pennoyer*, 65 N. H. 113, 18 Atl. 878, 5 L. R. A. 709; *State v. Griffin*, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177, 76 Am. St. Rep. 139.

[4] One of the evident purposes of the Legislature, as disclosed by the act in question, was to secure greater cleanliness in food when exposed for sale and to protect the public health, so far as practicable, from the danger incident to the unclean and unsanitary conditions to which food is often exposed; and, to be more specific, it is declared in section 2 that such conditions "shall be deemed to exist * * * if food in the process of production, storage, sale, or distribution is unnecessarily exposed to flies, dust, or dirt." In view of the well-recognized medical facts that the germs of disease are distributed by flies when they come in contact with food designed for human consumption, like loaves of bread, and that typhoid fevers are often traced to that cause, it is clear that the statute has direct reference to the public health. Such a condition or practice is a constant danger to the health of the community; and the statute was enacted to protect the people from that danger, and if enforced it would manifestly have that effect. Hence it is within the police power of the Legislature and is a constitutional enactment, so far as its purpose is concerned. *State v. Cate*, 58 N. H. 240; *Watertown v. Mayo*, 109 Mass. 315, 319, 12 Am. Rep. 694.

[5] As it is clear that if the statute had contained the rule in question it would have been a valid provision, it remains to consider whether the fact that it was made by the board of health under a delegated power from the Legislature renders it invalid as a rule. The statute is complete in itself. It in effect declares that bread unnecessarily exposed to flies and dirt is a public menace and provides a penalty for the infringement of any of the provisions of the act. But to

secure an efficient enforcement of the act, and to accomplish the legislative purpose, the state board of health is charged with the enforcement of the law, and for that purpose it is authorized "to make all necessary rules and regulations." This provision was not intended to authorize the board to legislate, or to add to, change, or modify the statute. It was not intended as a delegation of legislative power. The "rules and regulations" were to be such as might be deemed necessary "for the enforcement of this act." In order to prevent flies from congregating on the loaves of bread in bakers' shops and in their carts, one of the objects the Legislature had in mind, some general rule, if a feasible one could be devised, was necessary for the practical enforcement of the act; and when the board of health made the rule requiring loaves of bread to be wrapped in paper they were not legislating, but merely exercising a power conferred upon them by the state as administrative officers. It was their duty to enforce the law, and the rule they promulgated in the exercise of that power was a means they adopted for the accomplishment of that purpose. They merely devised a reasonable and effective method by which the legislative purpose could be carried out.

The delegation of such power is not unusual. The state board of cattle commissioners is authorized to make such "regulations as the board deems necessary to exclude or arrest" diseases in cattle. P. S. c. 113, § 5. Each board of medical examiners "may make any by-laws and rules, not inconsistent with law, necessary in performing its duties." Laws 1897, c. 63, § 3. The inspector of steamboats may make rules and regulations. P. S. c. 119, § 3; Laws 1899, c. 82, § 1. Similar power is given to the commissioners of pilotage. P. S. c. 120, § 2. And numerous other instances might be cited of power given to public administrative officers to make rules for the enforcement of specific laws.

If such rules are not unreasonable, and if they are not repugnant to the laws of the state or the Constitution, they are usually upheld as the exercise of power specially conferred by the Legislature for the more efficient enforcement of the statutes to which they relate. "As the possessor of the law-making power," the Legislature "may confer authority and impose duties upon others and regulate the exercise of their several functions. It may pass general laws for that purpose, giving them expressly or by necessary implication an incidental discretion to employ the proper means to fill up and regulate the details for themselves and subordinates, though the exercise of that discretion be quasi judicial. * * * The true distinction is between the delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its

execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made. 1 Lewis, *Suth. Stat.* § 88. It cannot be said that every grant of power to executive or administrative boards or officials, involving the exercise of discretion and judgment, must be considered a delegation of legislative authority. While it is necessary that a law, when it comes from the lawmaking power, should be complete, still there are many matters relating to methods or details which may be, by the Legislature, referred to some designated ministerial officer or body. All such matters fall within the domain of the right of the Legislature to authorize an administrative board or body to adopt ordinances, rules, by-laws, or regulations in aid of the successful execution of some general statutory provision." *Blue v. Beach*, 155 Ind. 121, 132, 56 N. E. 89, 93 (50 L. R. A. 64, 80 Am. St. Rep. 195). In that case it was held that, under a general statutory authority to prevent the spread of contagious and infectious diseases, a rule of the state board of health upon the subject of vaccination was not legislation. In *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228, it was held that a provision of the pure food law, that the board of health should adopt measures necessary to facilitate the law's enforcement and prepare rules regulating minimum standards of foods and defining specific adulterations, was not a delegation of legislative power.

"Congress cannot delegate its power to make a law; but it can make a law to delegate a power to an administrative officer to determine a fact or condition of affairs in regard to which the law makes its own action depend." *Dastervignes v. United States*, 122 Fed. 30, 34, 58 C. C. A. 346, 350. In *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525, it was held that, where a statute acts on a subject as far as practicable and only leaves to executive officials the duty of bringing about the result pointed out and provided for, it is not unconstitutional as vesting executive officers with legislative powers; and that an act of Congress to prevent the importation of impure and unwholesome tea is not unconstitutional because the power conferred to establish standards is legislative and not delegable to administrative officers. These principles have been applied in a great number of cases, among which are the following: *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566; *Broadbent v. Revere*, 182 Mass. 598, 66 N. E. 607; *Health Department v. Rector*, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579; *Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 58 L. R. A. 277, 85 Am. St. Rep. 357; *Hurst v. Warner*, 102 Mich. 238, 60 N. W. 440, 26 L. R. A. 484, 47 Am. St. Rep. 525; *State v. Thompson*, 160 Mo. 333, 60 S.

W. 1077, 54 L. R. A. 950, 83 Am. St. Rep. 468; *United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294.

[8] It may be admitted that where the statute is incomplete as legislation and authorizes an executive board to decide what shall and what shall not be deemed an infringement of the law (*State v. Burdge*, 95 Wis. 380, 70 N. W. 347, 37 L. R. A. 157, 60 Am. St. Rep. 123; *Schaezlin v. Cabaniss*, 135 Cal. 468, 67 Pac. 755, 56 L. R. A. 733, 87 Am. St. Rep. 122), or where its authorization is general and the board makes a rule which conflicts with other statutory or constitutional rights (*Commonwealth v. Drew*, 208 Mass. 493, 94 N. E. 682; *Potts v. Breen*, 167 Ill. 67, 47 N. E. 81, 39 L. R. A. 152, 59 Am. St. Rep. 262), the action of the board cannot be sustained; but in the present case the statute, as we have before noted, makes the practice of bakers unnecessarily exposing their bread to flies, dust, and dirt a nuisance, and merely authorizes the board of health to adopt and enforce such regulations as will result in the abatement of the nuisance. No discretion is vested in the board to determine whether such exposure of bread is or is not a nuisance, or what the penalty shall be for such exposure. The board is merely authorized to abate the nuisance declared to exist by the lawmaking power, and for this purpose—that is, the enforcement of the law—to make reasonable rules and regulations, for the violation of which, resulting in the continuance of the nuisance, a penalty is imposed. Nor is the rule in conflict with any existing statute.

If the defendants had prevented the nuisance by adopting some other precaution than that of wrapping their bread in paper, it may be they would not have been subject to prosecution for not complying with the rule; but they did not attempt to abate the nuisance in any effective way, but persisted in maintaining a condition of things about their shop and carts which the Legislature had prohibited. They were violators of the statute and became amenable to the penalty prescribed. *Morford v. Board of Health*, 61 N. J. Law 886, 391, 39 Atl. 706; *Freund*, Pol. Pow. § 84.

Exceptions overruled. All concurred.

GULDEN v. LUCAS et al.

(Court of Chancery of New Jersey. Jan. 25, 1918.)

1. CHATTEL MORTGAGES (§ 192*)—RECORDING—"IMMEDIATE RECORDING."

The Chattel Mortgage Act (P. L. 1902, pp. 487, 488) §§ 4, 5, requiring immediate possession by the mortgagee, or an immediate recording of the mortgage, means, by "immediate recording," as soon as may be by reasonable dispatch, under the circumstances.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 434-437; Dec. Dig. § 192.*]

2. CHATTEL MORTGAGES (§ 192*)—RECORDING—TIME—"IMMEDIATE RECORDING."

A chattel mortgage was ready for record and in mortgagee's possession between 12 and 1 o'clock on Saturday, the 27th. The mortgagee's place of business was only an hour's ride by trolley from the office of the county register, which could be reached by mail in the afternoon, if the document was mailed in the morning, or, if mailed in the afternoon, it would be delivered the next morning on a business day. If the mortgage had been mailed on Saturday the 27th, it would have been delivered on Monday, the 29th, and, if mailed on the morning of the 29th, would have been delivered to the register during office hours; but it did not in fact reach his office until the afternoon of the 30th. *Held*, that the recording of the mortgage was not an "immediate recording," within the Chattel Mortgage Act (P. L. 1902, pp. 487, 488) §§ 4, 5, which means as soon as may be by reasonable dispatch, under the particular circumstances.

[*Ed. Note.*—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 434-437; Dec. Dig. § 192.*]

Action by William Gulden against August W. Lucas and others. Judgment for defendants.

Chas. W. Kappes and Emil Walscheid, both of Town of Union, for complainant. Hudspeth, Rysdyk & Garrison, of Jersey City, for defendants.

GARRISON, V. C. The only point to be decided in this suit at this time is whether or not a chattel mortgage given by the defendant Lucas to the complainant, Gulden, is valid as against the defendant the Berghoff Brewing Company. The Berghoff Brewing Company was a creditor of Lucas, has obtained a levy, and is legally in a position to attack the validity of the chattel mortgage in question. Prior to November 26, 1909, Lucas was indebted to the Berghoff Brewing Company in a sum exceeding all the money involved in this suit. On the 26th of November, 1909, in the afternoon of that day, Mr. Kappes, who was the lawyer for Mr. Gulden, and Mr. Gulden and Mr. Lucas met for the purpose of having Lucas make a chattel mortgage to Gulden for money due from Lucas to Gulden. Mr. Kappes testifies, and he is not contradicted, either by other oral testimony, or by written evidence, that Mr. Gulden left before the chattel mortgage was executed; that at the time that Gulden left everything had been agreed upon excepting the manner of repayment. After Gulden left, Kappes and Lucas agreed tentatively upon the matter just mentioned, and the chattel mortgage was fully executed, acknowledged, and in shape for record. Mr. Kappes, however, says that he had no right at that time to accept this mortgage on behalf of his principal, Mr. Gulden, and would not have such right until Mr. Gulden had been informed of the tentative agreement as to the terms of repayment, or payment, whichever phrase is the correct one. On Saturday,

the 27th of November, 1909, Mr. Kappes, about the middle of the day (some time, he says, between 12 and 1), saw Mr. Gulden and, Gulden approved of the mortgage as drawn, and Kappes left it with Gulden. On Tuesday, the 30th of November, 1909, at 29 minutes after 12 o'clock, noon, the mortgage was recorded. The sole question is whether or not, under the statute and the decisions construing the same, this mortgage was recorded in time to save it from attack as against the existing creditor.

[1] I had occasion, in the case of *Brockhurst v. Cox*, 71 N. J. Eq. 703, 64 Atl. 182, affirmed 72 N. J. Eq. 950, 73 Atl. 1117, to consider the existing law in this respect; and, since the Court of Errors adopted the opinion filed in that suit, the rule is as stated therein. It was there held that the provisions of the Chattel Mortgage Act (P. L. 1902, pp. 487, 488) §§ 4, 5, require an immediate possession by the mortgagee, or an immediate recording of the mortgage, and that "immediate recording" means as soon as may be by reasonable dispatch, under the circumstances of the case.

[2] The circumstances of the case to be here considered are that this mortgage, at the very latest, was complete and ready for record and in the possession of the mortgagee at some time between 12 and 1 o'clock on Saturday, the 27th day of November, 1909, conceding, in his behalf, that it was not to be considered to be operative and ready for record from 5 o'clock in the afternoon of Friday, the 26th, when his attorney received it in its completed, executed condition. The mortgagee's place of business, where the mortgage was delivered to him, was not more than one hour by trolley from the office of the register of Hudson county, where the mortgage should properly be recorded. By messenger, it could reach said office in one hour; by mail, it could reach the office in the afternoon of any business day on which it was mailed in the morning, or, if mailed in the afternoon, would be delivered the next morning on any business day. If it had been immediately sent by a messenger, it would have reached the office on the afternoon of the 27th. If it had been mailed on Saturday, the 27th, it would have been delivered in the morning of Monday, the 29th, and, if mailed on the morning of the 29th, would have reached the office some time during business hours of that day. As above stated, it did not reach the office until the afternoon on the 30th.

I feel constrained to hold that in no proper use of language can this be said to be an "immediate recording," under the circumstances of the case. If "immediate recording" is extended so as to include more time than is reasonably adequate under the circumstances, the rule laid down is practically abrogated. I cannot find that the time consumed between the receipt of this mortgage

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by the mortgagee and its recording could reasonably have been utilized in getting the paper to the place of record. The result is that this mortgage must be held to be invalid as against the existing creditor.

WILLARD v. NORCROSS.

(Supreme Court of Vermont. Essex. Feb. 5, 1913.)

1. PHYSICIANS AND SURGEONS (§ 14*)—MALPRACTICE—RIGHT OF RECOVERY—LOCAL STANDARD.

To warrant a recovery for malpractice, the plaintiff must prove that the defendant did not exercise the care and skill then had and exercised by physicians and surgeons in the treatment of like cases in the same general neighborhood.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 21-30; Dec. Dig. § 14.*]

2. PHYSICIANS AND SURGEONS (§ 18*)—ACTION FOR MALPRACTICE—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to show malpractice in defendant's treatment of Colle's fractures of plaintiff's wrists.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.*]

3. EVIDENCE (§ 538*)—COMPETENCY—ACTION FOR MALPRACTICE.

Certain doctors were not incompetent to testify, in an action for malpractice, as to the proper local standard of treatment in the neighborhood in which defendant practiced, though they were somewhat more prominent, and their principal practice was in a community a few miles distant, and they had no practice in the defendant's immediate neighborhood.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2348; Dec. Dig. § 538.*]

4. APPEAL AND ERROR (§ 712*)—CONSTRUCTION—ACTION FOR MALPRACTICE.

A statement in a bill of exceptions, in an action for malpractice, that the "defendant claimed" that the plaintiff improved certain witnesses to testify to the local standard of treatment was not equivalent to a statement that the witnesses qualified as experts or gave testimony on that question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2951-2954; Dec. Dig. § 712.*]

5. PHYSICIANS AND SURGEONS (§ 18*)—ACTION FOR MALPRACTICE—EVIDENCE.

Where defendant tried the case, and the court instructed on the theory that the local standard of skill would determine the defendant's liability for malpractice, there was no broadening of the issue to the standard of good surgery generally, so as to authorize consideration of testimony as to good surgery, without reference to location, given by physicians incompetent to testify to the local standard.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.*]

6. PHYSICIANS AND SURGEONS (§ 14*)—MALPRACTICE—LIABILITY.

A physician is not responsible for injurious treatment, where he exercises the requisite care and skill.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 21-30; Dec. Dig. § 14.*]

7. APPEAL AND ERROR (§ 1175*)—DECISION.

Where on a third appeal from jury trials, in each of which the verdict was for plaintiff, the judgment is reversed, and it appears that plaintiff has made as good a showing as possible, and would not be entitled to recover under all the facts shown, the Supreme Court will render judgment for the defendant, and not remand the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

On Motion to Remand and Petition for a New Trial.

8. NEW TRIAL (§ 168*)—PETITION FOR MODIFICATION OF JUDGMENT ON REVERSAL.

On plaintiff's petition to the Supreme Court for remand for new trial in lieu of final judgment for defendant on reversal, it was the petitioner's duty to call the court's attention to the missing evidence necessary to his recovery on a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 232, 245, 252, 253, 266, 280, 281, 286, 291, 292, 294, 296, 303, 305, 318; Dec. Dig. § 168.*]

9. PHYSICIANS AND SURGEONS (§ 15*)—MALPRACTICE—LIABILITY.

Where a physician, in the exercise of proper skill and care, makes a mistake in his diagnosis, and treats the injury properly according to this diagnosis, he is not liable for malpractice.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 32; Dec. Dig. § 15.*]

10. PHYSICIANS AND SURGEONS (§ 15*)—MALPRACTICE—ACTIONABLE NEGLIGENCE.

Where a physician, from his examination of a wrist which has sustained a Colle's fracture, decides the injury to be a sprain only, but in the exercise of proper skill and care, either at the first examination or during the subsequent treatment, the real nature of the injury would have been discovered, he is guilty of actionable negligence.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 32; Dec. Dig. § 15.*]

11. PHYSICIANS AND SURGEONS (§ 14*)—MALPRACTICE.

Whether a physician, in failing to distinguish a Colle's fracture from a sprain, exercised a proper skill and care must be determined from the conditions existing at the time of the treatment, and not from conditions subsequently developing.

[Ed. Note.—For other cases see Physicians and Surgeons, Cent. Dig. §§ 21-30; Dec. Dig. § 14.*]

12. PHYSICIANS AND SURGEONS (§ 16*)—MALPRACTICE.

That the final result of a physician's treatment of an injured wrist is as good as could be expected from the most skillful treatment is not conclusive upon the question of the physician's liability for negligent treatment, since there might still be a liability for greater suffering and longer disability than in case of proper treatment.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 31; Dec. Dig. § 16.*]

13. NEW TRIAL (§ 168*)—GROUNDS—SURPRISE.

It was not ground for granting a new trial in the Supreme Court, in an action for malpractice, that the ruling of the presiding judge that a certain physician was not qualified to testify to the local standard of treatment was a surprise to the plaintiff, especially where it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

appeared that plaintiff had ample time to call other witnesses on this point, and no continuance was sought.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 232, 245, 252, 253, 266, 280, 284, 286, 291, 292, 294, 296, 303, 305, 318; Dec. Dig. § 168.*]

14. NEW TRIAL (§ 168*)—GROUNDS—MISLEADING REMARK BY JUDGE.

It was not ground for a new trial in the Supreme Court, in an action for malpractice, that the trial judge misled plaintiff by expressing an erroneous opinion that there was evidence tending to show that defendant's conduct fell below the local standard; responsibility for the sufficiency of the evidence being upon counsel and not upon the court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 232, 245, 252, 253, 266, 280, 284, 286, 291, 292, 294, 296, 303, 305, 318; Dec. Dig. § 168.*]

15. NEW TRIAL (§ 168*)—PETITION—AFFIDAVIT.

Under rules of the Supreme Court, a petition to the Supreme Court for a new trial should have been supported by the affidavit of the petitioner, and also by the affidavit of all the attorneys then acting for her.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 232, 245, 252, 253, 266, 280, 284, 286, 291, 292, 294, 296, 303, 305, 318; Dec. Dig. § 168.*]

16. NEW TRIAL (§ 168*)—APPLICATION—TAKING OF TESTIMONY—NOTICE.

The rule of the Supreme Court, relative to the taking of testimony to be used on a motion to the Supreme Court for a new trial, contemplates that such testimony shall be taken upon notice to the petitionee, though it does not expressly so provide.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 232, 245, 252, 253, 266, 280, 284, 286, 291, 292, 294, 296, 303, 305, 318; Dec. Dig. § 168.*]

17. NEW TRIAL (§ 168*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

Where the newly discovered evidence relied upon by plaintiff in her petition to the Supreme Court for a new trial, in an action against a physician for malpractice, consists of testimony of two doctors within easy reach, and with whom her counsel before trial had talked about the matters desired to be proven, and where no sufficient excuse is shown why such testimony was not procured, and it does not appear that such testimony could probably produce a different result, the motion will be denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 232, 245, 252, 253, 266, 280, 284, 286, 291, 292, 294, 296, 303, 305, 318; Dec. Dig. § 168.*]

Exceptions from Essex County Court; Alfred A. Hall, Judge.

Action by Hattie Willard against El F. Norcross. Verdict and judgment for plaintiff, and defendant excepts. Reversed and rendered, and plaintiff's petition for a new trial dismissed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Carney & Blake, of Gardner, Mass., and Simonds & Searles, of St. Johnsbury, for plaintiff. George L. Hunt, of Montpelier, for defendant.

ROWELL, C. J. This is an action for malpractice as a physician and surgeon. On December 29, 1902, the plaintiff, as she was leaving her place of employment in Island Pond in the town of Brighton, in Essex county, slipped and fell forward onto her outstretched hands and hurt her wrists. The defendant, living and practicing in Island Pond, being called to attend her, undertook the case, and visited her three or four times before she left Island Pond and went to Charleston, Vt. The testimony on her part tended to show that, on defendant's first visit, her wrists were swollen and painful; that he took hold of them and moved them back and forth several times and examined them, and said no bones were broken; that she spoke about using liniment, and asked him if any particular kind was needed, and that he said any kind—horse liniment was good, it was strong—that he did not bandage them; that, two days after the injury, her wrists were swollen a little larger than normal, and were black and blue; and that for two months or more she was unable entirely to dress or to feed herself, and had never since been entirely free from pain, does not sleep well, and is unable to use her wrists as effectually as before without causing them to become painful and swollen.

The testimony on her part, given by Drs. Van Allen and Smith, of Springfield, Mass., further tended to show that she had at some time suffered an impacted Colle's fracture of both wrists. On cross-examination Dr. Smith testified, among other things, that the plaintiff had apparently a useful wrist, had a good movement of the hand; that he did not know about the strength of the wrist, her power to work with it, but, as far as movements were concerned, she had good movement; that she had more deformity than she would have had, perhaps, if there had been some attempt at replacing the bones and holding them in position; that he should say she had a fair result; that he should not expect a perfect result in a person 55 years old; but that, as far as function is concerned, the mobility of the joint was as good as could be expected with any kind of treatment. On redirect examination he testified that the prognosis in case of a woman of 55 years old, suffering a Colle's fracture of both wrists, is good, good hand and useful wrist, with a slight deformity. The testimony of Dr. Smith further tended to show that a Colle's fracture is difficult of treatment; that, when the bone is only slightly cracked and no displacement, there is great danger of overlooking it and mistaking it for a sprain.

The plaintiff called the defendant in the opening of her case, and he testified that he had practiced his profession in Island Pond for more than 25 years; that on December 29, 1902, he undertook the professional care of the plaintiff, and, after a careful and satisfactory examination, diagnosed a sprain

of both wrists, but found no fracture; that in his treatment of her he used only one form of splint, namely, a pillow to support her hands and wrists, which were in no way bound to the pillow, but only rested upon it.

[1, 2] Passing all else, for the present, at least, we come to consider whether there was any medical expert testimony tending to show that the defendant, in his treatment of the plaintiff, did not have and exercise the care and skill then had and exercised by physicians and surgeons in the treatment of like cases in the general neighborhood of said Brighton, for that question is raised by his motion for a verdict. That such testimony was essential to recovery is not denied, and is shown by *Wilkin's Adm'r v. Brock*, 81 Vt. 332, 343, 70 Atl. 572.

The bill of exceptions says that the only medical expert testimony introduced by the plaintiff for the purpose of showing that the defendant, in his treatment of the plaintiff, did not have and exercise such care and skill as physicians and surgeons in the general neighborhood of Brighton, in the same general line of practice as that of the defendant, had and exercised in like cases is found in the cross-examination of Dr. Stiles, of St. Johnsbury, a witness called by the defendant and qualified as an expert in the X-ray, and also as a physician and surgeon; in the testimony of Dr. Mitchell, of Lancaster, N. H., deceased, given at the first trial and read at this; and in certain portions of the testimony of Dr. Leith given at the first trial and read at this. The bill then goes on to say that the defendant claimed that the plaintiff also improved Dr. Van Allen and Dr. Smith for the same purpose, and that, as to whether they were so improved, their testimony thereafter recited is referred to and made a part thereof. The bill also says that it appeared that Drs. Mitchell and Leith were physicians and surgeons at Lancaster, about 40 miles from Island Pond, and having a thousand more population, and that they practiced there and in Essex county; that some of the evidence tended to show that they were physicians and surgeons of wide experience and practice, and prominent in their profession in the vicinity of Guildhall, the county seat of said county; and that their practice extended over a larger territory than the defendant's. As to whether the above-mentioned testimony of Drs. Stiles, Mitchell, and Leith tended to show that the defendant, in his treatment of the plaintiff, did not have and exercise such care and skill as that which physicians and surgeons, practicing in the general neighborhood of Island Pond, in the same general line of practice, ordinarily had and exercised in the treatment of like cases, their testimony is referred to and made a part of the bill.

The evidence on the part of the defendant tended to show that he treated the plaintiff five times from December 29, 1902, to January 29, 1903, and attended her until she

left Island Pond and went to Charleston; that at his first visit he found her in a nervous, excited condition, with considerable pain; that her wrists were somewhat swollen, but that she could use her fingers; that he manipulated her wrists and found no displacement of bone, no deformity, and no crepitus, and diagnosed the injury as a severe sprain of both wrists, and had in mind the possibility of a crack in the radius, but, on examination, found no indication of it; that he advised complete rest, with cold applications for the first 24 or 36 hours, and then hot applications, and that she should keep her hands at rest on a pillow; that the matter of using liniments was mentioned, and he suggested that it might be well to use them at the proper time; that at his second visit he found the plaintiff in practically the same condition, except less pain and swelling in the wrists, and advised hot applications, such as liniment, hot salt and water or beef brine, to take out the soreness; that at his last visit he found a marked improvement in the plaintiff, absence of swelling, pain greatly subdued, and such a state of recovery that he advised gentle movement of the wrists to prevent stiffness and inflammation; that neither splints nor bandages were required by good surgery under the circumstances in which he found the plaintiff, but that their use, both arms being involved, would have increased her discomfort and been burdensome to her, and, considering her nervous temperament, would have done more hurt than good, and prevented the application of local remedies; that his treatment was good surgery, and that therein he had and exercised all the care and skill that physicians and surgeons practicing in the general neighborhood of Island Pond, in the same general line of practice, ordinarily had and exercised in the treatment of like cases; that the plaintiff never suffered a Colle's fracture of either wrist, and, if she had, her recovery was perfect; that the pain she claimed to suffer in her wrists was partly pretended and the rest neurotic, which was in no way due to malpractice, but to a fixed idea in her mind resulting from brooding over her injury. But it must be noticed in this connection that the defendant testified otherwise, in some respect, at the first trial. For he then said, on cross-examination, that he thought the radius was cracked, but that there was no fracture nor displacement, and no deformity, except that made by the swelling. That testimony is evidence against him now, tending to show that the radius was cracked, as he then said it was, and that, according to some of the medical testimony, would make a Colle's fracture, and such will be taken to be the fact for the purposes of the motion.

[3] Coming, now, to the medical expert testimony introduced by the plaintiff, as stated, to show malpractice, the defendant ob-

jects that, as matter of law, the testimony of these doctors is not available to the plaintiff to establish the standard by which he was to be judged, for that they practiced in places much larger than Island Pond, one of which is in another jurisdiction where the standard required was not known, and for that they were more prominent in their profession than he, and of wider practice and greater experience, especially in fractures of this kind; and, though one witness said that they practiced in Essex county, he could not say that they had ever practiced in Island Pond. But the objection is not well taken, and the testimony stands for consideration.

Dr. Stiles said on cross-examination, in effect, that if, when 50 or 55 years old, the plaintiff slipped and fell, as she claimed, and immediately thereafter suffered great pain and was unable to move her hands and fingers, he should say she had sprained her wrists, and that, had he been called to treat her, he should undoubtedly have used liniments, and possibly cold or hot applications, and had them rest; that he should have examined them to see if there was something more than a sprain, and, if he had found an impacted Colle's fracture, he should probably have put it into splints; that in the vicinity of his practice a good many do, and some do not, put them into splints; that it had usually been his practice to use splints of some kind; that it is a question for the attending surgeon whether he will use splints or not; that he did not know what other doctors did in that respect, but presumed they used splints, which he considered the best treatment.

Dr. Mitchell testified to having attended and had to do with probably more than 100 cases of Colle's fracture; that the prognosis of such a fracture, as to the use of the wrist, is very good; that they expect to get a useful wrist, and do in a great majority of cases, but that in nearly all cases there will be a little deformity; that the wrist will not be exactly the same shape as it was before; that it is impossible to make it the same, whatever is done; that the prospect of a perfect wrist is much less when the patient is old than when young; that, in the treatment of a Colle's fracture, the object of using splints is simply to keep the fragments—the bones—in position, if there is a deformity, and it is necessary on that account to set the wrist, in which case splints should be put on to retain it in proper position, but, if the lower end of the radius is merely cracked and no displacement, there is no necessity for splints; that according to the defendant's statement of what he found when he first visited the plaintiff, and his idea of her condition and what he did and prescribed, his treatment was good surgery; that splints are not always used in fractures; that every case must be treated on its own

merits; that a splint often does a certain amount of harm in any case, galls frequently, presses, and contracts the muscles, though in a great majority of cases it must be used; that, where there is no deformity, there is no call for the splint, and in many other instances; that, in respect to Colle's fracture, it is laid down in medical authorities that any appliance is proper that will be comfortable and allow the parts to remain in position; that there is no hard and fast rule, fractures are so different, no two alike; that the best plan for the surgeon to adopt is to reduce the dislocation, if there is any, any deformity, and put the parts into the most comfortable and proper position that can be done, and keep them there; that if the plaintiff had such a fall as she claims, and thereby sustained a Colle's fracture, she has had a very excellent recovery, a great deal better than the majority of cases; that art could not expect to do better, and probably might have done worse; that she has some deformity, mainly or entirely in the dislocation of the head of the ulna, which is dislocated and dropped down, making the ordinary deformity; that, in perhaps nine-tenths of all the cases of Colle's fracture he ever treated or saw treated, there is that deformity left, especially in people along in years; that in young people and children you can remove the deformity better; that Wyeth has a good book on surgery in which he says that, if there is little or no displacement and deformity, there should be no extension nor other force used; that, in these cases, any arrangement that will allow the wrists and hands to be quiet and still is sufficient, and the witness adds that a pillow is a splint, which fact he said had not been exactly understood in this case, he thought, had not been brought out as it might have been; that in this case there never had been a displacement of the lower end of the radius, though it might be a little higher than normal, compared with the ulna, but would not say whether it was or not, but that it is not the result of a fracture and is not uncommon; that he had generally had fairly good results in Colle's fracture in from four to six months, and sometimes not till very much longer; that there is a great difference in time in that respect; that he thought the plaintiff had suffered a Colle's fracture, but without displacement; that simply a crack is a fracture, and with no displacement it could not be told how extensive it may be, the only symptom of that being some movement of the fracture; that, if there is a liability to displacement, the rule would be to use something to keep it comfortable, but, if the bone was broken completely off, it would be liable to displacement; that two rolled bandages, about as large as your finger, laid so as to put a plaster around to hold them, and putting the hand into a sling, is a well-established treatment; that that and splints are

not the only methods prescribed by the books; that Dr. Connor, a celebrated physician and surgeon, prescribes the sling method with no splints nor other appliances, and no adhesive plasters; that Wyeth prescribes anything that will keep the hands and wrists stiff; that these were the only methods he then had in mind; that the plaintiff had had excellent results; that, in fractures of this kind, not only the bony union, but the restoration of the soft tissues, have to be considered; that frequently, and, in fact, it may perhaps be said always, the reparation and use of the soft tissues are delayed much longer than the bony union; that the disability that remains for a long time is on account of the soft tissues, muscles, nerves, ligaments, and tendons; that it takes very much longer for these to get well; that splints usually interfere to a certain extent with their recovery; that Dr. Connor says you must first reduce the fracture—that is, that you must put the bones in as near the natural position as possible—there usually being a great deformity about the wrists, and you have got to work it up, loosen it up, and place the bones as near normal as possible so as to keep it straight; but, the witness says, when there is no displacement, there is no room for reduction, as there is nothing to reduce, and that it would be an injury to try it; that a fracture will unite whether set or not, but with deformity, of course; and that horse liniment is as good for men as for horses.

Dr. Leith testified that the prognosis of a Colle's fracture in a woman of 50 is fairly good; that he never undertakes the treatment of such a fracture without telling the patient that in all probability he could not obtain, and that they must not expect, a perfect result as regards deformity; that the most he could assure was a fairly good use of the joint, but not perfect restoration of shape; that a little deformity is inevitable in almost every case of an adult; that a fracture of the radius may occur without displacement; that splints are not necessary; that the fundamental principle of treating all fractures is, first, to set the bone; that, if there is break without displacement of bone, there is no occasion for manipulation, and none for reduction, as there is nothing to reduce, and an attempt at reduction might, with some bones, be malpractice; that the only use of splints is to assist in keeping the bones in place when set; that it is very largely, in every case, a matter of discretion with the surgeon whether it is best to treat a case without splints; that he treated one case without splints as a sprain, because he did not know it was a fracture till later on; that there is great difficulty in detecting a Colle's fracture, if there is no displacement of fragments, because of the swelling and the absence of deformity; that the symptoms of all fractures, as near as can be put in a few words, are

deformity, unnatural mobility, and crepitus; that with no deformity, and no separation of fragments, there might be no crepitus, unless you used excessive force in manipulation to determine it, and for that reason one might get deceived, which often happens with the best of surgeons; that sprains have been treated as fractures, and fractures as sprains; that if there is a crack of the radius, with nothing to indicate a separation of fragments, there would be no necessity for the use of splints, the treatment then would be for the restoration of the soft parts; that from the defendant's description of what he found when called to the plaintiff, and what he did, his treatment in this particular case was good surgery, and that, if she suffered a Colle's fracture, as she claimed, she had as good a recovery as could be expected under any treatment or any circumstances; that, in a fracture where there is no displacement of fragments, you are carrying out the fundamental principle of treating fractures when you put the parts at rest, and that a pillow is a good agent to use in that case; that he usually uses splints in treating Colle's fractures; that, had he known that the case he mistakenly diagnosed as a sprain was in fact a Colle's fracture, he should probably have used splints, as that was his usual custom; and that it is good surgery in most cases to use splints, unless there is some good and positive reason why you should not.

Thus have we stated, with sufficient fullness and substantial accuracy, we think, the material parts of the testimony of these witnesses on the said question raised by the motion.

[4] As to whether the plaintiff also improved Drs. Van Allen and Smith on the same question, we think the bill of exceptions clearly shows that she did not, for, as we have seen, the bill says that the only medical expert testimony introduced by her on that subject is found in the cross-examination of Dr. Stiles, and in the testimony of Drs. Mitchell and Leith, given at the first trial and read at this. The bill then goes on to say, as we have also seen, that the defendant claimed that the plaintiff did thus improve them; but it nowhere says that the plaintiff did, nor that she claimed to do it, but, on the contrary, it says that neither Dr. Van Allen nor Dr. Smith qualified as experts on that question, and that, before Dr. Smith had given any of the testimony set out in the bill under exceptions 9 to 11, inclusive, the plaintiff had attempted to qualify him on the subject, and that the court had found, as a fact, that he was not qualified. This being so, it cannot be said that the plaintiff introduced, or supposed she was introducing, the testimony of these doctors to show a thing that one of them had not qualified upon, and evidently could not, because of his remoteness from the general neighborhood of the defendant's practice, and that the other, only equally remote, had been expressly found

not to be qualified upon. So the defendant mistook below the purpose for which the plaintiff used Drs. Van Allen and Smith, supposing it was to show that he fell under the local standard, whereas it was, and must have been, in the circumstances, only to show that his treatment was injurious, if the local standard was to govern, and he failed to come up to it, or if the issue should be broadened to good surgery in general, regardless of that standard. That the plaintiff so understood the matter in respect of establishing the local standard is shown by her brief where counsel, referring to exceptions based upon her alleged failure to prove, by expert evidence, that the defendant failed to treat her with the degree of care and skill ordinarily exercised by physicians and surgeons in the same general line of practice, and the same general neighborhood as the defendant, refer to the testimony of Drs. Stiles, Mitchell and Leith, and to that only, as sufficient to warrant the jury in finding such failure.

[5] But the plaintiff claims that the parties, by the way they tried the case, broadened the issue to good surgery in general, without reference to location, as the parties did in *Sheldon v. Wright*, 80 Vt. 312, 67 Atl. 807, and that therefore the testimony of Drs. Van Allen and Smith was properly admitted as to the nature of her injury and its proper treatment, and the difference in results that might, in their opinion, be expected to follow such treatment as the defendant prescribed, and those that they would expect to follow from a treatment with splints, a cast, a sling, or some equivalent device, to support the fragments of the injured bone and keep them in place. But this claim is not well founded, for the issue was not thus broadened. On the contrary, the defendant insisted throughout, and the evidence on his part tended to show, as the exceptions state, that, in his treatment of the plaintiff, he had and exercised all the care and skill of others practicing in the general neighborhood of Island Pond. And the court expressly made that the standard in its charge, and told the jury that if, in the examination of experts, it should find that any questions put to them, or answers made by them, referred to any higher degree of skill, such questions and answers would be immaterial and should not be considered. The plaintiff also claims that it should be presumed, in favor of the verdict, that the court modified its opinion about Dr. Smith's nonqualification as to the local standard, and allowed him to testify as an expert on such questions, as his expert testimony was in fact received, and that the testimony referred to on page 10 of the exceptions amply justifies such a conclusion. But if the presumption were indulged, or if it should be said, without indulging it, that the testimony was properly admitted, it would avail the plaintiff nothing, unless she showed that the defendant failed to come up

to the local standard, for the testimony does not touch that question, and cannot touch it, as we have seen.

[6] Having determined that the plaintiff did not use Drs. Van Allen and Smith to show that the defendant did not come up to the requisite standard of care and skill in treating her, that question is left to stand for medical expert testimony solely upon that of Drs. Stiles, Mitchell, and Leith, introduced by her, the exceptions say, for the purpose of showing that he did not come up to that standard; and, if her testimony did not tend to show that, her case must fail, even though his treatment was injurious, for he is not responsible for such treatment if he exercised the requisite care and skill in giving it; and whether it did tend to show that he did not exercise that care and skill is left for us to say on their testimony, which is referred to for that purpose, and we think it does not so tend, but tends the other way instead, as the exceptions virtually say, by saying that the evidence on the part of the defendant tended to show that he had and exercised all the care and skill that physicians and surgeons, practicing in the general neighborhood of Island Pond, in the same general line of practice ordinarily, had and exercised in the treatment of like cases, and Drs. Stiles, Mitchell, and Leith were his witnesses. We hold, therefore, that there was no medical expert testimony in the case fairly and reasonably tending to show malpractice by the defendant, and consequently that his motion for a verdict should have been granted.

[7] This is the third time this case has come here from a jury trial. The plaintiff has had a verdict and judgment each time. The first time the judgment was reversed. The second time it was affirmed, but subsequently reversed on a petition for a new trial based on the misconduct of jurors. Then it came up from the denial of a motion for a change of venue. Though the question now ruled upon does not appear to have been raised before, yet it is fair to presume that she has now made as good a showing upon it as she ever can; and, in view of this and of the history of the case, we think it ought not to be remanded, but to be ended here. In this we follow *Wetherby's Adm'r v. Twin State Gas Co.*, 83 Vt. 189, 75 Atl. 8, 25 L. R. A. (N. S.) 1220, 21 Ann. Cas. 1092.

Judgment reversed, and judgment for the defendant to recover his costs.

On Motion to Remand and Petition for a New Trial.

POWERS, J. When the foregoing opinion was read and the judgment order announced, counsel for the plaintiff asked that the entry order be suspended until they could examine the opinion and take such action as the interests of their client seemed to require.

This request was granted, the entry order was withheld, and the case left with the court. Thereupon the plaintiff filed a motion to remand the case and a petition for a new trial. These have been argued and considered.

1. It has come to be the settled practice of this court to render final judgment for the defendant in cases situated as this one was when last before us on exceptions, unless it appears, or is made to appear, with reasonable certainty that, in another trial, the plaintiff can supply the evidence which is found to have been lacking in the previous one. The plaintiff evidently appreciates the requirements of this rule, and she seeks to bring her case within its proviso by showing that, in another trial, she can supply the missing evidence.

[8] Our attention is first called to certain statements as to the tendency of the evidence in a former trial found in the bill of exceptions, and the opinion of this court when that trial was under review, and it is said that these show that the missing evidence is available. But the statement in the opinion is doubtless a mere recital of the statement in the bill; and the bill was prepared to present the questions raised at that trial. It was then binding on us and all concerned as to the facts stated; but we cannot accept it here upon the questions now presented. If there was evidence of the tendency stated, it is for the plaintiff to produce the transcript and point it out, or otherwise bring it to our attention. The depositions of Drs. Sargent and Elle are pointed to as furnishing the missing evidence. In other words, the claim is that the testimony of these doctors fairly and reasonably tends to show that the defendant, by omitting to use splints or some similar device in his treatment of the plaintiff's injuries, did not exercise the care and skill then exercised by physicians and surgeons, in the same general line of practice, in the treatment of like cases in the same general neighborhood. These depositions were taken ex parte and attached to the petition for a new trial, and furnish the newly discovered evidence on which the petition is based, so far as it is based upon such evidence. The defendant, however, afterwards took the further depositions of these witnesses and seasonably filed the same. There is no reason why we should not consider the testimony of these doctors under the motion to remand, though, of course, we must consider their testimony as a whole, without regard to who procured it to be taken.

In determining the importance here to be ascribed to these depositions, and in estimating the probable effect of the evidence therein contained upon the result of another trial, it must be kept in mind that the plaintiff has so framed her declaration as to be entitled to a recovery, if the defendant was

negligent either in his diagnosis or treatment.

[9] It must be admitted that there was evidence tending to show that the plaintiff's injuries were, in fact, fractures. The defendant treated them as sprains. Was he negligent in making his diagnosis? And this is no more than asking if, in his effort to ascertain the character and extent of the injuries, he had and exercised the care and skill then had and exercised by physicians and surgeons in the examination of like cases in that locality. If this question is answered in the defendant's favor, liability can be established only by proof of negligent treatment; and, in proving this, it must be remembered that his mistake in the diagnosis was free from legal fault. In other words, treatment is to accord with the diagnosis; and, in judging it, it must be referred to the diagnosis, assuming, of course, that there is no negligence during the treatment in not discovering the true nature of the injury.

[10] A physician is bound to give his patient a careful and thorough examination, so far as the circumstances will admit, using such care and skill, and such methods of diagnosis for discovering the nature of the ailment or injury, as are required by the rules of good local practice. If, in the exercise of such care and skill, either at the first examination or during the subsequent treatment, the plaintiff's fractures would have been discovered, the defendant's failure to discover them would amount to actionable negligence. *Rogers v. Kee* (Mich.) 137 N. W. 260.

[11] The defendant's conduct in this behalf must be judged by what he saw and knew, or ought to have seen and known, at that time, not by what may have developed or come to light since; and, if conditions were such that the nature of the injuries became a matter of judgment merely, the defendant cannot be held liable, though he erred. *Rann v. Twitchell*, 32 Vt. 79, 71 Atl. 1045, 20 L. R. A. (N. S.) 1030. On this question, Drs. Sargent and Elle are better witnesses for the defendant than they are for the plaintiff. For while they testify to the ordinary symptoms of Colle's fracture, and that these are usually characteristic and easily recognized, both admit that, if the condition and appearance of the plaintiff's wrists was what the defendant's evidence tended to show, the injuries might easily be mistaken for sprains. And this, they admit, is a mistake which standard writers say is not uncommon. There is no evidence before us, new or old, to indicate that the condition and appearance of the wrists was any different than the defendant testifies; nothing to contradict his statements as to what he did; nothing to show that he found any deformity, or that any existed; nothing to discredit his claim that there was no crepitus. These doctors suggest some additional tests, which

might be applied in a doubtful case, but do not make their omission malpractice. The conduct of a physician is to be judged, not by what usually appears and can be discovered in such cases, but by what appears or could be discovered in the instant case. Everything goes to show that this was not a usual case, but an unusual one, with conditions so obscure that the defendant's failure to discover the fractures, if, indeed, any existed, was not due to professional negligence. We do not say that such negligence could not be established by circumstantial evidence, nor that cases might not come up in which the result itself might not afford some evidence thereof; but here the result strongly makes in the defendant's favor. The plaintiff's recovery is so complete, both as regards function and deformity, as to indicate very strongly that the defendant's mistaken diagnosis, if it was such, was not due to negligence.

[12] The evidence is overwhelmingly to the effect that the result is as good as could be expected by the most skillful treatment. And the radiographs before us show such a complete and perfect restoration of the injured wrists that any abnormal conditions now existing are so slight as to escape the untrained eye. This result, however, is not to be taken as conclusive on the question of the defendant's liability for negligent treatment. For, though the ultimate result is all that could be expected, if the defendant negligently adopted a course of treatment which resulted in greater suffering or longer disability than would otherwise have followed the injuries, he would be liable to that extent. *Rogers v. Kee*, supra.

The question of negligent treatment, as we have seen, is to be referred to the diagnosis. If this is free from negligence, and the treatment is in accord therewith, no cause of action for malpractice exists. So it remains for us to examine the evidence before us to see if there is anything fairly and reasonably tending to show that the treatment here was not in accord with the rules of good local practice in cases of severe sprains of the wrist.

Again, our attention is called to the depositions already referred to. It is true that Dr. Sargent testifies that he uses splints in cases of severe sprains of the wrist; that he does so to keep the joint at rest and reduce swelling, for practically the same purpose as in case of Colle's fracture; and that in a case of severe sprain, with a possibility of a slight Colle's fracture, treatment with splints would be safer. But the doctor does not undertake to say that, in view of the unusual character of this injury, the use of splints by a physician, who was treating the patient for a sprain, was required by the rules of good local practice, or would have decreased the pain or produced an earlier recovery, or contributed to a better result.

Dr. Elie says that a severe sprain may get well alone, but a bandage and liniment are good, and rest is essential; that he gets the rest by a bandage or splint; and that these are in common use. But there is nothing in this statement to show that, by the standard here involved, the rest and liniment are not sufficient.

We must assume that jurors will weigh evidence candidly and impartially, and on a careful review of this record, in the light shed upon the case by the depositions referred to, we are satisfied that the case should not be remanded. Claim is made that the history of the case shows that there is merit in the plaintiff's claim. But to us the history of the case shows some other things; and we are satisfied that the ends of justice are more apt to be served by a final judgment here than by a remand of the case. We reach this conclusion without regard to those suggestions in the plaintiff's brief, which are predicated upon the assumption that there is something wrong in our decision on the exceptions. The doctrine of the law of the case applies; and, right or wrong, it will not be changed on this motion. Whether this doctrine is anything more than a rule of procedure, and whether it is subject to no exception whatever, we do not now say. And, lest it might be thought that this suggestion implies a doubt of the soundness of that decision, we take occasion to say that we are fully satisfied that it is correct.

[13, 14] The plaintiff says that her counsel were misled by the attitude of the trial court: First, in deciding that Dr. Smith was not qualified to testify to the local standard; and, second, by the opinion expressed by the presiding judge that there was evidence tending to show that the defendant's conduct fell under that standard. But, if the ruling regarding Dr. Smith was a surprise, a continuance, if required, should have been asked for. And, besides, it appears that the plaintiff had an abundance of time to call other witnesses to this point. And, as to the other point, the responsibility was upon counsel, and not the court.

[15] 2. The defendant moves to dismiss the petition for a new trial, assigning various reasons therefor. The petition is not supported by the affidavit of the petitioner, as required by the rules of this court. Such an omission was held to be fatal to the petition in *Taft v. Taft*, 82 Vt. 64, 71 Atl. 831. It is not supported by the affidavit of all the attorneys then acting for her. This omission would be fatal, for nothing appears to take the case out of the ordinary rule, the purpose of which would not be served if all the attorneys did not attach their affidavits.

[16] The testimony relied upon as newly discovered was not taken upon notice, as the rule contemplates, though it does not expressly require it. This is made plain enough when the purpose of attaching the

evidence is recalled—that this court may estimate its probable effect upon the result of another trial. No adequate estimate could be made, unless the effect of cross-examination was to be seen. Besides, the rule expressly requires the petitioner's evidence to be taken on notice, and it must be that it was the purpose of the rule to treat both parties alike in this respect.

[17] But, beyond this, we deem the evidence relied upon neither newly discovered nor sufficient. The two doctors were within easy reach of the petitioner's counsel at all times. Her leading counsel had talked with them regarding these matters. No sufficient excuse is shown for being ignorant of just what they would testify to, if called. Not only this, but the character of the evidence which they give is not such as to make it probable that the true issue in the case, perhaps now for the first time fully understood, would be found in the plaintiff's favor.

Motion overruled. Petition dismissed with costs. Let the judgment order be entered.

LIVINGSTONE MFG. CO. v. RIZZI BROS.
(Supreme Court of Vermont. Washington.
Feb. 5, 1913.)

1. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

No error in exclusion of offered evidence was harmless; the same witness being subsequently allowed to give it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

2. TRIAL (§ 45*)—INTRODUCTION OF EVIDENCE—OFFER OF PROOF.

The question asked of defendant by his counsel, immediately after plaintiff, for purpose of laying foundation for admission of a letter, showed it to defendant, and he identified it and admitted that he wrote it, not being cross-examination, and the expected answer not being obviously disclosed, an offer of proof was necessary to make erroneous the exclusion, on objection, of the question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 110-114; Dec. Dig. § 45.*]

3. TRIAL (§ 60*)—ORDER OF PROOF.

The exclusion of the question asked of defendant by his counsel, while defendant was being examined by plaintiff, which was not cross-examination, was not error; its effect being only to defer it till defendant had the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 141-145; Dec. Dig. § 60.*]

4. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of the question asked of defendant by his counsel, what a certain payment was for, was not error; plaintiff admitting that defendant, when paying it, said it was for the purpose claimed by defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.*]

5. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of the question of his counsel to defendant, what a certain payment, made by him, was for, was not error; his letter, in-

closing his check for the payment, and stating what it was for, being admitted in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

6. WITNESSES (§ 288*)—EXAMINATION—REDIRECT.

The subject of the relation to plaintiff of G., claimed by defendant to be plaintiff's selling agent, having first been touched on cross-examination of plaintiff's witness, he could testify thereon on redirect.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1003; Dec. Dig. § 288.*]

7. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

If there was no evidence in support of defendant's claim that a certain person was plaintiff's agent, admitting plaintiff's evidence that he was not such agent was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

8. WITNESSES (§ 288*)—CROSS-EXAMINATION.

A question asked by defendant of plaintiff's witness being on the erroneous theory of there being evidence that he was plaintiff's agent, exclusion of it, as not being proper cross-examination, with the effect of deferring it till defendant had the case, was proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 288.*]

9. PRINCIPAL AND AGENT (§ 23*)—EVIDENCE OF AGENCY.

Acts and sayings of an alleged agent are not sufficient to show his agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.*]

10. EVIDENCE (§ 258*)—ACTS AND DECLARATIONS OF AGENT—PRELIMINARY PROOF.

Before the acts and declarations of an alleged agent can be received against the principal, there must be evidence of the agency.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

11. PRINCIPAL AND AGENT (§ 166*)—AGENCY BY RATIFICATION.

Before agency by ratification can be shown, it must appear that the alleged principal knew what had been done, and that it had been done for him, and assented thereto.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 627-633; Dec. Dig. § 166.*]

12. COMMERCE (§ 46*)—INTERSTATE COMMERCE—STATE CONTROL.

The sale of an article to be shipped from another state to Vermont, followed by such shipment, is interstate commerce, not subject to state control, and therefore not affected by P. S. § 776, prohibiting a foreign corporation maintaining an action in the state on a contract made in it, unless it has obtained the certificate required by section 774 for a foreign corporation to do business in the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113, 126; Dec. Dig. § 46.*]

Exceptions from Washington County Court; William H. Taylor, Judge.

General assumpsit by the Livingstone Manufacturing Company against Rizzi Bros. Verdict and judgment for plaintiff, and defendants bring exceptions. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

John W. Gordon, of Barre, for plaintiff.
M. M. Gordon, of Barre, for defendants.

POWERS, J. The plaintiff is a corporation organized under the laws of the state of Maine, having its principal place of business at Rockland, in that state. It manufactures and sells granite cutting machines, and among these is one known as the Padbury surfacer. The plaintiff's evidence tended to show that one Carroll, who resides in Barre, was its agent in selling granite tools and supplies, and had been such agent since March 1, 1910; that Carroll solicited and obtained the order for the surfacer here in question; that the defendants did not want the bush hammer which went with it, and asked Carroll to get a price on the machine without this hammer; that a week or so after this talk Carroll received word that the plaintiff would furnish the machine, without the hammer, for \$225; that he so reported to the defendants, who gave him an order for the machine, which he forwarded to the plaintiff at Rockland; that the plaintiff shipped the machine to the defendants, and it was set up in their shed at Barre and turned over to them August 23, 1910; that Carroll was the only person with authority to solicit or obtain this order, and that the Graham whose name appears in the case was only employed to do certain repairing for the plaintiff; that the defendants kept and used the machine, without notice of its non-acceptance being given to the plaintiff or its agent, Carroll, until December 5, 1910, when they wrote the plaintiff a letter, inclosing a check for \$75, stating that this was in payment for the surface cutter (head), and that the frame was unsatisfactory and subject to plaintiff's order.

[1] 1. The plaintiff called Stephen R. Rizzi, one of the defendants, as a witness, and showed by him that the plaintiff sent the defendants monthly statements showing the amount claimed to be the full contract price, \$225, and requesting payment, and that the defendants never made reply to these statements until they sent the letter of December 5th, hereinbefore referred to, claiming that this silence and failure to complain was a circumstance from which an inference against them could be drawn. Thereupon the defendants offered to show that they bought the machine from one Graham, and that they notified him of the unsatisfactory condition of the machine, and that that was the reason why they did not sooner notify the plaintiff. This evidence was excluded, and the defendants excepted. We need not examine this question; for the witness was later allowed to say that the reason why they did not sooner notify the plaintiff was that they had nothing to do with Mr. Livingstone (evidently meaning the plaintiff) about the machine, because they bought it, not through Livingstone, but through Graham. So if there was any

error in excluding the offered evidence, it was rendered harmless by its subsequent admission. In *re Claffin's Will*, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261; *Walker v. Collins*, 61 Vt. 542, 17 Atl. 744; *Davis v. Randall*, 85 Vt. 70, 81 Atl. 250; *Hindle v. Healey*, 204 Mass. 48, 90 N. E. 511.

[2-5] 2. For the purpose of laying a foundation for the admission of the letter of December 5th, the plaintiff showed the letter to this defendant, and the latter identified it and admitted that he wrote it for his firm. Thereupon the defendants' counsel asked the witness what the \$75 payment was for. An objection being made, the question was excluded, and the defendants excepted. Various reasons might be given why this ruling was free from error. In the first place, it was not cross-examination, and no offer was made, and the record does not so obviously disclose the expected answer as to make an offer unnecessary. Again, the ruling only deferred the question until the defendants had the case. And still further, Mr. Bicknell, the plaintiff's manager, admitted that the defendants said, when they paid the \$75, that it was for the "head" which went with the machine. And, finally, the letter itself was admitted, and it showed this fact.

[6, 7] 3. When Mr. Bicknell was on the stand, counsel for the defendants cross-questioned him regarding Graham's relation to the plaintiff and the order for this surfacer. This was new matter and a subject not alluded to in his direct examination. On redirect examination, he was allowed to testify, subject to defendants' objection and exception, that Graham had never been employed by the plaintiff to make a contract for this surfacer. In this there was no error. The defendants' theory was that Graham was the selling agent. If there was any evidence in the case tending to sustain this claim, this evidence was, on plainest principles, admissible to meet it; if there was not any evidence so tending, its admission could have done no harm.

[8] 4. Graham was a witness for the plaintiff. He testified that all he had to do with the sale of the machine was to notify Carroll that the defendants wanted a surfacer, and to recommend it to them; that he made certain repairs on it and left it in apparently good condition. No evidence had come into the case to show that Graham was plaintiff's agent, or that he had any authority to receive notice to take the machine away, or that he had communicated to the plaintiff, or any of its officers or agents, the talk he had with the defendants about the machine. The defendants then claimed the right to ask him if the defendants did not at some time notify him to take the machine away, basing the claim on the ground that the witness had testified that the sale was made through him, and that the plaintiff had ratified his acts by accepting the order and ship-

ping the machine. The evidence was excluded, but only because it was not proper cross-examination, and therefore should be deferred until the defendants had the case. The position of the court was correct and the ruling free from error.

[9, 10] It was the claim of the defendants all along through the trial that Graham was the plaintiff's agent. Many of the exceptions argued before us are predicated upon the assumption that there was evidence, either offered or received, which tended to establish such agency, if not by appointment, by adoption. But this claim cannot be sustained. The only evidence of an agency by appointment, either received or offered, was such as was afforded by the acts and sayings of Graham, the alleged agent. This was not enough. Agency may be shown by circumstantial evidence; but the mere fact that one person assumes to act for another is not, of itself, sufficient to establish the relation of principal and agent. 3 Ell. Ev. § 1635. The acts and admissions of an agent in the scope of his employment are admissible against the principal. But this rule presupposes two things: That there is evidence tending to prove the agency; and that the act or admission is within its scope. "The fact of agency must, of course, be somehow evidenced before the alleged agent's declarations can be received as admissions; and therefore the use of the alleged agent's assertions that he is agent would, for that purpose, be inadmissible, as merely begging the very question." 2 Wig. Ev. § 1078. This is the established doctrine of this court. It was announced in *Dickerman v. Fire Insurance Co.*, 67 Vt. 609, 32 Atl. 489, wherein it was held that the fact that one claiming to be the agent of a fire insurance company had its blank proofs of loss was not evidence tending to show that he was the agent of that company. It was said, in *Sias v. Consolidated Lighting Co.*, 73 Vt. 35, 50 Atl. 554, that "it is well settled that the agency must be shown before the acts or declarations of the agent can be received against the principal," and this was approved in *Prouty v. Nichols*, 82 Vt. 181, 72 Atl. 988, 137 Am. St. Rep. 996.

[11] Nor can the defendants stand on the ground of ratification; for there was no offer to show knowledge on the part of the plaintiff of what Graham was doing or had done. Before ratification takes place, knowledge and assent, express or implied, must be shown. 3 Ell. Ev. 1635. The alleged principal must not only know what has been done, but that it was done for him. "Acts done and declarations made by one assuming to be agent do not and cannot prove the agency, or the extent of the agent's power, unless they are made known to the principal and in some way ratified by him, after being informed of what had been done, and the character in which it was done." *Huntsville, etc., Ry. Co. v. Corpening*, 97 Ala. 681, 12 South. 295; *Reynolds v. Continental*

Ins. Co., 36 Mich. 131. This, too, is a rule frequently recognized by this court. Vt. Dig. 2222 et seq.

[12] At the close of all the evidence, the defendants moved for a directed verdict, on the ground that it had been shown that the plaintiff was a foreign corporation doing business in this state, and had not proved a compliance with P. S. § 774; wherefor it was precluded by P. S. § 776, from maintaining this action. This motion was overruled pro forma, and the defendants excepted. The reply to this contention is that the subject-matter of this contract is interstate commerce, and consequently is not subject to state control, and the statute cannot apply. Assuming that the burden of proof was on the plaintiff to show compliance with the statute referred to, and assuming that the evidence shows that the plaintiff was "doing business" in this state, and assuming still further that this contract was made in this state, the motion was properly overruled.

That the power of a state to regulate and control foreign corporations seeking to do business therein is limited by the provisions of the federal Constitution regarding interstate commerce is common learning. It was fully recognized by this court in *International Text-Book Co. v. Lynch*, 81 Vt. 101, 69 Atl. 541. The following are some of the cases decided in state courts, wherein statutes similar to ours have been held to be ineffective because they interfered with interstate commerce: *Greek-American Sponge Co. v. Richardson Drug Co.*, 124 Wis. 469, 102 N. W. 888, 109 Am. St. Rep. 961; *Colt & Co. v. Sutton*, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819; *Mearshon v. Pottsville Lumber Co.*, 187 Pa. 12, 40 Atl. 1019, 67 Am. St. Rep. 560; *Lehigh Portland Cement Co. v. McLean*, 245 Ill. 326, 92 N. E. 248, 137 Am. St. Rep. 322. See, also, note to *Hessig-Ellis Drug Co. v. Sly*, 22 Ann. Cas. 554.

The question presented is a federal one, and the decisions thereon of the Supreme Court of the United States are, of course, binding upon us. It was held, in *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, that a Kansas statute of similar import was an unconstitutional interference with interstate commerce, and that the action could be maintained, notwithstanding the statutory provisions to the contrary. When the *Lynch Case*, hereinbefore cited, which arose under a statute not essentially differing from the one here involved, reached the Supreme Court of the United States, it was held that the business of that plaintiff was interstate commerce and beyond the reach of the statute. *International Text-Book Co. v. Lynch*, 218 U. S. 664, 31 Sup. Ct. 225, 54 L. Ed. 1201. The opinion therein is a mere memorandum; the court being content merely to follow the *Pigg Case*.

The case in hand is a much clearer case of

interstate commerce, and is obviously of that class over which the power of Congress is exclusive, since it includes the transportation, purchase, and sale of commodities. This is shown by *State v. Peet*, 80 Vt. 449, 68 Atl. 661, 14 L. R. A. (N. S.) 677, 130 Am. St. Rep. 908, a case wherein the principle here involved is satisfactorily discussed.

In the consideration of this question, we have treated the case just as counsel have presented it, and have given no consideration to the question whether a motion for a verdict could be sustained, even if the case was one to which the statute could be applied. This question is not raised.

There was nothing for the jury, and the court properly directed a verdict for the plaintiff for the amount of its claim.

Affirmed.

LEE v. FOLLENSBY et al.

(Supreme Court of Vermont, Caledonia. Jan. 21, 1913.)

1. EVIDENCE (§ 178*)—SECONDARY EVIDENCE—PRELIMINARY EVIDENCE.

Where plaintiff testified that he had received a receipt from defendants, and referred to it in a letter to the defendants, which was introduced in evidence, and that a letter from defendants referred to the contents of this letter, sufficient connection was shown between plaintiff's letter, the receipt, and defendants' letter to permit him to testify to the contents of defendants' letter, which was lost, over objection that plaintiff was not shown to be acquainted with defendants' signature.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.*]

2. WITNESSES (§ 256*)—REFRESHING MEMORY—LETTERS—EXAMINATION BY ADVERSARY—PRIVILEGED COMMUNICATIONS.

Where a plaintiff was permitted to refresh his memory from a letter he had written his counsel, and defendant's counsel asked to see the letter, the court properly limited his inspection to the signature and the portion the plaintiff said that he used in refreshing his memory, where the plaintiff's counsel suggested the inclusion of confidential communications.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 891; Dec. Dig. § 256.*]

3. EVIDENCE (§ 543*)—OPINION EVIDENCE—QUALIFICATION OF WITNESS.

Where an experienced lumberman testified that he had done much cutting in the vicinity, knew the distance and the roads over which the lumber was taken, knew that there was quite a hill on the farm, but had not been on the land where this lumber was cut, and another witness testified that he thought that he knew where the lumber was cut, and that it was on the mountain across a certain pond, they were both qualified to testify as to the stumpage value of the merchantable lumber of kinds taken.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2356½-2358; Dec. Dig. § 543.*]

4. EVIDENCE (§ 554*)—OPINION EVIDENCE—DEFINITENESS.

Where a witness, called upon to give his opinion on the stumpage value of timber generally, limited his answers to "lumber of good quality, lumber that was solid, and lumber that

was sound and all right," his testimony was sufficiently confined to a definite grade of lumber.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2375; Dec. Dig. § 554.*]

5. EVIDENCE (§ 543*)—OPINION EVIDENCE—COMPETENCY OF WITNESS.

Where a witness testified that he had estimated the value of stumpage in a number of towns near the timber in question, and that he had special knowledge as to the value of stumpage, he was properly allowed to testify as to the stumpage value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2356½-2358; Dec. Dig. § 543.*]

6. DEPOSITIONS (§ 101*)—WHO MAY USE—"CLAIMING UNDER" PARTY TAKING DEPOSITIONS.

Defendants, contesting a claim of trespass on the ground of a license from the plaintiff, which the plaintiff denied, are not "claiming under" the plaintiff within P. S. 1630, providing that a deposition to perpetuate evidence may be used "by the person at whose request it was taken, or by any person claiming under him," and cannot use a deposition taken at his request; the person claiming under the party taking the deposition being one who stands in his place with relation to the controversy.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 237-241; Dec. Dig. § 101.*]

7. HOMESTEAD (§ 62*)—EXTENT.

The owner of a homestead right, not set out, is not entitled thereby to license the cutting of timber on lands three-fourths of a mile from the dwelling house and separated by a fence from the intervening pasture land; there being but one dwelling house on the farm, and this and the outbuildings being worth \$2,000, the homestead being limited to the dwelling, outbuildings, and land used in connection therewith to the value of \$500.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 90; Dec. Dig. § 62.*]

8. TENANCY IN COMMON (§ 55*)—STRANGERS TO THE TITLE—RECOVERY.

A deed to timber rights by one of four cotenants, being inoperative as against the other three, was not such a color of title as to connect the grantee with the title so as to prevent, in an action by one of the three for trespass against the grantee, his recovery for the other two, as well as himself.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 140-156; Dec. Dig. § 55.*]

9. TRIAL (§ 234*)—INSTRUCTIONS—EVIDENCE.

Where a certain deposition, taken at the request of the plaintiff, was not offered by him, nor allowed to be introduced by the defendant, an instruction that the jury was not to presume anything as to what was in the deposition, nor use the assertions of counsel as to what was in it, but that counsel might comment on the fact that the plaintiff did not use the deposition, and that the only thing that could be presumed is that it would not, on the whole, be favorable to him, was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.*]

10. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS—ILLUSTRATIONS.

Where a deposition, taken at plaintiff's request, was not offered by him nor allowed to be introduced by the defendant, and the court instructed the jury as to how they should consider it, and the assertions made by counsel as to its contents, an illustration of the position in which the plaintiff might be placed with ref-

erence to some fact testified to, if the deposition were used, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

11. TRIAL (§ 251*)—INSTRUCTIONS — PLEADINGS.

Where the pleas set up the plaintiff as a tenant in common, the defendant cannot object to an instruction that defendant admitted that plaintiff was a tenant in common.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

12. TENANCY IN COMMON (§ 55*) — INVALID DEED—LICENSE—EVIDENCE.

An invalid deed to timber rights by a cotenant of plaintiff does not operate as a license by the plaintiff, unless it is because of some authority back of the deed, which the one claiming the license has the burden of showing; and evidence tending to show that plaintiff left the maker of the deed in possession, with authority to license, did not shift it.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 140-156; Dec. Dig. § 55.*]

13. TENANCY IN COMMON (§ 43*)—DEEDS OF RECORD—NOTICE TO COTENANT.

A tenant in common is not bound to examine the records to see whether his cotenant has given a deed of timber, which could not be effective against his rights, even as color of title, and one relying upon such a deed cannot claim that his acts in cutting timber from the premises charged such tenant with the general duty of inquiry.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 130-132, 136, 137; Dec. Dig. § 43.*]

14. TRIAL (§ 260*)—REQUESTED INSTRUCTIONS — SUFFICIENCY OF INSTRUCTIONS.

Where the instructions of the court were to the effect that if plaintiff knew of a sale of timber rights, before or after the sale by a cotenant, and permitted defendants to proceed under it, his silence would prevent a recovery, it was not necessary to give a requested instruction as to an express approval of the sale.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

15. TRIAL (§ 296*)—CORRECTED ERROR—INSTRUCTIONS.

Where the court instructed that the defendant had not introduced any evidence that a certain person had authority to sell defendant certain timber, to which the defendant excepted and claimed that a certain witness so testified, the error, if there was any such evidence, was cured by a supplemental charge calling the attention of the jury to defendant's claim, and leaving it to them to recall the testimony and determine just what it was.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

16. APPEAL AND ERROR (§ 882*)—INVITED ERROR—INSTRUCTIONS.

The defendant cannot complain of an instruction that a license was authority which might be revoked at any time, but that there was no evidence of a revocation, so that, if authority was given, the license continued, on the ground that there was no such issue in the case, and that it was misleading, where he requested an instruction that the jury was not to consider the question of whether the license, if found, was revoked, in that it was immaterial under the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

17. TRIAL (§ 140*)—QUESTIONS FOR JURY—EVIDENCE.

In an action of trespass for cutting timber under a license, after receiving a notice to quit on September 6th, the defendant having testified on the stand, after looking at a memorandum, that he cut timber after that date, but when later put on the stand said that he had not cut any after such date, the court was justified in submitting the question to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

18. TRESPASS (§ 43*)—PLEADING—ISSUES.

In an action of trespass for cutting timber, where the defendant pleaded that he had a license, the plaintiff could recover for timber cut after the alleged license expired, under a denial in his replication that there was any license, without claiming that defendants had exceeded the license.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 102-111; Dec. Dig. § 43.*]

19. APPEAL AND ERROR (§ 275*)—OBJECTION BELOW—SUFFICIENCY.

In trespass for cutting timber, an instruction on damages that the jury was not entitled to figure interest, but could add such sum as they might think proper for the delay, to which the defendant excepted, because no rule was laid down to guide the jury as to what amount would be proper, was not available error, where the defendant had not excepted to the whole charge, but took 76 exceptions, this being the sixty-second, and did not call the court's attention again to such exception, and the court did correct many of its instructions in a supplemental charge, and no doubt inadvertently failed to limit such damage to "not exceeding the legal rate of interest," although, in ordinary circumstances, the exception would probably be held sufficient to save the point; the court being in such a case entitled to a reminder.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1647; Dec. Dig. § 275.*]

20. ESTOPPEL (§ 68*) — INCONSISTENT POSITIONS—MOTION IN ARREST—MISJOINDER OF COUNTS.

Where plaintiff's counsel said that they would not claim a recovery on certain additional counts, and the court said he had the right to waive recovery on such counts, and defendant's counsel moved for judgment in that, since the plaintiff had spread such waiver on the record, there was no answer to certain pleas, the defendant could not thereafter move in arrest for misjoinder by reason of such counts, based on the fact that the counts were not formally stricken.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

Exceptions from Caledonia County Court: Fred M. Butler, Judge.

Action for trespass *quare clausum*, with a count in trespass *de bonis*, and one in *trover*, brought by Edward P. Lee against Curtis B. Follensby and another. Judgment for plaintiff, and defendants excepted. Affirmed. See, also, 83 Vt. 35, 74 Atl. 327, 138 Am. St. Rep. 1061.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Elisha May, of St. Johnsbury, and George L. Hunt, of Montpelier, for plaintiff. Harland B. Howe, of St. Johnsbury, and Herbert W. Hovey, of Montpelier, for defendants.

MUNSON, J. [1] A letter from plaintiff to defendants, dated September 6th, having been received in evidence, plaintiff was permitted to testify to the contents of a lost letter which he claimed to have received from defendants in reply. It appeared from plaintiff's testimony that he had a receipt from defendants; that this receipt was referred to in his letter of the 6th; and that the lost letter related to the contents of his letter. Evidence of the contents of the lost letter was received against defendants' objection that the plaintiff was not qualified to testify as to its being from defendants, not being acquainted with their signature, and "not having conducted a course of correspondence with them any more than to have this receipt, which is not correspondence." We think the connection between the receipt and the plaintiff's letter, and the connection between the plaintiff's letter and the lost letter, were such as to justify proof of the contents of the latter.

[2] In testifying to the contents of this letter, the plaintiff was permitted to refresh his recollection from a letter which he wrote to his counsel soon after this letter was received. When defendants' counsel asked to see the letter so used, plaintiff's counsel objected to their having the whole letter, suggesting the inclusion of confidential communications; and the court restricted the inspection to the signature and that part of the letter which the witness said he made use of. We think this disposition of the matter was within the discretion of the court.

[3] One Morgan, an experienced lumberman, who had done much cutting in the vicinity of the Lee farm, and had bought and sold lumber on the stump, and knew the distances and the roads over which this lumber was taken, and knew that there was quite a hill on the farm, but had never been on the land, where this cutting was done, to make any examination of it, was permitted to testify to the stumpage value of merchantable lumber of the kinds taken. This was against the objection that the witness did not know the lay of the land, and the difficulty or ease with which the lumber could be taken off. The statement may fairly be construed to indicate that the witness had some knowledge of the territory where the lumber was cut; and we cannot say that the court erred in treating him as qualified. Evidence of the same character was given by R. M. Lawrence; and it is objected that this witness had never been on the Lee farm, and had never examined any of the lumber cut by the defendants. The witness testified that he thought he knew where the defendants cut lumber on the Lee farm; that it was off the mountain across the pond. This brings the evidence, as regards the first objection, within the point just decided. Clearly an inspection of the timber cut was not necessary.

[4] It is objected further that the witness

should have been confined to some definite grade of timber. The witness generally limited his answers to lumber of good quality, good lumber, lumber that was sound and all right, and was evidently testifying throughout with reference to such lumber. This was a sufficient designation of the grade.

[5] W. R. Richardson, a man of large experience in estimating timber, who had estimated the timber in question, was permitted to give an estimate of the stumpage value of the timber. It was objected that it did not appear that he had any knowledge as to the value of stumpage in that vicinity. It appeared that he had estimated the value of stumpage on other lands in Waterford and in Concord, an adjoining town, and in Lunenburg, a town adjoining Concord, and that he had made such examination that he had special knowledge in respect to the value of stumpage. Knowledge of the value of stumpage necessarily involves knowledge of the market value of lumber in the vicinity of the stumpage. So there was evidence tending to show that the witness had some knowledge of the stumpage value of this lumber. It appeared that some of the timber cut was less than 10 inches on the stump, and this witness was permitted to testify that the small growth was worth more standing than cut. It is urged, against this testimony, that the witness had no knowledge as to the value of the small growth on the Lee farm, and was not an expert on the value of real estate in that vicinity. The admissibility of the evidence, as against these objections, sufficiently appears from what has already been said.

[6] The testimony of Albert Lee was taken in perpetuum at the request of the plaintiff, and was recorded in the county clerk's office, as required by our statute. The plaintiff did not offer the deposition in evidence; and, when offered by the defendants, it was excluded. The use of such a deposition is determined by P. S. 1630. It may be used "by the person at whose request it was taken, or by any person claiming under him." The defendants insist that, inasmuch as they are claiming under a license from the plaintiff they are within the very terms of the statute. But the sense of the simplest phrase may depend upon the subject-matter to which it relates. Thus viewed, the person referred to here, as claiming under the party taking the deposition, would be one who had taken his place in relation to the controversy. We think that defendants, who are contesting a claim of trespass on the ground of a license, which the plaintiff denies, are not claiming under the plaintiff within the meaning of the statute. As against others, they would be claiming under the party taking the deposition; as against him, they are claiming adversely.

[7] At the close of all the evidence, the defendants moved for a verdict on the ground that Albert Lee and his wife, by virtue of a conveyance from Isabel Lee, were

seised and possessed of a homestead right in the premises, which had not been set out, and that the plaintiff had no right in or possession of the close as against this homestead estate, and that Albert Lee could license the defendants to enter by reason of such homestead estate. If these conclusions followed from the fact that the homestead had not been set out, there was ground for the motion. But they do not follow from that fact. The interest of Isabel Lee did not extend to any part of the real estate beyond that portion of the dwelling, outbuildings, and land used in connection therewith to the value of \$500. *Lindsey v. Brewer*, 60 Vt. 627, 15 Atl. 329. The homestead must center in and about the dwelling house, and the statute does not prevent the husband from disposing of the overplus, if he leaves the dwelling house, outbuildings, and land, used in connection therewith, of sufficient value to answer the demands of the statute, both at the time of the conveyance and at the time the homestead may become vested in the widow. *Thorp v. Thorp*, 70 Vt. 46, 39 Atl. 245. It appeared, from undisputed evidence, that there was but one dwelling house on the farm; that this and the outbuildings were worth \$2,000; and that the tracts of woodland cut over by the defendants were from three-fourths of a mile to a mile from the dwelling house, and were separated from the intervening pasture land by a fence. So, upon the case presented, the land where defendants' cutting was done was not a part of the premises used in connection with the buildings, and a conveyance of that land, by the owners of the residue would have left the homestead right unimpaired.

[8] The court permitted the plaintiff to recover for the fourths of John and Howard, as well as his own. Such a recovery is permitted as against a stranger to the title. The defendants claim that they were not strangers to the title, but entered under a color of title. The plaintiff insists that they were strangers to the title, because the grants from Albert were inoperative as to his three brothers, as held in this case when here before. *Lee v. Follensby*, 83 Vt. 35, 74 Atl. 327, 138 Am. St. Rep. 1061. We think the plaintiff's claim is correct. Albert's deeds being inoperative as against his cotenants, the title stands, as regards their rights, the same as if the deeds had not been given. So, in determining the scope of Edward's recovery, the defendants must be treated as strangers to the title. The deeds did not give them even color of title as against Albert's cotenants.

[9, 10] The defendants excepted to the court's instruction to the jury that they were not to presume anything that Albert testified to in his deposition, nor to consider what was in the deposition. It appears from the charge on this subject that, in connection

with the offer of Albert's deposition by the defendants, some suggestions were made, in the presence of the jury, as to what was testified to in the deposition. In view of this, the court said: "We are not to presume anything that Albert testified to; neither are we to use the assertions of counsel of what Albert said in the deposition as evidence: that is not evidence. * * * It was proper for counsel to comment upon the fact that this deposition was not used by the plaintiff, but that would only have a bearing upon the evidence given in court. * * * You should not consider what was claimed to have been in that deposition as evidence in any way. * * * The only thing that can be presumed is that the evidence of the witness who testified would not on the whole be favorable to the party who could have used it." Defendants also excepted to this last expression, and now claim that it was an incorrect statement of the rule. The court followed these instructions, with an illustration of the position in which the party taking a deposition might be placed with reference to some fact testified to, if the deposition were used. This also was excepted to. We think the cautions against presuming what Albert had testified to were proper in the circumstances; that the rule, as given, was, in substance, the rule approved in our decisions; and that the use of the illustration, if in any sense objectionable, was not reversible error.

[11, 12] Errors are claimed because the court said that the defendants admitted that the plaintiff was a tenant in common of the close; that, if Albert had no authority to give the deeds, they were of no effect, as far as the plaintiff is concerned; and that the burden was on the defendants to establish the fact of a license. It is argued that the defendants made no such admission; that it was not necessary that Albert have authority to give the deeds, if he had express or implied authority to sell the timber and license the defendants to enter and remove it; that an invalid deed may operate as a license; that the burden was not on the defendants to prove a license in fact, because the evidence tended to show that the plaintiff kept Albert in charge and possession, with authority to give license. These claims cannot be sustained. The pleas on which the case was being tried set up the plaintiff as one of four tenants in common. If an invalid deed operates as a license, it is because of some authority back of the deed. The charge that the deeds were of no effect, as against the plaintiff, if given without authority, was followed by the statement that in such case the defendants "must establish this license"—evidently referring to the claimed parol license. Evidence tending to show that plaintiff kept Albert in possession, with authority to license, did not shift the burden of proof.

[13] The court charged as follows: If the plaintiff "did not know of the deeds given by Albert, or that Albert had made the sale to the defendants, then he would not be bound to protest, even if he knew that the defendants were cutting timber from this land. For he is not bound to protest against a mere trespass, unless he understands that the trespasses are being committed under a claim of right or authority. If a man enters upon your farm, cuts down your timber, without any authority from you or any one having the color of title, you are not bound to go and stop him or protest, because he is doing it without right and without color of right." The defendants excepted to the charge that, if the plaintiff did not know of the sale, he would not be bound to protest, saying: "It would be his duty to inquire, while he was there on the land in question, and not shut his eyes to what was going on there, with Albert in possession and in the management of the property, as the evidence tended to show he was." It is now argued that the defendants were not mere trespassers, but entered under the color of title afforded by a deed which gave an accurate description of the property; that the acts of the defendants were acts of possession; that the plaintiff had notice, on the town records, that they claimed title to the timber; that the plaintiff could not close his eyes to what was going on and assume that the defendants were trespassers, but was bound to exercise reasonable diligence in prosecuting inquiry, when he saw the defendants cutting the timber. But the record of a deed is notice only to those who are bound to search for it. We think a tenant in common is not bound to examine the records to see whether his cotenant has given a deed which could not be effective against his rights, even as color of title, and that the one relying upon such a deed cannot claim that his acts charged such tenant in common with the general duty of inquiry.

[14] The defendants, in three separate but consecutive requests, asked the court to charge that, if the plaintiff did not authorize Albert to sell the timber, but approved and ratified the sale after it was made, he could not recover; that ratification would be any act or consent expressing approval of the sale, whether made to the defendants or to Albert; that the sale could be ratified and approved by the plaintiff after it was made, although he did not know of it until it was completed; and that this would relate back to the time of the sale, and make it binding on the plaintiff. The court charged that, if the plaintiff stood by and permitted Albert to sell the timber, knowing that he was doing so, that would constitute a license; that if the plaintiff knew that Albert had sold the timber to the defendants, and that the defendants were about to enter for the purpose of cutting and removing it, and stood

by and permitted them to do so, without protest, that was a license; that if the plaintiff knew of the sale, and stood by and permitted the defendants to go on under it without protest, that would be a license, or ratification of the license, which he knew had been given. Defendants excepted to the charge because it did not comply, in form or substance, with their requests above stated, and to the charge as given upon the subject-matter. Counsel also said: "I think that there ought to be something more said on the question of ratification; and in a further charge the court said that if the defendants had failed to establish that Albert had authority to sell this timber, or that the plaintiff stood by and permitted him to do so, knowing what he was about to do, or that the plaintiff knew that Albert had undertaken to sell this timber, and by his conduct ratified the sale, then the verdict should be for the plaintiff; but that if the defendants had established these facts, or any of them that constituted a license, the verdict should be for the defendants. No further exception was taken.

[15] In considering the exceptions taken to the failure to comply with the three requests above stated, reference should be had to a further matter connected with the charge. In directing the attention of the jury to evidence of a conversation between the plaintiff and Albert shortly before the deeds were given, the court said that no witness had testified "directly to the giving of this authority to Albert." The defendants excepted to his statement, saying that George Green had testified that Edward told Albert to sell the timber. In a supplemental charge, the court called the attention of the jury to this claim, and left it for them to recall the testimony and determine just what it was. The defendants did not treat this as disposing of the exceptions, for the testimony of George Green and Emmett Palmer is referred to upon the question whether any witness testified directly to the giving of authority to Albert. The reference to this testimony, to determine the accuracy of the court's statement, necessarily involves the question whether such statements as were testified to were made before or after the sale, and so presented a case of authorization or of ratification. It is difficult to find, in the testimony referred to, any direct evidence of authority given to Albert; but, if it is considered that there was such evidence, the error of the court, in stating the contrary, was corrected by its further charge. The indefiniteness of the testimony is such that it is difficult to determine whether the statements referred to were made before or after the sale. The only statement which can fairly be assumed to have been made subsequent to the sale, if taken to refer to the timber in question, appears in the testimony of Green, who says that one morn-

ing, as Edward was getting ready to leave, he said to his brother, "Albert, you remember about those corners up there; (see) that they don't get off onto other folks' land; you look after it;" and that Albert replied, "I will."

It is not claimed that any statements of authorization or ratification were made by the plaintiff to either defendant. So whatever the court said regarding the effect of plaintiff's expressions of approval, whether made before or after the sale, must have been understood to apply to his conversations with Albert. There was nothing in the case presented, nor in the language of the second of these three requests, that called for specific instructions distinguishing between express and implied ratifications. We think all three of the requests were substantially complied with. The court sometimes uses the word "ratification," and sometimes treats the silence of the plaintiff, with knowledge of the sale, as amounting to a license. The plain meaning of the charge is that if the plaintiff knew of the sale at the time it was made, or learned of it after it was made, and permitted the defendants to proceed under it, the mere fact of his silence would prevent a recovery. If the jury thought there was evidence tending to show a subsequent express approval of the sale, they could not possibly suppose that such an approval would be less efficacious than mere silence.

[16] The court charged that the license was authority which might be revoked at any time before the timber was cut, but that there was no evidence of a revocation, so that, if authority was given, the license continued until all the timber was removed, and said later that there was no question of revocation in the case. Defendants excepted to this charge because there was no issue in the case as to whether the license could be revoked or not. It is now argued that, there being no question of revocation in the case, the instruction was liable to mislead the jury. But defendants cannot well claim this, for they requested an instruction that the jury were not to consider the question of whether the license, if found, was revoked, inasmuch as that question was immaterial under the pleadings.

[17] The court charged that, whatever might be found regarding the claimed license from the plaintiff, it could not affect his right to recover for timber cut on lot 1 after April 1, 1905, the day on which the right to cut under Albert's deed expired. The only testimony that any of the lumber from this lot was cut after that date came from defendant Follensby. It appeared that under date of September 6, 1905, plaintiff wrote the defendants, forbidding further cutting. In the cross-examination of defendant Follensby, he was asked whether any cutting was done on the second tract before he received plaintiff's letter, and replied that

there was not, as he recollected. The examination then proceeded as follows: "Q. But you had completed the cutting on the first tract next to the Fay land at that time? A. No, we had not. Q. (The Court): You hadn't completed cutting on the first tract? A. No, sir. Q. Then you cut considerable after that, did you? A. A small portion of the piece they finished up that winter of 1904-05. Q. How many thousand do you think you cut on the first tract after September 6, 1905? A. Well, now, I have a memorandum of that to refresh my mind. Q. Will you look at it and tell us? A. About 43,000 to 45,000 that was cut to balance up the contract. Q. (The Court): That is, you had already cut on the first tract from 43,000 to 45,000 when you got that letter? A. No, we had that balance to cut." When next on the stand, he changed his testimony in this respect. It is claimed that this slight mistake, so quickly corrected, did not justify the submission of this matter to the jury. But we think the first statement was made with such references to a memorandum and the date of the plaintiff's letter that it was not error to leave it to the jury to say which statement was right.

[18] It is said, further, that the submission was error because the plaintiff did not claim, in his replications, that the defendants had exceeded the license. The wrong complained of here lies, not in exceeding the license, as regards the limits of location or the character of the acts, but in exceeding the limit of the license as regards time; that is, in continuing the cutting within the described close after the time allowed for it had expired. We think this claim could be made under the general replication. It has been held, in the case of a license pleaded, that where the declaration alleged the commission of trespass on divers days and times, and the defendant pleaded a license generally, viz., on the several days and times when, etc., without confining the generality of the declaration by specifying any particular trespass or trespasses, he was bound to show a license coextensive with the trespasses proved, and that proof of a trespass prior to the license entitled the plaintiff to a verdict on the general replication *de injuria*, without any new assignment. 1 Chit. Plead. *634; *Barnes v. Hunt*, 11 East, 451.

[19] In its instruction regarding damages, the court said to the jury: "You are not entitled to figure interest upon the damages," you may find for the plaintiff, "but you are entitled to have in mind the time that has elapsed since the taking of the timber, and add to the damages such sum as you may think is proper and right for the delay in the payment." To this the following exception was taken: "The defendants except to the charge of the court that they shall add such sum as they think proper and right for the delay in the payment, because the charge

lays down no rule as to what should guide the jury in arriving at what is proper and right for delay in payment." The attention of the court was not otherwise directed to what it had said on the subject. The court should have added to its instruction: "Not exceeding the legal rate of interest."

In ordinary circumstances, the exception taken would probably be held sufficient to save the point. But the circumstances here were not ordinary. The defendants did not except to the whole charge; but they took 76 exceptions to the charge, which apparently covered everything in it; the exception in question being number 62. After hearing these 76 exceptions presented, the court charged the jury further on some of the points complained of, but failed to mention this. The omission of the limitation in the original charge was doubtless an inadvertence; and the failure to correct the instruction in the supplemental charge can easily be accounted for by the multiplicity of the exceptions taken. In view of the nature of the error made, and of the burden imposed upon the court by the course taken, which cannot well be claimed to have been essential to the protection of the defendants' rights, we think the court was entitled to something further in the way of statement or reminder.

[20] The defendants filed a motion in arrest of judgment on the ground that there was a misjoinder of counts. There was evidence in the case applicable to all the counts. While plaintiff was putting in his opening case, he obtained leave to amend the declaration by striking out the fifth additional count. He never obtained permission to amend by striking out the first four additional counts, unless such permission can be inferred from what was said by the court during a discussion had by counsel. Plaintiff's counsel stated that they did not and should not claim to recover under these counts; but there was no formal withdrawal of them, and no striking out in terms. The case was submitted to the jury solely on the original *quare clausum* counts; but the jury were not informed that the first four additional counts could not be made the basis of recovery. If these counts are to be treated as remaining in the declaration, the case is within the decision in *Rowley v. Shepardson*, 83 Vt. 167, 74 Atl. 1002, 138 Am. St. Rep. 1078, which is relied upon by defendants.

While the defense was going in, plaintiff's counsel said they should not claim to recover under the *de bonis* and *trover* counts; and defendants' counsel said, "That is equivalent to striking those counts out, is it?" and plaintiff's counsel replied, "I don't understand they will stay in as a basis of recovery." Defendants' counsel then asked the court to indicate whether this course would be permitted, and the court said its understanding

was that, at any time before the close of the trial, the plaintiff could waive recovery under any of the counts, whereupon defendants' counsel said, "And you now waive that? That's the construction as I understand it;" and the court remarked, "That is what they said." Later in the trial, defendants' counsel said to the court: "The plaintiff having spread upon the record the fact that they claim no recovery under their *trover* and *de bonis* counts, we move for judgment, because there is no answer to our fourth and fifth pleas, which relate to the original cause of action. Therefore there is no issue here whatever. * * *" In taking this position, defendants' counsel treated the remaining four additional counts as no longer in the declaration; and the defendants cannot now take advantage of the fact that the counts were not formally and in terms stricken out.

Defendants' counsel, before taking up their brief, referred to the great number of points made in it, and orally indicated certain subjects to which the attention of the court might be confined. A number of points briefed are left without consideration; some because not included in the subjects named, and some because sufficiently disposed of by the views expressed on other points.

Judgment affirmed.

DUNHAM v. DESLANDES.

(Supreme Court of Rhode Island. Feb. 21, 1913.)

1. JUDGMENT (§ 144*)—DEFAULT JUDGMENT—OPENING—FALSITY OF AFFIDAVIT FOR SCIRE FACIAS.

Where judgment was rendered against defendant by default on writ of *scire facias*, falsity of the affidavit on which the writ was granted would not, of itself, be sufficient to entitle defendant to a trial on the merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 255; Dec. Dig. § 144.*]

2. JUDGMENT (§ 143*)—DEFAULT—VACATION—GROUNDS—"ACCIDENT, MISTAKE, OR UNFORESEEN CAUSE."

Defendant, after judgment by default on a writ of *scire facias*, applied for a new trial, alleging generally that he had a good defense; that the affidavit on which the writ was granted was false; that the attorney he had employed to defend failed to do so, which the attorney denied. *Held*, insufficient to show that the default was the result of accident, mistake, or unforeseen cause, so as to justify the granting of a trial on the merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. § 143.*]

Action by Fred E. Dunham against Damase Deslandes. On defendant's petition for a trial after judgment by default on a writ of *scire facias*. Petition denied and dismissed.

Frederick C. Olney, of Wakefield, for plaintiff. Irving Champlin and Joseph J. Cunningham, both of Providence, for defendant.

PER CURIAM. [1] The defendant, after judgment against him by default on a writ of *scire facias*, petitions for a trial, on the grounds that the affidavit attached to said writ, and by virtue of which he was arrested, was false, and that he employed an attorney to answer the action and defend him, and that said attorney failed to do so. He states that he has a good defense to the action, but does not state what it is. The question of the lawfulness of the arrest could have been raised by motion to discharge from arrest. After judgment, we think the falsity of the affidavit, if established, would not, by itself, be a ground for the granting of a trial upon the merits of the case. The petitioner makes affidavit that he retained an attorney, and this the attorney denies.

[2] We have considered all the affidavits and the testimony offered, and are of the opinion that they do not disclose a case of accident, mistake, or unforeseen cause which justifies the granting of a trial.

The petition is denied and dismissed.

KENDALL v. ROSSI et ux.

(Supreme Court of Rhode Island. Feb. 20, 1913.)

1. APPEAL AND ERROR (§ 422*)—NOTICE OF INTENT TO PROSECUTE EXCEPTIONS—SUFFICIENCY.

In an action against a husband and wife, represented at the trial by the same attorney, where all the evidence was equally applicable to both, and all of the exceptions taken on behalf of both, a notice of intention to prosecute the exceptions, reciting that "the defendant" excepted to the decision and gave notice of "his intention" to prosecute a bill of exceptions, was amendable, the use of the singular number being apparently a mere inadvertence or clerical error, and was cured by the bill of exceptions filed on behalf of both defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2149; Dec. Dig. § 422.*]

2. EXCEPTIONS, BILL OF (§ 55*)—PROCEEDINGS TO ESTABLISH EXCEPTIONS.

Where a petition to establish the truth of defendant's exceptions and the correctness of the transcript was supported by affidavits, and nothing was shown to the contrary, it will be granted.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 90-93; Dec. Dig. § 55.*]

Action by H. H. Kendall against Luigi Rossi and wife. Verdict for plaintiff, and defendants bring exceptions. On petition by defendants to establish the truth of their exceptions and the correctness of the transcript. Petition granted.

Barney & Lee, of Providence (Arthur E. Munro, of Providence, of counsel), for plaintiff. Bassett & Raymond, of Providence (R. W. Richmond, of Providence, of counsel), for defendants.

PER CURIAM. This is defendants' petition to establish the truth of exceptions and

the correctness of the transcript of testimony in a suit at law wherein the justice of the superior court who tried the case failed to allow the bill of exceptions and the transcript of testimony within the statutory period, after the same had been duly filed and presented to him for allowance.

[1] The plaintiff objects to the granting of this petition to establish the truth of the exceptions and the correctness of the transcript, on the ground that the notice of intention to prosecute exceptions is filed in the name of only the defendant Luigi Rossi while there were two defendants to the suit, namely, Luigi Rossi and Madalena Rossi, his wife, claiming that the said notice so filed is insufficient.

We are of the opinion that this objection is not well taken. It is true that the notice of intention to prosecute is in the singular number, using the words "the defendant comes into court, and hereby excepts to said decision, and hereby gives notice of his intention to prosecute a bill of exceptions," etc., and is signed "by his attorneys"; but the defendants were sued together as indorsers or joint makers on a promissory note, and all the evidence in the case was equally applicable to both. Both defendants were represented by the same attorney at the trial, and all of the exceptions were taken on behalf of both defendants, and we think it was a mere inadvertence or clerical error in filling out the notice that the singular number, "the defendant," was used instead of the plural. As the notice stands, not using the name of either defendant, it is applicable to either defendant, and, under our liberal practice regarding amendments, we think it may be amended so as to apply to both defendants; and, inasmuch as the bill of exceptions is filed on behalf of both defendants, we are of the opinion that it shows the intention of both defendants to prosecute exceptions, and that it is sufficient.

The law with regard to construction of statutes (Gen. Laws 1909, c. 32, §§ 2 and 3), permitting "every word importing the masculine gender only" to be "construed to extend to and include females as well as males," and "every word importing the singular number only" to be "construed to extend to and include the plural number also," may be cited as showing the liberality with which our Legislature intends words to be construed, so as to make statutes effectual to accomplish their manifest purpose; and we are of the opinion that we should so construe the notice here in question, or allow it to be so amended as to serve the manifest intention of the defendants to prosecute the exceptions actually taken on behalf of both defendants.

[2] As the petition to establish the truth of the exceptions and the correctness of the transcript is duly supported by affidavits

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

and nothing appears to the contrary, the petition is granted; and it is ordered that the papers in the case be transmitted to this court, in order that the defendants may be heard upon their bill of exceptions.

HARRIS v. SPRING.

(Supreme Court of Rhode Island. Feb. 20, 1913.)

MORTGAGES (§ 357*) — FORECLOSURE—SALE—ADJOURNMENT—AUTHORITY OF MORTGAGEE—PRESENCE OF AUCTIONEER.

Where a mortgage provided that the mortgagee had full power to continue or adjourn a sale from time to time, the mortgagee had power to adjourn a sale by giving notice, though the auctioneer was not present, especially when the only bidder who was present at the first sale attended the adjourned sale and purchased the property.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1070, 1071; Dec. Dig. § 357.*]

Appeal from Superior Court, Kent County; Willard B. Tanner, Presiding Justice.

Action by Charles A. Harris against Ellen E. Spring. From a decree dismissing the bill, complainant appeals. Affirmed.

Arthur Cushing, William F. Carroll, and James F. McCartin, all of Providence, for appellant. Erwin J. France, of Woonsocket, for respondent.

PER CURIAM. The only point raised and argued by the complainant upon his appeal in this case is that on the 10th day of April, 1906, the premises in question having been duly advertised for sale on that date, under a mortgage held by Mary J. Gilbane for \$500, the sale was postponed to April 24, 1906, but that there was no legal adjournment of the sale to that date, because no auctioneer was present, and therefore no legal adjournment could be taken in the absence of the auctioneer, and the appellant therefore claims that the sale on April 24, 1906, was illegal and void.

But the evidence shows that on April 10, 1906, Henrietta Harris, Mary J. Gilbane, the mortgagee, and the clerk of Mrs. Gilbane, were the only persons present at the time and place as advertised for the sale, and no auctioneer was present; that at said time Mrs. Gilbane, the mortgagee, notified Henrietta Harris, who was the only bidder present, that the sale was postponed; but Mrs. Harris does not remember that Mrs. Gilbane told her that it was postponed to a definite date. It does appear, however, that an adjournment of the sale was duly advertised for April 24, 1906, that Mrs. Harris saw this advertised notice, and was present on April 24th, and bought at the sale then held.

There is nothing in the claim urged by the

appellant that the sale was not lawfully adjourned to April 24, 1906. It was not necessary that the auctioneer be present to adjourn the sale, because by the terms of the mortgage it is expressly provided that the mortgagee has "full power to continue or adjourn such sale from time to time." The mortgagee exercised this power, and due notice of the time to which the sale was adjourned was given to the only bidder present, so that she attended the adjourned sale and was the bidder and purchaser at the sale. There was no error in the decree of the superior court dismissing the bill.

The appeal is dismissed, the decree of the superior court dismissing the bill, entered on the 25th day of April, 1912, is affirmed, and the cause is remanded to the superior court, sitting within and for the county of Kent, for further proceedings.

PROVIDENCE INST. FOR SAVINGS v. WALLACE et al.

(Supreme Court of Rhode Island. Feb. 20, 1913.)

GIFTS (§ 49*)—GIFTS INTER VIVOS—EVIDENCE—SUFFICIENCY.

There could be no finding of a gift of a savings bank deposit by decedent, where the evidence did not show that he ever intended to make a gift, and it appeared that he always retained the passbook in his possession down to the time of his death.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.*]

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Bill by the Providence Institution for Savings against Sarah C. Wallace and another. From the decree, respondent Ellen A. McBride appeals. Appeal dismissed, decree affirmed, and case remanded.

Cooney & Cahill, of Providence, for appellant. Tillinghast & Collins, of Providence, for respondent Providence Inst. for Savings. Simon S. Lapham, of Providence, for respondent Wallace.

PER CURIAM. The evidence does not show that the deceased, Michael A. Wallace, ever intended to make a gift of the deposit in the complainant's bank to Annie M. L. Purcell, or that in fact any completed gift was ever made; he having always retained the passbook in his own possession down to the time of his death. We find no error in the decree of the superior court entered May 8, 1912.

The appeal is dismissed, the decree of the superior court is affirmed, and the case is remanded to the superior court for further proceedings.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

BLOMEN et al. v. N. BARSTOW CO.**FREDERICKSON v. SAME.**

(Supreme Court of Rhode Island. Feb. 20, 1913.)

1. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS—CONCLUSIVENESS.

On appeal from a decree, the trial judge's findings are entitled to great weight.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

2. NUISANCE (§ 33*)—DISTURBING NOISES AND JARRING—EVIDENCE—SUFFICIENCY.

On bills to enjoin a manufacturer from operating drop hammers, evidence held to sustain findings that the operation of the hammers disturbed the comfort of neighbors through producing noises, jarring, etc.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 84-89; Dec. Dig. § 33.*]

3. NUISANCE (§ 19*)—PRIVATE NUISANCE—RIGHT TO ENJOIN.

Persons residing in a residence neighborhood are entitled to enjoin a nearby manufacturer from operating drop hammers in such manner as to constitute a nuisance by producing disturbing noises, jarring, etc.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 55; Dec. Dig. § 19.*]

4. NUISANCE (§ 3*)—PRIVATE "NUISANCE"—USE OF PROPERTY—RIGHT TO ENJOIN.

One must use his property so as not to injure another's or interfere with the reasonable and proper enjoyment thereof, and the carrying on of a business which creates noisome smells or noxious vapors, or causes great and disturbing noises, jarring, or vibrations, which injuriously affect property in the vicinity, or render the occupation thereof inconvenient or uncomfortable, is a nuisance for which a person whose property or health is injured, or whose reasonable enjoyment of his estate as a place of residence is impaired or destroyed, may sue for the injury; and in such case a court of equity may enjoin the continuance of the nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 4, 5, 9-25; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4855-4864; vol. 8, p. 7734.]

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Bill by Gustav Blomen and others, and bill by Carin Frederickson, against the N. Barstow Company. Decrees for complainants, and defendant appeals. Appeals dismissed, decree affirmed, and cause remanded.

Littlefield & Barrows, of Providence, for appellant. Thomas A. Carroll and Walter P. Suesman, both of Providence, for appellees.

JOHNSON, O. J. These two bills in equity are brought by the complainants to restrain the respondent from operating a drop or hammer, weighing 500 pounds, and from operating several smaller hammers, two of which weigh 250 pounds each, and a gas generator, used by the respondent in its business of manufacturing jewelry, and contained in its large brick factory building located on the corner of Public and Temple streets

in the city of Providence. The complainant Carin Frederickson is the owner of a lot of land, with a dwelling house thereon, situated on the easterly side of Temple street, a short distance south of Public street. The complainants Blomen are the owners of a lot of land, with a dwelling house thereon, situated on said easterly side of Temple street, and bounding northerly on said Frederickson land. These houses were built before the respondent purchased the land immediately north of said Frederickson land, and erected a jewelry shop thereon. In the Temple street end of this factory, respondent erected five drop hammers, weighing respectively 500 pounds, 250 pounds, 100 pounds, and two 50 pounds each. All of these drop hammers are located just northerly of the Frederickson house.

The bills allege that the operation of said drops or hammers causes noise and vibration, which destroy the comfortable enjoyment of the property of said complainants. These allegations are denied by the respondent, which admits that a slight noise and jar of the complainants' property is caused by the operation of the 500-pound hammer, but denies that the noise and jar so caused is excessive or so great as to destroy or seriously impair the comfortable enjoyment of the complainants' property. The respondent also denies that the operation of the small hammers and of the gas generator causes any disturbing noise or any perceptible jar of the complainants' property.

The causes were heard together by the presiding justice of the superior court. The evidence showed that from September, 1911, until Christmas, 1911, the factory and these hammers were operated until 9 o'clock in the evening. Since that time, the factory has been running in the daytime only. When the 500-pound hammer is in operation, it drops about two or three times a minute, from a height of 2 feet, 8 or 9 inches. Complainants' witnesses testified that the operation of the 500-pound hammer jarred the Frederickson and Blomen houses. Mrs. Frederickson says it jars the house; it is a severe shake. Mr. Thomasson, one of Mrs. Frederickson's tenants, says he feels a perceptible jar to the premises. George E. Smith, another of Mrs. Frederickson's tenants, says it make the whole place tremble and vibrate. Mr. Anderson, one of Mr. Blomen's tenants, says there is a steady jar and shock. Mrs. Anderson, his wife, says there is a jarring of the house every time the hammer strikes. Mr. Lauigan, another of Mr. Blomen's tenants, says it shakes and vibrates and jars the house. Mrs. Lauigan, his wife, says it jars the house. These witnesses testify that this jarring and vibration is heavy enough to rattle the dishes, to swing a door open, to move a flatiron on a shelf, to rattle the windows, and to shake a

paper when reading. The complainants had other witnesses who did not testify; it being admitted by respondent's counsel that they would testify substantially the same in regard to the concussion. George E. Smith, one of Mrs. Frederickson's tenants, says it is so bothersome and disturbing there that he has made up his mind to leave just as soon as he can. Mr. Thomasson, another of Mrs. Frederickson's tenants, says his tenement is not so desirable as it was, and that he is going to get out of there as soon as he gets straightened out, unless the thing is stopped. Mrs. Anderson, who lives in the Blomen house, says that, owing to the disturbance and vibration from respondent's factory, she and her husband are going to move just as soon as they can find a house. John F. O'Rourke, one of respondent's witnesses, says he is in the real estate business, and that the factory has depreciated the value of Mrs. Frederickson's house to the extent of \$1,500. The respondent's witnesses testify that a slight vibration could be felt in the Frederickson yard; that there was a jar or jolt in the Frederickson yard, and slight vibration and concussion in the Blomen yard just south of the former, and farther away from the factory; that a tremor of the ground could be slightly felt in the third yard; and that a very slight vibration could be felt at 239 Public street.

The court took a view of the premises, and, after hearing further testimony, announced his decision wherein he says he would not grant the preliminary injunction if he had not a very clear opinion of the case; that he is satisfied the heavy drop is something unendurable to the people in the immediate vicinity; that the vibration and noise are very great, very disturbing, startling, jarring, not only extremely uncomfortable, but necessarily injurious to the nervous system of the people who are near enough to it; that, as to the Frederickson and Blomen houses, he is of the very clear opinion that the noise is unendurable, and that the preliminary injunction ought to be granted. At the request of counsel for respondent, the court consented to modify the decrees so as to allow respondent to use the 500-pound hammer for four hours a day; but the court wished it to be understood that he did not intend the modification to be permanent; that he made the modification simply during the pendency of the appeal; and that, in his opinion, the 500-pound hammer should be stopped entirely.

Decrees for a preliminary injunction were entered in each case, as advised by the court, temporarily restraining the respondent from further operating said 500-pound hammer; but with the modification that, during the pendency of this appeal, the respondent might operate the 500-pound drop, but only for four hours a day. The respondent appealed from these decrees, and

filed the same reasons of appeal in each case.

These reasons of appeal are as follows: First, that said decree is against the evidence and the weight thereof; second, that said decree is against the law; third, that said decree is against the rights of the respondent as disclosed by the pleadings and proved; fourth, that said court erred in finding and decreeing that the operation of said power drop or hammer, as operated by the respondent, is a nuisance; fifth, that said court erred in finding that said decree should be without any modification and absolute.

[1,2] The findings of fact by the trial judge are entitled to great weight. He heard and saw the witnesses on the stand, and besides he took a view of the premises when the 500-pound drop was in operation, and personally observed its effect upon the houses of the complainants. From our examination of the evidence, we are satisfied that his findings of fact are justified.

[3] It remains, therefore, to consider whether his application of the law to the facts, as found, was correct. If the injury complained of amounts to a nuisance, and a continuing one, the appropriate remedy is by a bill for an injunction. In *Tipping v. St. Helen Smelting Co.*, 4 Best & S. 608, the principle was largely discussed, and the judgment at nisi prius and in banc was affirmed in the Exchequer Chamber, 4 Best & S. 615, and upon appeal, by the House of Lords, 11 H. L. Cas. 642. That was an action for an injury to the plaintiff's dwelling house, caused by noxious vapors proceeding from defendant's smelting works. The judge, at nisi prius, laid down the law thus: "That in an action for nuisance to property by noxious vapors arising from the land of another, the injury, to be actionable, must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it."

In *Crump v. Lambert*, L. R. 3 Eq. Cas. 409, Lord Romilly said: "With respect to the question of law, I consider it to be established, by numerous decisions, that smoke, unaccompanied with noise or noxious vapor, that noise alone, that offensive vapors alone, although not injurious to health, may severally constitute a nuisance to the owner of neighboring or adjoining property. That, if they do so, substantial damages may be recovered at law, and that this court, if applied to, will restrain the continuance of the nuisance by injunction in all cases where substantial damages could be recovered at law." In that case the injury resulted from a combination of smoke, noxious vapors, and noise, which proceeded from the defendant's works adjoining the plaintiff's houses, where he carried on the business of manufacturing iron bedsteads. Other cases in the same line are *Elliotson v. Feetham*, 2 Bing. (N. C.) 134; *Soltau v. De Held*, 2 Sim. (N. S.) 133; *Inchbald v. Barington*, L. R. 4 Ch. App. 338; *Ball v. Ray*, L. R. 8 Ch. App. 467.

In *Fish v. Dodge*, 4 Denio (N. Y.) 311, at page 316 (47 Am. Dec. 254), which was for a nuisance by noise and dust from a steam boiler factory adjoining the plaintiff's dwelling house, the Supreme Court of New York, by Bronson, C. J., says: "It is a rule of the common law that a man should so use his own as not to hurt another; and therefore, if one carry on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages. * * * It is not necessary to a right of action that the owner should have been driven from his dwelling; it is enough that the enjoyment of life and property has been rendered uncomfortable. * * * Although the manufacturing of steam engine boilers is a lawful business, it was carried on in such a manner in this case as to make it a great annoyance to the plaintiff; and she is undoubtedly entitled to redress by action."

In *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659, the action was for both damages and an injunction under the New York Code; and the trial judge found that the action of the defendant's machinery, used to saw marble, produced a jarring and shaking of complainant's two houses, injuring the same, and amounting to a nuisance (the degree of vibration was not stated), and gave judgment for \$967, apparently for loss of rent, with an award of an injunction. The general term of the Supreme Court struck out the judgment for damages, but made the injunction perpetual. The Court of Appeals affirmed this judgment.

Campbell v. Seaman, 63 N. Y. 568, at page 576 (20 Am. Rep. 567), was an action for a nuisance resulting from a process used by the defendant in burning bricks upon his land, by which noxious gases were generated, which, borne by the winds upon the adjacent lands of his neighbor, injured and destroyed his trees and vegetation. Earl, J., said: "It is a general rule that every person may exercise exclusive dominion over his own property, and subject it to such uses as will best subserve his private interests. Generally no other person can say how he shall use or what he shall do with his property. But this general right of property has its exceptions and qualifications. 'Sic utere tuo ut alienum non ledas' is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. Such a rule could not be enforced in civilized society. Persons living in organized communities must suffer some damage, annoyance, and inconvenience from each other. For these they are compensated by all the advantages of civilized society. If one lives in the city, he must expect to suffer the dirt, smoke, noisome odors, noise, and confusion incident to city life. * * * But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he make

an unreasonable, unwarrantable, or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort, or hurt to his neighbor, he will be guilty of a nuisance to his neighbor. And the law will hold him responsible for the consequent damage. As to what is a reasonable use of one's own property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality, and under some circumstances, may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable, and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient."

The principle is also sustained by the Supreme Judicial Court of Massachusetts in *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95, 90 Am. Dec. 181, and by the Supreme Court of Maine in *Barnes v. Hathorn*, 54 Me. 124. In *Davidson v. Isham*, 9 N. J. Eq. 189, Chancellor Williamson held that: "It is not necessary that the smell should be unwholesome, it is enough that it renders the enjoyment of life and property uncomfortable." And again: "The authorities are abundant to sustain the position that an individual cannot erect, in a densely settled portion of a city or town, occupied by private dwellings, any kind of manufacturing establishments, and so use the machinery and carry on the business as to render living in the neighborhood uncomfortable, either on account of the noise it occasions or of its smoke and offensive smells."

In *Ross v. Butler*, 19 N. J. Eq. 294, at page 298 (97 Am. Dec. 654), Chancellor Zabriskie says: "The first question is whether the large volume of dense smoke, issuing from this factory upon the premises, and penetrating the dwellings of the complainants, is such a nuisance as will be restrained by this court. The business is a lawful one; there can be no pretense that it is injurious to health; and it is a question of great practical importance in this state, where manufactures flourish and are on the increase, whether such business can be permitted in the neighborhood of dwelling houses, where the smoke and cinders render the houses uncomfortable to the inhabitants. Smoke, noise, or bad odors, even when not injurious to health, may render a dwelling very uncomfortable, so as to drive from it any one not compelled by poverty to remain. If the citizen has no protection against such annoyances, the comfort and value of his home can be destroyed by any one that may choose to erect such annoyance near it, and no one, not rich enough to buy all the land around him from which he could be so annoyed, could be safe. The law takes care that lawful and useful business shall not be put a stop to on account of every trifling or imaginary

annoyance, such as may offend the taste or disturb the nerves of a fastidious or over-refined person. But, on the other hand, it does not allow any one, whatever his circumstances or condition may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business, carried on in his vicinity. The maxim, "sic utere tuo ut alienum non laedas," expresses the well-established doctrine of the law."

In *Hennessey v. Carmony*, 50 N. J. Eq. 616, at page 630, 25 Atl. 374, at page 381, decided in 1892, the facts were quite similar to the facts in the case at bar. That was a bill for an injunction to restrain the jarring and shaking of complainant's house, caused by the operation of two centrifugal machines or "whizzers," immediately in the rear of complainant's land. The injunction was granted. Pitney, V. C., says: "The result of careful review of the evidence upon my mind is to lead me to the conclusion that the degree of injury is such as to entitle the complainant to damages in an action at law, with the result that he is entitled to an injunction in this court. The injury, to be actionable, must be sensible and appreciable, as distinguished from one merely fanciful; and in a case like this I assume, for present purposes, that it must have the effect of rendering the premises less desirable, and so less valuable for ordinary use and occupation. Now, it seems to me that a vibration that causes the windows and doors of a house to rattle in their casings, and dishes on the shelves to rattle and move on one another, and the walls to crack, and is distinctly felt by persons in the house, would have such effect, and is therefore actionable."

In *Hurlburt v. McKone*, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17, there was a vibration of the same character and degree, as near as may be, as that shown in this case; the windows rattled in the casings, dishes and other like things standing on the table or shelves shook and jolted together. There was, however, in that case, an additional element of dense smoke, and there was proof that the health of the plaintiff and his family had been injured. The court gave judgment for the plaintiff, and assessed damages, but, in view of a change made by the defendants in the mode of operating their works, held that an injunction was not necessary. The judgment was affirmed.

In *Dittman v. Repp*, 50 Md. 516, at page 523 (33 Am. Rep. 325), the court says: "Here, superadded to the mere noise made by the operation of the machinery, it is alleged that the working of the engine or pump produces strong vibratory and jarring motions, which shake the complainant's house and render it unfit and unsafe for habitation. Such state of things, if true, clearly amount to a nuisance, such as will give a right of action at law, or a court of equity will restrain. *Scott v. Firth*, 4 Fost. & Fin. 349. We shall there-

fore affirm the order granting the injunction."

Complainants' houses are not situated in a manufacturing neighborhood. There is no factory on Temple street, except that of the respondents, and no other factory in the immediate vicinity, except one owned by the Seamless Wire Company, which owns the land lying to the east of complainants' lands. But the Seamless Wire Company's shop is on Eddy street. There are no drop hammers in the Seamless Wire Company's shop, and that shop causes no inconvenience. The factory of the Metal Products Corporation is on Thurbers avenue, which is quite a distance from complainants' houses. The most favorable view for the respondent of the testimony on this point is, not that complainants' houses are in a manufacturing neighborhood, but that, within a radius of a quarter of a mile, it is becoming a manufacturing neighborhood.

In *Ross v. Butler*, 19 N. J. Eq. at page 305 (97 Am. Dec. 654), supra, the language of Chancellor Zabriskie is: "I find no authority that will warrant the position that the part of a town which is occupied by tradesmen and mechanics for residences and carrying on their trades and business, and which contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious, is a proper and convenient place for carrying on business, which renders the dwellings there uncomfortable to the owners and their families by offensive smells, smoke, cinders, or intolerable noises, even if the inhabitants are themselves artisans, who work at trades occasioning some degree of noise, smoke, and cinders. Some parts of a town may, by lapse of time, or prescription, by the continuance of a number of factories long enough to have a right as against every one, be so dedicated to smells, smoke, noise, and dust that an additional factory, which adds a little to the common evil, would not be considered at law a nuisance, or be restrained in equity. There is no principle in law, or the reasons on which its rules are founded, which should give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer, and their families, the fewer and more restricted comforts which they enjoy."

The respondent introduced some testimony to show that the foundation of the drops had been designed with a view to minimize the jar and vibration as much as possible. But the question here is a question of nuisance, not of negligence. It is true the respondent may make a reasonable use of its property; but no use of its property is reasonable, if it results in a nuisance to complainants. In *Atty. Gen. v. Cole & Son* (1901) 1 Ch. 205, at page 207, which was an action to restrain a public nuisance, an injunction was granted against a fat melter who allowed noxious gases to escape from his premises. *Keke-wich, J.*, in his opinion says: "Mr. Cole

erected this building some time ago to carry on a lawful trade, and he has been anxious to do everything he possibly could to prevent his trade from being an injury to his neighbors. It is conducted in a perfectly decent and proper way. From his point of view, he is a reasonable man; but, from the point of view which I have laid down, he is not acting reasonably if he commits a nuisance."

Respondent's counsel argue that the granting of an injunction in such cases is within the discretion of the court, and that it will not be granted where it will be inequitable between the parties, or will work detriment to the public, or will involve damage to the defendants, engaged in a lawful business, disproportionate to the damage to the complainant from the continuance of the alleged nuisance. Such an argument was made in *Broadbent v. Imperial Gas Co.*, 7 De G., M. & G. 436, at page 462. The complaint was that vegetables, growing in the market garden of the complainant, were injured by the gas of that company, and the argument was pressed that this injury was slight in comparison with the benefits conferred by the company on the public, and that on that account the court would not exercise its power to restrain the manufacture of gas. Lord Cranworth says: "If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on." He further remarks: "But unless the company had such a right, I think the present is not a case in which this court can go into the question of convenience or inconvenience, and say, where a party is substantially damaged, that he is only to be compensated by bringing an action toties quoties. That would be a disgraceful state of the law and I quite agree with the vice chancellor in holding that in such a case this court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplies with gas." This case was affirmed on appeal, L. R. (7 H. L. Cas.) 601.

In *Higgins v. Water Co.*, 36 N. J. Eq. 538, the court says: "If this water company is doing a legal wrong, injurious to the complainant, such wrongful conduct must, if persisted in, either now or hereafter, be restrained in equity. After the rights of these parties have been settled in this court, suits at law, founded in this diversion of this stream, would be mere assessments of damages. Judgments in such actions, as a matter of course, must pass in favor of the complainants. To be prohibited therefore, from

doing the wrongful act, which must lead to such results, cannot be regarded, with respect to the defendant, as anything inequitable. Nor, under such circumstances, can a court of equity rightly withhold its hand on the ground of any supposed inconvenience to those who are the customers of this company."

In *Hennessey v. Carmony*, supra, Pitney, V. C., after citing the last-mentioned case, said: "And I desire here for myself to say that I have never been able to see how the question of the right of the complainant to an injunction on final hearing could ever be a matter properly resting in the 'discretion' of the chancellor, as I understand the force of that word in that connection. If by 'discretion' is here meant that the judge must be discreet, and must act with discretion, and discriminate, and take into consideration and give weight to each circumstance in the case, in accordance with its actual value in a court of equity, then I say that that is just what he must do in every case that comes under his consideration, no more and no less. * * * But if the word 'discretion,' in this connection, is used in its secondary sense, and by it is meant that the chancellor has the liberty and power of acting, in finally settling property rights, at his discretion, without the restraint of the legal and equitable rules governing those rights, then I deny such power. It seems to me that the true scope of the exercise of this latter sort of discretion in the judicial field is found in those matters which affect procedure merely, and not the ultimate right."

[4] The rule of law is well settled that every person is bound to use his property so as not to injure that of another, or interfere with the reasonable and proper enjoyment thereof; and that the carrying on of a business, which creates noisome smells, or noxious vapors, or causes great and disturbing noises, jarring, or vibrations, which affect injuriously property in the vicinity or render the occupation thereof inconvenient and uncomfortable, is a nuisance for which a person whose property is damaged, or whose health is injured, or whose reasonable enjoyment of his estate, as a place of residence, is impaired or destroyed thereby, may maintain an action to recover compensation for the injury, and that in such case a court of equity will restrain the continuance of the nuisance by injunction.

We are of the opinion that, upon the allegations and the proof, the preliminary injunction was in each case probably granted. In each case, therefore, the appeal is dismissed, the decree below is affirmed, and the cause is remanded to the superior court for further proceedings.

SAYLES v. STEERE et al.

(Supreme Court of Rhode Island. March 1, 1913.)

EXECUTORS AND ADMINISTRATORS (§ 35*)—REMOVAL.

In order to have an administrator removed, petitioner must show some improper acts or neglect of duty, and cannot have him removed merely by showing that he was unfit for appointment in the first instance, and that petitioner should have been appointed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 227-262; Dec. Dig. § 35.*]

Exceptions from Superior Court, Providence and Bristol Counties; Elmer J. Rathbun, Judge.

Action by Laura M. Sayles against Varnum Steere, Administrator, and others. Verdict for defendant administrator, and petitioner excepts. Exceptions overruled, and case remitted for decree on verdict.

See, also, 83 Atl. 83.

Frank L. Hanley, of Providence, for appellant. Tillinghast & Collins, of Providence, for Varnum Steere.

PER CURIAM. This is an appeal by Laura M. Sayles from a decree of the probate court of Burrillville dismissing the appellant's petition for the removal of the appellee, Varnum Steere, as administrator of the estate of Elliott S. Sayles, and for the reappointment of herself as administratrix. The appeal was heard in the superior court, and a verdict was rendered for the appellee, by direction of the court. The case is now before this court on exceptions to the direction of a verdict, and to rulings of the trial justice excluding evidence. The appellant having informed the court, through her brief and by the statement of counsel, that she relies entirely upon her fifth exception, which is to the ruling of the trial judge in directing a verdict, the other exceptions of the appellant will not be considered.

The appellant is the daughter of Elliott S. Sayles, who died August 14, 1904. She was appointed administratrix of her father's estate by the probate court of the town of Burrillville, and gave bond as such administratrix, as required by said court. Later the surety on her bond petitioned for release. This petition for release was granted, and the appellant was ordered to file a new bond, with satisfactory surety, within a certain time; and, failing so to do, she was removed as such administratrix by said court by decree entered on May 29, 1909. On June 26, 1909, the appellee, Varnum Steere, was appointed by said court administrator in place of the appellant, by a decree duly entered. From this last-mentioned decree no appeal was taken.

Subsequently the appellant filed in said probate court her petition asking for the removal of the said Varnum Steere, as ad-

ministrator as aforesaid, and for the appointment of herself in his place. This petition of the appellant was dismissed by decree of said probate court, entered January 28, 1911; and from such decree the appellant appealed to the superior court, where she later claimed a jury trial.

The grounds of the appellant's petition, to the probate court of Burrillville, for the removal of Varnum Steere as administrator are: (1) That the said Steere is unfit and unsuitable to administer said estate; (2) that he is not entitled by law to administer or to occupy the position of administrator; (3) that she (the appellant) is entitled by law to administer; (4) that she (the appellant) was removed as administratrix solely for the reason that she failed to file a bond as ordered; (5) that she (the appellant) is now ready and willing to give bond and will furnish same upon her reappointment; (6) that appellant had no notice of the pendency of the petition for the appointment of Steere as administrator; and (7) that the estate of Elliott S. Sayles consists of one undivided eighth part of what is known as the Pascoag Mills, said mills being claimed and operated by Fred A. and Albert L. Sayles, and, the appellant, while administratrix, having brought suit against the said Sayles to recover said estate, the said Varnum Steere, being friendly with the said Sayles and unfriendly to the appellant, will not act for the best interests of the estate.

Following the jury trial and a verdict for the appellee in the superior court, the appellant filed her bill of exceptions. The fifth exception, and the only one which we are asked to consider, is as follows: "To the rulings of said justice, at the trial of said cause, in directing the jury to return a verdict in favor of the appellee," etc.

The appellant, as appears both from her petition to the probate court of Burrillville and her reasons of appeal filed in the superior court, is seeking to bring about the removal of Varnum Steere as administrator, and her reappointment as administratrix upon her father's estate. In order to effect such desired change, it would be incumbent upon her, in the first instance, to present satisfactory testimony that the conduct of Varnum Steere, since his appointment, has been such as would justify the court in removing him and appointing somebody in his place. She must necessarily show some improper acts upon the part of Steere as administrator, or the neglect of some duty which his appointment imposes. On the contrary, the appellant has undertaken to show that Varnum Steere was unfit and unsuitable to be appointed as administrator upon her father's estate, and that she was by law entitled to such appointment herself. These matters cannot be inquired about in this proceeding. If she had desired to contest the appoint-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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ment of Steere as administrator, she should have taken an appeal from the decree of the probate court appointing him, which she failed to do. We do not think that it is competent for the appellant to raise any question, upon this appeal, as to the original fitness, or suitability of Varnum Steere to administer the estate. The record does not disclose that any testimony was offered regarding the unfitness or unsuitableness of Steere, based upon any acts or omissions of duty subsequent to his appointment. The appellant claims, however, that Steere, owing to his friendliness to the said Fred A. and Albert L. Sayles and his unfriendliness to her, has failed to act for the best interests of the estate in not prosecuting a suit for the recovery of some interest in the Pascoag Mills property, which had been commenced by her prior to her removal as administratrix. Taking into consideration the various proceedings brought against the appellee since his appointment, the fact that the interest in the mill property is heavily mortgaged and in possession of the mortgagee, and that he has no funds in his hands as administrator with which to prosecute a suit, we cannot say that Steere has been guilty of any omission, in the discharge of his duty, which would justify his removal.

The appellant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter its decree on the verdict.

CAMPBELL v. CAMPBELL et al.

(Supreme Court of Rhode Island. Feb. 26, 1913.)

1. INSANE PERSONS (§ 77*)—BILLS AND NOTES—KNOWLEDGE OF INSANITY.

In an action on a note made by an insane person, the plaintiff cannot recover on the ground that he was ignorant of the fact of the maker's insanity, and that the dealings were fair.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 131; Dec. Dig. § 77.*]

2. INSANE PERSONS (§ 99*)—ESTATES—CLAIMS—BILLS AND NOTES.

Where, in an action to enforce a claim against an insane person's estate on a promissory note, the defenses were lack of consideration and insanity of the maker, and a great amount of conflicting evidence was introduced on both issues, the refusal of a requested instruction that, even if the maker was found to have been insane, the plaintiff should recover a reasonable compensation for services rendered and for money loaned, for which the note was given, was error; it not being a different claim, since the promissory note was only evidence of the debt.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 175-178; Dec. Dig. § 99.*]

Exceptions from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

Proceedings by Elisha J. Campbell against George E. Campbell and others, commission-

ers upon the insolvent estate of James Campbell. Judgment for defendants, and plaintiff excepts. Reversed.

See, also, 83 Atl. 325.

James A. Williams, of Providence, for appellant. Irving Champlin, James Harris, and John S. Murdock, all of Providence, for appellees.

PARKHURST, J. For the nature and previous travel of this case, which is an appeal from an award of commissioners upon the insolvent estate of James Campbell, reference may be had to the opinion of this court in the same matter, reported in 30 R. I. 63, 73 Atl. 354. Upon the new trial had pursuant to the order therefor as set forth in that opinion, the case was again tried, and resulted in a verdict of the jury in the following terms: "The jury find that the claim of the appellant, Elisha J. Campbell, against the estate of James Campbell for \$15,550, for 'note, money and service,' which said claim was allowed by the commissioners on said estate for the sum of \$2,700, should be disallowed, and that there is nothing due to Elisha J. Campbell from said estate by reason of said claim, and that the sum of \$2,700 should be deducted from the claim of said appellant as allowed by said commissioners."

The claim filed by the appellant in the municipal court of the city of Providence, the court of probate for said city, is as follows:

"Providence, R. I. March 4, 1905.

"Estate of James Campbell, to Elisha J. Campbell, Dr.

1902.	April 1st.	To amount of negotiable promissory note made by James Campbell April 1, 1902, for ten thousand dollars, payable on demand to Elisha J. Campbell, or order.....	\$10,000
1904.	June 28.	To services two years and three months to date at \$150 per month	4,550
1904.	June 28.	To moneys paid on your account	1,500
Total			\$15,550*

It is upon this claim of the appellant that the proceedings are based. The appellees defended against said claim upon the grounds that there was no consideration for the note, and that the appellant rendered no such services as claimed under the second item, and never paid any moneys as set forth in the third item. The appellees further set up that, at the time when the \$10,000 note was signed and delivered to the appellant, James Campbell was insane and incapable of transacting business, and that therefore the note was void, and no recovery could be had thereon. Thus it appears that there was a double defense set up as to the claim upon the \$10,000 note: First, that the same was given without consideration; and, second,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that it was void by reason of the insanity of James Campbell. A vast amount of testimony appears in the transcript introduced on behalf of the appellant in the endeavor to show that said note was given to him by his father partly in consideration of work and labor in his father's service extending over a period of years, for which he was entitled to a salary which was not paid, and partly in consideration of moneys loaned and advanced by the appellant to his father, all prior to the date of the note; and the appellees introduced testimony to contradict this. Also there was a vast amount of testimony introduced in the endeavor to show, on the one hand, that said James Campbell was insane when the note was signed and delivered, and, on the other hand, to show that at that time he was of sound mind and capable of giving a valid note.

During the progress of the trial the appellant took exceptions to the number of 21, relating to exclusion and admission of testimony and to the refusal of certain requests for instructions to the jury, and duly prosecuted his bill of exceptions to this court, and the case is now before this court upon his bill of exceptions.

[1] At the argument before this court the appellant waived all of his exceptions, except those which are numbered 19, 20, and 21. The nineteenth exception was to the refusal of the trial judge to charge, at appellant's request, as follows (noted on page 1764 of the transcript): "Even if the jury believe that James Campbell was insane at the time he gave the note in evidence in this case to Elisha J. Campbell, yet if the jury also believe that Elisha J. Campbell, at the time he received the note, did not know, or have sufficient reason to know, that his father was then insane, then, inasmuch as Elisha J. Campbell cannot now be tendered back such consideration as he furnished for the note, he is entitled to recover in this action at least the amount of that note, and interest thereon to the date of the death of James Campbell."

Exception 19 must be overruled. It presumes the fact that James Campbell was insane at the time he gave the note. It cannot then be said that the note, as such, became a valid obligation upon which recovery could be had, simply because the payee of the note did not know, or have sufficient reason to know, of such insanity. That would be a most dangerous rule as to recovery in such cases; it would permit the payee to show that he was ignorant, and entitled to recover in a case where every one else knew the fact of insanity, and where the proof of the fact was overwhelming. Such a ruling was refused in the trial court in the case of *Seaver v. Phelps*, 11 Pick. (Mass.) 304, 22 Am. Dec. 372, and the refusal was sustained by the Supreme Judicial Court, on exception; the opinion stating the principle

as follows (Wilde, J.): "The general doctrine that the contracts, and other acts in pais, of idiots and insane persons are not binding in law or equity is not denied. * * *

These principles are not controverted by the defendant's counsel; but they maintain that, if the plaintiff was of unsound mind and incapable of understanding at the time he pledged the note to the defendant, yet, if the defendant was not apprised of that fact, or had no reason to suspect it from the plaintiff's conduct, or from any other source, and did not overreach him, or practice any fraud or unfairness, then that the contract of bailment was valid and binding, and could not be avoided in the present action. And they requested the court of common pleas so to instruct the jury. That court, however, were of opinion that the law was otherwise, and we all concur in the same opinion. If it had been only proved that the plaintiff was a person of weak understanding, the instructions requested would have been appropriate and proper; for every man, after arriving at full age, whether wise or unwise, if he be compos mentis, has the capacity and power of contracting and disposing of his property; and his contracts and conveyances will be valid and binding, provided no undue advantage be taken of his imbecility. It is sometimes difficult to determine what constitutes insanity, and to distinguish between that and great weakness of understanding. The boundary between them may be very narrow, and, in fact, often is, although the legal consequences and provisions attached to the one and the other, respectively, are widely different. In the present case, however, this point is settled by the verdict, and no question is made respecting it. We are to consider the plaintiff as in a state of insanity at the time he pledged his note to the defendant; and, this being admitted, we think it cannot avail him as a legal defense to show that he was ignorant of the fact and practiced no imposition. The fairness of the defendant's conduct cannot supply the plaintiff's want of capacity."

[2] Exception 20 (noted on page 1765 of transcript) was to a refusal to charge the jury, at appellant's request, as follows: "Even if the jury should find from the evidence that James Campbell was insane at the time he gave Elisha J. Campbell the note for ten thousand dollars (\$10,000), which is in evidence in this case, and should find that said note is invalid, nevertheless, if the jury should also find that Elisha J. Campbell, prior to the time when he received said note, had either performed services for or had loaned money to James Campbell, or had both performed such services for and loaned such money to James Campbell, which services or loans, or both, were understood by Elisha J. Campbell to be the consideration of said note, then Elisha J. Campbell is entitled to recover in this action the rea-

sonable value of such services, and the amount of such loan or loans for which he had not been paid up to April 1, 1902, with interest to the date of the death of James Campbell."

The trial judge refused to charge as above requested, upon the theory set forth in other parts of his charge that, inasmuch as the appellant made his claim before the probate court upon a promissory note, he could not, if the jury found that James Campbell was insane at the time of the making and delivery of the note, be allowed to recover upon the original consideration of the note, even if he satisfied the jury that he had rendered services and loaned money, as he claimed, as a consideration therefor, because that would be equivalent to allowing him to recover upon a different claim from the one presented to the probate court. This is shown by reference to the language of the trial judge, as follows (pages 1754, 1755 of transcript): "And I charge you, gentlemen, that if you find from a fair preponderance of the testimony that this note was made and issued by James Campbell, and if you find that there was a good and valid consideration for this note, but if you find that his mind was such at the time he made this note that he did not understand the nature and effect of his act, then, gentlemen, you must find for the estate of James Campbell on that point." And again (quoting from the charge on page 1758), after reciting the claim as filed in the probate court by the appellant, the court said: "That is, that was the claim he presented against his father's estate. The consideration of that note, as he claims, was back salary and money loaned. He made no claim to the probate court for back salary or for money loaned for any period of time prior to April 1, 1902. He merely made a claim for this promissory note. So it follows, gentlemen, therefore, that, inasmuch as the statute provides that no claims other than those presented, as aforesaid, can be enforced against the estate, if you find that this promissory note was issued to Ellsha J. Campbell, and there was a good and valuable consideration for the giving of that note, and if you find that James Campbell did not understand the nature and effect of the act he was performing when he gave the note, this appellant cannot recover for any services performed for his father, or any money loaned to his father, prior to April 1, 1902, unless he can recover on this promissory note, because, as I say, he never preferred to the probate court any claim for any services or money loaned prior to that time."

We think the rule laid down by the trial judge, as above quoted, was too stringent, and was not in accord with the more liberal rules adopted by this court in at least two recent cases. While it is true that it was held, in the case of *Anderson v. Williams*, 26 R. I. 64, 66, 58 Atl. 251, 252, that a cred-

itor who files his claim in the probate court under the statute is bound by such claim in any subsequent action against the estate, both as to the amount of and the period covered by the claim, and also as to the nature of the claim, yet it is to be noted that in that case the cause of action set forth in the first count of the declaration was totally and entirely distinct and different from anything set forth in the claim, and based upon a different consideration; while the cause of action set forth in the second count was for a greater amount and for a longer period than that set forth in the claim as presented. The essence of the decision is that the plaintiff could not recover upon the first count at all, and could not recover upon the second count for services in excess of her claims as presented. The court foreshadows the liberal policy since followed in the cases hereafter cited in the following language: "While we should hesitate to apply the bar of the statute to a claim which had been substantially made, though lacking in technical exactness of statement, or to a claim which omitted to state unliquidated damages, yet we cannot concede the right of a creditor, who has stated a claim for a definite sum of money for services rendered in a definite period of time, to sue for other services rendered outside of that period, or for an amount of money greater than that originally claimed."

In the case of *Ralph v. Taylor*, 33 R. I. 503, 82 Atl. 279, where suit was brought by a person under guardianship to recover for services rendered to the defendant's intestate during her lifetime, it was at first attempted to recover upon an express contract alleged to have been made between the plaintiff (then under guardianship) and the defendant's intestate during her lifetime, and to show that there was an express agreement between the parties that the plaintiff should be compensated at the rate of \$5 per month; and evidence to that effect was offered, and the jury so found. But upon exceptions before this court it was determined that the plaintiff, being under guardianship, was, under our statute, incapable of making an express contract; but it was also determined that he was entitled to prove what services he had rendered, and the value of them, under a common count in *indebitatus assumpsit* for a quantum meruit. The claim, as filed in the probate court, was as follows: "To fourteen years and eight months labor at \$8 per month, \$1,408; by credit, payment on account, \$120.95; balance due, \$1,287.05." And as to this claim we held as follows: "There is no suggestion in this statement of claim whether it is based upon an express contract or not, and nothing which is inconsistent with the maintenance of the suit upon the second count of the declaration, being, as above shown, a common count in *indebitatus assumpsit* for a quantum meruit. It is merely the state-

ment of a claim, which does not conclude the nature of the evidence upon which it may be maintained." The principle underlying this case is analogous to that in the case at bar, in that, while it appears that an attempt to recover as upon an express contract cannot succeed because of the legal incapacity of one of the parties to make an express contract, yet a recovery may be had upon showing the value of what was actually done, which would have been the consideration of such an express contract had not such incapacity existed. And see, also, *White v. Almy*, 34 R. I. 29, 35, 82 Atl. 397, as to the effect of claims as filed in the probate court.

In the case at bar, as we have already shown, the appellees contested the appellant's claim upon the \$10,000 note, both on the ground of want of consideration and also on the ground of the invalidity of the note by reason of the insanity of James Campbell at the time it was made and delivered. The appellant was thereby compelled to offer proof of a valid and adequate consideration for the note, and a large part of the transcript is taken up in the direct examination and cross-examination of the appellant and other witnesses on that point. Of course, the prima facie evidence of the appellant's claim for this sum of \$10,000 was the note itself, which was presented by him in support of his claim. But the note itself is only evidence of the claim; the foundation of the note and of the claim thereon was the services rendered and money paid by the appellant; and where the consideration of the note is disputed, and evidence of consideration is offered at great length, it would be technical in the extreme to say that nothing could be recovered, even though the underlying consideration was fully proved to the satisfaction of the jury, simply because, after the time when all the services had been rendered and the money advanced, the maker of the note became insane, and was insane at the time when the note was made. It is to be noted, also, that, on the question of the insanity of James Campbell at the time when the note was given, the record contains upwards of 900 pages, or more than one-half of the entire transcript, devoted to the conflicting testimony of witnesses on that subject. In view of such a difference of opinion, it would be highly unjust to hold, in substance, that the appellant, by taking a note from a man who was deemed by so many disinterested witnesses to be quite sane and capable of transacting business and giving a note, having been accustomed to give notes during a long and active business life, should be cut off from all recovery, when he would have been

entitled to have recovered if he had not taken the note. It is to be noted that the claim, as filed in the probate court, to wit: "1902, April 1st. To amount of negotiable promissory note made by James Campbell April 1, 1902, for ten thousand dollars payable on demand to Elisha J. Campbell or order, \$10,000"—states a claim for the sum of \$10,000, evidenced by a promissory note. It appears, also, in the statement of this case in 30 R. I. 63, on page 64, 73 Atl. 354, on page 355, that this court, in speaking of the appellant's claim, says: "This claim was made up as follows: \$10,000 due on a promissory note given for work and labor, and money loaned by the plaintiff to his father." It does not appear to have occurred to anybody that this was not a correct and substantial statement of the appellant's claim, in view of the evidence before the court. The claim, as stated in the probate court, is for "amount" of \$10,000. Such a statement precludes the appellant from recovering more than \$10,000 upon that item of his claim; but if the evidence of it, by means of a promissory note, turns out to be insufficient by reason of the invalidity of the note, due to the insanity of the maker, the appellant is not thereby precluded from offering other evidence of such claim to an amount of \$10,000 for good and valuable considerations running from him to his father. See *Ralph v. Taylor*, supra. To have allowed the appellant to recover in accordance with the instruction which is above quoted, and which was refused and is the subject of the exception now under discussion, would not have been to allow recovery upon a different claim from that filed in the probate court, but only upon the same claim, evidence in support of which had been given before the jury at great length and without objection.

We are of the opinion that the trial judge erred in refusing to instruct the jury as requested, and exception 20 is therefore sustained.

As to exception 21, to the denial of the appellant's motion for a new trial, it becomes unnecessary to consider it, because, as shown above, the jury was not properly instructed in the particulars above set forth, and was not allowed to consider certain very important evidence for technical reasons which we have disapproved; and it would be unprofitable to consider the weight of the evidence until it shall appear that a jury has been allowed to consider all of the evidence under proper instructions.

The appellant's exceptions numbered 19 and 21 are overruled, the twentieth exception is sustained, and the case is remitted to the superior court for a new trial.

CARRIGAN v. COLE et al.

(Supreme Court of Rhode Island. March 1, 1913.)

1. DEATH (§ 30*)—RIGHT OF ACTION—SURVIVAL—DEATH OF WRONGDOER.

An action of trespass on the case for death by wrongful act brought under Gen. Laws 1909, c. 283, § 14, authorizing an action for wrongful death against the person or corporation which would have been liable had death not resulted, will not survive the death of the wrongdoer.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 34; Dec. Dig. § 30.*]

2. DEATH (§ 9*)—RIGHT OF ACTION—CONSTRUCTION OF STATUTE.

Gen. Laws 1909, c. 283, § 14, giving a right of action for death from wrongful act, being in derogation of the common law, confers only such rights as may be consistent with a strict construction of its language.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 11; Dec. Dig. § 9.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by Patrick F. Carrigan against Frank W. Cole and others. Motion by Susan A. Cole, administratrix, to dismiss plaintiff's amended declaration, was sustained, and plaintiff excepts. Exception overruled, and cause remitted.

John C. Quinn, of Providence, for plaintiff. Stone & Lovejoy, of Providence, for defendants.

VINCENT, J. The plaintiff, Patrick F. Carrigan, by his writ dated the 14th of June, 1910, commenced suit against Frank W. Cole and Susan A. Cole as administratrix upon the estate of William H. Cole, deceased. The said Frank W. Cole and William H. Cole were formerly copartners doing business under the name and style of F. W. Cole & Co. The writ directed the attachment of the goods, chattels, and real estate of Frank W. Cole "of the commonwealth of Massachusetts," and also the attachment of the personal estate of the said Frank W. Cole in the hands or possession of the Cole Teaming Company, a corporation located and doing business in Providence, in the state of Rhode Island. The writ further directed that the said Frank W. Cole and Susan A. Cole, as administratrix, be summoned to answer the complaint. The suit was an action on the case for negligence, and was brought by Patrick F. Carrigan as father and next of kin of Joseph Carrigan, an infant, deceased, it being alleged that by reason of the negligence of said Frank W. Cole and William H. Cole, by their servants and agents, said Joseph Carrigan was run over by a vehicle owned by said Frank W. and William H. Cole, receiving injuries from which he died. It appears from the return of the officer upon the writ that a copy thereof was left with the treasurer of the Cole Teaming Company for the purpose of attaching the stock or shares

of said Frank W. Cole in said company, that the defendant Susan A. Cole, administratrix, was summoned, and that a further copy of said writ was sent by mail to Frank W. Cole to South Rehoboth, Mass., that being his place of address, he having no usual place of abode in Rhode Island. William H. Cole deceased November 16, 1909, some seven months prior to the date of the plaintiff's writ. On August 2, 1910, the treasurer of the Cole Teaming Company made affidavit that at the time of the service of the writ the said Frank W. Cole was not, either directly or indirectly, the owner of any stock or shares in said company, and that there was no personal estate of the said Frank W. Cole in the hands or possession of said Cole Teaming Company. The plaintiff filed his declaration July 27, 1910. The defendant Susan A. Cole, administratrix, on August 5, 1910, demurred to the plaintiff's declaration, and the demurrer was sustained to all of the counts by consent, and the plaintiff allowed 10 days to amend. After several attempts to bring his declaration within the decision of the court upon the demurrer, the plaintiff filed his last amended declaration April 22, 1911. On May 3, 1911, the defendant Susan A. Cole, administratrix, filed a motion setting forth that she had demurred to each and all of the counts of the plaintiff's original declaration on the following grounds: (1) That said declaration did not set forth any act of negligence on the part of the defendants; (2) that the said declaration did not state that said claim was presented to said defendant Susan A. Cole, administratrix, or filed in the office of the municipal court of the city of Providence before the bringing of said suit; and (3) that said declaration did not set forth a cause of action which at common law or under the statutes of this state survived the death of the intestate of the said defendant Susan A. Cole. The said motion of the defendant Susan A. Cole further states that her demurrer to all the counts of the plaintiff's original declaration was sustained, that no exceptions were taken thereto, and that the pretended amended declaration of the plaintiff does not in any way cure or attempt to cure the defects of the original declaration, and she therefore moves that the so-called amended declaration be stricken from the files and for judgment. This motion of the defendant Susan A. Cole, administratrix, was granted, and to the granting thereof the plaintiff took his exception to this court. The defendant Frank W. Cole is a nonresident. No personal service has been made upon him in this suit, and the attempted service by way of the attachment of his personal estate in the hands and possession of the Cole Teaming Company has failed, as appears by the affidavit of the garnishee, and it is therefore unnecessary to consider further his connection with this matter.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] The case presents two questions: (1) Does an action of trespass on the case brought to recover for a death by wrongful act survive the death of the wrongdoer under our statute; and (2) should the plaintiff have filed his claim in the municipal court against the estate of William H. Cole? A recovery of damages in case of the death of a person by the wrongful act of another is provided for by statute. In section 14 of chapter 283 of the Gen. Laws of 1909 we find that: "Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured. * * *

[2] Under the common law no action for damages by reason of death by wrongful act could be maintained. Lord Campbell's Act, from which our statute before referred to is derived, provided a new and independent remedy for the loss sustained by the widow and children on account of the death of the person upon whom they were dependent. Lord Campbell's Act, as well as our statute which is taken therefrom, being in derogation of the common law, only confers upon parties and courts such privileges and powers as may be consistent with a strict construction of the terms and language employed. It is not, perhaps, necessary, considering the frequent discussion of this subject and the well-settled rule regarding the construction of statutes which are in derogation of the common law, to repeat here the familiar arguments upon that subject. From an examination of the language above quoted from section 14, c. 283, we are unable to discover any intent to confer upon a plaintiff, under the circumstances of the present case, the privilege of pursuing the estate of the wrongdoer through an action commenced, subsequent to his decease, against his administrator. The language of the statute quoted seems to limit the proceeding to "the person who * * * would have been liable if the death of the plaintiff's intestate had not ensued." There is no provision indicating or language which might be construed or from which it might be implied that it was the intent of the statute to provide any remedy against the personal representatives or the estate of a deceased wrongdoer.

We do not think, therefore, that the plaintiff's action against Susan A. Cole, as admin-

istratrix on the estate of William H. Cole, is maintainable. In this view of the case, it would be immaterial whether or not the plaintiff's claim was filed in the municipal court against the estate of William H. Cole, and we need not, therefore, enter into any discussion of that question at this time.

The plaintiff's exception is overruled, the decision of the superior court in dismissing the plaintiff's amended declaration is affirmed, and the case is remitted to that court for further proceedings.

SHEER v. HALL & LYON CO.

(Supreme Court of Rhode Island. March 1, 1915.)

APPEAL AND ERROR (§ 635*)—SUFFICIENCY.

Where the record showed that plaintiff excepted to the decision of the trial judge who heard the cause without a jury, his bill of exceptions will not be dismissed because not clearly showing that exception; it appearing that was the only one relied upon on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2285, 2776-2782, 2829; Dec. Dig. § 635.*]

Action by Hyman Sheer against Hall & Lyon Company. There was a judgment for defendant, and plaintiff appeals. On motion to dismiss plaintiff's bill of exceptions. Denied.

James A. Williams, of Providence, for plaintiff. C. M. Van Slyck and Frederick A. Jones, both of Providence, for defendant.

PER CURIAM. The defendant's motion to dismiss the plaintiff's bill of exceptions is denied. The record shows that the plaintiff duly excepted to the final decision of the superior court rendered by the presiding justice after a trial before him without a jury. In his bill of exceptions the plaintiff recites said decision, but does not in express terms set forth that he excepted thereto. It clearly appears, however, that in said bill the plaintiff is endeavoring to state that he excepted to said decision of the presiding justice and now relies upon that as his only exception. From a consideration of the whole bill such a statement fairly may be deduced. The bill of exceptions is not drawn carefully and is not in accordance with the form which we have approved in *Blake v. Atlantic National Bank*, 33 R. I. 109, 80 Atl. 181, yet we do not think that the court should refuse to hear the plaintiff's exception on the ground that he has not clearly stated the exception upon which he relies.

The bill may stand for assignment for hearing.

EDDY v. ANGELL.

(Supreme Court of Rhode Island. March 1, 1913.)

WILLS (§ 365*)—APPEAL—TIME—APPLICATION FOR LEAVE TO APPEAL—EVIDENCE.

In an application for leave to appeal from a decree admitting a will to probate, evidence held to show that petitioner failed to appeal in time because she was sick and wholly unable to attend to business, and that her uncle, who was executor, deceived her as to the contents of the will, and falsely represented to her that he was looking after her interest, entitling her to an appeal.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 330; Dec. Dig. § 365.*]

Petition by Harriet V. Eddy to be allowed to appeal from a decree admitting an alleged will of Harriet E. Eddy, deceased, to probate. Opposed by Henry M. Angell, executor. Granted.

James J. McGovern, of Providence, for petitioner. Harry J. Williams, of Providence, for respondent.

PER CURIAM. The petitioner sets forth in her petition that she is the sole heir at law of Harriet E. Eddy, late of Providence, deceased, and that she is aggrieved by a decree of the municipal court of Providence entered February 27, 1912, admitting to probate a certain instrument in writing purporting to be the last will and testament of said Harriet E. Eddy, (1) because said decree is erroneous and contrary to the law and evidence; (2) because said instrument was not the last will and testament of Harriet E. Eddy; (3) because said Harriet E. Eddy was not of sound and disposing mind and memory at the time she executed said instrument; and (4) because said Harriet E. Eddy was induced to execute said instrument through undue influence.

The petitioner also alleges that, by reason of accident, mistake, and unforeseen cause, she did not appeal from said decree of the municipal court within the time allowed by law; that at the time of her mother's death and for a long period thereafter she was very ill, very weak, and nervous, and wholly unable to attend to matters of business; that she was entirely without means and largely dependent upon charity; that she relied upon her uncle, Henry M. Angell, who repeatedly assured her that he would look after and care for her interests in the matter of her mother's estate; that her said uncle withheld from her all knowledge as to the contents of said will; that she believed her uncle would protect her and look after her interests as he had promised to do; and that she is without experience in business matters.

The parties have filed numerous affidavits in support and in contradiction of the facts alleged in the petition. We have carefully examined these affidavits, and we think it

sufficiently appears therefrom that the condition of health of the petitioner upon and after the death of her mother was such, and continued to be such, for a period of more than 40 days after the entry of the decree admitting the will to probate, as to unfit her for the transaction of business, and that during such period she received assurances from her uncle that he would look out for and protect her interests under her mother's will. The affidavit of Mr. Angell, the uncle, contains some reflections upon the private character of the petitioner, which, not being material to the questions at issue, were apparently designed to prejudice the court against the petitioner. Inasmuch, however, as it appears that Mr. Angell had testified about a year previously, in another proceeding, that the petitioner was a good woman, and had always so conducted herself, his later reflections upon her moral character only serve to lessen the dependence which can be placed upon his statements.

We think upon the whole testimony presented that the petitioner is entitled to the relief asked for, and her petition is accordingly granted. An order for entry may be presented.

KENYON et al. v. KENYON et al.

(Supreme Court of Rhode Island. Feb. 25, 1913.)

PARTITION (§ 94*)—OWELTY—COMMISSIONERS' AWARD—CONCLUSIVENESS.

Complainants in partition in appealing from an award of owelty cannot complain because the commissioners refused to testify in support of their report, since the report is not conclusive and could be overcome by other evidence showing unfairness or inequality of the award.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 287-299; Dec. Dig. § 94.*]

Appeal from Superior Court, Kent County; Elmer J. Rathbun, Judge.

Bill by Solomon H. Kenyon and others against Albert A. Kenyon and others. From a decree awarding owelty of partition, complainants appeal. Partly affirmed, and partly reversed and remanded.

Harvey A. Baker, of Providence, for complainants. Samuel W. K. Allen, of East Greenwich, for respondents.

PER CURIAM. In the above cause the complainants have appealed to this court from a decree of the superior court for the county of Kent, partitioning certain lands, and awarding the sum of \$340 owelty of partition to be paid by the complainants to the respondents.

The gist of the objections made by the complainants is that the award of owelty is unjust, because they say that, under the evidence adduced on their behalf before a justice of the superior court upon the hear-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing which resulted in the confirmation of the commissioner's report and the entry of the decree of partition, it appears that the portion of the lands awarded to the complainants as their one-fifth part of the entire realty is not of greater value than the other one-fifth parts awarded to the respondents, but is actually of less value, and that owelty of partition should have been awarded to be paid to the complainants by the respondents. Upon a careful examination of the testimony, this court is of the opinion that the evidence supports the contention of the appellants (complainants) to the extent that it does not appear that the portion of the lands set off to the complainants (as their one-fifth of the entire realty) is of any greater value than that of any other one-fifth part of the realty set off to the respondents, and that, therefore, the award of owelty as against the complainants was not justified.

But we are also of the opinion that the evidence does not clearly show that the complainants are entitled to owelty as against the respondents. The evidence varies to a considerable extent as to the values of the different parcels of land; and we are unable to figure out with any certainty that there is any such difference in the actual values of the portions set off to the parties that we can say that owelty should be awarded to the complainants. The fact that the commissioners were not compelled to testify as to the details of the figures by which they arrived at the conclusions set forth in their report we do not deem to be material in this consideration. If they had testified fully in this regard, their testimony would not have been conclusive, but might, perhaps, have stated their opinion, as to details, more fully than is shown in their report. The report would still have been open to attack on the part of any of the parties in the effort to show that the partition and owelty awarded were unfair and unequal. The complainants have had a full opportunity to produce all the evidence at their disposal to support their objections, and it cannot be said that they have been deprived of their rights simply because the commissioners refused to testify and were not compelled to do so. The report of the commissioners is simply their opinion, and is certainly not strengthened, as against the complainants' objections, by reason of their refusal to testify in support thereof. As the parties have had a full opportunity to present evidence in support of their contentions, we do not deem it advisable to put the parties to the expense incident to a recommitment of the cause to commissioners. On the evidence before this court we are unable to award owelty in favor of the complainants; but we are of the opinion that the award of owelty against the complainants is unjust and should be disallowed.

The appeal is sustained so far as to reverse that portion of the decree of the supe-

rior court which allows the sum of \$340 as owelty of partition (being clause "third" of the decree appealed from, entered March 29, 1912); and in all other respects said decree is affirmed.

The cause will be remanded to the superior court sitting in the county of Kent for further proceedings.

HAMMOND v. HAMMOND.

(Supreme Court of Rhode Island. Feb. 25, 1913.)

APPEAL AND ERROR (§ 78*)—FINAL DECREE—REVIEW.

On demurrer to a whole bill for partition, where the court sustains the demurrer, but finds the bill good as a bill for an accounting, and strikes out the words of dismissal in the decree, there is no final decree from which an appeal may be taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 464-483; Dec. Dig. § 78.*]

Bill by Julia F. Hammond against George W. Hammond. Decree for defendant, and plaintiff appeals. Appeal dismissed.

Washington R. Prescott, of Providence, for complainant. Charles H. McFee and James H. Rickard, Jr., both of Woonsocket, for respondent.

PER CURIAM. The decree appealed from, although it sustains the demurrer, does not dispose of the bill by dismissing it. While, "strictly speaking, upon a demurrer to the whole bill being allowed, the bill is out of court" (Daniel's Ch. Pl. & Pr. p. *597), it is clear from the rescript of the presiding justice, in finding the complainant's bill good as to an accounting although not as to the partition, as well as from the striking out from the draft of the decree submitted before its entry the words of dismissal, that said decree was not intended to be a final decree. Our opinion is that said decree is not a final decree as such a decree is defined in *McAuslan v. McAuslan*, 34 R. I. 467 et seq., 83 Atl. 837, and that it is not within the exceptions stated in said case in which an appeal may be taken from a decree not final.

The motion to dismiss the appeal is therefore granted.

Cause remanded to the superior court for further proceedings.

FOX v. ARTESIAN WELL & SUPPLY CO.

(Supreme Court of Rhode Island. Feb. 20, 1913. On Rehearing, March 12, 1913.)

JUDGMENT (§ 143*)—VACATING DEFAULT.

Where between the date of the service of the writ and the filing of the declaration plaintiff executed a release of all damages arising out of defendant's negligence, and defendant informed its counsel that the case was settled, a default taken for defendant's failure to file pleas is properly vacated and the case reinstated for trial; plaintiff having full opportunity to try his case on the merits and to introduce testimony to set aside the release.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. § 143.*]

Exception from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Henry M. Fox against the Artesian Well & Supply Company. A judgment for plaintiff on default was vacated, and upon nonsuit, on retrial, plaintiff brings exception. Exception overruled.

Joseph C. Cawley and Frederick J. Berth, both of Providence, for plaintiff. Tillinghast & Lynch, of Providence, for defendant.

PER CURIAM. We think the superior court justice properly exercised his discretion in taking off the default in the above case, under the facts disclosed by the record, where it appears that the plaintiff had given a release of all damages arising from the alleged negligence of the defendant, between the date of service of the writ in the case and the time of filing the declaration; that the defendant informed its counsel that the case had been settled, prior to the time of filing pleas; and that by reason of such information counsel for defendant failed to file pleas, and defendant was defaulted. We find no abuse of discretion on the part of the superior court in vacating the judgment by default and reinstating the case for trial. The plaintiff was given full opportunity to try his case upon the merits, and to produce such testimony as he saw fit to offer to set aside the release; and if he did not see fit to avail himself of such opportunity, he cannot now complain. Plaintiff declined to offer any testimony at a trial of his case in the superior court, after the reinstatement, and was nonsuited.

Plaintiff's exception to the action of the superior court, in vacating the judgment in default and in reinstating the case for trial, is overruled, and the case is remitted to the superior court for entry of judgment for the defendant on the nonsuit.

On Rehearing.

The motion for reargument sets forth no new considerations. All of the grounds set forth were carefully considered before the decision of this court was arrived at. We find no reason for a reargument of the case.

The motion is denied.

JOHNSON v. HEALEY.

(Supreme Court of Rhode Island. Feb. 20, 1913.)

GARNISHMENT (§ 41*)—PROPERTY SUBJECT—DEBT NOT DUE.

A person who had contracted to pay plaintiff's debtor a certain sum for certain work to be performed, payment to be made in July, could not be charged as garnishee in an action against the debtor under a writ served on him in June and while the work was not completed.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 78-81; Dec. Dig. § 41.*]

Action by George Johnson against Edward F. Healey. Motion to charge as garnishee Seth P. Remington was denied, and garnishee discharged, and plaintiff sues out a writ of error. Judgment discharging garnishee affirmed.

James B. Littlefield, of Providence, for petitioner. Thomas J. Dorney, of Providence, for respondent.

PARKHURST, J. Upon this petition for a writ of error filed October 18, 1912, a writ of error was issued November 1, 1912, to the district court of the Sixth judicial district directing it to certify its records relating to an action between the above-named parties. The said records were duly certified and are now before this court.

It appears from said records that the case was tried before a judge of the district court of the Sixth judicial district, and that on October 15, 1912, decision was entered for the plaintiff for \$336.33 and costs; that on the same day, upon motion to charge as garnishee one Seth P. Remington, said motion was denied and the garnishee was discharged; and thereafter on October 22, 1912, judgment of said district court was entered for the plaintiff upon the decision; and that no jury trial has ever been claimed. Thereupon the plaintiff sued out this writ of error, claiming that said court should have charged the garnishee under the disclosures of the garnishee's affidavit and of the evidence submitted upon the motion to charge.

It appears upon inspection of the record that the suit was commenced by a writ of attachment issued out of said district court dated June 27, 1912, against said Healey, wherein the officer was commanded "to attach the personal estate of the said defendant in the hands or possession of Samuel P. Remington of Warwick, county of Kent, in said state, as trustee of the said defendant": that the writ was actually served upon Seth P. Remington, in said Warwick, on the 29th day of June, 1912, and was duly served upon the defendant; that on the 5th day of July, 1912, said Seth P. Remington filed in said district court an affidavit as follows: "State of Rhode Island, County of Providence. District Court of the Sixth Judicial District. In the case of George Johnson, Plaintiff, against Edward F. Healey, Defendant. I, Seth P. Remington, of the city of Worcester, in the commonwealth of Massachusetts, on oath make affidavit, and say that I am. * * * That at the time of the service on me of a copy of the writ in said case for the purpose of attaching the personal estate of the said defendant in the hands and possession of Samuel P. Remington, of Warwick, I do not know whether there was or not in the hands or possession of any such person any personal estate of the defendant. There was none of the personal estate of said defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in my hands or possession either directly or indirectly, except that said defendant was engaged in some work for me under a contract, according to the terms of which no payment was due at the time of the service of said writ on me. Seth P. Remington. Subscribed and sworn to before me in the town of Warwick, in the county of Kent, on this 3d day of July, A. D. 1912. John Henshaw, Notary Public."

It further appears by stipulation of the parties on file that, upon the hearing on the motion to charge the garnishee, the following facts appeared:

(1) That the garnishee, Seth P. Remington, filed in the case of Thomas H. Earley v. Edward F. Healey, the defendant, district court No. 82,592, an affidavit that on July 5, 1912, at 10:50 o'clock a. m., the time when the garnishee was served with a copy of a writ, there was in his hands and possession, of the personal estate of the defendant, the sum of \$500.

(2) That the contract mentioned in the garnishee's return in the case of George Johnson v. Edward F. Healey is or was as follows: "Providence, R. I., Feb. 16, 1912. Agreement entered into between Mr. Seth P. Remington, of Worcester, Mass., and Edward F. Healey, 'Forester,' of Providence, R. I. Edward F. Healey on his part agrees to trim all dead and diseased wood from the Chestnut trees in the forest reserve on Mr. Remington's estate in the town of Warwick, also to cart, carry and destroy all diseased wood cut from trees in pursuance of said work. He further agrees to put all of said trees in good condition and to treat any and all trees for borers where it is deemed necessary and to fall any dead trees now standing and to destroy the same. He further agrees to inspect all trees in the forest reserve in the different seasons of the year and to report to Mr. Remington the condition of the trees especially in regard to the Chestnut Tree Fungus. Mr. Seth P. Remington on his part agrees to pay Edward F. Healey the sum of \$1,150.00 for this work. Payments to be made during progress of said work to the extent of \$650.00. The balance to be paid during the month of July, 1912. [Sign] Edward F. Healey. [Sign] Seth P. Remington. Witness: Henry Harmon Chamberlin."

(3) That at the hearing on plaintiff's motion to charge the garnishee the plaintiff introduced evidence to show that at the time of the service of the writ upon said Seth P. Remington in the case of George Johnson v. Edward F. Healey, namely, at 5:50 p. m. o'clock, on June 29, 1912, the heavy bulk of the work under said contract had been completed under the terms of which contract the sum of \$500 was to be paid during the month of July, 1912, and that this sum was the same sum mentioned in the garnishee's affidavit in the case of Thomas H. Earley v. Edward F. Healey, and that to have finished

the contract would have taken work probably not in excess of \$50.

Upon motion filed October 21, 1912, on behalf of the plaintiff, the said district court, after hearing, ordered on October 30, 1912, that the officer be allowed to amend his return on the writ to show that he had made service upon Seth P. Remington, and the return was so amended. Upon this state of the record, the plaintiff's counsel insists that the said Seth P. Remington should have been charged as garnishee, and that it was error on the part of the justice of the district court to discharge him.

This court is unable to agree with that contention. It is not necessary to consider whether the service of the writ upon the garnishee, being actual service upon Seth P. Remington, although not so named in the writ, should be considered to be sufficient, because we find that in any event, even if rightly served, there was at the time of the service of the writ none of the personal estate of the defendant in his hands as to which he could be held as trustee.

The contract above set forth under which the plaintiff claims that money was due the defendant is an entire and indivisible contract as to the payment of the sum of \$500, which by the terms of the contract was not payable until the month of July; and therefore the defendant could not have enforced payment of said sum by suit, even if he had completed his work thereunder, until after the 31st day of July; and the evidence admitted shows that on the 29th day of June the work under the contract was not done, there being work remaining to be done which would cost probably not in excess of \$50 to finish it. These facts take the case out of the line of cases, referred to by the plaintiff's counsel and cited in support of the paragraph quoted from 2 Wade on Attachment, § 484, to the effect that: "The mere fact that the demand is not yet mature does not affect the existence of the debt. There are no contingencies upon which the obligation to pay depends, when nothing but the lapse of time is necessary to entitle the creditor to legal process to enforce his claim against the debtor."

It cannot be said in this case that "nothing but the lapse of time is necessary to entitle the creditor to legal process," etc., since, the contract as to the payment of the \$500 being entire, the fact that the work was not fully completed might defeat the recovery of any sum of money whatever. It will be noted that the contract is to "trim all dead and diseased wood, * * * also to cart, carry and destroy all diseased wood," etc. It is conceivable that all of the work might have been done, except that of carting and carrying away and destroying, and that a small sum of money only might be necessary to complete such carting, carrying away, and destruction; and yet this is of the very es-

sence of the contract which has in view the eradication of disease from the forest, and it might be of the most vital importance to the owner of the forest that this portion of the work be completed, otherwise the entire value of the work of preservation of trees not diseased might be lost.

The case comes within the rule laid down in 2 Wade on Attachment, § 483: "So, where there is any future contingency upon which the liability depends, any act to be done, or work to be completed on a contract which is not apportionable, there will be no indebtedness until such contract is completed."

The principles governing garnishment under our law were fully discussed in the case of Grimwood v. Capitol Hill Bldg. & Const. Co., 28 R. I. 32, 65 Atl. 304, and we think they are applicable in this case. It was there held in substance that in trustee process, as a plaintiff can have no greater right against the garnishee than the defendant would have, and can occupy no better position with respect to the garnishee than the defendant could in a suit brought by him against the garnishee, it follows that, where a contract between the defendant and the garnishee had not been fully performed by defendant at the time of attachment by plaintiff, the garnishee is not chargeable.

The authorities were carefully considered in the case last cited, and we do not find it necessary to cite other cases.

Inasmuch as we find that, in no event, was the garnishee chargeable under the attachment attempted to be made on June 29, 1912, we do not find it necessary to consider the other questions raised in the case.

The fact that Remington admitted, by subsequent affidavit filed in the case of Earley v. Healey in the same court, that on July 5, 1912, he had personal estate of the defendant in his hands to the extent of \$500, is immaterial. It may be that at that time the work under contract had been fully completed to the satisfaction of Remington, and that he was willing to waive further delay in payment; but with that we have no concern, as it appears in this case that the work was not complete and Remington did not waive either the completion of the work or the delay in payment.

The judgment of the district court of the Sixth judicial district in discharging the garnishee is affirmed, and the papers in the case will be remitted to the said district court.

CALDARONE v. HEBERT et al.

(Supreme Court of Rhode Island. March 1, 1913.)

PROHIBITION (§ 3*)—GROUNDS OF REMEDY.

Prohibition to restrain the district court from taking cognizance of liquors and vessels seized and taken from a dwelling house (Gen. Laws 1909, c. 123), on the ground of want of

jurisdiction to hear the complaint for forfeiture, will not issue; a remedy by appeal in such cases being provided by section 34 of the act.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

Petition by Nicola Caldarone for a writ of prohibition against Felix Hebert and others. Petition denied.

Bassett & Raymond, of Providence, for petitioner. Alberic A. Archambault, of Providence, for respondents.

JOHNSON, C. J. In this case a writ of prohibition is sought to prevent the justice of the District Court of the Fourth Judicial District, and said court, from taking further cognizance of the liquors and vessels seized and taken from a dwelling house in Warwick by a special constable, under chapter 123 of the General Laws 1909. The grounds are: (1) The alleged insufficiency of the statement in the search warrant of the facts on which the belief of said special constable, as to the selling and keeping for sale of intoxicating liquors in said house contrary to law, was based; (2) that said district court has no jurisdiction to hear said complaint for forfeiture, because said complaint does not state the value of the liquors proceeded against. In the complaint said special constable states that his belief as aforesaid "is founded on the following facts and circumstances—common report." The petition states that the petitioner moved in the district court to quash the complaint "on the ground that it does not appear that this court has jurisdiction to entertain this complaint, in that it does not appear by any averment contained in said complaint that said liquors are not of value exceeding \$500," and that said motion was denied by said district court.

The general rule is that the writ of prohibition issues only where no other remedy is expressly provided. In 32 Cyc. 613, the rule is stated thus: "Prohibition will not issue where there is another adequate remedy at law or in equity readily available to the applicant, either by appeal, or writ of error, or by any other writ, motion or proceeding appropriate to the relief." In Taylor v. Bliss, 26 R. I. 17, 57 Atl. 939, which was an application to take the poor debtor's oath the court, Stiness, C. J., said: "The office of a writ of prohibition is to restrain excess or improper assumption of jurisdiction."

* * * If the execution is within the terms of section 10 [Gen. Laws 1896, c. 200], the respondent had no jurisdiction to issue the citation; for the execution defendant would not be entitled to take the oath, nor would he be entitled to apply for a citation. A writ of prohibition is therefore proper if the case is within section 10. There is no appeal from the decision to grant the poor debtor's oath, and no other way to restrain ac-

tion. Objection at the hearing would be of no avail if the justice should proceed to administer the oath." In *Harkness*, Petitioner, 27 R. I. 124, at page 125, 60 Atl. 1067, the court, said: "The proceedings upon a petition to be admitted to take the poor debtor's oath are supplemental or ancillary to suits at law, and no provision is made in the statutes for exception to the magistrate's decision therein. If the ordinary course of bringing a case before this court by bill of exceptions were applicable to these proceedings, a writ of prohibition, which was allowed in *Taylor v. Bliss*, 26 R. I. 16 [57 Atl. 939], would be unnecessary." In the case at bar a remedy by appeal is expressly provided by section 34 of said chapter 123, Gen. Laws, 1909.

The petition is therefore denied and dismissed.

RALPH v. TAYLOR.

(Supreme Court of Rhode Island. Feb. 25, 1913.)

1. DEPOSITIONS (§ 107*)—OBJECTIONS—TIME FOR MAKING.

Defendant was not entitled to object to portions of a deposition covered by questions which were not objected to upon the taking of the deposition, though his counsel was then fully aware of the defense, to which the testimony objected was pertinent.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 309-319; Dec. Dig. § 107.*]

2. APPEAL AND ERROR (§ 1053*)—OBJECTIONS.

Defendant cannot complain because plaintiff was permitted to read portions of a deposition where the trial judge, in admitting the deposition, stated that he would, and afterwards did, instruct the jury to disregard the portions complained of.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

3. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL—MATTERS COVERED.

Instructions covered by those given are properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—REFUSAL.

Instructions authorizing deductions from recovery not warranted by the evidence are properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Exceptions from Superior Court, Providence and Bristol Counties; Darius Baker, Judge.

Action by Henry J. Ralph, revived after his death by Thomas F. Cooney, Executor, against Clarrington E. Taylor, Administrator. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled, and the case remitted.

See, also, 82 Atl. 495.

Cooney & Cahill, of Providence, for plaintiff. Edward M. Sullivan, of Providence, for defendant.

PER CURIAM. The first exception set forth by the defendant is to the denial of defendant's motion for a new trial, based on the grounds that the verdict was against the evidence and the damages were excessive. There was ample evidence properly admitted, without objection on the part of the defendant, to sustain the verdict both as to the question of liability and as to the amount awarded by the verdict; and the same has been approved by the justice who presided at the trial. We find no error in the denial of the motion for a new trial, and the exception thereto is overruled.

[1] As to the defendant's exceptions, respectively numbered in his bill from 1 to 10, inclusive, they all relate to a series of rulings by the trial judge, permitting the reading before the jury of the deposition of Henry J. Ralph, the plaintiff, and of certain specific questions and answers contained therein, against the objection of the defendant's counsel, on the ground that portions of the deposition, and these questions and answers, had to do with evidence of a specific contract between the plaintiff and the defendant's intestate. It is sufficient to say, with regard to these exceptions, that none of the questions, to which objection was made, were objected to upon the taking of the original deposition, although the defendant's counsel was at that time fully aware, as shown by the pleas on file, that he was intending to defend the action on the ground that the plaintiff was under guardianship and incapable in law of making a contract with the defendant's intestate at the time when his services are alleged to have begun, so that he could have taken his objection to the testimony given by the plaintiff, at that time on that ground, had he seen fit to do so.

[2] Furthermore, it was stated by the trial judge, in the presence of the jury that he (the judge) would permit the entire deposition to be read, and that it would be his duty to instruct the jury to disregard those portions of it which tended to prove a specific contract. This the judge subsequently did in his charge to the jury, where he specifically instructed them (page 266) that the Supreme Court had held "that, in consequence of Mr. Ralph's being under guardianship, he could not make a contract, so that any evidence that was introduced in Mr. Ralph's deposition, in which he set out that Mrs. Mathewson specifically agreed to pay him \$8 a month, even if you believe that to be true, the plaintiff would not be entitled to recover in this case, owing to the fact that Mr. Ralph was under guardianship. Even if Mrs. Mathewson had agreed to pay him that, it would not result in a contract that would bind her because of his inability to make the contract; even if they had such a conversation, that would not bind either

party as a contract, and therefore he could not recover, even if such a conversation occurred." The judge further proceeded to instruct the jury, fully and properly, as to the plaintiff's right of recovery under the second count, and no exception to any part of the charge was taken. Exceptions numbered 1 to 10 are overruled.

[3, 4] Exceptions 11 and 12, to refusals to charge the jury as requested, are also overruled. So far as they contain proper language relating to the measure of the plaintiff's recovery, the judge had already charged the jury fully and properly; but they also contained language relating to deductions to be made for board, lodging, clothing, care and nursing in sickness, and medical attendance, which were improper and not warranted by the testimony. There is nothing to show that Mrs. Mathewson had ever expended any definite sum or any sum on behalf of the plaintiff for any such matters; the only important illness for which it appears that he had medical attendance, and which resulted from an accident in falling downstairs, is shown by the doctor, who attended him at that time, to have been paid for by his guardian, William R. Sherman (page 153). The plaintiff had a pension, and there is nothing to show that he did not pay for his clothing and other incidental expenses, either from his pension or from moneys in the hands of his guardian, or from the moneys received from Mrs. Mathewson and credited to her in his account.

We find no error in the record. All of the defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter its judgment for the plaintiff upon the verdict.

WELCH v. McGLINCHY.

(Supreme Judicial Court of Maine. Feb. 26, 1913.)

FRAUD (§ 11*)—ACTIONABLE MISREPRESENTATIONS.

Where an agent, employed by an owner of an undivided interest in land to sell the same, stated to a prospective purchaser as a fact that the owner was the sole owner, and the prospective purchaser was inexperienced and did not know the importance of ascertaining if the proposed grantor had title, and she, from her acquaintance with the agent, had confidence in him, and he knew the facts, and she relied on his representations and purchased the premises, he was guilty of actionable misrepresentations; and the purchaser, suing within six years after the discovery of the falsity of the representations, could recover the damages sustained by reason of the defect in the title.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

Action by Mary Welch against James H. McGlinchy. There was a verdict for plaintiff, and defendant moves for a new trial. Overruled.

D. A. Meaher and W. G. Chapman, both of Portland, for plaintiff. John T. Fagan and Connellan & Connellan, all of Portland, for defendant.

PER CURIAM. This cause comes up on a motion for a new trial. The action is to recover damages sustained by reason of alleged misrepresentations made by the defendant during the negotiations for the purchase by the plaintiff of certain real estate.

One Ellen McGlinchy, a cousin of the defendant, employed him to sell the real estate for her. He undoubtedly supposed at that time that she was the sole owner of the property. But it subsequently appeared that she had title to but one undivided sixth of it, as an heir of her mother.

Acting as agent of his cousin, the defendant sold the property to the plaintiff, and she received a warranty deed thereof, executed by Ellen McGlinchy. The plaintiff claimed that the defendant stated to her in the negotiations that Ellen McGlinchy was the sole owner of the property; that she was "the only one that owned the property; and that there was no other heirs about it."

The question of the defendant's liability involved three issues of fact:

First. Did he state to the plaintiff as a fact, and not as an expression of his opinion, and as an inducement to the purchase of the property, that Ellen McGlinchy was the sole owner of the property, and that there were no other heirs to it?

Second. Did she rely upon his statement, and was she justified in so doing and in not having the title examined?

Third. Did she first discover that his statement was not true within six years prior to the commencement of her action?

These issues of fact were explained to the jury in instructions by the presiding justice that were clear and explicit, and to which no exceptions were taken, and the jury decided in the plaintiff's favor.

1. The defendant does not now seriously contend that he may not have made the representations to the plaintiff which she claims he did make. He testified that he understood, at the time of the sale, that Ellen was the sole owner of the property, and, being asked, "May you not have said so to her, believing it yourself?" he answered, "I might have."

2. The plaintiff had never owned any real estate, and was wholly inexperienced in such transactions. She did not know the importance of ascertaining if a proposed grantor of real estate had title to it, or how that fact could be ascertained. She had known the defendant for a long time, was a tenant of his, and had confidence in him and relied upon him. And he knew of her inexperience and limitations in relation to such a transaction, and that she reposed confidence in him; for he practically admitted

that he did not show her the property, and that she did not examine it. She acted on his advice that the purchase of this real estate would be a good trade for her, and he must have so understood it.

3. She testified that the first time she knew that her title was defective was after she had made a trade to sell the property, and less than three years before the trial. And it appears that she sustained damages, by reason of the defect in the title, amounting to as much, at least, as the verdict.

The court does not find from an examination and consideration of the evidence in this case that the verdict of the jury was not reasonably justified.

Motion overruled.

BOND v. HUMBIRD.

(Court of Appeals of Maryland, Nov. 14, 1912.)

1. BROKERS (§ 41*) — COMPENSATION — RIGHT TO.

A real estate broker cannot recover commissions on a sale which he was not employed or authorized to make, unless his act has been ratified by the owner, or the circumstances are such as to estop the owner from denying his authority.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 41; Dec. Dig. § 41.*]

2. BROKERS (§ 88*)—QUESTIONS FOR COURT.

In an action by a real estate broker for compensation, where his recovery of compensation depends wholly on correspondence with the owner, it is for the court to determine the legal effect of the letters.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121-130; Dec. Dig. § 88.*]

3. TRIAL (§ 136*)—QUESTION FOR COURT—INTERPRETATION.

In determining the legal effect of written instruments, it is the duty of the court to discover and declare the intention of the parties, and what they have written is to be read in the light of the surrounding circumstances.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323-327; Dec. Dig. § 136.*]

4. BROKERS (§ 40*)—CONTRACTS—WHAT CONSTITUTES.

Where a real estate broker wrote to a landowner that an out of town customer wanted to buy a large tract of land and he wished to know if the owner's land was for sale and if so at what price, the owner's reply, fixing a price and describing his land in accordance with the request, will not create a contract entitling the broker to commissions for procuring a purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 38-40; Dec. Dig. § 40.*]

Appeal from Circuit Court, Allegany County; Robert R. Henderson, Judge.

Action by Thomas R. Bond against J. Wilson Humbird. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Robert H. Williams, of Baltimore, and W. C. Devecmon, of Cumberland, for appellant. D. Lindley Sloan, of Cumberland, for appellee.

BURKE, J. The trustees of the estate of the late Jacob Humbird owned nine tracts of land situated in St. Mary's county, Md., and containing in the aggregate about 2,800 acres. Under appropriate proceedings had in the circuit court for St. Mary's county, this property was sold by the trustees in December, 1910, to J. Wilson Humbird for the sum of \$50,000. On the 6th day of January, 1911, J. Wilson Humbird and wife granted and conveyed the property to the National Slavonic Society of the United States, a corporation, in consideration of the sum of \$70,000 cash. On November 30, 1910, Thomas R. Bond, who is a licensed real estate broker residing in Baltimore city, made a demand upon J. Wilson Humbird for the payment of commissions on the sale of the property to the Slavonic Society, and, upon his refusal to pay, Mr. Bond instituted a suit against him in the circuit court for Allegany county. At the conclusion of the plaintiff's case, the court, upon the request of the defendant, directed a verdict for and entered a judgment in favor of the defendant upon the ground that the plaintiff had offered no evidence legally sufficient to entitle him to recover. This appeal, which presents the single question as to the correctness of that ruling, was taken by the plaintiff from that judgment.

The declaration contained the six common counts, and two special counts. The special counts set out the facts upon which the plaintiff relied to fix liability upon the defendant. The seventh, or first special, count alleged that the defendant was authorized by the owners, who were the trustees of the estate of Jacob Humbird, to sell the property, and that on the 14th day of December, 1903, he did "employ the plaintiff, a duly licensed real estate broker, resident in the city of Baltimore, and known as such to the defendant, and did authorize and employ him, the said plaintiff, to offer for sale the said property." The declaration then alleged that "by virtue of such authority and employment it was agreed and understood by and between the plaintiff and defendant" that the defendant would pay a reasonable commission to the plaintiff in case the plaintiff should effect a sale of the property upon terms acceptable to the defendant. It then alleged that the plaintiff did find a purchaser for the property in the person of one Joseph Joscak, "acting as agent of the National Slavonic Society of the United States of America, a corporation, and the plaintiff further says that he placed Joscak in communication with said defendant, and that thereupon said defendant made sale to the said National Slavonic So-

ciety for the sum of \$70,000; and that said plaintiff further says that he was the procuring cause of said sale, and that upon the consummation thereof he became and was entitled to have and receive from said defendant the usual and ordinary broker's commission charged in such cases." The eighth count, although it sets out the facts with more fullness of detail, rests the liability of the defendant upon precisely the same ground stated in the seventh count, viz., the employment of the plaintiff by the defendant to make the sale and the negotiation of the sale by the plaintiff.

It is obvious, upon an examination of the record, that the plaintiff bases his authority as agent of the defendant to make the sale upon two letters; one from himself to the defendant dated December 14, 1908, and the defendant's reply thereto dated December 15, 1908. This is clear both from the allegations of the narr., and from the letter of Mr. Robert H. Williams, the attorney for the plaintiff, to the defendant dated November 30, 1910, in which a demand was made for the payment of commissions on the sale. In that letter Mr. Williams said: "At Mr. Bond's request I now make formal demand on you for the amount of the commissions on the sale of all the property in St. Mary's county which you placed in Mr. Bond's hands for sale by letter of December 15, 1908, with memorandum attached thereto, naming the farms for sale with acreage." On the following day, Mr. Humbird replied to this letter, and stated that he had "no records of having placed any property in the hands of Mr. Bond for sale," and he asked that Mr. Williams send him copies of the letters referred to. He further stated that the property in St. Mary's county belonged to the estate of Jacob Humbird and was represented by trustees, and that he had no authority to pay commissions. He further said that, "Perhaps you only have the prices that were asked for the various properties."

It is not pretended that the plaintiff prior to December 15, 1908, had any authority to represent the defendant in the sale of the property. Several years before that date he had met Mr. Humbird on one occasion in the office of Kennard & Co., real estate brokers in Baltimore city. At that time the plaintiff had a customer who wanted to buy some timber land, and he talked with the defendant about the timber on the farms then in Kennard's hands for sale; but it was found that the quantity of timber on these farms was not sufficient to interest his customer. No further communications appear to have been had between the plaintiff and the defendant until December 14, 1908. On that day the plaintiff wrote and mailed to the defendant a letter of which the following is a copy: "Dec. 14, 1908. Mr. J. W. Humbird, Cumberland, Md.—Dear Sir: I have an inquiry from an out of town party who wants

to buy a large tract of land in Maryland. I was referred to Mr. Thos. Brome, St. Mary's Co., as having in charge a large tract known as Snow Hill, etc. I wrote to Mr. Brome in reference to the land and he referred me to you. If the property is for sale, and you will send me a description of the same with the price, I will submit it to my party. Hoping to hear from you, I am, Yours respectfully." When this letter was written, the plaintiff was under the impression that Mr. Brome was the agent having the properties in charge, and he testified that the out of town person referred to in his letter was a man named Cyne Leesk. The defendant replied to this letter as follows: "Cumberland Md., December 15, 1908. Mr. Thomas R. Bond—Dear Sir: Yours of the 14th inst. in reference to lands in St. Mary's received. The lands are located on the St. Mary's river, St. Mary's county, Md., and consist of several farms, containing in the aggregate about 2,813 acres as per memoranda on separate page—of which you will observe about 1,175 cleared land and 1,638 in timber. Assuming that the St. Mary's river runs north and south, the properties lie on the east side of the St. Mary's river and on the west of St. Ingoes creek, occupying most of the land between the two streams. St. Mary's harbor fronts on the property. The stream is navigable for big boats. The Snow Hill property is beautifully located at the head of the harbor. The view from this point has been very much admired. I ask in figures \$7,000.00 for the Snow Hill property. Yours very respectfully." Inclosed in this letter was a memorandum giving the prices of the several farms, aggregating the sum of \$52,000. This was the only letter written by the defendant to the plaintiff, except the one above mentioned in which he said he had no record of ever having placed the property in Mr. Bond's hands for sale.

The plaintiff, however, wrote four subsequent letters to the defendant, but to none of these did the defendant reply. First. In August, 1909, he wrote that he had an inquiry for a farm on Horseshoe Bend, St. Mary's county, and asked the defendant if he would sell 100 acres at that point and at what price. He suggested in this letter the advisability of cutting the properties up into small places of 50 to 100 acres each. Second. On October 30, 1909, he wrote that he had an inquiry for a large tract, and asked if the prices for the property were the same as those formerly submitted. He also asked for a rough plat of the different farms, and how they were located with reference to the water front.

The two other letters are here transcribed:

(1) "November 17, 1909. Mr. Humbird, Cumberland, Md.—Dear Sir: Mr. F. W. Valiant, who is a representative of mine in St. Mary's county, informs me this morning that he has taken a Mr. Jos. Joscak down to see

your property in St. Mary's city which you gave me a description of last winter. Mr. Vallant writes me that Mr. Joscak seems very much interested in the property, and is to spend several days at Mr. Brome's looking it over. I have written you several letters recently for a fuller description of the property, but my letters have been unanswered. Will you kindly answer this letter and give me full particulars up to date, and we may be able to make a deal for you. Hoping to hear from you, I am, Yours very respectfully."

(2) "October 5, 1910. Mr. Humbird, Cumberland, Md.—Dear Sir: Under date of November 17, 1909, I wrote you that Mr. F. W. Vallant, a representative of mine in St. Mary's county, had taken a Mr. Jos. Joscak to see your property at Brome's wharf, of which you had sent me a description some time previous. I now understand from Mr. Vallant that Mr. Joscak and his people, the National Slavonic Society, have bought the property. As neither you or Mr. Joscak notified us, I would like for you to write me and let me know the particulars. Mr. Vallant took Mr. Joscak down to see the property so that there can be no doubt about these people being our clients. Hoping to hear from you at an early date, I am, Yours very truly."

The evidence shows that the National Slavonic Society in June, 1909, appointed a committee to look up lands suitable for an asylum which it proposed to establish. Mr. Joscak was a member of that committee. He met Mr. Vallant about the 13th of November, 1909, and was taken by him to the Humbird property. He stopped for three nights at the residence of Mr. Brome and carefully examined the property. He made two other visits to the property, the last one on December 16, 1909, in company with a number of other members of the committee, and on this occasion the committee rejected the property as unsuitable. Mr. Joscak in a letter to Mr. Vallant, dated March 28, 1910, stated: "The Humbird property *was not bought*, but the committee of 14, including myself, went to look at it. It was, however, the society's lawyer who made Mr. Humbird to state figures on the tract and he arranged the excursion; but the matter of buying was set aside. The principal objection for that country around you was that there is much malaria, and is therefore undesirable to build an establishment such as we propose to build." At the annual meeting of the society in May or June, 1910, the committee of which Joscak was a member resigned, and a new committee, of which he was not a member, was appointed to secure a desirable property for the proposed asylum. This committee, in company with Mr. Joscak, visited the Humbird property, and the society in August, 1910, decided to buy it, and the sale was finally consummated on the 6th of January, 1911. There is nothing in the record to show

when or under what circumstances the purchaser first took up the question of sale with Mr. Humbird, or when the contract of sale was entered into; but it does appear from the letter of Mr. Joscak to which reference has been made that the attorney for the society at some time prior to March 26, 1910, had taken up the matter with the appellee.

We have now stated all the material and essential facts of the plaintiff's case, and the question to be determined is: Are they legally sufficient to entitle him to recover?

[1] The general principles of law applicable to cases of this kind have been repeatedly announced in a long line of decisions in this court. Speaking generally, it may be said to be well established that a broker cannot recover commissions on a sale he was not employed or authorized to make, unless his unauthorized act has been ratified by the owner. This was distinctly held in the case of *Moore v. Councilman*, 115 Md. 629, 81 Atl. 122. In the absence of ratification, or the existence of circumstances which estop the owner to deny the authority of the broker to make the sale—and no such circumstances appear in this record—a broker who has made a sale without authority, either expressed or implied, cannot recover. The general rule is that it is essential for him to show a delegated authority to act.

[2] Now, in this case, assuming that the correspondence of December 14 and 15, 1908, did not constitute the plaintiff the agent of the defendant to make the sale, it would appear to be clear that the plaintiff cannot recover, because there is no evidence whatever to show that Mr. Humbird ratified or approved of anything he had done; nor is there the slightest parol evidence from which it could be reasonably inferred that the plaintiff was authorized by the appellee to effect a sale of the property. It was therefore the duty of the court, and not the province of the jury, to determine the legal effect of the two letters of December 14 and 15, 1908. We said, in *Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689, that "the general rule undoubtedly is that the construction of all written documents is a question of law for the court, and, when a contract is sought to be made out from such documents alone, it is for the court to ascertain and determine its construction, whether the documents are many or few."

[3] The object of all judicial interpretation is to discover and declare the intention of the parties as expressed in the written documents. Obviously, the most simple and satisfactory way to ascertain that intention is to read what they have written in the light of surrounding circumstances existing at the time. What they meant to say must be gathered from what they did say, as viewed from the standpoint they then occupied.

[4] Examining these two letters in the light of these simple but well-settled rules of construction, it is difficult to see how it can be claimed that they constitute a contract of employment, or confer upon the plaintiff any authority to represent the defendant in the sale of the property. Evidently at that time such a relation was not in the contemplation of either party. The letter of December 14, 1908, is simply a request for information. The plaintiff's out of town customer, Mr. Leesk, wanted to buy a large tract of land, and the plaintiff wished to know if the Humbird land was for sale and at what price. If the properties were for sale, the defendant was asked to send a description of the same with the price in order that the plaintiff might submit it to his customer. There is nothing in the letter to suggest to the defendant that Mr. Bond desired to be employed or authorized by the defendant to act as his agent in the sale. This was evidently not intended. The defendant's reply, letter of December 15, 1909, merely furnished the information desired, but contained no expression that would indicate an intention on his part to constitute the plaintiff his agent to deal with the property in any way. We are therefore of opinion that the case was properly withdrawn from the consideration of the jury by the granted prayer.

The case of *Blake v. Stump*, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103, upon which the plaintiff placed some reliance at the hearing, presented a situation quite unlike the one we are here dealing with in two important particulars: First, the evidence to support the contract of agency was wholly oral; and, secondly, there was legally sufficient evidence offered to prove the contract. Under such circumstances, it was proper to submit the question contract vel non to the finding of the jury.

Judgment affirmed, with costs.

HUGHES et al. v. HALL.

(Court of Appeals of Maryland. Nov. 15, 1912.)

CORPORATIONS (§ 563*)—RECEIVERS—PREFERENCES—DECREE OF DISSOLUTION.

Where a corporation goes into the hands of an ordinary chancery receiver, a decree of dissolution, and appointment of a receiver thereunder, is a prerequisite to the recovery of an illegal preference, under Code Pub. Civ. Laws, art. 23, §§ 78, 79, providing, among other things, that, "whenever any corporation shall be dissolved by a decree, its property shall vest in its receivers, who shall have all the powers vested in the permanent trustees of an insolvent debtor," etc.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2280, 2280½; Dec. Dig. § 563.*]

Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

Bill by Adrian Hughes and another, re-

ceivers, against Frederick D. Hall. Decree for defendant, and plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTERSON, and STOCKBRIDGE, JJ.

Sylvan Hayes Lauchheimer and Thomas Hughes, both of Baltimore, for appellants. Richard S. Culbreth, of Baltimore, for appellee.

PEARCE, J. The bill of complaint in this case was filed by the appellants, alleging that the Hopkins Clothing Company, a corporation under the laws of Maryland, was engaged in the sale of ready-made clothing in Baltimore city, and that, while so engaged, receivers were appointed for said company on June 27, 1910, by a decree of the circuit court of Baltimore city, in a proceeding in which Frederick D. Hall and others were complainants and the said company was defendant, the record of which was prayed to be read and taken as a part of the bill of complaint in this case.

It appears from that record that Frederick D. Hall was the president of that company and one of its stockholders and creditors, and that, while the bill did not allege insolvency, it did allege that the company had been distrained on for rent in arrear to the amount of \$3,500, which it was then unable to pay, and was in arrears for taxes for several years, payment of which was urgently pressed, and that a sale under distress, or for said taxes, would result in great and unnecessary loss to creditors and stockholders; but that, if a receiver were appointed, the assets could be disposed of, and the affairs of the company be wound up to the best advantage of all concerned; that it was believed by such course all indebtedness could be paid. It alleged that the interest of the creditors and stockholders required that the corporation "should be dissolved under the statute," and the prayer of the bill was for such dissolution and the appointment of a receiver. The answer specifically consented to the appointment of a receiver, and generally to such decree as the court should deem proper; but the decree passed did not provide for dissolution of the corporation.

The bill in the present case alleged that, by an order of the court in the last-mentioned case, the receivers were authorized and directed to bring this suit; but the only order appearing in that record, authorizing and directing the receivers to bring any suit, is an order passed November 10, 1910, directing them, on their petition, to take such proceedings as should be deemed proper to enforce the liability of the stockholders of stock of said company, which was the subject-matter of the appeal in the case of these receivers v. Frederick D. Hall & John Spring.

Jr., reported in 117 Md. 547, 83 Atl. 1023. This averment, however, is one of fact, and is admitted by the demurrer filed to the bill. The bill further alleged that, at the time of filing the first-mentioned bill, the company was, and for a long time before had been, insolvent, and that such insolvency was apparent from the books and papers of the company, and was well known to the defendant, then a director and president of the company, and a director from its incorporation to the time of filing the original bill; that the auditor's account, filed in said original case, shows that, in the distribution of the assets of the company made therein, the creditors received a dividend of only about 29.7 per cent. of their claims, and that there was no prospect of payment of said claims in full; that, at the date of filing of the original bill, the defendant was "a creditor of said corporation for moneys advanced by him to it, and in other ways; * * * that, while being such creditor, he from time to time caused to be paid to himself, on account of his claim as such creditor, the sums shown in his account with said corporation, a copy of which account, marked Exhibit F. D. H., is herewith filed as part hereof, knowing at the respective dates of such payments that the corporation was hopelessly insolvent, and that, in making such payments, he was preferring himself to the then existing creditors of said corporation, who are still such, at a time when his duty as president and director required him to see that all such creditors should be equally provided for; that demand had been made on him to repay said receivers the amounts so improperly paid to him as creditor; and that he had refused to comply with that demand. The defendant demurred to the bill on the ground that it did not state such a case as entitled the receivers to any relief against him in a court of equity. The demurrer was sustained, with leave to amend the bill within 30 days; and, the plaintiffs not amending, the bill was dismissed, from which decree this appeal is taken.

The grounds of the demurrer are twofold: (1) That a decree for dissolution of the corporation is a prerequisite to the recovery of an illegal preference; and (2) that the ordinary chancery receiver cannot sue in such a case, and that only a receiver appointed and named in the decree of dissolution can recover an illegal preference. The receivers in this case are ordinary chancery receivers, and there has been no decree of dissolution naming them as receivers.

The appellants insist that their power and right to recover in this case is settled by the case of *Clark v. Colton*, 91 Md. 212, 213, 46 Atl. 386, 49 L. R. A. 698, while the appellee contends that it necessarily results from the recent decision in *Hughes & Frank, Receivers, v. Hall*, 117 Md. 547, 83 Atl. 1023, that their right to recover must be denied. A brief reference to the familiar principles regulating the powers of ordinary chan-

cery receivers, and an examination of the course of legislation in this state affecting corporations, actually insolvent, will aid in reaching a satisfactory conclusion in this case.

In *Quincy Missouri Pac. R. R. v. Humphreys*, 145 U. S. 95, 12 Sup. Ct. 787, 36 L. Ed. 632, it was contended that the receiver of the Wabash Railroad was liable for rent for the Quincy Railroad because he took possession of it; it being operated by the Wabash Company under a lease to it. But the court held otherwise, saying: "The receivers were not statutory receivers, nor did they occupy identically the same position as assignees in bankruptcy, or insolvency, or the like. They were ministerial officers, appointed by the court of chancery to take possession of, and preserve, pendente lite, the fund or property in litigation; mere custodians, the utmost effect of whose appointment is to put the property from that time into their custody, as officers of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession of the property"—and the court then quoted the passage we have reproduced from *Gaither v. Stockbridge*, 67 Md. 224, 9 Atl. 632, 10 Atl. 222, later on in this opinion.

In *Great Western Mining Co. v. Harris*, 198 U. S. 574, 25 Sup. Ct. 773, 49 L. Ed. 1163, a receiver was appointed by the United States Circuit Court for Kentucky in a suit to adjudicate and enforce liens, and to subject the property of the company to the payment of the claims of creditors. He filed a bill in the Circuit Court for the District of Vermont against *Harris*, a citizen of that state and a director of the company, alleging that certain stock had been issued to him without consideration and in fraud of his duty as a director, and for an accounting in respect thereto. The bill was dismissed upon the ground that, with no other title than that derived from the decree of the character mentioned, the receiver could not sue in a foreign jurisdiction; but, in the course of the opinion, the court used language so pertinent to the case before us that we reproduce it here, as follows: "It does not appear that, by order of the court or otherwise, there has been any conveyance of the property and assets of the company to the receiver, nor has the corporation been dissolved, and the receiver made its successor, entitled to its property and assets. * * * Nor is our attention called to any statute vesting the title of the corporation in the receiver." This language is in exact accord with that of Judge Alvey in *Gaither v. Stockbridge*, supra, 67 Md. 225, 9 Atl. 633, where, in speaking of an ordinary chancery receiver, he said: "It is manifest that the scope of his duties and powers are very much more restricted than those of an assignee in bankruptcy or insolvency. In the case of an assignee in bankruptcy, the law casts upon such

assignee the legal title to the unexpired term of a lease, and he thus becomes assignee of the term by operation of law, unless, from prudential considerations, he elects to reject the term as being without benefit to the creditors. But not so in the case of a receiver, unless it be as in New York and some of the other states, where, by statute, a certain class of receivers are invested with the insolvent's estate, and with powers very similar to those vested in an assignee in bankruptcy. The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court."

Prior to the Act of 1896, c. 349, corporations were not within the provisions of the insolvent law. That act was passed to bring them within those provisions, and to give courts of equity power to declare them insolvent, and to dissolve them. *Clark v. Colton*, 91 Md. 205, 46 Atl. 386, 49 L. R. A. 698; *Mowen v. Nitsch*, 103 Md. 687, 62 Atl. 582. That act added a new section to article 23 of the Code, title "Corporations," designated section 264A. Section 264, Code of 1888, provided that, whenever any corporation in this state, other than a railroad corporation chartered by the state, shall have been determined by legal proceedings to be insolvent, it may be adjudged to be dissolved, upon a bill filed by any stockholder or creditor or by the Attorney General of the state, or the State's Attorney of the county where the principal office of the corporation is situated; and sections 265 to 276 provide for the procedure under such bill. Section 264A provided that whenever any corporation mentioned in section 264, other than a railroad corporation chartered by the state, shall have been adjudged to be dissolved, as provided in section 264, all of its property and assets should be distributed to its creditors, as the property and assets of an insolvent debtor are distributed under article 47 of the Code, and the receiver of such corporation should have the power to maintain suits to set aside preferences and fraudulent payments, conveyances, and transfers, as the permanent trustee of an insolvent debtor has, when such payments, conveyances, and transfers are made by a natural person, who has become an insolvent debtor. Chapter 198 of 1902 repealed and re-enacted this section in totidem verbis, with an addition merely providing that its operation should not defeat or affect any sale of property of such corporation, made, under a decree of court, a power in a mortgage or a deed of trust.

In the Code of 1904, section 264A became section 377 of article 23; and chapter 240 of 1908, being a revision of the corporation laws of the state, repealed sections 264 and 264A among many others, and, by sections 53 and 54 of that act, enacted the law as it now stands in sections 78 and 79 of Bagby's Code of 1912. Section 79 provides that, "when- ever any corporation shall be dissolved by

decree of any court of this state, its property shall vest in its receivers, appointed and named therein, and all preferences, payments, and transfers, howsoever made by it, or by any of its officers on its behalf, which would be void or fraudulent under the provisions of the insolvency laws of this state, if made by a natural person, shall to the like extent, and with the like remedies, be fraudulent and void, and for the purpose of setting aside such preferences, payments and transfers, the receiver of such corporation shall have all the powers vested in the permanent trustee of an insolvent debtor." It is thus seen, in tracing the legislation upon this subject that in the original act of 1896, and in every repeal and re-enactment thereof, an adjudication of dissolution was made the foundation for the application of the principles of the insolvent laws, in the distribution of the assets of an insolvent corporation.

In *Hughes v. Hall & Spring*, 117 Md. 547, 83 Atl. 1023, the bill was filed by these same receivers against a number of stockholders to recover the par value of stock issued to them as a bonus, and their right to recover was resisted upon the ground that no decree for dissolution had been obtained before filing the bill. Judge Stockbridge, in delivering the opinion of the court, observed that sections 41 and 54 of chapter 240 of 1908 both deal, in part, with the same subject-matter, and calls attention to the fact that section 54 is a combination of sections 377-382 and 383, of article 23, of the Code of 1904, and that it makes no provision for liability of stockholders upon any stock held by them. That liability is dealt with in section 41 of chapter 240 of 1908, and the provision there made is that such liability shall be an asset of the corporation, and may be enforced by the receiver or other person winding up the corporation, "and that, too, without any distinction of the character of the receiver as 'chancery' or statutory, and without any mention whether such insolvency shall be established by a decree of court, or the proof of it as a fact." It was accordingly held, in that case, that the receivers could maintain the suit, though the demurrer to the bill was sustained for want of sufficiently definite allegations as to some of the matters charged, and the case was remanded for amendment in these respects.

But in considering section 54, which relates expressly to cases of dissolution under a decree of court, and provides that in such cases the property of the corporation shall vest in its receivers "named and appointed therein," the court said: "This vesting in the receiver is thus made the legal consequence of a decree of dissolution"—that is to say, that, when the dissolution prayed for has been decreed, then, by virtue of such decree, the receiver is vested with the powers of a permanent trustee in insolvency, and may ask that unlawful preferences be set

aside, just as was said in *Mowen v. Nitsch*, supra. "It is under sections 376 and 377 of article 23 of Code of 1904, and section 22 of article 47, that proceedings must be had to set aside or avoid a prohibited preference."

Whatever support might be derived from the case of *Clark v. Colton*, 91 Md. 195, 46 Atl. 388, 49 L. R. A. 698, for the argument of the appellants, if that were the last word upon the subject, it cannot be successfully contended, since the decisions in *Mowen v. Nitsch* and *Hughes v. Hall & Spring* that a prior decree of dissolution is not essential to the maintenance of a bill by a receiver to set aside an unlawful preference. In view of this conclusion, it is unnecessary to consider any of the other questions argued in support of the demurrer.

Decree affirmed, with costs to the appellee above and below.

BALTIMORE TRUST CO. v. GEORGE'S CREEK COAL & IRON CO.

(Court of Appeals of Maryland. Nov. 20, 1912.)

1. RECEIVERS (§ 35*)—APPOINTMENT—NOTICE—HEARING.

A court of equity will not appoint a receiver without notice, unless the necessity thereof is of the most stringent character.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 54-60; Dec. Dig. § 35.*]

2. CORPORATIONS (§ 553*)—RETENTION OF DIVIDENDS—LIABILITY.

A corporation is not bound to invest dividends due its stockholders, or to pay interest thereon where the stockholders permit the dividends to remain in the possession of the corporation, and loss of interest arising from the neglect or omission of the stockholder to claim dividends is not a necessity for the appointment of a receiver of the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.*]

3. CORPORATIONS (§ 621*)—LIQUIDATION—RECEIVERSHIP.

Under Code Pub. Civ. Laws, art. 23, § 80, providing that, where a corporation is dissolved otherwise than by judicial proceedings, the directors shall become trustees, and liable to the extent of the property coming into their hands, the court in a suit against a corporation in liquidation to compel it to issue a duplicate certificate of stock, in lieu of an original lost or destroyed, may not appoint a receiver merely because the greater part of the assets of the corporation have been distributed and the remainder will soon be distributed, so that it will have no assets and no financial responsibility.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2461-2469, 2471; Dec. Dig. § 621.*]

4. CORPORATIONS (§ 109*) — ISSUANCE OF STOCK—INTEREST OF CORPORATION.

A corporation issuing stock in the name of a person followed by the word "trustee" is interested in the dispute as to the ownership of the stock, and may refuse to issue a duplicate certificate to the receiver of the estate of the stockholder, who is dead until it is determined that the stock was the property of the person in his own right when he died.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 462; Dec. Dig. § 109.*]

5. CORPORATIONS (§§ 95, 109*)—ISSUANCE OF STOCK—INTEREST OF CORPORATION—"TRUSTEE."

The word "trustee," following the name of a person to whom stock is issued, is notice of a trust, and the corporation, when the receiver of the estate of the stockholder, who is dead, demands a duplicate certificate, does not have the burden of proving the beneficiary in the trust, and a mere lapse of time of the beneficiary to appear and claim the stock or dividends raises no presumption of personal ownership.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 436, 462; Dec. Dig. §§ 95, 109.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7128-7133.]

6. TRUSTS (§ 169*)—DEATH OF TRUSTEE—LIABILITY.

Trusts of realty on the death of the trustee devolve on his heirs at law, while trusts of personalty devolve on the executor or administrator, for the preservation of the title, until the appointment of a new trustee, and, where the trust estate has been in course of administration by the deceased trustee, his executor or administrator must render an account, and is a proper party to a proceeding for the appointment of a new trustee.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 222-224; Dec. Dig. § 169.*]

7. CORPORATIONS (§ 109*) — ISSUANCE OF STOCK—DUPLICATE.

A corporation issued stock in the name of a person followed by the word "trustee." It retained cash and stock dividends for many years, and, after the stockholder's death, the receiver of his estate demanded a duplicate certificate and the dividends due and unpaid. None of the avails of the trust had ever been in the hands of the stockholder as trustee. Held, that the receiver appointed on the petition of the administrator with will annexed of the stockholder had no equitable interest in the subject-matter to compel the relief demanded, and the court was without jurisdiction.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 462; Dec. Dig. § 109.*]

8. EQUITY (§§ 42, 160, 178, 220*)—JURISDICTION—WANT OF JURISDICTION—OBJECTIONS.

Objection on the ground of want of jurisdiction may be made by demurrer, plea, answer, or may be taken advantage of at the hearing.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 119, 120, 397, 414, 497; Dec. Dig. §§ 42, 160, 178, 220.*]

9. EQUITY (§ 117*)—PARTIES—CAPACITY—WANT OF CAPACITY—OBJECTIONS.

Objection on the ground of the capacity of plaintiff instituting a suit in equity may be made by demurrer, plea, answer, or taken advantage of at the hearing.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 246, 285-292; Dec. Dig. § 117.*]

Appeal from Circuit Court of Baltimore City; Carroll T. Bond, Judge.

Suit by the Baltimore Trust Company, receiver of the estate of Telly Allen, deceased, against the George's Creek Coal & Iron Company. From a decree of dismissal, complainant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Stuart S. Janney, of Baltimore, for appellant. Shirley Carter, of Baltimore, for appellee.

PEARCE, J. This is an appeal from a decree of the circuit court of Baltimore city dismissing a bill filed by the Baltimore Trust Company, a corporation of the state of Maryland, as receiver, against the George's Creek Coal & Iron Company, also a corporation, of the state of Maryland, the ground of the dismissal being want of jurisdiction in the court to entertain the proceeding. The bill alleges (1) that 58 shares of the capital stock of the defendant company stand in the name of Telly Allen of New York, in trust, and has so stood since March 22, 1841, under the certificate therefor issued on that date; (2) that on September 29, 1911, the Baltimore Trust Company, administrator c. t. a. of the estate of Telly Allen, deceased, filed an ex parte petition in the circuit court of Baltimore city, alleging the fact just stated, the death of the said Telly Allen about August 18, 1862, leaving a last will and testament, and the appointment of the petitioner as administrator c. t. a. of his estate, praying for the appointment of a receiver to reduce to possession by demand, suit, or otherwise, said 58 shares of stock and all cash, bonds, or scrip representing the same, to be administered to the best advantage of all concerned under the jurisdiction of said court; and that the petitioner was accordingly appointed such receiver by an order of said court passed September 29, 1911; (3) that, pursuant to the authority contained in said order, the Baltimore Trust Company applied to the George's Creek Coal & Iron Company for the issue of a new certificate for said 58 shares of stock to be made out in the name of the receiver, the original certificate having been lost or destroyed; (4) that said George's Creek Coal & Iron Company, being advised by counsel that it was not its duty to issue such new certificate, refused to issue the same; (5) that the receiver was advised by its counsel that it was its duty to institute proceedings to require the issuance of such new certificate.

The prayer of the bill was that an order should be passed requiring the defendant to issue and deliver to the receiver such new certificate, and to pay to the receiver all dividends due and unpaid thereon, and for an injunction restraining the defendant from issuing a new certificate for said 58 shares of stock, or from paying any new stock, bonds, scrip, or cash payable or distributable thereon to any party other than said receiver. An order was accordingly passed requiring the defendant to show cause why it should not be directed to comply with the demand of the receiver.

There was filed with the bill as an exhibit, and as part thereof, a copy of the petition above mentioned, the substance of which is necessary to be stated in order to a proper understanding of the whole controversy. This petition, after making the allegations before mentioned, further alleged that said

certificate had been lost or destroyed, and the only evidence in the possession of the George's Creek Coal & Iron Company or information as to the form of said certificate was the entry in the stock ledger, all of its other books and records having been destroyed by the great fire of February 7 and 8, 1904; that said Telly Allen by his last will and testament gave his entire estate to his only son, John Hazard Allen, who was made sole executor, a copy of said will being filed with the petition; that John Hazard Allen died March 2, 1906, intestate and without issue, but leaving a widow, Mary C. Allen, residing at East Orange, N. J.; that in the settlement of the estate of Telly Allen made by said executor no mention was made of said stock either in the inventory or otherwise; that in 1910 one of the directors of the defendant company, for the purpose of ascertaining who was entitled to said stock, caused advertisement to be made in certain newspapers published in New York City and in Brooklyn, asking for information concerning said Telly Allen, and that Mrs. Anna V. S. Hazard Allen responded thereto, and an exhaustive investigation was then made for the purpose of ascertaining the surviving relatives of Telly Allen who might by possibility be entitled to said stock, and to ascertain whether any trust in respect thereto really existed and if so its character, and who were the beneficiaries; that the only practical result of such investigation was to disclose the fact that Telly Allen left two sons by a first wife, Mary Cutler, both of whom died many years ago, and that the probate records at their respective residences disclose no will or administration; that by his second wife, Mary Hazard Merritt, who died in 1833, Telly Allen left three children, two of whom have been dead many years, and John Hazard Allen before mentioned, who died intestate in 1906 leaving a widow, Mary C. Allen, and that the only living persons having or being likely to have any information as to said stock are Mary C. Allen and Anna V. S. Hazard Allen; that Mary C. Allen, widow of John Hazard Allen, knew Telly Allen, but has no knowledge or information of any stock held by him in trust, though she recalls that at the time of his death there was some talk in the family that he owned some worthless stock, the name of which she did not know or hear; that Anna V. S. Allen has no knowledge or information as to any stock owned or held by Telly Allen as trustee, but that her father, John Van Schoonhoven Hazard, was once a business partner of Telly Allen; that her father failed in business about 1837, and afterwards said he could not on that account hold property in his own name, and that her mother had said she had then given up her property, but that it would come back to her children; that it had never come back to them, and "she thinks it possible on speculation and

surmise" that Telly Allen may have held this stock upon some trust for them; that the inventory of Telly Allen's estate showed stocks in various companies, but that a number of those companies are now out of existence, and there is nothing to show whether these stocks were held by him in trust; that at the time of his death he was agent for one Anson G. Phelps, of Phelps, Dodge & Co., of New York City, but that no light has been obtained from that quarter; that, beginning with 1864, 83 separate dividends have been declared on said stock, and in 1910 a reduction of capital stock was made, and several liquidation dividends were declared and paid to stockholders, and a distribution made to them of bonds and scrip, but all these in respect of said 58 shares of stock are retained by the defendant for whoever may be entitled thereto, and the total of said cash dividends is now \$20,952.50 and the total value of such bonds and scrip is now \$14,236.35, in all of which the petitioner asserts the defendant company has no claim or interest; that during all this period no one has ever laid claim to said stock and dividends or ever communicated with the defendant company in respect thereto.

The petitioner then avers that it believes no trust ever existed in respect to said 58 shares of stock, but that the same belonged absolutely to said Telly Allen, all of his debts having been paid by his executor; "that even if, by chance, some trust does exist with respect to such stock, then, in the absence of any claim by any one interested thereunder, it is the right and duty of the petitioner, as administrator c. t. a. of Telly Allen, to take possession of the same, and to retain, preserve, and protect it for account of the true owner; that the petitioner nevertheless realizes that the fact that this stock stands in the name of Telly Allen in trust raises a question as to its right to recover the same as administrator c. t. a. of Telly Allen, but that there can be no doubt whatever of its duty as such administrator to protect said stock and fund and "to put in motion the proper machinery of the court, to the end that the property may be ultimately distributed to those entitled thereto"; that, if the property is permitted to remain in the hands of the defendant company, there will be a loss to the ultimate owners, as no interest will be allowed upon the \$20,952.50 representing cash dividends, and, moreover, that said company is now in liquidation, has distributed the greater part of its assets to its known stockholders, and will shortly distribute the remainder, and will then have no assets at all, and no financial responsibility, and the petition closes with the prayer for the receiver which was granted as stated. A copy of said bill of complaint, exhibits, and order having been served on the defendant company, its answer was promptly filed admitting the preliminary allegations of the

bill, but alleging that the appointment of the receiver having been made, as shown by the exhibit, in an ex parte proceeding, without any notice to the defendant of such application, and without opportunity to be heard in opposition thereto, that the order of appointment was improvidently made, and should be forthwith stricken out, and the bill of complaint be dismissed.

The defendant, however, tendered itself ready, upon the dismissal of the bill of complaint, to answer forthwith the allegations of the ex parte petition, if made in a bill of complaint filed in that court by Baltimore Trust Company, administrator c. t. a. of Telly Allen, deceased, to which the defendant should be made a party defendant, and in order to inform the court what its answer would have been to said ex parte petition, if an opportunity to answer had been given and what its answer will now be if given an opportunity to answer the same, it proceeded to set out in detail what such answer would be. It admitted the facts averred as such in paragraphs 1, 2, 3, 4, and 5. It said it had no knowledge of the averments of paragraphs 6, 7, 8, 9, and 10, and neither admitted or denied the same, except the averment that no dividends were made before 1864, which it admits.

It admits the averments of paragraph 11, relating to the number of dividends declared, the reduction of the capital stock, and the distribution of bonds and scrip upon said 58 shares of stock, the amount of such dividends and of such bond and scrip, and their retention by the defendant for whoever may be entitled thereto, but it does not admit that the defendant has no claim to, or interest in, said 58 shares of stock, and it alleges that the number of shares of stock now standing in the name of Telly Allen in trust, though originally 58 is now 116; the number of shares of all the stockholders having been doubled in recent years. It admits the averment of the twelfth paragraph that during all these years no demand has been made by any beneficiary for said stock, dividends, bonds, or scrip, but denies the averment that the absence of such demand is any more evidence that said stock was not held in trust than that it is owned by a relative or next of kin of Telly Allen.

Answering the thirteenth, fourteenth, fifteenth, and seventeenth paragraphs, as to the belief of the petitioner that the property in question belonged absolutely to Telly Allen, as to the petitioner's averment, that, even if any trust exists, it is its duty to take possession thereof for the actual owner, as to the refusal of the defendant to issue and deliver a new certificate, as to the petitioner's claim that, though there is a question of its right to recover the property, it is yet its duty to put in motion the machinery of the court for the distribution of the property to those entitled thereto, and as to the aver-

ment that the defendant ought not to be permitted to remain in possession of the property because no interest will be allowed on the cash dividends, and because the defendant is in liquidation, and its assets will soon be all distributed, the defendant says that, even if it were proper for a receiver to be appointed, the petitioner would not be a proper appointment, because his interest and duty as administrator of Telly Allen is to assert the private ownership of said Allen, rather than the trust ownership in which it stands, and that any receiver appointed should be impartial upon that question, and the defendant says it is ready forthwith to have said stock, dividends, etc., invested under the order of the court. Further answering, the defendant refers to certain proceedings pending in the same court against it upon a bill filed by Edward E. Montell and others, stockholders of the defendant, in reference to the disposition of the stock standing on the books of the defendant in the name of Morris Robinson, agent (being the same stock which was the subject of controversy in *Tyson, Adm'r of Morris Robinson, v. George's Creek Coal & Iron Co.*, 115 Md. 564, 81 Atl. 41), and says that for the reasons given in its answer in said case it is not necessary that a receiver should be appointed in this case; but that all the questions herein can be determined under proceedings taken by this corporation under the direction of this court without the appointment of a receiver, and without burdening the property representing the stock standing in the name of Telly Allen, in trust, with receivers' commissions; the president of the defendant having offered to render without compensation all services which could be performed by a receiver. The defendant, further answering, suggested that the court should by its order direct the defendant to give notice to the administrator of Telly Allen, and to all others claiming said stock in any way, to file their claims thereto by a day to be named in said order, or else be thereafter forever barred, and that the court, after such notice, proceed to determine upon the validity of said claims, or that, if it should be thought proper that a receiver should be appointed at all, the same receiver should be appointed in this case as in the *Montell Case* before mentioned, and that the receiver's services in both cases should be compensated by reasonable salary instead of the allowance of commissions.

The defendant further prays that if the court should dismiss the bill in this case, and allow the receiver to file another bill in lieu of said *ex parte* petition, his answer in this case may be taken as an answer to such new bill, or, if in the judgment of the court it will be more conducive to efficient dealing with the ownership of these 58 shares of stock, that said new bill so to be filed shall

be dismissed, and the administrator *c. t. a.* of Telly Allen shall be made a coplaintiff with said Montell and others in the bill filed by them that the court will so order.

The case was heard on the motion to dismiss incorporated in the answer, and the court being of opinion that it was without jurisdiction to pass the order of September 29, 1911, upon said *ex parte* petition, and also that "the plaintiff is not entitled to receive the stock and dividends thereon and the other things as prayed in the bill of complaint in this cause from the defendant," the bill was dismissed. It thus appears from the language of the decree that the court considered and determined two questions: (1) The propriety of the appointment of a receiver upon the *ex parte* petition: and (2) whether, if the receiver had been appointed, only after notice to defendant, and opportunity to be heard, the receiver had established its right to the stock and dividends.

[1] As to the first question little need be said. A fundamental rule of equity is that, "unless the necessity be of the most stringent character, the court will not appoint a receiver until the defendant is first heard in response to the application." *Blondheim v. Moore*, 11 Md. 374; *Johnston v. Lippert*, 96 Md. 588, 54 Atl. 114.

[2, 3] It cannot be contended that any real necessity whatever existed in this case for the appointment of a receiver upon an *ex parte* petition without notice or hearing. *Anderson v. Cecil*, 86 Md. 493, 38 Atl. 1074; *Baker v. Baker*, 108 Md. 277, 70 Atl. 418, 129 Am. St. Rep. 439. The only attempts to show any necessity are found in the following allegations: (1) That there will be a loss to the ultimate owners, if the property is permitted to remain in the hands of the defendant, since no interest will be allowed by it on the cash dividends of \$20,952.50. But there is no duty imposed upon corporations to invest dividends due their stockholders, or to pay interest thereon, and loss of interest arising from the neglect or omission of the stockholder to claim dividends can hardly be held to constitute the necessity for a receiver. (2) That the company is in liquidation, has distributed the greater part of its assets, and will shortly distribute the remainder so that it will have no assets at all and no financial responsibility for the proper care of said property, or to prevent its loss, waste, or diversion. If this ground were otherwise tenable, it is fully answered by section 80 of article 23, which provides that where a corporation is dissolved otherwise than by judicial proceedings, and until other persons are appointed as receivers by competent authority, the directors at the time of the dissolution become trustees for the creditors and stockholders, and are made jointly and severally liable to the creditors and stockholders to the extent of its property which should come into their hands. The appellant relies upon this point upon the

language of the court in *Voshell v. Hynson*, 26 Md. 94, where it is said that the rule laid down in *Blondheim v. Moore*, *supra*, is one which can only be enforced upon appeal directly from the order appointing a receiver. But in the case before us the petition for a receiver, and the order appointing one, is made a part of the bill, and that order is thus brought before the court on this appeal.

[4] The appellant also contends that no notice was required to the defendant, and no injury could be wrought by the *ex parte* appointment, because no receiver was appointed for the defendant and none of its property was or can be taken from its possession by such appointment, and that the defendant corporation has no interest in the property in question here, or in its possession, nor in any dispute as to the ownership of these shares of stock and their accretions. But this contention is opposed to clear authority. In *Bank v. Lange*, 51 Md. 144, 34 Am. Rep. 304, this court following the law laid down in *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, held that the addition of the word "trustee" after a name, gave notice of a trust, and this was approved in *Swift v. Williams*, 68 Md. 256, 11 Atl. 835, and again in *Marbury v. Ehlen*, 72 Md. 216, 19 Atl. 650, 20 Am. St. Rep. 467, where it was held that "the corporation is the custodian of the stock and clothed with power to protect all persons interested from unauthorized transfers, and that it is the duty of the corporation to exercise diligence in the discharge of its trust to see that unauthorized transfers are not made to the prejudice of cestuis que trust, * * * and that it is bound to see that the trust property in its custody was protected and not misappropriated." It is therefore quite clear that the defendant corporation is interested in the dispute as to the ownership of these shares of stock, and that there was manifest propriety and prudence in its refusal to issue and deliver to the plaintiff a duplicate certificate for said shares of stock until it was determined by a court of competent jurisdiction that said stock standing in the name of Telly Allen in trust was the property of Telly Allen at the time of his death in his own right.

This inquiry constitutes the second question the substantial and vital question in the case. The gist of the appellant's ingenious and earnest argument upon this question may be best stated in the following extract from his able brief: "The certificate of stock standing in the name of Telly Allen, of New York, in trust, either constitute a trust fund which Telly Allen held in trust for some unknown beneficiary or beneficiaries, or it constituted a part of his own estate, the words 'in trust' being placed upon the stock for some personal reason. The petition for the appointment of receivers sets forth the efforts that were made to discover any trust

to which the stock might belong, and we respectfully submit that the failure of these efforts to disclose any such trust is *prima facie* evidence that none exists. In such event, the stock and that which it represents are a part of the estate of Telly Allen, and the administrator *c. t. a.* is entitled to take steps for the protection thereof."

[5] The theory here presented is that the failure of the appellant's efforts recited in the *ex parte* petition for a receiver to discover some cestui que trust is *prima facie* evidence that there was no trust, and that the stock belonged to Telly Allen in his own right, and therefore the administrator *c. t. a.* of Telly Allen has such an interest as entitles him to apply for a receiver. But this contention is in conflict with what was decided in *Tyson v. George's Creek Coal & Iron Co.*, *supra*, for, with respect to the words "agent" and "trustee," in so far as the question is whether the stock in this case was held in trust or in his own right, there is no ground for discrimination. In the *Tyson Case*, *supra*, the court reached its conclusion that the word "agent" was notice of an agency, and that the stock was not held in his own right, in reliance upon the decisions in *Marbury v. Ehlen*, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467, and *Swift v. Williams*, 68 Md. 255, 11 Atl. 835, where the word "trustee" was held to give notice of a trust. The *Tyson Case* also held that the burden of proof was not upon the corporation to prove who was the principal, and for the same reason the burden is not upon the corporation here to prove who was the cestui que trust. The *Tyson Case* also held that mere lapse of time after failure of the principal to appear and claim the stock or dividends raised no presumption of personal ownership in the person named in the certificate as agent. Nor does it in this case raise such presumption against the cestui que trust. It was also held in that case that the entry on the books of the company was a continuous assertion that the stock was not the private property of Morris Robinson, and prevented the application of limitations, and that the stock did not pass to Morris Robinson's administrator. All those findings in that case are applicable in this case, and are conclusive against the appellants that the stock in this case constituted no part of Telly Allen's own estate.

[6] But the appellant further contends that even if we should conclude that the fact that the stock stands in the name of "Telly Allen in trust" constitutes presumptive evidence that he held it in a purely fiduciary capacity for another, and that the failure to discover and identify a cestui que trust does not overthrow that presumption, still there can be no doubt that it is both the right and duty of the administrator *c. t. a.* to take steps for the protection of the fund until a new trustee be appointed. The general principle is

not questioned that trusts of real estate upon the trustee's death devolve upon his heir at law, and trusts of personalty devolve upon the executor or administrator for the preservation of the title until the appointment of a new trustee, and that, where the trust estate has been in a course of administration by the deceased trustee, it is the duty of the executor or administrator to render an account of the trust; and in such case it would be proper, and perhaps necessary, that the executor or administrator should be a party to a proceeding for the appointment of a new trustee. But this is not such a case.

[7] Here the record shows that none of the avails of the trust ever were in the hands of Telly Allen as trustee. The stock certificate presumably was in his possession, but all the cash dividends, bonds, and scrip in controversy are and always have been in the possession of the defendant company, and there is no settlement that could be made or refused by the representative of the deceased trustee. There is no question of commissions or expenses to be allowed the trustee, and no possible beneficial interest whatever in the trustee. Hence in *Offutt v. Jones*, 110 Md. 238, 73 Atl. 629, it was held not necessary to make the executor of a deceased trustee a party to a proceeding for a new trustee. This case comes within the principles of *Sellman v. Sellman*, 63 Md. 520, and *Hamilton v. Traber*, 78 Md. 26, 27 Atl. 229, 44 Am. St. Rep. 258. In the former case certain children and grandchildren of their living father and grandfather filed a bill in equity to set aside certain deeds made by him on the ground of undue influence in their execution, claiming that on his death the property might by possibility be sent to them. The bill was dismissed on the ground that to sustain a bill the plaintiff must show "an interest in the subject of the suit, or a right to the thing demanded, and proper title to institute the suit concerning it." In the latter case, the niece of Mrs. Traber filed a bill alleging that her aunt was mentally weak and incapable of managing her estate, and that it would be to her aunt's interest and advantage that her real estate be sold, and a sale was ordered and made. On exceptions filed by the purchaser it was shown that the niece had no interest whatever in the subject-matter of the proceeding, and that, "without being beneficially concerned in the property herself," she sought to take it out of the possession of the defendant, and have it sold. The sale was set aside, the court declaring that the plaintiff was a mere volunteer, that the court was entirely without jurisdiction to order the sale, and that the decree for sale was a pure nullity. In the present case we think it is quite plain that the petitioner has no such legal or equitable interest in the subject-matter of the petition as would warrant

him in asking for a receiver; that he was nothing more than a mere volunteer; and that the court consequently was without jurisdiction to appoint any receiver, and its order of appointment was a nullity.

[8, 9] Objection on the ground of want of jurisdiction or the capacity of the plaintiff may be made by demurrer, plea, answer or taken advantage of at the hearing. *Tartar v. Gibbs*, 24 Md. 338. So, without further prolonging this opinion by consideration of the numerous authorities cited in the able brief of the appellant, we must affirm the decree.

Decree affirmed, with costs to the appellee above and below.

GOELLER v. STATE

(Court of Appeals of Maryland. Nov. 20. 1912.)

1. INDICTMENT AND INFORMATION (§ 56*)—SUFFICIENCY OF CHARGE.

Acts 1903, c. 179, regulating the sale of intoxicants in Baltimore county, provides by section 14 that one convicted a second time, "which fact the court may ascertain from the dockets of the court," shall pay a certain fine, violates Maryland Declaration of Rights, art. 21, giving accused the right to be informed of the accusation against him, in that it does not require the indictment to state that accused was charged with a second offense.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 176, 178; Dec. Dig. § 56.*]

2. CRIMINAL LAW (§ 992*)—JUDGMENT—CONFORMITY WITH VERDICT.

In a prosecution for unlawfully selling intoxicants, it was error to render a judgment as for the commission of a second offense by imposing an increased fine, where it did not appear by the verdict that accused was found guilty of a second offense.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2519; Dec. Dig. § 992.*]

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Joseph Goeller was convicted of selling intoxicants on Sunday, and appeals. Reversed and remanded for judgment.

Argued before BOYD, C. J., and BRISCOE, PEARCE, THOMAS, PATTERSON, and STOCKBRIDGE, JJ.

Wm. H. Lawrence, of Baltimore, for appellant. Edgar Allan Poe, Atty. Gen., for the State.

PEARCE, J. The appellant was indicted in the circuit court for Baltimore county for selling liquor on Sunday, and, upon conviction, was sentenced to pay a fine of \$200, and his license was suppressed. The docket entry was as follows: "Feby. 28th 1912. It appearing to the court upon an inspection of the dockets of the court, and on evidence, that this is a second conviction under the license issued May 1st 1911, the sentence of the court is that the traverser pay a fine of

\$200 and costs, and that his license be and it is suppressed."

There are two counts in the indictment, but in neither is it averred that the offense charged was a second offense, which fact, if relied on as affecting the punishment, it was determined in *Maguire v. State*, 47 Md. 496, must be averred in the indictment as the law then stood. Chapter 179 of the Acts of 1908, regulating the sale, and granting of licenses for sale, of spirituous and fermented liquors in Baltimore county, provides, in section 14, that: "If any person having a license under the provisions of this act, shall violate any of the provisions of this act, upon conviction thereof, except in the cases enumerated in the next preceding and succeeding sections, he shall pay a fine of not less than \$100, nor more than \$200, and on conviction a second time, which fact the court may ascertain from the dockets of the court, in connection with evidence, he shall pay a fine of \$200, and his license shall be suppressed." This act appears to have been passed to meet cases of a second offense, where, from ignorance of the fact, or inadvertence in drawing the indictment, that fact is not averred in the indictment. The record has been brought here as upon writ of error to determine the validity of section 14 of chapter 179 of 1908, and the petition designates the following points of law by the decision of which the appellant feels aggrieved: "(1) That the court gave judgment directing, in addition to the other penalty imposed, that his license to engage in the liquor business be suppressed. (2) That by such judgment the court determined that he was guilty of a second or subsequent offense, of the character charged against him, and liable to the aggravated penalty therefor. (3) That in thus giving judgment and determining the court imposed upon him a punishment for matter of which he did not stand accused by the indictment presented against him, nor established by the verdict upon said indictment. (4) That in this manner he was deprived of his legal and constitutional right to be informed of the nature and cause of the accusation against him."

The first, second, and third of these points state facts apparent upon the face of the record, and thereby raise the question for decision, viz., whether he was thus deprived of his constitutional right under article 21 of the Maryland Declaration of Rights, which, among other things, declares "that in all criminal prosecutions, every man has a right to be informed of the accusation against him," and "to have a copy of the indictment, or charge, in due time, if required, to prepare for his defense." The information hereby guaranteed to him is not to be conveyed by word of mouth, nor by any other means than by "a copy of the indictment or charge," or accusation, upon which he is to be tried, and it is a guaranty that he must be informed of the whole charge

or accusation against him, and not of a part only. The reason for this is given in the same article of the Declaration of Rights, viz., "to prepare for his defense," and this he cannot do without a full knowledge, both of every element of the offense charged and of the penalty or penalties to which he may be subjected in event of conviction. Mr. Bishop, in his *New Criminal Procedure*, has treated more fully, perhaps, than any other legal writer, the principles which underlie the authorities upon this question. In volume 1, § 77, he says: "Every wrongful fact, with each particular modification thereof, which in law is required to be taken into account in determining the punishment upon a finding of guilty must be alleged in the indictment. This doctrine is fundamental. Originating in natural reason and abstract justice it has been adopted into the common law and confirmed by our written constitutions. * * * An indictment which does not substantially set down all the elements of the offense, every act or omission which the law has made essential to the punishment it imposes is void." Id. § 98A. "An accusation is nothing unless it specifies in some way the whole wrong for which the punishment is to be inflicted." Id. § 87. "A statute having made a second offense punishable more heavily than the first, it was held not to be unconstitutional when it provided a short form of stating the first offense and conviction in the second indictment, adding, 'and such allegation may be amended without terms and as a matter of right'; but an entire omission to aver the former offense, or conviction for it, cannot be authorized." Id. § 101, subsec. 2. This doctrine is consistently sustained in a line of Massachusetts decisions (*Commonwealth v. Phillips*, 16 Pick. [Mass.] 213; *Commonwealth v. Wood*, 4 Gray [Mass.] 11; *Commonwealth v. Lang*, 10 Gray [Mass.] 11), and in other courts, as in *State v. Startup*, 39 N. J. Law, 432, *Riggs v. State*, 104 Ind. 261, 3 N. E. 886, and *Williams v. State*, 12 Tex. App. 395. The twelfth article of the Declaration of Rights of Massachusetts provides "that the offense must be fully and plainly, substantially and formally described to the accused"; and, construing that article, the Supreme Court of Massachusetts held in *Commonwealth v. Harrington*, 130 Mass. 35, a statute permitting an increased penalty without alleging prior conviction in the indictment to be in conflict with that article of the Declaration of Rights of that state; and the Supreme Court of Maine in *State v. Learned*, 47 Me. 426, held that the Legislature cannot validate an indictment which does not fully and formally inform the accused of the accusation against him. In 22 Cyc. p. 285, the law is stated thus: "It is within the power of the Legislatures under such a constitutional provision to prescribe the form of the indictment or information, and such form may omit averments

regarded as necessary at common law; but the Legislature, while it may simplify the form of an indictment or information, cannot dispense with the necessity of placing therein a distinct presentation of the offense, containing allegations of all its essential elements."

This court has said in *Maguire v. State*, supra, "that if the party be proceeded against for a second or third offense under the statute, and the sentence prescribed be different from the first, or severer, by reason of its being such second or third offense, the fact thus relied on must be averred in the indictment, for the settled rule is that the indictment must contain an averment of every fact essential to justify the punishment inflicted. *Rex v. Allen*, Russ. & R. 513; *Regina v. Page*, 9th C. & P. 756; *Reg. v. Willis*, L. R. 1 C. C. 363; *Plumbly v. Commonwealth*, 2 Metc. (Mass.) 413; 3 Wharton's *Crim. Law*, § 3417; 1 Bishop's *Crim. Law*, §§ 961 and 963." The court did not there specifically allude to the Declaration of Rights we are now considering, but it relied upon the common-law doctrine, which, as Mr. Bishop notes, has been adopted and written into the organic law embodied in our Constitution, thereby disabling the Legislature from depriving by statute any person from the protection of the Constitution. In *Maguire's Case*, supra, on page 498 of 47 Md., Judge Alvey said: "The authorities are clear to the effect that, in order to justify a sentence as for a second offense, it must appear by the verdict that the jury have found the party guilty of such second offense. *Thomas' Case*, 22 Grat. (Va.) 912; 3 Wharton's *Crim. Law*, § 3418; 1 Bishop's *Crim. Law*, §§ 961-963." In *Maguire's Case* no judgment had been entered in the court below, and the case came up on exceptions to the rulings of the court in allowing the state's attorney to read to the jury that part of the indictment which contained the allegation of a former conviction under the statute in his opening statement, and to the admission in evidence of the docket entries of the proceedings on the former indictment, the ground of the objection being that the fact of prior conviction of a similar offense should not be allowed to influence the mind of the jury until after a conviction of the particular offense for which the party was then on trial, and that, if he should be found guilty, the jury should then be required to pass upon the fact of the alleged former conviction, and the identity of the accused. But the rulings appealed from were affirmed, and the court said the course of procedure suggested by the appellant was not in accordance with the established practice in such cases. In closing that opinion the court said, "We thus notice the verdict in order to avoid a possible error in the rendition of the judgment" (on the remand of the cause), meaning thereby that as a general

verdict only had been rendered, and it was too late to amend it, so to embrace also a finding on the previous conviction and then make a specific verdict as for a second offense, the only judgment that could be entered on the verdict as rendered was as for a first offense. In this case the verdict of the jury was a general verdict only of guilty, and as the result of the reasoning in the *Maguire Case* it was error in this case to render a judgment as for a second offense. To the argument of the learned Attorney General, citing Mr. Bishop's 1 *New Crim. Law*, § 961, "that there is no reason why the law should not, as in some localities it does, permit this matter to be omitted from the indictment until the prisoner has been convicted of the offense itself, and then be brought forward in some proper manner in aggravation of the punishment," it must be answered that Mr. Bishop must be presumed to refer to jurisdictions where the organic law did not forbid such legislation. Otherwise there would be direct conflict between that passage and his repeated and emphatic declarations heretofore cited in this opinion. In the footnote to the passage cited he refers to only two cases in California and Louisiana, viz., *People v. Meyer*, 73 Cal. 548, 15 Pac. 95, and *State v. Hudson*, 32 La. Ann. 1052. Reference to the Constitution of these states discloses that in neither Constitution is found the requirement of our own, or any equivalent or similar language, but a total silence upon that subject. The only other case we have found which apparently sustains the appellee's contention here is *State v. Freeman*, 27 Vt. 523, which was a prosecution for violation of the liquor law. It was there held that a statute which provided that a former conviction need not be averred in the indictment was valid, though the Bill of Rights in one section contains substantially the same language in this respect as our own, but the decision was placed upon the significant ground that a later section of the Declaration of Rights dispensed with the requirement of the former section as to minor offenses affecting police regulations.

It may safely be declared, therefore, that if our Declaration of Rights requires all former convictions to be alleged in the indictment there is no other proper manner in which any former conviction can be brought forward in aggravation of the punishment, and Judge Alvey, in fact, has so declared in *Maguire's Case*, in saying that very course of procedure was not in accord with the established practice in such cases; and it could not be, if, as he has also said, the previous conviction must be alleged in the indictment. In the case before us we have the anomaly pointed out by Judge Alvey in *Maguire's Case*, supra, viz., a divided verdict, part rendered by one tribunal and part by another. The jury demanded by the traverser,

and impaneled to try every issue involved, passed upon a single issue only, the fact of the sale charged in the indictment, while the court passed upon another issue, the fact of a conviction of a previous similar offense, an issue vitally involved under the act in question; so that one fact in issue is found by the verdict of the jury, and another fact in issue is found by the court in its sentence, not it is true in the professed form of a verdict, but of the essence of a verdict.

[1] It is to be regretted that this act should be stricken down, but no consideration can justify a court in depriving a violator of law of a right guaranteed by the Constitution to such violator. Without the act, the evils it seeks to correct can be effectually reached if state's attorneys will be vigilant to ascertain from the records of the court before drawing indictments whether the party charged has been previously convicted of a similar offense. A very simple method would be to procure a list of convictions of licensed liquor sellers, which could be furnished with little trouble or cost, and be brought up to date after every term of court.

[2] Even if we were able to sustain this act, the judgment in this case would necessarily be reversed because of the defect in the verdict, which, as pointed out in the Maguire Case, would only permit a sentence as for a first offense. Nothing that we have said herein is to be understood as applicable to the imposition of a penalty in any case not arising under a statute of the character before us.

Judgment reversed, with costs to the appellant above and below, and the case remanded for the entry of a proper judgment, as for a first offense, as provided in section 81 of article 5 of the Code of Public General Laws.

STEWART et al. v. MAY.

(Court of Appeals of Maryland. Nov. 20, 1912.)

1. QUIETING TITLE (§ 44*)—EVIDENCE—SUFFICIENCY.

Evidence held to show defendants held no title to a strip of land in controversy, entitling plaintiff to quiet title as against a deed and mortgage given by them.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 89-92; Dec. Dig. § 44.*]

2. EASEMENTS (§ 2*)—SUBJECTS.

A party cannot have an easement in his own land.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 8; Dec. Dig. § 2.*]

3. WATERS AND WATER COURSES (§ 154*)—EASEMENT OF DRAINAGE—ABANDONMENT.

Any right in defendants to drain water into an alley from a building on an adjoining lot was abandoned, where the original building was torn down and they built over the alley in such way as to prevent use in the manner claimed,

and where they claim title to the strip in which the easement is now asserted.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

Appeal from Baltimore Circuit Court; Henry D. Harlan, Judge.

Bill by William May against Hyland P. Stewart and others. Decree for complainant, and defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Charles F. Harley, of Baltimore, for appellants. Francis J. Carey and Francis K. Carey, both of Baltimore, for appellee.

BOYD, C. J. This case was previously before us on appeal from an order of the circuit court of Baltimore City overruling a demurrer to the bill of complaint, and is reported in 111 Md. 162, 73 Atl. 460, 18 Ann. Cas. 856. We affirmed the order of the lower court and remanded the case for further proceedings. After it was remanded, the defendants answered and testimony was taken in open court. A decree was passed declaring that the deed from Mary De C. Garrison to Hyland P. Stewart, dated the 10th day of October, 1907, was null and void in so far as it purported or attempted to convey title to the southernmost three feet of the lot described in the deed, and that the title to the said strip of ground three feet wide is in the plaintiff in fee simple, free and clear of any easement appurtenant to the defendants' lot, and the mortgage from Stewart to Mrs. Garrison of the same date was likewise declared to be null and void as to those three feet. From that decree this appeal was taken.

The object of the bill filed by the appellee was to remove the cloud on his title to the three feet, caused by the deed and mortgage referred to above, and, as we held the bill sufficient to entitle him to relief on the facts therein alleged, the real question now to be determined is whether the answers and testimony present such different facts or conditions from those alleged in the bill as preclude the appellee from the relief sought.

In the case of *Garrison v. Hill*, 79 Md. 75, 28 Atl. 1062, 47 Am. St. Rep. 363, which was decided in 1894, Mr. Stewart was counsel for Mrs. Garrison. She had acquired the property on the southeast corner of Liberty and Lexington streets in the city of Baltimore (spoken of in this case as No. 47 Lexington street) as the heir at law of Maria M. Johnson. The two properties spoken of in this case as Nos. 45 and 47 belonged to Maria E. Weise, who died in 1891, leaving a last will and testament by which she left "all that piece or parcel of ground situate at the southeast corner of Liberty and Lexington streets in the city of Baltimore aforesaid, together with the improvements and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appurtenances," to Thomas Hill in trust for Maria M. Johnson for life, and after her death in trust for William W. Johnson, his heirs and assigns, but, in case he died without leaving a child or descendant, then the property was to go to Emma Maria C. Johnson. The property became vested in the latter person, who made Maria M. Johnson her sole devisee, and Mrs. Garrison inherited it as her only heir at law. By the next item of her will Maria E. Weise left all the rest, residue, and remainder of her estate, "inclusive of my house and lot of ground and premises on Lexington street adjoining the property described in the foregoing item of my will and which is known as No. (96) ninety-six," to Thomas Hill in trust for the purposes therein named. The new number was 45 Lexington street. Mrs. Garrison contended in the case in 79 Md. that No. 45 ultimately became vested in Emma Maria C. Johnson, and that she inherited it as she had done the other property; but we held that it had not become vested in Emma M. C. Johnson, and hence did not pass under her will to Maria M. Johnson, whose heir Mrs. Garrison was.

It will be observed that when Maria E. Weise died in 1881 she owned the two properties, and, although the will does not show how they were divided in reference to the three feet which were included in the alley in question, the conduct of the parties throws much light on the subject. The suit in ejectment, reported in 79 Md., was instituted in 1893, and Mr. Stewart, one of the present appellants, was one of her attorneys, and signed the declaration. In that declaration the property sued for, which it must be remembered is what is now owned by the appellee, was described as one parcel, as follows: "Beginning for the same on the southernmost side of Lexington street at the distance of nineteen feet and eight inches southeasterly from the southeast corner of Lexington and Liberty streets, and which place of beginning is designed to be in the center of the division wall between the house next adjoining on the west, and running thence southeasterly, bounding on Lexington street, twenty feet and three inches to the center of the wall between the house erected on the lot now being described and the house next adjoining on the east, thence southwesterly through the center of the said wall fifty-two feet, more or less, to the north end wall of the house next adjoining on the south, thence northwesterly along said wall forty feet to the easternmost side of Liberty street, then northeasterly, bounding on Liberty street, three feet to the southwest corner of the house adjoining on the north, thence southeasterly along the sound end wall of said house, eighteen feet six inches until it intersects a line drawn southwesterly through the center of the division wall first above mentioned, thence northeasterly through the center of said wall forty-nine feet, more or less, to the place of beginning."

The declaration thus clearly recognized the alley as a part of what is spoken of as No. 45 Lexington street. If Mrs. Garrison, heir of Maria M. Johnson, had acquired the alley under the devise in the will of Maria E. Weise of the property at the corner of Liberty and Lexington streets, why would she have sued Thomas Hill for the alley as a part of No. 45? Or, if the alley was hers through that devise, can it be supposed that when it was determined by the decision in 79 Maryland she had not inherited the other property (No. 45), her attorney would not at least have endeavored to recover the alley? But in addition to that, Mrs. Garrison and her husband made a deed to Mr. Stewart on May 7, 1892, by which they granted an undivided half part or moiety of all their right, title and interest in and to the respective estates of Maria E. Weise, Maria M. Johnson, and Emma M. C. Johnson, and then on the 4th day of December, 1894, they made a confirmatory deed to him in which they referred to the former conveyance being made "with no exact description in said deed of the property hereinafter mentioned, and for the purpose of confirming said deed and of giving an accurate description of this particular part of the property mentioned in said deed these presents are executed," and then conveyed an undivided half interest in and to the property by courses and distances, which limited the lot to 49 feet in depth and called for running along the south end wall of the house on No. 47, "and on the north side of an alley three feet wide," thus in terms excluding the alley from the conveyance, and added: "Being the same piece or parcel of ground, the title to which was acquired by Mary De Charms Garrison as the only heir at law of Maria M. Johnson, who was the sole devisee under the will of Emma M. C. Johnson, * * * the said Emma M. C. Johnson having acquired the same in fee as devisee under the will of Maria E. Weise."

It was thus admitted by that deed, executed as late as December 4, 1894—the same year that the ejectment suit was decided against Mrs. Garrison—that the property acquired by Emma M. C. Johnson, as devisee under the will of Maria E. Weise, was 49 feet in depth and was on the north side of the alley. A deed made by Eliza P. Johnson and husband to Thomas Ireland Elliott for an undivided half interest in No. 45 was dated July 23, 1894, and the property conveyed thereby was described precisely as it was in the declaration. Eliza P. Johnson was the only heir at law of William W. Johnson, and it was decided in 79 Md. that this property descended to his heirs who were living at the death of Emma M. C. Johnson. There can therefore be no doubt that as late as 1893 and 1894 the owners of those two lots understood and believed that the strip included in the alley belonged to the property referred to as No. 45, and it is equally certain that Mr. Stewart so thought, as other

wise he would not have *included* the alley in the ejectment suit and have *excluded* it in the confirmatory deed to himself, which was made for the special purpose of giving a proper description of the property spoken of as No. 47. It was certainly a very natural and wise division of the properties, for inasmuch as No. 47 was on the corner, and had an entrance from Liberty street, as well as from Lexington street, and as No. 45 was erected between two houses on Lexington street, the alley leading to Liberty street from the rear of this lot was of great value to it, as the properties then stood. Then when the devisees of Eliza P. Johnson conveyed the other half of No. 45 to Philip H. Hoffman, on May 8, 1905, the property was described as in the declaration, and the case of *Garrison v. Hill*, 79 Md. 75, 28 Atl. 1062, 47 Am. St. Rep. 363, was referred to in the deed. But when on the 10th day of October, 1907, Mr. and Mrs. Garrison conveyed the other undivided half to Mr. Stewart, in fee simple the description of the lot included the alley, making the lot 52 feet in depth, instead of 49 and calling for the northerly wall of the house adjoining on the south.

It cannot be doubted from the testimony in the record that at least as far back as 1887, when Mr. Struven became tenant of No. 45, the strip included in the alley was regarded as part of No. 45 Lexington street. Indeed, from the testimony of Samuel Bealmear, a witness produced by the appellants, it may be inferred that such was the case from the time he went into No. 47, which was in 1868. He extended the house on that lot to the alley, and in his testimony the following appears: "Have you any recollection as to whether there was any use made of the alley by the corner house while you were there? A. I really cannot remember. I do not know that I was ever back there but twice. I was in there six years, and I do not think I was ever back in the yard twice during that time. Q. But you could go back there if you wanted to? A. Yes, but I had no occasion to go back there." If the alley was in any way appurtenant to No. 47, or of any use to it, surely he would have gone into it twice in six years, especially as he made the addition extending to the alley. It may be said in passing that his evidence would seem to conclusively show that there was no door or other exit leading into the alley from No. 47. He did not remember any, and, if there had been, he would certainly have used it twice in six years.

[1] When the owners of No. 45 leased the property, it was doubtless not deemed necessary to particularly mention the alley, as we are satisfied from the evidence that it was connected with the yard of No. 45, and it was apparent that it belonged to and was a part of that property. The evidence of Mr. Struven, who rented No. 45 from 1887 until about 1892, and Mr. Hall, who occupied No. 47 about that time, both of whom were

familiar with the properties for a number of years, is too clear to admit of any doubt about that. The record in our judgment proves beyond question that Mrs. Garrison had no right to convey, and Mr. Stewart, who was familiar with the facts, had no right to mortgage the strip included in the alley. It is equally clear that placing the deed and mortgage on record was calculated to create a cloud on the title of the appellee. If they were permitted to remain in force as to the alley, without objection by the appellee, what was at the time no title in the appellants when the deed and mortgage were given might in the course of time ripen into one which could not be successfully assailed.

It was decided in the former appeal that possession by a tenant was such possession as would enable the owner to maintain a bill of this character. The tenants in possession of this building must be held to be the tenants of the appellee, to the extent of the property spoken of as No. 45 Lexington street, including the alley which we have already said was regarded as a part of No. 45. The appellants certainly knew that the owners of No. 45 claimed it, and they also knew that they had failed to recover it in the ejectment suit a year or two before the new building was erected. If it was intended to surrender the title to it when the new building was erected, it cannot be possible that Judge Elliott, as owner of an interest in No. 45, and Mr. Stewart, as part owner of No. 47 and as attorney for Mrs. Garrison for whom he was acting in connection with the new arrangement, would have thought it unnecessary to make it a matter of record. The litigation between the parties was too recent to be forgotten. Mr. Stewart, in answer to the question, "There was a little feeling between the owners of 45 and 47, as a result of that ejectment suit?" replied: "More than a little; it was very hot." It would therefore be utterly unreasonable to suppose that Judge Elliott, who had acquired a half interest in No. 45 after that litigation had ended, would have given away the three feet which would be so essential to his property, if it became necessary to rent No. 45 separately when the lease to Salomon & Co. terminated. It would likewise be quite as difficult to believe that, if he was willing to do so, Mr. Stewart, the then owner of the half interest in No. 47 and the attorney for the owner of the other half, would not have obtained a deed or some satisfactory evidence of the surrender of the alley. The testimony of Judge Elliott shows that in making leases and in dealing with the tenants he kept constantly in mind the possibility of No. 45 again being rented as a separate property. Indeed, the owners executed separate leases for their respective properties, although they were, of course, aware that the tenants were arranging with the owners of adjoining properties, and doubt-

less knew how the buildings were being constructed; but Judge Elliott, representing himself and to some extent his co-owner of No. 45, always kept in mind the possibility of that property having at the end of his lease to be rented separately and required the tenants to covenant to restore the walls. It would perhaps have been a wise course to have had an agreement, as subsequent events proved, for about a year after the lease was made the deed and mortgage were executed by which it was attempted to convey what the parties must have known they had no right to convey, namely, a fee-simple title to that alley.

[2, 3] The only remaining question we will consider is whether the decree should have declared that the title to the strip of ground three feet wide is in the plaintiff in fee simple, free and clear of any easement appurtenant to the defendant's lot. The decided weight of the evidence is to the effect that the only opening in the wall on the alley was a window 14 inches square, which was either in the second story or near the ceiling of the first. Then there was some testimony that the eaves of the roof projected over some part of the alley, although the extent of the projection is wholly indefinite, and that some water drained into it from the house on No. 47. Any other uses of the alley by the owners or tenants of No. 47 attempted to be shown are so uncertain and indefinite as not to require any further reference to them by us. It would be impossible to decide from the evidence how far, if at all, the eaves of the roof of the house on No. 47 extended over the alley; but if it be conceded that they did project over it to some extent, that there was an opening in the rear wall about 14 inches square, and that some water did run from that house into the alley, what rights have the appellants now?

It must not be forgotten that until Maria E. Weise died in 1881 she owned both properties, and therefore no easements were acquired by prescription. A party cannot have an easement in his own land. *Oliver v. Hook*, 47 Md. 308; *Mitchell v. Seipel*, 53 Md. 263, 36 Am. Rep. 404. Between the death of Miss Weise, in 1881, and tearing down the house when the present building was erected, in 1895 or 1896, sufficient time did not elapse to give the right to the owners of No. 47 by prescription. But even if it be conceded for the purposes of the case that there were such apparent easements existing that the benefit of them passed to the owner of No. 47, under the principles announced in such cases as *Burns v. Gallagher*, 62 Md. 462, and *Eliason v. Grove*, 85 Md. 215, 36 Atl. 844, which we need not determine, was there not an abandonment of them when the

appellants tore the old house down and erected the present building and undertook to convey the alley in fee? In *Vogler v. Geiss*, 51 Md. 407, Judge Alvey said: "It is now very well settled, by authorities of the highest character, that a party entitled to a right of way or other mere easement in the land of another may abandon and extinguish such right by acts in pais, and without deed or other writing. * * * A cesser of the use coupled with any act clearly indicative of an intention to abandon the right, would have the same effect as an express release of the easement, without any reference whatever to time." In *Canton Co. v. B. & O. R. R. Co.*, 99 Md. 218, 57 Atl. 637, that was repeated. See, also, 14 Cyc. 1188; 10 Am. & Eng. Ency. of Law, 437.

The appellants had undoubtedly ceased to make any use of what they claim to have been easements for at least 12 years when this bill was filed, and had voluntarily torn the house down, in which the little window was, on which the alleged projecting eaves were, and from which the water was claimed to have been drained into the alley. But that is not all, they had built over the alley in such a way as to make it impossible for them to enjoy what they called "easements," as they claim they had the right to use them. Those facts might be sufficient to prove an intention to abandon and an actual abandonment, but they did not stop there. One of them conveyed to the other, in fee simple, the very strip of land in which they claim the easements existed, and the other conveyed by way of mortgage the same land, describing it as in fee simple, and in their answers they admit that Stewart is claiming title to the alley and set out at length the grounds on which they rely for their claim. It would be difficult to prove acts of abandonment of easements of a more decisive character, or which more clearly indicate an intention to abandon the rights, if they existed. They even claim that they have been paying the taxes on the strip embraced in the alley for many years, and in short claim to own the property in fee. So, without deeming it necessary to determine whether there once were such easements in the alley, we are of the opinion that, if there were, the appellants have abandoned them.

We will only add that we do not in any way determine what the rights of the respective parties may be, in case the present arrangement of the buildings is terminated, as that is in no wise involved in this case. Nor will we discuss the exceptions to the testimony filed, as they could not affect our conclusion.

Decree affirmed; the appellants to pay the costs above and below.

DOYLE v. GIBSON.

(Court of Appeals of Maryland. Nov. 20, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 205*)
—SERVICES TO DECEDENT.

Plaintiff is entitled to recover against decedent's estate on an implied assumpsit for nursing and boarding him for three years preceding his death and following his discharge from the Soldiers' Home; plaintiff not being a member of decedent's family.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 732; Dec. Dig. § 205.*]

2. TRIAL (§ 420*)—VERDICT—MOTION TO DIRECT—DENIAL—WAIVER OF ERROR.

Defendant waived right to rely upon refusal to direct a verdict in his favor by proceeding with the trial after refusal of that prayer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. § 420.*]

3. EVIDENCE (§ 543*)—EXPERT TESTIMONY—VALUE OF SERVICES.

On an issue of the value of plaintiff's services in nursing decedent preceding his death, a witness, who had acted as an untrained nurse for 15 years, was properly permitted to state the value of the services rendered by plaintiff, who was also an untrained nurse.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2356½-2358; Dec. Dig. § 543.*]

4. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL—MATTER COVERED.

An instruction substantially covered by one given is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—REFUSAL.

An instruction not supported by evidence is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 506, 508-612; Dec. Dig. § 252.*]

Appeal from Baltimore Court of Common Pleas; Henry Duffy, Judge.

Action by Mary Gibson against James F. Doyle, administrator of John Conway's estate. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

John T. Morris, of Baltimore, for appellant. Myer Rosenbush, of Baltimore, for appellee.

STOCKBRIDGE, J. The record in this case presents 29 bills of exception and covers 164 pages; but the case is, nevertheless, a comparatively simple one so that it will not be necessary to consider in detail each of the bills of exceptions, nor seriatim all of the rulings of the court upon questions of admissibility of evidence or action upon the prayers.

[1] The case arises in this manner: John Conway, a veteran of the Civil War, was an inmate of the Soldiers' Home at Hampton, Va. He made periodical visits to Baltimore during the time that he was there, and, that he might have a definite location in that city, kept a room, for which he paid a trifling sum, at the home of Mrs. Mary Gibson,

the original plaintiff in this case. In July, 1908, Conway was discharged from the Soldiers' Home, and upon that discharge went to Baltimore, and thereafter, until the 20th of April, 1911, the date of his death, occupied a room at Mrs. Gibson's, the rental of which had been increased from the former price of \$2 a month to \$3. After his death Mrs. Gibson presented an account against his estate for nursing from July, 1908, to the time of his death, amounting to \$888, and for board from April 6, 1911, to April 20, 1911, during which he was confined to his room, of \$10, and for bedding and matting, which had become unfit for further use by reason of his occupancy of the room, of \$18.20. Payment thereof was refused by the administrator, and this suit was instituted.

While there was some conflict in the evidence, testimony was given tending to show that during the entire period from 1908 to 1911 Conway was in the habit of indulging in periodical sprees, at which time he required care and nursing, and also during the periods immediately following these sprees, when he was recovering from the effects of them.

Whatever may be the rule of law outside of Maryland, the decisions in this state have firmly established our own policy. In *Gill v. Staylor*, 93 Md. 453, 49 Atl. 650, it was said: "If the plaintiff was not a member of the decedent's family, then the rendering of the services is prima facie evidence of their acceptance, and of an obligation to pay what they were worth, if there be no evidence of an express contract to pay a definite sum." And in *Wallace v. Schaub*, 81 Md. 594, 32 Atl. 324: "As between persons not members of the same family, the mere fact of rendering services useful to the defendant would furnish prima facie evidence of their acceptance, and, in the absence of some proof to the contrary, would raise an obligation to pay what they were worth"—citing *Spencer v. Trafford*, 42 Md. 20. In *Harper v. Davis*, 115 Md. 353, 80 Atl. 1014, 35 L. R. A. (N. S.) 1026, this court said: "When no family relation exists between the parties, the law implies a promise to pay for services rendered and accepted; and the burden is on the party resisting payment to show that no charge was to be made, if the rendition and acceptance of the services are proven." See, also, *Bixler v. Sellman*, 77 Md. 496, 27 Atl. 137. In *Bouk v. Maught*, 76 Md. 440, 25 Atl. 423, Alvey, C. J., declared the law as already set forth. That was a suit for services rendered to a deceased in nursing. The evidence showed that the deceased had boarded with the mother of the claimant; but in deciding the case Judge Alvey makes it very plain that a contract for board does not necessarily include services which may be rendered in the way of nursing.

[2] There is a well-recognized exception to the implied assumpsit which the law raises

from the rendition and acceptance of service, and that is in cases where the individual rendering the services was a member of the family of the deceased; but in this case there can be no claim of such a relation between the parties, so as to bring it within the operation of the exception. The law being as thus recited, and evidence having been given of services rendered and accepted, the trial court was clearly right in its rejection of the prayer offered by the defendant at the close of the plaintiff's evidence; and, even if it were not, by proceeding with his case after the refusal of that prayer, as has been repeatedly decided by this court, the defendant waived all right to rely upon it on appeal. *Barabasz v. Kabat*, 91 Md. 53, 46 Atl. 337.

[3] The first exception on evidence was as to permitting Mrs. M. C. McKnew to testify as to the value of the services. Mrs. McKnew gave evidence that she had been acting as an untrained nurse, going out nursing, for 15 years; that she had heard the evidence as to the services performed by Mrs. Gibson, and was then asked to place an estimate upon the value of the services rendered by Mrs. Gibson. In the case of *Wallace v. Schaub*, 81 Md. 594, 32 Atl. 324, evidence was offered by a trained nurse as to the value of services rendered by a trained or untrained nurse, and the admission of the evidence was approved. While it is true that Mrs. McKnew was not what is technically known as a "trained nurse," the line of reasoning upon which the evidence was admitted in the case of *Wallace v. Schaub*, supra, applied with equal force to the present case. Mrs. McKnew, for a number of years, had been performing duties and receiving compensation as an untrained nurse; she was therefore competent to say what was the market rate or value of services of that character, when rendered by an untrained nurse, such as Mrs. Gibson admittedly was.

[4] With regard to the prayers of the defendant which were rejected or modified, it may be said generally that a number of the prayers were, in legal effect, identical, varying only slightly in phraseology; and one having been granted upon a subject the refusal of the other prayers was correct, as the inevitable tendency of two prayers upon the same subject, in different phraseology, would have been to confuse or mislead the jury.

[5] As to others of the prayers, the record discloses no evidence upon which they could be predicated, and their rejection was therefore proper; while, with the exceptions which deal with evidence, the large proportion of them were exceptions reserved to the admission or exclusion of evidence wholly immaterial to any issue raised by the pleadings of the case.

Upon a review of the entire record, we discover no prejudicial error; and, being of the opinion that the prayers as granted fully

and fairly placed the case before the jury, the judgment will be affirmed.

Judgment affirmed; appellant to pay the costs.

JOSEPH v. BONAPARTE.

(Court of Appeals of Maryland. Nov. 14, 1912.)

1. EJECTMENT (§ 9*)—TITLE OF PLAINTIFF—EVIDENCE—REQUISITES.

A plaintiff in ejectment must recover on the strength of his own title, and must show a legal title and a right to possession not barred by limitations.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

2. EJECTMENT (§§ 9, 10*)—TITLE OF PLAINTIFF—EVIDENCE—REQUISITES.

A plaintiff in ejectment, who deduces title from a patent granted by the state, and who proves his right of possession, or who shows a good title by adverse possession, is entitled to recover.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 16-29, 30-41; Dec. Dig. §§ 9, 10.*]

3. ADVERSE POSSESSION (§ 44*)—PRESUMPTION OF GRANT—FACTS SUPPORTING.

A plaintiff in ejectment, instituted in May, 1911, showed a deed conveying the premises to him executed by C. and wife by deed dated March, 1911, and showed that C. and wife acquired title by deed executed by R. and wife in April, 1894, and that R. acquired title by deeds executed by J. and wife and S. and wife in 1876. He had never been in possession, and at the date of the deed to him defendant was in possession and had been in possession since 1894. There was no evidence that J. or C. were ever in possession, but R. was in possession at one time, but when his possession began or how long it continued was not proved. *Held*, that he did not establish a title otherwise good within Code Pub. Gen. Laws 1904, art. 75, § 76, providing that in all actions at law, where title to land is in question, it shall not be necessary to prove that the land has been patented, but a patent will be presumed in favor of the one showing a title otherwise good, and he could not recover.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 226-231; Dec. Dig. § 44.*]

4. EJECTMENT (§ 90*)—EVIDENCE—ADMISSIBILITY.

In ejectment a copy of a deed, not tending in the remotest degree to show title in plaintiff, is properly excluded.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 254-277; Dec. Dig. § 90.*]

5. EJECTMENT (§ 95*)—EVIDENCE—ADMISSIBILITY.

Where in ejectment defendant admitted the dates of a deed and a decree of foreclosure under which the deed was executed, it was not necessary to show the dates by the introduction of the deed.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 280-295; Dec. Dig. § 95.*]

6. EJECTMENT (§ 90*)—WEAKNESS OF ADVERSARY'S TITLE.

A plaintiff in ejectment, who fails to establish a good legal title, may not inquire into the character of the title of defendant, and evidence relating thereto is properly excluded.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 254-277; Dec. Dig. § 90.*]

peal from Superior Court of Baltimore. James M. Ambler, Judge. Ejectment by Daniel C. Joseph against Les J. Bonaparte. From a judgment for defendant, plaintiff appeals. Affirmed. Decided before BOYD, C. J., and BRISCOE, RICE, BURKE, THOMAS, PATTISON, STOCKBRIDGE, JJ.

Twin T. Dickerson, of Baltimore, for appellant. William Reynolds, and Charles J. Bonaparte, of Baltimore, for appellee.

BURKE, J. This appeal presents for review five exceptions taken by the plaintiff in the course of the trial below to rulings of the trial court; four of which relate to questions of evidence, and one to the action of the court upon the prayers.

The suit was an action in ejectment, instituted by the appellant against the appellee to recover two lots of ground situated on the east side of Woodyear alley in Baltimore, and which are described in the declaration.

The fifth exception was taken to the action of the court in rejecting the plaintiff's prayers, and in granting a prayer by which the jury were directed to find a verdict for the defendant, upon the ground that the plaintiff had offered no legally sufficient evidence under the pleadings to entitle him to recover. This exception presents the most important question in the case, and for that reason, and for the further reason that in dealing upon it we shall necessarily say some things applicable to the other exceptions, that will be first considered.

The suit was brought on May 2, 1911, and to establish his title to the lots described in the declaration the plaintiff proved: First, that the lots were conveyed to him by William Caspari, Jr., and wife by deed dated March 20, 1911; second, that the lots had been conveyed to Caspari and wife by Lewis Reitz and wife, deed dated April 10, 1894; third, that Reitz had acquired title to the lots by two deeds to him, one from Joseph Bone and wife, dated February 7, 1876, one from Samuel Snowden and wife dated January 18, 1876. The plaintiff's evidence also showed that he has never been in possession of the lots, and that at the time of the deed to him from Caspari and wife the defendant was in possession of the lots, and had been in possession of it since 1894, and possibly at an earlier date. There is no evidence to show that Joseph Bone, or William Caspari was ever in possession of the property. He proved that Lewis Reitz was in possession of the lots at the time, but when his possession began, or how long it continued, the record does not show.

Assuming that there was no error in the rulings of the court prejudicial to the plaintiff upon the evidence, we are of opinion that the lower court was clearly right in withdrawing the case from the jury, be-

cause the plaintiff had proved no title to the lots upon which an action of ejectment could be maintained. Unless the plaintiff in ejectment shows a legal title and a right to possession, not barred by the statute of limitations, he cannot recover in ejectment under the settled law of this state, no matter what may be the rule in other jurisdictions. In 1 E. Poe, Pl. & Prac. (4th Ed.) § 260 it is said:

"Three leading rules are enforced in the trial of ejectment causes: First, the plaintiff cannot recover upon simply proving that his title is stronger or less defective than that of the defendant; nor is it enough for him to show that the defendant had no title whatever, or not so good a one as his own, for the decision of the case does not turn upon any such comparison. He must recover, if at all, upon the strength of his own title, and not by reason of the weakness of that of the defendant, and therefore the defendant may always defeat the action by proof of a clear subsisting title in a stranger. This has always been an established principle of ejectment law in Maryland. Second, the plaintiff must show that he has a legal title to the land. Formerly this could only be done by deducing a chain of title by patent from the state, except in cases where plaintiff and defendant both claimed under the same original title, beyond which it was not necessary to go. The enforcement of this rule was often attended with inconvenience and expense, and finally it was dispensed with altogether by the act of 1852, chapter 177, section 2, embodied in the Code (article 75, section 76) which provides that: 'In all actions at law where the title to land is in question, it shall not be necessary for any party to any such action to prove that the lands in controversy have been patented; but a patent shall in all cases be presumed in favor of the party showing a title 'otherwise good.' The rule requiring the plaintiff to show a legal title is gratified by proof of a title prima facie good."

There are some exceptions to the general rule, which are stated by Mr. Poe in section 262; but these need not be here considered, because they are not involved in this case.

[2, 3] Two propositions it must be admitted are thoroughly well settled in this state in the law of ejectment: First, the plaintiff can recover where he deduces title from a patent granted by the state and proves his right of possession; or, where he shows a good title by adversary possession. These principles are too familiar to need citation of authority to support them, but upon neither of these principles was the plaintiff entitled to recover in this case, because he showed neither a patent nor adversary possession. But it is insisted that the proof offered makes out a title "otherwise good" within the meaning of the act of 1852, chapter 177, section 2.

Prior to the act of 1852, whilst the general rule in an action of ejectment was that the plaintiff must show a legal title, the defendant could defeat the action by proving a title "otherwise good."

the plaintiff must show a grant from the proprietary or the state, there were exceptional cases in which he might show a prima facie title, or a title "otherwise good," without producing a patent for the land or a certified copy thereof. Varying conditions of fact from which such a title might be shown, in the absence of proof of patent, appear in the adjudged cases. For example, he might show by proof that both he and the defendant claim under the same original title, or that he and the defendant had submitted to arbitration their respective claims to the land, and that the award had been in favor of the plaintiff; or he might show a valid title by adversary possession; or, as stated in *Plummer v. Lane*, 4 Har. & McH. 73, 1 Am. Dec. 395: "A seisin of the land, and a dying seised of the person under whom the lessor derives his title, and a regular title from the person dying seised."

It is said in *Cockey v. Smith*, 3 Har. & J. 20, that: "In actions of ejectment to recover the possession of land, it is incumbent on the plaintiff to show a grant of the land from the proprietary. To prove such grant he must produce the patent, or a copy of the same. This is the general rule, and must be generally adhered to, because there can be no recovery in ejectment without showing a legal title in the plaintiff, which cannot be done without producing a grant from the proprietary. The cases in which this general rule has been deviated from, and in which secondary evidence has been resorted to, and admitted, for the purpose of obtaining the direction of the court to the jury to presume and find a grant, rest on strong facts and circumstances, evincing an equitable right to the land—an incipient title from the proprietary, and length of possession in conformity thereto—mesne conveyances, and wills, transmitting the right from the taker up to the plaintiff. In actions of ejectment the producing the grant of the proprietary is the first step in deducing title. If that is wanting, and inferior testimony is resorted to for presuming a grant, the foundation must be laid by stating and combining all the facts and circumstances existing in the case, on which the prayer to the court is to be made for their direction to the jury, to presume and find a grant."

The reference in the opinion to "facts and circumstances evincing an equitable right to the land—an incipient title from the proprietary, and length of possession in conformity thereto—mesne conveyances, and wills, transmitting the right from the taker up to the plaintiff," evidently refers to and applies to such cases as *Plummer v. Lane*, supra, and *Carroll v. Norwood*, 5 Har. & J. 155. In the case last referred to the person from whom the plaintiff deduced his title had obtained a certificate of survey, and had paid the composition money; but the grant was not issued to him until after his death. He devised the land mentioned in the cer-

tificate to his three sons. He and his sons and those claiming under them, took possession of the land and held it from 1723 to about the year 1797. In dealing with state of facts the court said: "Every fact in the case, on which the direction to the jury was prayed, existed independent of the void grant which issued to John Israel, and at the time it did issue the three sons were entitled to it, and not John Israel, who was dead. Here, then, is a clear equitable title shown in the sons of John Israel, and deduced from them to the lessors of the plaintiff, and a possession held in conformity thereto from 1723 until within ten years before the institution of this ejectment." See, also, *Lloyd v. Gordon*, 2 Har. & McH. 254.

In *Mitchell v. Mitchell*, 1 Md. 44, Judge Robinson said: "The general principles of ejectment law in Maryland have been settled by long series of unvarying decisions, and cannot be disturbed by this court, however hard may be their operation in particular cases. Among these is that the plaintiff must recover, if at all, on the strength of his own title, and cannot do so because of the weakness of that of the defendant. Another is that he must show that he has the legal title and a right of possession, and that he cannot establish such legal right in himself without first showing the land has been granted by the state. The cases of *Hall v. Gittings*, 2 Har. & J. 125, *Wilson v. Inloe*, 11 Gill & J. 358; and *Cockey v. Smith*, 3 Har. & J. 26, are full on these points. They merely affirm what has always been the law of Maryland."

It is quite evident from an examination of the facts in *Warner v. Hardy*, 6 Md. 525, upon which the plaintiff relies in support of his contention, that the evidence offered shows a title "otherwise good," that, apart from title by patent, the plaintiffs had shown a title otherwise good within the principle of *Plummer v. Lane*, supra, and *Cockey v. Smith*, supra, and that for this reason the defendant's second prayer was held to have been rightly refused.

Tested by the principles to which we have referred, the plaintiff has proven no title to the lots that would enable him to recover under the law of this state, and when the other exceptions are examined in the light of these principles, they disclose no error in the rulings embraced therein, because none of the facts excluded by the court tend to establish a legal title in the plaintiff.

The plaintiff's first and fourth exceptions present the same question, and may be considered together.

It is shown by the first exception that the court refused to permit the plaintiff to offer in evidence a certified copy of a deed dated May 17, 1894, from William Reynolds, trustee, to the defendant, granting and assigning to him two leasehold lots of ground on the west side of Carey street, in the city of Ba-

timore. This deed was made by authority of a decree of circuit court No. 2 of Baltimore city passed on the 24th day of May, 1892, in the case of Charles J. Bonaparte v. Lewis H. Reitz. The lots sued for are not, nor is any portion thereof, included within the descriptions contained in the deed, and the deed in no way relates to the title of the lots in controversy.

In the fourth exception it appears that the plaintiff produced the original deed mentioned in the first exception. The defendant objected to the introduction of the deed in evidence, but admitted that a decree for the sale of the two lots granted by the deed to the defendant had been passed by the circuit court No. 2 of Baltimore city on the 24th of May, 1892, and that the trustee's deed to him therefor was dated May 17, 1894. Upon these admissions being made, the court refused to permit the deed to be read in evidence.

[4, 5] The ruling in each of these exceptions was correct: First, because neither the deed nor the certified copy thereof tended in the remotest degree to show title in the plaintiff to the lots sued for; and, secondly, because the admissions made by the defendant as to the dates of the deed and the decree of foreclosure dispensed with the necessity of showing those dates by the introduction of the deed.

[6] The second and third exceptions also present the same question. In the second exception it appears that the plaintiff offered to prove that, at an interview between himself and the defendant and by some correspondence between them, the defendant said he was holding the two lots sued for, and was going to hold them until somebody proved a better title, and that he had no title to the lots.

In the third exception it is shown that the plaintiff identified the following letter:

"Dear Mr. Bonaparte: Mr. Manning and Mr. Reynolds as I understand it admit that they have simply taken possession of the property, although they hold no title and feel as though they should hold it until a better title is proved by someone else. I felt it my duty (as a younger member of the bar and also as somewhat of a ward of yours, having adopted you as a sort of guardian ad litem) to see you before taking action. Is their statement final? Daniel C. Joseph."

"Yes. Go ahead. C. J. B."

He further testified that he wrote the part signed by him in the defendant's office downstairs; that he could not go upstairs to see the defendant; that the letter was written in the presence of Mr. Manning, who is the agent of the defendant, who is in the defendant's office, and does some work for him; that the letter came back to him with the little notation at the bottom. The plaintiff thereupon offered said letter and notation

thereon in evidence; but, upon objection by defendant, the court refused to permit them to be introduced in evidence.

Counsel for the plaintiff has cited a number of cases from other jurisdictions for the purpose of showing that the evidence embraced in the second and third exceptions is admissible. But until he showed a good legal title to the land, he had no right to inquire into the character of the defendant's holding. He must recover on the strength of his own title; and, if his evidence on that point failed, his whole case failed, no matter what the defendant's title may be. Had the plaintiff proved a good *prima facie* title to the lots, or had Mr. Bonaparte been called upon to show title by adversary possession, a different question would have been presented. For the reasons stated the judgment appealed from will be affirmed.

Judgment affirmed; the appellant to pay the costs above and below.

LUPTON v. UNDERWOOD.

(Superior Court of Delaware. New Castle.
Dec. 9, 1912.)

1. HUSBAND AND WIFE (§ 330*)—ALIENATION OF AFFECTIONS—RIGHT TO SUE—STATUTES.

Under 14 Del. Laws, c. 556, § 4, providing that any married woman may prosecute and defend suits at law or in equity for the preservation and protection of her property as if unmarried, a married woman may sue in her own name for alienation of the affections of her husband, without alleging that she was still married to the husband, that she was living apart from him, or that defendant knew of the marriage at the time of the grievances complained of.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1122; Dec. Dig. § 330.*]

2. WITNESSES (§ 387*)—BEST AND SECONDARY EVIDENCE—EXAMINATION OF WITNESS.

Defendant, having shown to plaintiff, while testifying as a witness, certain letters alleged to have been written by her which had been marked for identification, and which she had identified as in her handwriting, but which had not been introduced in evidence, was not entitled to embody parts of such letters in questions asked of the witness as to whether she did not write such matter to affect her credibility; the letters being the best evidence of their contents and what she wrote.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1228-1232; Dec. Dig. § 387.*]

3. HUSBAND AND WIFE (§ 335*)—ALIENATION OF AFFECTIONS—QUESTION FOR JURY.

In an action for alienation of the affections of plaintiff's husband, evidence *held* to require submission of defendant's liability to the jury.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1126; Dec. Dig. § 335.*]

4. EVIDENCE (§ 185*)—DOCUMENTS—NOTICE TO PRODUCE—TIME.

Whether a notice to produce documents not given until the case was on trial was too late depended on the ability of the party noti-

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fied to produce the document in compliance with the notice.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 642-660; Dec. Dig. § 187.*]

5. WITNESSES (§ 5*)—COMPETENCY—PRIVILEGE.

Plaintiff's counsel participating in the actual trial of the case was privileged from being called by defendant as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 8; Dec. Dig. § 5.*]

6. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS.

A question asked of the defendant in an action for alienation of affections, whether she wrote certain letters referred to, and whether she wrote them with the intention to induce her husband to leave her, or counsel plaintiff's husband to leave her, was objectionable as leading.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. § 240.*]

7. EVIDENCE (§ 151*)—INTENT.

In an action for alienation of affections of plaintiff's husband, a question asking defendant as a witness to state why she wrote certain letters to plaintiff's husband was admissible on the issue of motive or intent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.*]

8. EVIDENCE (§ 151*)—WITNESSES (§ 240*)—INTENT.

A question asked of defendant as to whether she wrote certain letters in evidence to induce plaintiff's husband to separate from his wife was objectionable as leading, but a subsequent question as to whether defendant had any other motive in writing the letters than sympathy or friendship for plaintiff's husband was proper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.* Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. § 240.*]

9. WITNESSES (§ 199*)—COMPETENCY—ATTORNEY.

Attorneys whom plaintiff consulted with reference to instituting an action for alienation of affections were disqualified to testify with reference to communications between themselves and plaintiff, though they subsequently declined to represent her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 749-751, 766, 767; Dec. Dig. § 199.*]

10. WITNESSES (§§ 199, 391*)—COMPETENCY—ATTORNEY.

In an action for alienation of the affections of plaintiff's husband, he having previously testified that he had not talked with defendant's former attorney at his office prior to the trial, the attorney was competent to testify that he was employed by defendant immediately after the suit was brought, and, at her suggestion, sent for plaintiff's husband, and talked with him about the case, but was not entitled to state that in that conversation the husband denied that he ever had any affection for his wife.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 749-751, 766, 767, 1248; Dec. Dig. §§ 199, 391.*]

11. EVIDENCE (§ 588*)—CONFLICTING TESTIMONY—WEIGHT AND CREDIT.

Where testimony is conflicting, the jury should endeavor to reconcile it, if possible, and, if they cannot, should accept that part which they deem worthy of credit and reject the rest, considering all the testimony adduced and the

circumstances surrounding the witness, means of information, interest or bias, manner and apparent truthfulness and in giving their testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.*]

12. HUSBAND AND WIFE (§ 325*)—ALIENATION OF AFFECTIONS—INJURY TO PERSONAL RIGHTS—ACTION.

Since marriage gives to the wife the right of conjugal society as it does to the husband, each being entitled to the companionship, and affection of the other, interference therewith is a violation of a natural right, but also of a property right, which the wrongdoer is liable in damages.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1119; Dec. Dig. § 325.*]

13. HUSBAND AND WIFE (§ 325*)—ALIENATION OF AFFECTIONS—NATURE OF ACTION—LOSS OF SERVICE—PECUNIARY LOSS.

The gist of an action for alienation of affections of plaintiff's husband is the loss of conjugal fellowship and aid of the husband and the alienation of affections, matter of aggravation, it not being necessary to the maintenance of the action that there should be loss of the husband's service or other pecuniary loss.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1119; Dec. Dig. § 325.*]

14. HUSBAND AND WIFE (§ 333*)—ALIENATION OF AFFECTIONS—PRESUMPTIONS.

In an action for alienation of affections of plaintiff's husband, it will be presumed that plaintiff's husband had affection for her up to the time of the separation, in the absence of evidence to the contrary.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124; Dec. Dig. § 333.*]

15. HUSBAND AND WIFE (§ 325*)—ALIENATION OF AFFECTIONS—NATURE OF ACTION.

In an action for alienation of affections of plaintiff's husband, it is immaterial whether plaintiff was justified in leaving her husband is not material, defendant's resting on the determination of the jury whether plaintiff's loss of consortium was caused by the wrongful acts of the defendant is not essential that defendant's acts have been the sole cause, if they were the controlling cause.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1119; Dec. Dig. § 325.*]

16. HUSBAND AND WIFE (§§ 326, 333*)—ALIENATION OF AFFECTIONS—DEFENSE.

Unhappiness, or even separation between plaintiff and her husband, not caused by defendant or the fact that plaintiff's husband had little or no affection for her, was no defense in an action for alienation resulting from interference between plaintiff and her husband by defendant, but proof of such unhappiness, etc., is admissible in mitigation.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1120, 1124; Dec. Dig. §§ 326, 333.*]

17. HUSBAND AND WIFE (§ 334*)—ALIENATION OF AFFECTIONS—DAMAGES.

In a suit for alienation of affections of plaintiff's husband, the measure of damages is such a sum as would reasonably compensate her for the injury to her feelings for loss of her husband's comfort, society and support.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1125; Dec. Dig. § 334.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Reports.

18. HUSBAND AND WIFE (§ 334*)—ALIENATION OF AFFECTIONS—PUNITIVE DAMAGES.

Where defendant's conduct causing alienation of the affections of plaintiff's husband is wanton and malicious toward plaintiff, plaintiff may recover punitive damages.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1125; Dec. Dig. § 334.*]

19. HUSBAND AND WIFE (§ 334*)—ALIENATION OF AFFECTIONS.

In a suit by a wife for alienation of the affections of her husband, a verdict allowing her \$4,000 was excessive, and should be reduced to \$2,500.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1125; Dec. Dig. § 334.*]

20. EXCEPTIONS, BILL OF (§ 40*)—PREPARATION—SIGNING TIME—EXTENSION—STATUTES—CONSTRUCTION.

Rev. Code 1852, amended to 1893, p. 851, c. 113, § 3, as amended by 25 Del. Laws, c. 238, provides that a bill of exceptions must be drawn in form and signed during the term in which the exception is proposed, unless the court shall otherwise order. *Held*, that the court has power to extend the time for the preparation and signing of a bill of exceptions beyond the term only when the application is made during the term.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. §§ 44, 45, 57-64; Dec. Dig. § 40.*]

Action by Sadie O. Lupton against Gertrude M. Underwood. Judgment for plaintiff. Application for enlargement of time for the preparation and signing of a bill of exceptions. Denied.

Argued before PENNEWILL, C. J., and BOYCE and RICE, JJ.

Daniel O. Hastings and Richard S. Rodney, both of Wilmington, for plaintiff. J. Frank Ball, of Wilmington, for defendant.

The defendant has, for many years, maintained a boarding house on Delaware Avenue, in Wilmington, and Ralph C. Lupton, husband of the plaintiff, had boarded there for about seven years, prior to his marriage to the plaintiff, on the eighteenth day of March, A. D. 1911, when Lupton and his wife immediately occupied an apartment and lived together until the 29th day of July following, when a separation occurred and has since continued. Lupton is and has been for several years a real estate broker. While boarding with the defendant and after his marriage, he looked after some properties belonging to the defendant, such as collecting rents, attending to repairs and paying insurance, etc. After his marriage he continued to visit the defendant's home, frequently in the nighttime, sometimes at the request of the defendant, at other times at the suggestion of friends, or as he felt inclined, remaining, at times, as late as eleven or twelve o'clock. His wife objected to this, and differences, from time to time, arose between them by reason of such visits and friendship. Their differences would be adjusted, only to arise again because of subsequent visits, and because of the manifest jealousies which existed between the two women and their dislike for each other. With this condition ex-

isting, the plaintiff saw the postman deliver a letter to her husband in the handwriting of the defendant, and she asked him what was in the letter, receiving the reply, in effect, "You must not inquire of me what the defendant writes to me." Later the wife observed a letter in the handwriting of the defendant sticking out of the pocket of her husband's coat, which was hanging over the back of a chair in their bedroom. She took the letter, read it and kept it, as she did seven other letters from time to time, written by the defendant to the plaintiff's husband. These letters made frequent disparaging references to the plaintiff, never, however, by name, but usually referring to plaintiff as "it," "that," or "they." These letters contained many expressions of friendly interest in Lupton. Some few sentences, picked here and there, from the letters will show their disparaging character: "Two lives wrecked for one. I'm sure you are too good for such a life." "I never can forgive that for doing as they did." "All the good I can say is, I hope and trust it may be short." Mr. ——— "when he called, saw you and what you had, knew it was not your choice." "I'm loyal and I wish you could have heard him. He asked me when could he see you without seeing her. The face struck him as it did—" "When that wants to cart you around with her kind, don't go, hear?" "Do take care of yourself and make it work or send it where it ought to be." "I'm sure your life will never be happy with that class, you look it, and if you both could settle the matter by having her go to her sisters." Miss ——— "It is the first time she has said to me you looked crestfallen and it made her sad to see you that way * * * * said tell me what you think. I think just as his other friends, the last man on earth to admire a woman like that." "I hate to know a good man like you having to live and do as you do." "If they decide to go you'll have money to pay some one to do your work and you'll soon build up your business and be able to live again." "We all make mistakes some times. Don't let it write any notes." "Don't be in a hurry to get any more things and don't move anything until I see you." It appears that when Lupton discovered, in the early part of June, that his letters were missing, he had very little to say to his wife. The wife testified that on Sunday, June 4th, she said to him, "Won't you please tell me what is the matter with you," and he replied, "Oh, no, you don't know, do you? You don't know that I've been missing anything out of my pocket?" She evaded his inquiry, and he then said: "He had tried to make a home and thought they would be very happy, but he made a miserable failure and she could just get her lawyer and have everything straightened up; that there was no use trying any more; that they could not get along together." Lupton left the house.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index-

Plaintiff took a ride with her brother, returning about six o'clock, finding her husband in the bed. After retiring their difficulties were again discussed. They "made up" the next morning, but Lupton again wanted to know about the letters, the wife did not inform him, but testified that she said: "This woman is trying to separate us, and if she does, I will certainly let everybody know who does it." He said, "Oh, no; you won't." Trouble continued from time to time, over the letters, followed by amicable relations, until the 25th of July when in bed the husband said: "Well, I must know about them." The wife said: "I can't tell you about them." The husband feigned a fit, fell back on the bed, breathed heavily as though he was dying. The wife called to him. Later he arose and said: "Well I must go if you won't tell me about those letters." The wife refusing to tell him, he packed his suit case, dressed, took his hat as if to leave, then his wife said: "I will tell you about those letters. I took them." He replied: "Well, I knew you did, but I wanted you to tell me so." They then "made up." The husband then said: "I want you to give me those letters and let me burn them." This was not done. The defendant had given Lupton a scarf pin which, at times, he wore. The wife objected to this and requested him not to wear it but the pin which she had given him, and this he did until the day of the separation, when the wife going to the office in the morning, discovered he was wearing the pin given to him by the defendant. The wife testified that she said to him: "I see you are wearing that pin;" and he replied: "You have no business to say what I shall wear and what I shall not, I shall wear this pin whenever I want to." They quarreled. The wife was told "she should go," and "go right away." She got a case from the safe, went to the apartment, packed her clothing, and awaited the return of her husband in the evening. After some conversation between them, the husband said: "Are you going to give me those letters?" She replied: "Those letters are not in my possession." He said: "You go right straight home to your father where you belong—right straight home." "He went out and slammed the door and I went home." Eight days after this separation Lupton called to see his wife at her father's home. He spent some time there with her. They had a walk together, going to the apartment where he urged his wife to go in and live with him again. She declined. He later wrote her assuring her of his love and beseeching her to come back to him. He kept the apartment open for her return for about two months. He insisted that the letters of the defendant had no alienating influences upon him. Several of these he said he had not read. He insisted that his wife was of a very jealous disposition, and that her jealousy was the chief cause of the trouble between them.

When the plaintiff was called to the stand, Ball, counsel for defendant, objected to her testifying in relation to any matter connected with the suit so far as it might in any way bind the defendant for the reason that this action is based upon an act, as amended (section 1, c. 80, 14 Del. Laws), to secure to a married woman money or other property held or acquired by her, living separate from and not supported by her husband, enabling her to sue therefor in her own name and for her own use.

It was urged that there is no averment that Ralph C. Lupton was, at the time of the commission of the grievances alleged either in the first, second or fifth counts of the declaration, the plaintiff's husband, or that he has continued to be her husband up until the present time, or that she was living separate and apart from him at the time the alleged grievances occurred, or that the defendant knew that the plaintiff and Ralph C. Lupton were husband and wife, the charge being that the defendant knowingly, wickedly, etc., committed the several grievances complained of.

It was contended that the mere recital in the commencement of the declaration that Gertrude M. Underwood, a feme sole, was summoned to answer Sadie C. Lupton, a feme covert, living separate from her husband, is sufficient to sustain these counts or to show that the plaintiff was living separate from her husband at the time she brought the suit.

BOYCE, J. [1] Under a later act (14 Del. Laws, c. 550), a married woman may prosecute suits in her own name as if unmarried.

The objection is overruled.

[2] Counsel for defendant in cross-examination handed the plaintiff two letters, for the purpose of ascertaining from her whether or not she wrote them to her husband. She having identified the letters as being in her handwriting, and the same having been marked for identification, the witness was asked for the purpose of contradiction: "You have just stated that you had no feeling against Mrs. Underwood prior to your marriage to your husband. After reading these letters which I have handed you, I will now ask you if you did not say to your husband in a letter to him of November eighth, 1910, 'I think the best thing would be for girlie to go and take care of Wanca and then she would get him away from that old mischief maker at 901. I certainly am not pleased with Wanca staying there one bit more than Wanca is pleased with girlie staying here; but Wanca makes girlie put up with that year after year.'"

(Objected to by Mr. Hastings, on the ground that it is immaterial whether the plaintiff, prior to her marriage, had ill-feeling against the defendant or not, and is not in cross-examination.)

Mr. Ball: This witness testified that on one occasion her husband told her that he had been to this defendant's house and she said "I object. Why don't you take me there?" intimating that she did not know any reason for her husband not taking her to the defendant's house. This was after her marriage, however. This question is asked for the purpose of affecting the credibility of and contradicting the witness, for she in this same letter called the defendant a mischief maker and objected, to Mr. Lupton boarding at the defendant's house or remaining there. She has testified in chief that she had no feeling against Mrs. Underwood before her marriage.

BOYCE, J.: Speaking for myself; the letter you refer to is not in evidence. When proved, if admissible in evidence, it will speak for itself. I do not think the contents of the letter should go to the jury except in an orderly way, or that questions should be based upon the contents of the letter even for the purpose of laying grounds for contradiction. Proceeding as you are, Judge Ball, the contents of the letter may be given to the jury although we overrule your questions. I do not think it should be done in that way. I understand your question is based upon the contents of the letter?

Mr. Ball: From a statement in that letter.

BOYCE, J.: It is the opinion of the court that the objection should be sustained for the reason that the question is directed to an immaterial matter.

Mr. Ball: I would like to ask another question to complete the record.

BOYCE, J.: Are you going to base your question on the contents of the letter?

Mr. Ball: On the contents of another letter, one that she has identified as having written.

Mr. Hastings: I object to his asking the question upon the very sound ground which the court has suggested. He cannot frame a question, quoting the contents of a letter not yet introduced in evidence, and upon the admissibility of which the court has not yet had an opportunity to pass.

BOYCE, J.: You have stated that you again propose to base your question upon the contents of a letter written by the plaintiff to Ralph C. Lupton, who is now, but was not her husband at the time the letter was written.

Mr. Ball: I am not attempting to get the whole letter before the jury. I am only attempting to ask if she did not say at a certain time, to a certain person, something in relation to this defendant. This plaintiff has testified in chief that when she came home from some place, her husband told her that he had taken Mr. McCorkle out to 901 Delaware Avenue, the home of this defendant,

and she said "I don't like you to take him out there; you never take me out there." She was asked the question why he did not take her out there and she said she did not know. Here is a statement from her that would show the reason why her husband would not take her out there—her own statement why she could not and would not go to that house. I certainly have a right to ask this witness if she did not make that statement upon a time prior to the time of her marriage and prior to the time when she said that he would not take her out and she knew no reason why he should not. The question goes to the prejudice or bias of this witness, and to nothing else.

BOYCE, J.: You may not frame any question upon the contents of that letter in the manner you have attempted. If the letter is admissible at all for any purpose—there is a regular way to get it in. We sustain the objection.

Mr. Ball: I now ask the permission of the court to present the question, which I had proposed to ask to the stenographer in order that he may enter it upon the record.

BOYCE, J.: Are you going to incorporate the contents of the letter in the question?

Mr. Ball: I am going to incorporate only so much of it as I desire to ask, (not stating it to the jury) in order that the record may show the question and that it was ruled out by the court.

Mr. Hastings: I object.

BOYCE, J.: We think, having inquired of you whether you are going to base your question upon the contents of one of the letters as you did in the former question, which we ruled out, and having your answer in the affirmative, there is sufficient on the record for the Supreme Court, if you should desire to test the soundness of our ruling in that court.

Mr. Ball: Your honors refuse to permit me to put the question to the stenographer?

BOYCE, J.: There is now on the record the fact that two letters have been shown to the plaintiff, which she has identified as letters written by her to Ralph C. Lupton before their marriage. That is true?

Mr. Ball: Two letters marked for identification, yes, sir.

BOYCE, J.: You have framed a question based upon the contents of one of these letters, not yet in evidence; and we overruled the question. You now seek to frame another question based upon the contents of the other letter, and we decline to permit you to do so. We think you have everything upon the record that is necessary to show the character and extent of our ruling, or to test its correctness elsewhere. We sustain the objection. You may note an exception. (Exception noted.)

Mr. Ball: The ruling of your honors, I imagine, applies to any statement contained

in a certain letter written by this witness, providing the question is based upon the letter?

BOYCE, J.: What we seek to do is to prevent the contents or part of the contents of any letter going before the jury in the way you have proposed. There is a mode of procedure for your purpose. You must pursue that.

[3] At the conclusion of plaintiff's testimony, Ball, counsel for defendant, moved for a nonsuit, on the ground that the letters written by defendant to plaintiff's husband, and introduced in evidence, taken in connection with the oral testimony, utterly failed to prove that they were the cause of the estrangement between and separation of the plaintiff and her husband; that they showed the only one desire or motive, on the part of the defendant, was to assure Ralph C. Lupton, husband of the plaintiff, that she and all his friends thought as much of him then as they had prior to his marriage, and to encourage him to be a man; not to do a foolish thing; not to injure himself but to live under the circumstances as best he could. Further, there was no evidence in the case that at the time of the separation anything that the defendant had said or done influenced the separation in anyway whatsoever, but on the contrary, all matters of difference theretofore existing between the plaintiff and her husband so far as the defendant was concerned had been adjusted; and that there was no evidence to prove that the letters were the controlling cause of the separation.

BOYCE, J.: We think under the evidence thus far submitted the question at issue is one for the determination of the jury. The motion for nonsuit is, therefore, denied.

[4] Ball, counsel for defendant, then served Mr. Hastings, one of the plaintiff's counsel, with the following notice:

"I hereby notify you to produce and demand that you do produce forthwith the letter bearing date August 7, 1911, which you state in your letter of September 20, 1911, to Mr. Ralph C. Lupton his wife had left with you, as I desire to use the same as evidence in the case of Sadie C. Lupton v. Gertrude M. Underwood now being on trial in the Superior Court of the State of Delaware, in and for New Castle County;" and asked for the production of the letter referred to.

Counsel for plaintiff contended that the notice, having just been delivered at the trial was too late, citing Carson v. Johns (163 Sept. T. 1904) unreported, and the English case of Holt v. Miers, 9 Carr. & Payne.

BOYCE, J.: The lateness of the notice to produce is not necessarily controlling.

Mr. Rodney: Do I understand the court has ordered the production of the paper on five minutes' notice?

BOYCE, J.: The question presented is whether you are in a position to produce.

Mr. Rodney: The objection to produce upon the lateness in making the demand.

BOYCE, J.: Your present ability to respond to the notice is the test of the competency of the notice. If you have the letter present, you must produce it.

Mr. Rodney: I am absolutely without knowledge whether Mr. Hastings has the letter or not. I desire to object to the notice itself.

BOYCE, J.: We overrule the objection.

Mr. Rodney: We have the letter.

BOYCE, J.: Then the notice is sustained.

The letter was, thereupon, produced and handed to Mr. Ball.

Mr. Ball: It is now in evidence.

BOYCE, J.: The letter having been produced in response to a notice therefor, inspected by counsel calling for it, it is in evidence, if there be no other legal objection.

Mr. Hastings: It must be proven that this letter was written by the husband and received by the plaintiff before it can be admitted in evidence.

BOYCE, J.: We overrule the objection. The letter is in evidence.

Mr. Ball: Mr. Hastings, will you take the witness stand?

Mr. Hastings: No.

[5, 6] BOYCE, J.: We cannot permit Mr. Hastings to be called. The defendant, when called, was asked by her counsel: "Did you write those letters (referring to the letters having been written by the defendant to plaintiff's husband) for the purpose or with the intention to induce or to persuade counsel Ralph C. Lupton to leave his wife?"

(Objected to by counsel for plaintiff on the ground, also on the ground that the defendant could not give explanation, in her defense, why she wrote the letters.)

Ball, for defendant, contended that it was competent for the defendant to negative the intent charged if she could, and to submit to the jury whether she had such intent as charged when she wrote the letters.

Mr. Hastings: The question is left to the jury and besides a stranger cannot justify any interference in a case like this on a plea of not guilty. Malice is presumed from these letters. The only way the defendant could testify in reference to writing these letters, would be in mitigation of damages, and not in bar of the action. 21 Neb. 1619; Hartpence v. Rogers, 145 Neb. 623, 45 S. W. 650; Trumbull v. Trumbull, 71 Neb. 186, 98 N. W. 683, 8 Ann. Cas. 51.

Ball, in reply, cited Prettyman v. Williams, 1 Pennewill, 224, 39 Atl. 731; Rath v. Rath, 2 Neb. (Unof.) 600, 89 N. W. 612.

BOYCE, J.: We sustain the objection to the question because of its leading character.

[7] Q. State to the court and the jury why you wrote those letters that have been testified to here that you did write.

(Objected to by counsel for plaintiff, on the ground as before stated.)

BOYCE, J.: It does not appear to the court that the purpose of the question is to justify but rather to show motive or intent. We overrule the objection.

A. Out of sympathy and friendship for Mr. Lupton.

[8] Q. Did you or not write any of the letters that have been offered in evidence, for the purpose of inducing Mr. Lupton to separate himself from his wife?

(Objected to by counsel for plaintiff as leading.)

BOYCE, J.: The objection is sustained.

Q. Did you have any other motive in writing these letters than the one you have stated—that you did it out of sympathy and friendship for Mr. Lupton?

(Objected to by counsel for plaintiff as leading.)

BOYCE, J.: The objection is overruled.

A. I did not.

[9] Ball, for defendant, called David T. Marvel, Esquire, an attorney at law, subpoenaed to bring with him a letter written to him by the plaintiff, dated August twenty-third, 1911, who after testifying that he had made search for the letter but could not find it, was asked: "Will you look at the paper I hand you, and tell me if that is a copy of that letter?"

(This was objected to by Mr. Hastings, who examined the witness as follows): "Did Mrs. Lupton, the plaintiff, come to consult with you after she and her husband had separated?"

A. She did.

Q. I will ask you whether you afterwards told her that under the circumstances you did not desire to represent her?

A. I did.

Q. Was it after the date of the letter you have referred to (July twenty-ninth, 1911) or before that you told her that you could not represent her in this matter?

A. I am unable to fix the date. I was advising both parties, trying to patch up their trouble, and when there was about to be a law suit, I refused to represent either one.

(Mr. Hastings here objected to the witness answering the question or any question relative to the matter in issue, upon the ground that whatever communication was made to him by the plaintiff was privileged.)

By Judge BOYCE:

Q. Can you tell by reading the letter and observing its contents, whether the plaintiff did consult you before you received it?

A. Yes, sir; she consulted me before that.

Q. Did she consult you professionally with reference to this case?

A. They had asked me to represent them. They had both spoken to me. I knew it

was coming to litigation and I had advised them on the law.

BOYCE, J.: We think the communication is privileged and sustain the objection.

Mr. Marvel was recalled for plaintiff in rebuttal, and asked: "Did you or not advise Mr. Lupton when he consulted you, that it would be necessary for him to invite his wife back in order to relieve him of her support?"

(Objected to by Mr. Ball, as a privileged communication.)

BOYCE, J.: We sustain the objection.

[10] Herbert H. Ward, Esquire, an attorney at law, was also called for plaintiff in rebuttal, and, after stating that he formerly represented Mrs. Underwood, the defendant, was asked: "In preparing this case, did you or not talk to Ralph C. Lupton in your office?"

(Objected to by counsel for defendant, who interrogated the witness as follows):

Q. You represented Mrs. Underwood up to a certain time?

A. Immediately after the suit was brought I became her counsel.

Q. And did she suggest to you certain witnesses that you might see and that you ought to see in preparing her case?

A. When she came to consult with me I talked the matter over with her, but did not go into the preparation of her case until after the declaration was filed. Then I had a further conversation with her and I then got the correct view of her case, and at her suggestion I called upon certain witnesses and at her suggestion, I sent for Ralph C. Lupton.

(Mr. Ball thereupon objected to the witness testifying to anything that occurred in his office, as a privileged communication.)

Mr. Hastings stated that he had asked the question for the purpose of contradicting Lupton, he having laid the ground therefor when Lupton was on the stand.

BOYCE, J.: We will permit this question to be answered.

A. I did.

Q. During one of the conversations had with Ralph C. Lupton, in your office, relative to this case, did he not tell you that he never had affection for his wife, or words to that effect?

(Objected to by counsel for defendant as privileged.)

BOYCE, J.: It occurs to the court that while this question may not strictly fall within the class of questions that are privileged, yet to permit it to be answered would be against the spirit and policy of former decisions by this court. We, therefore, sustain the objection.

Plaintiff's Prayers.

A husband is entitled to the society, comfort, fellowship, assistance and services of his

wife, and whoever, by the alienation of her affections, deprives him thereof, commits a wrong against the husband for which he is liable to respond in damages. *Prettyman v. Williamson*, 1 Pennewill, 224, 236, 39 Atl. 731.

The wife has a similar property right in her husband's consortium, enforceable in this state in an action at law brought by her. *Ellison v. Draper*, 77 Atl. 572.

No stranger has the right to intermeddle with the domestic and marital relations of husband and wife, and if one voluntarily does so, he or she is answerable for the consequences. *Hartpence v. Rogers*, 143 Mo. 623, 45 S. W. 650; *Modisett v. McPike*, 74 Mo. 636; *Barnes v. Allen*, 30 Barb. (N. Y.) 663.

If the acts and conduct of the defendant were the controlling cause of the wrong or injury complained of, and without which it would not have occurred, the action may be maintained, although there were other causes contributing thereto. *Prettyman v. Williamson*, supra; *Hadley v. Heywood*, 121 Mass. 236; *Fratini v. Caslini*, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843; *Dallas v. Sellers*, 17 Ind. 479, 79 Am. Dec. 489; 4 *Sutherland on Damages*, p. 3771.

The law presumes the husband had affection for his wife, but if this be rebutted, such rebuttal is no bar to the action for two reasons: (1) Because even if the husband had no affection for his wife, another person has no right to interfere to cut off all chances of its springing up in the future, and (2) because the alienation or loss of affection is not the substantive cause of action but a matter of aggravation of damages, the gist of the action being the loss of the consortium, that is, loss of aid, support, protection, comfort and society of her husband. *Beach v. Brown*, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114, 72 Am. St. Rep. 98; *Prettyman v. Williamson*, supra; *Fratini v. Caslini*, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843; *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947.

The alienation of the affections of the husband is often the means by which his separation from his wife is effected; that, however, is not essential to her cause of action. 4 *Sutherland on Damages*, p. 3771; *Nichols v. Nichols*, 147 Mo. 387, 401, 48 S. W. 947.

The measure of damages is such a sum as the jury may believe from the evidence will reasonably compensate the plaintiff for the deprivation and loss of her husband's affection, society, comfort, companionship, protection, support and aid; as well as the destruction of her happiness, the breaking up of her home, and the mental pain she has suffered. *Prettyman v. Williamson*, supra; *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947.

If the defendant wilfully and maliciously committed the injury or wrong complained of, the jury may in addition to compensatory damages award the plaintiff such damages as they may consider proper as a punishment to the defendant and an example to others. *Prettyman v. Williamson*, supra.

Defendant's Prayers.

The burden is upon the plaintiff to satisfy the jury by a preponderance of the evidence that the charges contained in the declaration are true.

The jury cannot assume the charges against the defendant to be true. *Waldron v. Waldron* (C. C.) 45 Fed. 316.

The jury cannot find a verdict in favor of the plaintiff on the suspicion that the acts charged against the defendant caused the alienation of the husband's affections.

The jury must find that the defendant caused the separation and alienation of the affections of the husband of the plaintiff, and that it was done intentionally and knowingly by some of the causes alleged in the declaration. *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492; *Waldron v. Waldron* (C. C.) 45 Fed. 315.

The defendant cannot legally be made to answer on account of the shortcomings and misconduct, if any exist, of the husband not caused by direct and active interference of the defendant.

If the defendant wrote the letters complained of and thereby the affections of the husband of the plaintiff were alienated, this will not warrant a verdict for the plaintiff, unless the jury be satisfied by a preponderance of the evidence that the defendant wrote them wrongfully, wickedly and unjustly, and that they were the controlling cause of the alienation.

It is necessary for the jury to ascertain first, whether the affections of the plaintiff's husband were really alienated, and second, if so, what was the controlling cause thereof.

If the plaintiff by leaving her home and refusing to return when requested to do so by her husband thereby of her own volition sacrificed her husband's affections and deprived herself of the comfort, fellowship, society, aid and assistance of her husband, the verdict should be for the defendant.

The mere saying to a wife by her husband "go home to your people" is not enough to warrant her to separate herself from him and refuse to return to him when so requested by him. And if the plaintiff separated herself from her husband because during a quarrel he told her to go home to her people, and if she refused to return when requested to do so by her husband, the plaintiff cannot recover.

BOYCE, J., charging the jury:

Gentlemen of the Jury: This action was brought by Sadie C. Lupton, the plaintiff and wife of Ralph C. Lupton, against Gertrude M. Underwood, an unmarried woman, the defendant, to recover damages for an injury to the right of property of her, the plaintiff, in the affections, society, and support of her husband, alleged to have been occasioned by the defendant.

It is not denied that the plaintiff is now, and was the wife of Ralph C. Lupton at the

time of the bringing of this action, and has been since March the eighteenth, A. D. 1911; and that they have lived separate and apart since July the twenty-ninth, the same year.

The plaintiff, in her declaration, charges, in substance, that the defendant, on certain days, therein mentioned, in the months of April and May, A. D. 1911, and on divers other days between those dates, respectively, and the commencement of this action, wrongfully, wickedly, and unjustly (1) wrote letters to plaintiff's husband, and thereby counselled, induced, and prevailed upon her husband to disregard the duty which he owed to her, and thereby his affection for her was alienated and destroyed, and by means thereof she has wholly lost and been deprived of the comfort, fellowship, society, aid, and assistance of her husband in her domestic affairs which she ought to have had and otherwise might and would have had; (2) that the defendant, in like manner, became the companion of the plaintiff's husband at the home of the defendant in this city to the loss and deprivation of the plaintiff; (3) that the defendant in like manner, enticed, persuaded, and prevailed upon the plaintiff's husband to separate himself from her, by means of which, and on no other account, she lost and was deprived of her husband's affection, assistance, and rights of consortium; (4) that the defendant, in like manner, enticed, persuaded, and prevailed upon the plaintiff's husband to frequently meet her, the defendant, at her said home, to the loss and deprivation of the plaintiff; and (5) that the defendant, in like manner, counselled, induced, and persuaded the plaintiff's husband to violate his marital obligations and to cease loving the plaintiff, his wife, whereby his affection for her was destroyed to the loss and deprivation of the plaintiff. It is then charged that by means of the several grievances the happiness of the plaintiff has been destroyed, her home has been broken up, and that she has been caused great mental pain and suffering, and otherwise greatly injured.

The defendant has pleaded not guilty by which she absolutely denies the commission of the several complaints of the plaintiff.

The defendant admits writing the several letters to plaintiff's husband, introduced in evidence by the plaintiff.

It is claimed for the defendant that she had known the plaintiff's husband, upwards of ten years; that he had boarded with her some seven or eight years prior to and up to the time of his marriage with the plaintiff; and that he had for a long time attended to business matters for the defendant. It is admitted that the plaintiff's husband visited the home of the defendant after the marriage—at times, it is claimed, at the request of others, and, at other times, for business reasons; and it is insisted that the relations between him and the defendant were proper, at all times. The defendant

denies that the said letters were written for the purpose of alienating or destroying the affections of plaintiff's husband for her, or for the purpose of inducing a separation between them. And it is urged that the plaintiff voluntarily separated herself from her husband; and that, after so doing, he besought her in person and by correspondence to resume marital relations with him. This is, at least, a partial summary of the contentions of the parties. Your recollection of the testimony will enable you to supply any omissions.

[11] We are not permitted to make any comment upon the testimony; the jury being made the exclusive judges of the credibility of the witnesses and of the weight and value of their testimony. Your duty is to carefully consider all the testimony, and to return a verdict in accordance with the preponderance of the evidence, considered in connection with our charge to you upon the law. When the testimony is conflicting, as in this case, the jury should endeavor to reconcile it. If they cannot do so, they should accept that part of it which they deem worthy of credit and reject that which they deem unworthy of credit, taking into consideration all the testimony adduced and the circumstances surrounding the witnesses respectively, their means of information and opportunity of knowing the facts of which they have testified, their interest or bias, if any, and their manner and apparent truthfulness and fairness in giving their testimony.

[12] Under the statutes of this state removing the disability, at common law, of a married woman to sue in respect to her property in her own name alone, a married woman may maintain an action for alienation of her husband's affections. Marriage gives to the wife the same right of conjugal society as it does to the husband. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage relation.

Any interference with these rights, whether of the one or the other—particularly by a stranger—is a violation, not only of natural right, but also of a legal right arising out of the marriage relation. *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553.

Whoever, therefore, by the alienation of the affections of a wife's husband, deprives her of his affections, commits a wrong against her property rights for which such wrongdoer is liable to respond in damages. *Ellison v. Draper*, 77 Atl. 572.

[13] The basis of the action is the loss of conjugal fellowship, society and aid of the husband. The actionable consequences of the injury of the wrong, whenever committed, is the loss of consortium, and the alienation of affections is a matter of aggravation. And it is not essential, therefore, to the

maintenance of the action that there should be any loss of the husband's services, or any pecuniary loss whatever.

[14] In the consideration of this case, you may assume that the plaintiff's husband, who lived and co-habited with his wife from their marriage to the time of their separation, had, during that time, an affection for his wife, unless you find testimony rebutting the presumption.

[15] The issue which you are called upon to decide is not whether the plaintiff was justified in leaving her husband but whether the defendant was the cause of the alienation and loss of consortium. It must appear by a preponderance of the evidence that the alienation and loss of consortium were wrongfully, unjustly and effectively caused by the defendant by the means and as charged in the plaintiff's declaration in order to warrant a verdict for the plaintiff. It is not necessary to entitle the plaintiff to a recovery that it should appear that the defendant's conduct was the sole cause thereof. It is sufficient if the defendant's conduct was the controlling cause. [16] If the defendant's conduct was effective in causing the injury complained of, any unhappiness or even separation between the plaintiff and her husband, not caused by the defendant, would not justify or excuse the defendant for any unlawful interference between the plaintiff and her husband; for even if it should appear that the husband had little or no affection for his wife, another person has no right to interfere to cut off all chance of its springing up in the future. If the alleged conduct of the defendant was not the controlling cause of the alienation, the plaintiff cannot recover.

Any unhappiness between the plaintiff and her husband, while living together, not induced by the defendant, would, in itself, constitute a bar to the plaintiff's action, but would go in mitigation or reduction of damages. In cases of this character the extent of the actual injury to the plaintiff will of course depend upon the plaintiff's allegations between the plaintiff and defendant. Evidence in mitigation or reduction of damages will, therefore, be received to show that the plaintiff suffered less injury than would be the probable inference from the action. It is proper therefore, for the plaintiff, in mitigation of damages, to introduce the action, evidence, if any, of any unhappy relations between the plaintiff and her husband, not caused by the defendant, to show that they are living together in the same circumstances under which the separation occurred. These damages, to determine the amount of such relation, little by reason of the defendant's conduct, if you find the de-

fendant committed them and that they induced the injury complained of. *Prettyman v. Williamson*, 1 Pennewill, 224, 39 Atl. 731.

[17] If you find from the evidence that the defendant wrongfully and unjustly, by any, or all of the acts complained of, had a controlling influence in alienating the affections of the plaintiff's husband, your verdict should be for the plaintiff; and the measure of damages would be such as you believe would reasonably compensate the plaintiff for the injury to her feelings; for the loss of her husband's comfort and society; and for the loss of his support.

[18] If you find from the evidence that the defendant's conduct was effective in causing the alienation of the affections of plaintiff's husband was wilful and malicious toward the plaintiff, you may, in such event, in your discretion, award exemplary or punitive damages, in addition to compensatory damages. But in order to warrant the awarding of exemplary damages, you must be clearly satisfied by the evidence that the defendant's conduct was wilful and malicious.

If you find from the evidence that plaintiff's husband alienated his affections from plaintiff without the influence of the alleged misconduct and interference on the part of the defendant, or that the alienation of his affections was the result of some other cause, over which the defendant did not exercise an effective influence, your verdict should be for the defendant.

In conclusion, your verdict should be for that party in whose favor the evidence preponderates.

Verdict for plaintiff for \$4,000.

[19] At the same term motions for a new trial and in arrest of judgment were made, which were continued to the January term, when after argument, and an expression of opinion by the court that the verdict rendered was excessive, the plaintiff consented to a reduction of the verdict to \$2,500. An order was accordingly made by the court, that the verdict should be so reduced, and the motions for a new trial and in arrest of judgment were refused. After such refusal the defendant made application for an enlargement of time for the drawing and signing a bill of exceptions till the first day of the March term. There was no exception taken or proposed, subsequent to the trial term. Neither was there any application made for an enlargement of time for drawing and signing a bill of exceptions till the January term. The plaintiff resists the defendant's application on two grounds, viz.:-

(1) Because the court has no authority to grant the application.

(2) Because, even if it had the power, the enlargement of the time asked for would nevertheless be in the sound discretion of the court, and in the exercise of such discretion the application could not be granted.

WILL, C. J., after stating the contentions as above, delivered the the court:

re raised in the present case two the first involving the power of and the second involving the dis- the court.

determination of the first ques- ds entirely upon the construction shall place upon a statute of this d in the Revised Code at 851, as by chapter 238, 25 Laws of Dela- ch provides that "the bill of ex- must be drawn in form and signed e term in which the exception is unless the court shall otherwise The concluding words, "unless the ll otherwise order," constitute the t, and were inserted in the orig- to take the place of the follow- : "Unless the parties otherwise i the assent of the court."

mitted by the defendant that under al act the application now made be granted, but it is insisted that act as amended it may be, because lment, when fairly construed, means ourt may make an order enlarging or drawing and signing exceptions, uring the term at which they were but at a subsequent term until ment is entered in the case. It is y the defendant that it would be ble to hold that the party must in- xpense and trouble of preparing ions and having them signed before ssibly know whether the judgment gainst him or not, because he can- there is a decision on his motion r trial, know whether he will sue rit of error or not.

ntiff replies that the drawing and the exceptions is an entirely dif- fter from suing out the writ of er- while the latter must follow the nal judgment, the former may pre- and that the requirement of the es not necessarily subject the par- ble and expense because if the ex- re not drawn and signed during when prepared it entails no hard- ake application at such term for ment of time. It is insisted that plication is in no wise dependent asuance of the writ of error. The ountends that the effect of the t was, not to enlarge the time xception might be drawn and sign- ly to give the court the power to e time without agreement of coun- e prior to the amendment if coun- agree the court could not adjourn ving reasonable time for preparing exceptions, and it was to obviate lity and embarrassment that the ended. The court are of the opin-

ion that this contention is sound and reason- able. It is admitted by the defendant, as we have stated, that prior to the amendment of the statute such an application as she now makes could not have been granted. We think the only additional authority confer- red upon the court by the amendment is to enable them to extend the time without agreement of counsel. The statute contem- plated, after amendment, as before, that the exceptions should be drawn and signed dur- ing the term at which they were proposed unless an enlargement of the time was then asked for and granted. If counsel sees fit to move for a new trial, or for an arrest of judgment at the trial term, and such motion is continued, the requirement that he shall at the same term apply for an extension of the time for signing his bill of exceptions to the next term, entails no expense and im- poses no hardship. He is not obliged to pro- cure a copy of the record, draw out his ex- ceptions or have them signed, before final judgment is entered in the case, but only to ask the court, before the adjournment of the term at which the exception was proposed, for an enlargement of the time during which his exceptions may be signed. This is, we think, a fair and reasonable construction of the statute based upon its language, and the manifest intent of the amendment, which was simply and solely to authorize the court to enlarge the time without any agreement of counsel.

The application of the defendant is refused.

STALLETO v. PLUMLEY & SARGENT.

(Supreme Court of Vermont. Windsor. Feb. 13, 1913.)

1. WORK AND LABOR (§ 30*)—ACTIONS—EVI- DENCE—SUFFICIENCY.

In an action for cutting timber under a contract to cut all the trees on certain lots where plaintiff testified that he was directed by defendant to stop cutting, a directed verdict for defendant on the ground that plaintiff was only told to stop cutting on the land of an ad- joining owner, and hence had not shown any excuse for the abandonment of the contract, was properly denied.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. § 30.*]

2. WORK AND LABOR (§ 30*)—ACTIONS—IN- STRUCTIONS.

In an action for the value of services in cutting timber, where the trial proceeded on the theory that the timber cut on the land of an adjoining owner was to be taken into account and adjusted, and evidence was introduced to show the damage by reason of cutting such timber improperly, and the claim that plaintiff was not entitled to pay for such timber was first raised in the argument to the jury, the court properly denied an instruction that plain- tiff could not recover for such timber.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. § 30.*]

3. WORK AND LABOR (§ 30*)—ACTIONS—IN- STRUCTIONS.

In an action for services in cutting timber, where plaintiff's testimony tended to show that

the cutting of timber on the land of an adjoining owner was due to defendant's fault, and not to his own, an instruction that defendants were entitled to retain a reasonable sum of money for their own protection, as otherwise money might have become due and payable to plaintiff by reason of his cutting over the line, was properly denied.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 59-65; Dec. Dig. § 30.*]

4. TRIAL (§ 191*)—ACTIONS—INSTRUCTIONS.

Where plaintiff claimed that he was directed by defendants to cease cutting timber under a contract requiring him to cut all trees on certain lots, and sued for the value of the work done under the contract, an instruction that, under the contract, the pay for cutting would become due within a reasonable time after the cutting, and that it was for the jury to say what a reasonable time was, was properly denied because it assumed that the contract was still in force.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

5. TRIAL (§ 280*)—EXCEPTIONS TO INSTRUCTIONS—SUFFICIENCY.

In an action for services in cutting timber under a contract requiring the cutting of all trees on certain lots, plaintiff testified that defendant told him to stop cutting, and that he thereupon stopped. Defendant's evidence tended to show that plaintiff was told to stop cutting on the land of an adjoining owner, but to finish the job on the land covered by the contract. On cross-examination plaintiff made statements that he stopped cutting because he did not get his pay when he wanted it, and because it got so late that the bark would not peel. The court told the jury to determine just what was said at the time plaintiff was told to stop cutting, and whether plaintiff understood, and had a right to understand, that defendant ordered him to do no more work under the contract. Defendant excepted on the ground that the court had no right to quote or rehearse one part only of the testimony of plaintiff and defendant without quoting plaintiff's further testimony, because it did not allow the jury to consider the reasons given by plaintiff inconsistent with the position taken by him. *Held* that, while inapt and somewhat obscure, this exception sufficiently raised the question whether the charge was erroneous in not calling the jury's attention to what the plaintiff said on cross-examination as to his reasons for stopping cutting.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 691-693; Dec. Dig. § 280.*]

6. WORK AND LABOR (§ 30*)—ACTIONS—INSTRUCTIONS.

The failure of such instruction to direct the jury's attention to the cross-examination in effect excluding it from their consideration was reversible error, since, the case having been submitted on the theory that defendant terminated the contract, plaintiff would not have been entitled to recover if he stopped cutting for the reasons stated by him on his cross-examination.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 59-65; Dec. Dig. § 30.*]

Exceptions from Windsor County Court; William H. Taylor, Judge.

Action by Frank Stalletto against Plumley & Sargent. Judgment for plaintiff, and defendant brings exceptions. Reversed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

C. V. Poulin, of Rutland, and Julius A. Willcox, of Ludlow, for plaintiff. Stickney Sargent & Skeels, of Ludlow, for defendant.

ROWELL, C. J. General assumpsit. The plaintiff, as shown by his specifications, seeks to recover for work and labor done and performed by him for the defendants in cutting and peeling pulp wood as per a written contract between them, dated May 8, 1911, and for cutting 10 cords of hardwood under the same contract. The contract called for the cutting by the plaintiff of all the hard wood and soft wood trees on three certain lots in Chester in varying quantities in specified times. The plaintiff stopped work before the completion of the contract, and seeks to recover, not upon the contract, but for what he has done under the contract, claiming that the defendants, without his fault, put an end to it.

[1] The defendants moved for a verdict for that the plaintiff, not having shown performance of the contract on his part, was not entitled to recover anything in an action of general assumpsit; he not having shown that he was forced to abandon the contract by reason of any act or failure of the defendants, the only evidence being that they told him not to cut another stick on the Woodbury-Barnard lot, which adjoined one of the defendants' lots mentioned in the contract, but which they did not own. This motion was properly overruled, for the plaintiff's evidence tended to show that without fault on his part the defendants told him to stop further work under the contract, which he accordingly did, and his claim was that, the defendants having thus put an end to the contract, he was entitled to recover as much as he merited for work done under it. This position is impregnable against the assault of the motion.

[2] The defendants requested the court to charge that the plaintiff could recover nothing for cutting on the Woodbury-Barnard lot. It appears from the charge that this claim was first made in argument to the jury. But the court held that the defendants were not warranted in taking this position at that stage of the case, because the trial had proceeded upon the theory that that cutting was to be taken into account and adjusted, and considerable evidence had been introduced tending to show what the damage was by reason of cutting that wood improperly, and as to its being cut into pulp wood when it was more suitable for saw timber, and that the defendants directed the plaintiff to go ahead and complete the cutting of what was felled, and peel and pile it under the contract. So the court treated the cutting on the Woodbury-Barnard lot as the case was conducted the same as it treated the other cutting, except as to why the plaintiff cut there—whether it was his fault or the defendants' fault, as to which the testimony

was conflicting. This request, therefore, was properly denied.

[3] The defendants also requested the court to charge that they were entitled to retain a reasonable sum of money for their own protection, for otherwise money might have become due and payable to the plaintiff by reason of his cutting over the line. But the court could not comply with this request, because, if for no other reason, plaintiff's testimony tended to show that it was not his fault, but the defendants', that he cut over the line.

[4] The defendants also requested the court to charge that under the contract the pay for cutting would become due from time to time within a reasonable time after the cutting, and that it was for the jury to say what was a reasonable time. But this request is not tenable because it assumes that the contract was still in force, whereas the plaintiff's claim is, as we have pointed out, that it was abrogated by the wrongful act of the defendants; and this his testimony tended to show.

[5, 6] It appeared that about the 1st of August it was discovered that the plaintiff was cutting on the Woodbury-Barnard lot, which was outside the territory covered by the contract. The plaintiff's evidence tended to show that, when that was discovered, the defendant Sargent told him to stop cutting, and that thereupon he did stop. The defendants' evidence tended to show that what was said was that the plaintiff should stop cutting up there, but should finish cutting up the trees that were cut down, and peel and pile that, and then go down to the land covered by the contract and finish up the job. The court told the jury that they would first have to determine just how this thing happened, and what was said. The court then put it to the jury to find whether the plaintiff understood from what was said, and had a right to understand, that the defendants ordered him to do no more work under the contract, because it must amount to that in order to justify the plaintiff in stopping at that time and failing to complete the contract. The court did not charge further nor otherwise on that subject. The defendants excepted to this part of the charge for that the court had no right to quote or rehearse to the jury one part of Sargent's testimony and that alone; and for that the court had no right to quote the testimony of the plaintiff as to what Sargent said when he came onto the lot and discovered that the plaintiff had got over the line, without quoting the testimony of the plaintiff further on because it did not allow the jury to take into consideration the reason the plaintiff himself gave, which was inconsistent with such position. But, while the language of this exception is inapt and somewhat obscure, we think it clear enough to give the court to under-

stand that the defendants were thereby claiming that its charge was erroneous in not calling the attention of the jury to what the plaintiff said on cross-examination, to the effect that he stopped cutting because he did not get his pay when he wanted it; and on cross-examination he gave that more than once as his reason for stopping. He also said that he stopped because the bark on the other lots would not peel, it had got so late. Now, as the court told the jury, it was necessary to recovery that the plaintiff should have understood, and have had a right to understand, that the defendants ordered him to do no more work under the contract, and, in effect, that he should have quit the job for that reason. But in determining that question the jury was virtually confined by the charge to what was said on the lot as above stated, and to the way it was said and the circumstances in which it was said. This amounted to excluding from the consideration of the jury what the plaintiff said on cross-examination about quitting because he was not paid and because the bark would not peel. If this had been brought to the attention of the jury in connection with what was said on the lot and how the plaintiff understood that, it might have been found that he did not quit because the defendants told him to, but because he had not been paid, which would have defeated recovery, as the case was put to the jury. Here is reversible error.

Judgment reversed and cause remanded.

SOMERVILLE LUMBER CO. v. MACKRES.

(Supreme Court of Vermont. Orleans. Feb. 22, 1913.)

1. JUDGMENT (§ 17*)—VALIDITY—PROCESS.

Where a foreign corporation, doing business within the state, did not designate a resident agent upon whom process against it could be served, service of process by attachment of the corporation's property in accordance with P. S. 1450, 1453, is sufficient, not only to bring the property attached within the custody of the court, but to support a personal judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33, 157, 422; Dec. Dig. § 17.*]

2. CORPORATIONS (§ 670*)—FOREIGN CORPORATION—SERVICE OF PROCESS.

Where a foreign corporation is served by attachment, it is not necessary for the return to negative the appointment of a process agent; that mode of service not being primary, but only additional.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2628-2639; Dec. Dig. § 670.*]

3. JUDGMENT (§ 173*)—JUDGMENT BY DEFAULT—AUDITA QUERELA.

Where an audita querela, to set aside a judgment by default was tried on its merits, the judgment should be for defendant instead of for the dismissal of the writ.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 840; Dec. Dig. § 173.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Exceptions from Orleans County Court; Alfred A. Hall, Judge.

Audita querela by the Somerville Lumber Company against Henry O. Mackres. There was a judgment pro forma that the writ be dismissed, and plaintiff excepts. Exceptions overruled.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

B. E. Bullard, of Hardwick, for plaintiff. Horace F. Graham, of Craftsbury, for defendant.

ROWELL, C. J. This is audita querela to set aside a judgment by default, rendered against the plaintiff in favor of the defendant in the Orleans county court. The action in which said judgment was rendered was commenced by the defendant, a resident of this state, on March 10, 1910, before and at which time the plaintiff was a Massachusetts corporation, having its principal place of business in Somerville in that state, but owning real estate and personal property in Craftsbury, Albany, and Greensboro in this state, and had for two years or more carried on a lumbering business in Vermont. Said property was in charge of one Chase, a stockholder of the plaintiff's since its organization, resident in Craftsbury, and in charge of the plaintiff's Vermont business—employed help, superintended the work, kept the books, etc.—and as the court below finds, was on said 10th day of March, and for about two years prior thereto and since had been, the agent and manager of plaintiff's business in Vermont, and, at the time the writ was served, was the lessee of plaintiff's mill in Craftsbury, and the custodian of its property.

On the 11th of said March, the writ was served by duly attaching the plaintiff's real estate and personal property, in all three of said towns, by leaving copies in the offices of the clerks thereof, with the officer's return thereon indorsed. The return further shows that on said last-mentioned day, at Greensboro, the officer delivered to said Chase, describing him as a stockholder and agent of this plaintiff, a copy of the writ, with a list and description of the property and estate attached, and the return thereon indorsed; and it appears that Chase immediately forwarded said copy to the plaintiff at Somerville. Not until some time after suit brought did the plaintiff designate an agent resident in this state upon whom process against it could be served here, as required by statute.

[1] The statute provides that when real estate is attached, a true and attested copy of the attachment, with a description of the estate attached, shall be delivered by the officer serving the same to the party whose estate is attached, or left at his last and usual place of abode; and that the officer shall leave a like copy of the attachment, with a description of the estate attach-

ed, in the office where by law a deed of the estate is required to be recorded; and, if the party whose estate is attached does not reside in the state, that a copy shall be delivered to his tenant, agent, or attorney; and if no such tenant, agent, or attorney is known, then such copy, with the officer's return thereon, lodged in the office where by law a deed of the estate is required to be recorded, shall be sufficient service. P. S. 1450. The statute also provides that, when the goods or chattels of a person are attached at the suit of another, a copy of the attachment, and a list of the articles attached attested by the officer serving the same, shall be delivered to the party whose goods or chattels are attached, or left at the house of his then usual abode, etc.; and, if such person is not an inhabitant of the state, that such copy shall be left with his known agent or attorney, and, for want thereof, at the place where such goods or chattels were attached. P. S. 1458.

Thus it appears, the plaintiff not having designated a process agent according to the statute, that the service of the writ was in strict compliance with the statute in case of nonresident defendants, and therefore sufficient, not only to bring the property attached within the custody and control of the law, and subject it to the satisfaction of the judgment obtained in the action, but also to make that judgment good as a personal judgment. This is so because, there being no statute specifically relating to the service of process on foreign corporations doing business in this state other than the one requiring them to appoint a process agent, they must be taken, if they omit that, to assent to be served with process the same as other nonresident defendants are served; or, in other words, they must take the law in that regard as they find it. Thus in *Attorney General v. Bay State Mining Co.*, 99 Mass. 148, 153, 96 Am. Dec. 717, it is said that a corporation that establishes a domicile of business in a state other than that of its creation must take that domicile as individuals are always understood to take it, subject to the responsibilities and burdens imposed by the laws it finds in force there.

In *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, the court had occasion to consider at length the manner in which state courts can acquire jurisdiction to render a personal judgment against nonresidents that will be received as evidence in the federal courts, and held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to such jurisdiction. The exceptions referred to, the court said, relate to cases where proceedings are taken in a state to determine the status of one of its citizens towards a nonresident, or where the party has agreed to accept a notification to others, or service on them as citation to himself.

In *St. Clair v. Cox*, 106 U. S. 350, 1 Sup

Ct. 354, 27 L. Ed. 222, it is said that this doctrine applies in all its force to personal judgments of state courts against foreign corporations; that the court rendering such a judgment must have acquired jurisdiction of the party by personal service or voluntary appearance, whether the party is a corporation or a natural person, there being only this difference, namely, that, as a corporation is an artificial person, it can act and be reached only through agents, and therefore process against it must be served on its agents, who must be such as may properly be deemed its representatives for that purpose; and that service upon such an agent is the same as personal service upon the corporation itself.

What is said in *Hill v. Warren*, 54 Vt. 73, about certain methods of service not being alternative but successive, has no application here, for that was said of a method that the statute expressly made successive.

[2] But here it was not necessary, as claimed, for the return to negative the appointment of a process agent by the plaintiff, for we construe that statute not to make that mode of service primary, but only additional. A similar statute is thus construed in *Mutual Reserve Fund Association v. Cleveland Woolen Mills*, 27 C. C. A. 212, 82 Fed. 508.

[3] The judgment below is not apt. It dismissed the writ, whereas it should have been judgment for the defendant, as the case was tried on its merits. *Foss v. Witham*, 9 Allen (Mass.) 572. But we let it stand, nevertheless.

Judgment affirmed.

ALLEN LUMBER CO. v. HIGUERA.

(Supreme Court of Vermont. Washington.
Feb. 14, 1913.)

1. APPEAL AND ERROR (§ 274*)—EXCEPTIONS—SUFFICIENCY.

A general exception to the court's findings and judgment does not raise the question of the sufficiency of the evidence to sustain any particular finding.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1631-1645; Dec. Dig. § 274.*]

2. TROVER AND CONVERSION (§ 9*)—DEMAND—NECESSITY.

Where defendant had used plaintiff's lumber placing it out of his power to restore it, a demand for its return was not essential to establish a conversion.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 58-83; Dec. Dig. § 9.*]

3. SALES (§ 202*)—TRANSFER OF TITLE—PAYMENT OF PRICE—NECESSITY.

Where a sale was for cash on delivery, title with the right to possession remained in the seller even after delivery until payment was made, unless the seller waived his right to treat the sale as a cash transaction.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 542-551; Dec. Dig. § 202.*]

4. SALES (§ 202*)—TIME OF PAYMENT—WAIVER.

A buyer of lumber to be paid for on delivery failed to make such payment. The seller called on him, and was told that the money would be sent as soon as the buyer's boy came. Not having received payment, the seller again called, and was again told that payment would be made soon, and told the buyer that he must have the money or the lumber. A few days later he again told him the same thing. The buyer used the lumber, and never paid for it. *Held*, that the facts did not show any consent to give credit or intent to waive the right to treat the sale as a cash transaction, and hence the buyer, not having obtained title, was liable for a conversion.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 542-551; Dec. Dig. § 202.*]

5. APPEAL AND ERROR (§ 268*)—RECORD—STATUTORY PROVISIONS.

Where the facts found by the court upon which judgment was rendered were reduced to writing and signed by the court, and filed as required by P. S. 1982, under the provision of that section, that no other or different facts at issue in the cause shall be allowed in the bill of exceptions, except such as relate to the admission or rejection of evidence, a recital in the finding referring to the transcript and making it a part thereof for any proper purpose in connection with the findings did not justify reference to the transcript, where no exception was taken to the sufficiency of the evidence to sustain any of the findings or claim made that a finding which was not made should have been made.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1596-1608; Dec. Dig. § 268.*]

6. TROVER AND CONVERSION (§ 68*)—FINDINGS—SUFFICIENCY.

In an action for the conversion of lumber sold, to be paid for on delivery, findings that it was not so paid for, that in a few days the seller called on the buyer about the matter and was told that the money would be sent, that it was not sent, and the seller again called and insisted on having the money or the lumber, and in a few days again told the buyer the same thing, were not substantially insufficient as to the length of time elapsing between the several occurrences mentioned.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 304-307; Dec. Dig. § 68.*]

7. TROVER AND CONVERSION (§ 68*)—FINDINGS—SUFFICIENCY.

In an action for conversion of lumber sold by plaintiff to defendant, a finding that plaintiff refused credit and insisted that the transaction must be a cash one, and that defendant agreed to pay cash on delivery, was not insufficient, because of the failure to find what plaintiff's understanding was as to when payment would be made since it stated the contract, and the contract expressed the understanding of the parties.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 304-307; Dec. Dig. § 68.*]

Exceptions from Washington County Court; E. L. Waterman, Judge.

Action by the Allen Lumber Company against E. Higuera. Judgment for plaintiffs, and defendant brings exceptions. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

J. Ward Carver, of Barre, for plaintiffs. Theriault & Hunt, of Montpelier, for defendant.

HASELTON, J. This is an action of trover. The case was heard by the court, and on facts found judgment was rendered for the plaintiffs and a certified execution was awarded. The defendant excepted.

The Allen Lumber Company is a partnership engaged in the lumber business. In July, 1910, the defendant purchased of the plaintiffs some lumber. He asked for credit, but that was denied on the ground that, as he was a stranger to the plaintiffs, the sale, if made, must be a cash transaction. The defendant told the partner with whom the business was done that, if the latter would send the lumber to a place in Montpelier where the defendant was building a house, he would pay cash. The plaintiffs sent the lumber, and it was paid for as agreed. Later a second sale of lumber was consummated between the parties. Some days afterwards the defendant came to one of the plaintiff firm, and asked for a third bill of lumber, and that it be sold him on credit. But the plaintiff firm again refused credit, and said the sale must be a cash transaction, whereupon the defendant said he had the money at the house, and that he would pay cash the same as before when the lumber was received at the house. The lumber was sent out, but the defendant did not pay for it. In a few days the partner with whom the business had been done on the part of the firm called on the defendant about the matter, and the defendant said his boy was not there, but that he would send the money as soon as the boy came. The defendant did not send it, and the partner referred to called again, when the defendant said the order was not complete; that there were some balusters which he had not received. The plaintiffs furnished the balusters, and the defendant said he expected some money soon and would pay. The plaintiffs told him they must have the money or the lumber. Again in a few days they told him the same thing. The defendant proceeded to use the lumber in building his house, and did not pay, and never has paid for the lumber in question. The court below found and held that the lumber did not become the property of the defendant, that he had no right to use the same, and that by using it as he did he converted it to his own use and became liable in this action for the value of the lumber which was found to be \$221.97.

[1] These facts were found by the court, reduced to writing, and signed by the judges as the statute requires, and the exceptions recite that thereon the court adjudged the defendant guilty and rendered judgment against him for the sum named with costs, and on motion granted a certified execution. The exception taken is thus recited: "To all of which defendant excepted." This ex-

ception does not raise the question of the sufficiency of the evidence to sustain any particular finding. *Landon v. Hunt*, 2 Vt. 322, 73 Atl. 865. The defendant does not claim that it does, but on various grounds claims that the findings are insufficient to sustain the judgment.

[2] It is claimed and argued that a demand and refusal were essential to establish a conversion, and that a demand for the lumber or the money was not a sufficient demand. But here a demand was not necessary, for the findings recite that the defendant had used up the lumber, and a demand is not required when it would necessarily be futile where there is no power to restore. When there has been actual conversion. *Chitty*, Pl. 170; *Crampton v. Valido Marble Co.*, 60 Vt. 291, 302, 303, 15 Atl. 153, 1 L. R. A. 120; *Merrill v. Bullard*, 59 Vt. 389, 8 Atl. 157; *Tinker v. Morrill*, 39 Vt. 477, 480, 94 Am. Dec. 345. This is upon the principle that the law never requires the performance of a vain or useless act.

[3] The transaction in question was a sale for cash on delivery, and the title with the right of immediate possession remained in the plaintiffs unless they had waived their right to treat the sale as a cash transaction. *Turner v. Moore*, 58 Vt. 455, 3 Atl. 467; *Drake v. Scott*, 136 Ala. 261, 33 South. 873, 96 Am. St. Rep. 25; *Tyler v. Freeman*, 3 Cush. (Mass.) 261; *Howard v. Haas*, 131 Mo. App. 499, 109 S. W. 1076; *Paulson v. Lyon*, 26 Utah, 438, 73 Pac. 510; *Berlinsky v. Rosenthal*, 104 Me. 62, 71 Atl. 69; *Dudley v. Sawyer*, 41 N. H. 326; *Hammett v. Linneman*, 48 N. Y. 399; *Benj. Sales* (7th Ed.) 270, 271, 298, 299; 2 Kent's Com. 496, 497. In the case of a sale for cash on delivery, the delivery and payment are, in contemplation of law, concurrent, and the doctrine that without payment the property will not pass even though it be actually delivered into the hands of the buyer is very generally recognized. In *Turner v. Moore*, 58 Vt. 455, 3 Atl. 467, there was a cash sale of a tombstone which the testimony tended to show was delivered at a cemetery where it remained for two or three days, and that then the seller had some conversation with the purchaser, during which he asked for a lie on the stone, which was refused. Becoming apprehensive that he would not get his pay, the seller reclaimed the stone and carried it back to his shop, and was thereupon sued by the purchaser, who recovered judgment, but the judgment was reversed, for this court said: "If the contract was for the sale of the stone, and there was no agreement that time should be given the plaintiff in which to make payment, it was a cash sale, and no title would vest in the plaintiff until she paid or tendered the money. The court told the jury that, if the stone was delivered to the plaintiff, the title vested in her and she became the owner. We think they should

have been told that, if they found it a cash sale, title would not vest until payment or tender of payment." The court commented upon the fact that the seller asked for a lien upon the stone, and considered that, in the circumstances, it had no tendency to show that the sale was not a cash transaction, but rather that it evinced the seller's unwillingness to give credit to the purchaser.

[4] If there was a waiver here by the plaintiffs, the sale became a sale on credit, and title passed to the defendant. But a waiver involves both knowledge and intent (*Webster v. State Mutual Fire Ins. Co.*, 81 Vt. 75, 69 Atl. 319), and here it cannot be said as matter of law that there was an actual consent on the plaintiffs' part to give credit, nor, in the circumstances, that the plaintiffs' conduct was such that the intent necessary to a waiver must be attributed to them.

[5] In discussing the question of waiver the defendant makes free reference to the transcript. The finding of facts say: "The entire transcript of the case is hereby referred to and made a part hereof for any proper purpose in connection with the finding of facts." This reference gave the defendant an opportunity by a proper exception to question the sufficiency of the evidence to sustain any of the findings, or to raise the claim that a finding should have been made which was not made, but he did neither of these things and the reference to the transcript goes for nothing, for the case was tried by the court under P. S. 1982, and must be considered upon the facts found and reduced to writing by a majority of the members of the trial court, and upon "no other or different facts." So we are confined to the findings of facts; and the demand for the money or the lumber did not, in law, amount to acquiescence or waiver or the giving of credit, for it asserted the plaintiffs' right and title to the lumber, which the defendant does not appear then to have disputed, and expressed only a willingness to pass title if the defendant would pay as he had agreed. On the facts found the plaintiffs did not consent that their lumber be used up by the defendant and his use thereof was an actual conversion, for it was an appropriation of the property to the party's own use in such a manner as to change its character, and exclude the plaintiffs from the possibility of exercising their rightful dominion over it. *Thorp v. Robbins*, 68 Vt. 53, 56, 33 Atl. 896.

For authority in this jurisdiction, the defendant relies principally upon *Eddy & Co. v. Field*, 85 Vt. 108, 81 Atl. 249, and *Andrews v. Carl*, 77 Vt. 172, 59 Atl. 167. But neither of these cases supports his position. The sound doctrine adverse thereto is fully recognized in both cases. In *Eddy & Co. v. Field* the defendant was under obligation to return empty soda bottles to the plaintiffs, and, he having had the bottles in question

freighted and waybilled to the plaintiffs, it was held that they could not maintain trover for the bottles upon a mere showing that they had not actually received them when suit was brought. *Andrews v. Carl* was a case of trover for a cow. When the cow was a calf, it strayed from its owner, and was taken up by the defendant. He inquired of several if they had lost a calf, but he did not do the posting and advertising required of him by the statute. The calf grew up on his farm, and he had the use of the cow. But the case as presented did not involve a consideration of his use, or claim of ownership, but the question was whether his mere failure to post and advertise as he should have done constituted in itself a conversion such that the statute of limitations began to run from the time of such failure. The reasoning of the case makes strongly against the contention of the defendant here.

The defendant refers to *Lumbra v. Campbell*, 84 Vt. 51, 78 Atl. 120, in support of his position. That case was trover for a clapboard sawmill which was leased for one season. When that season was closed, the mill was stored by the defendant in accordance with an agreement of the parties, and during the second season the defendant set it up and used it until it was destroyed by fire without his fault. Then the lessor undertook to hold the lessee liable in trover for the value of the mill, but the court rendered judgment for the lessee, and in support of the judgment this court held that the court below could fairly have inferred from the knowledge and conduct of the parties that the plaintiff was satisfied that the defendant should use the mill the second season, and so in support of the judgment below this court presumed that this reasonable and fair inference was made by the court below. The case in no respect supports the contention of the defendant.

[6] The defendant suggests that the finding of facts is deficient, in that it does not appear clearly how long a time elapsed between the several occurrences mentioned therein. But the finding of facts is not a pleading, and there is no substantial insufficiency in the respect mentioned.

[7] The defendant says, too, that there is a shortage in the finding of facts in that there is no finding "as to the plaintiffs' understanding as to when they were to receive their pay." But the findings show that the plaintiffs refused credit, and insisted that if there was a sale, the transaction must be a cash one, and that the defendant agreed to pay cash on delivery. This states the contract and a contract is a meeting of minds, and expresses the understanding and expectations of the parties, and the law of contract is as *Sir Frederick Pollock* has declared an endeavor "to establish a positive sanction for the expectation of good faith which had grown up in the mutual dealings of men of average right mindness." *Pollock, Principles of Contract*, 1 (8th. London Ed. 1911).

The defendant makes no claim that, if the judgment was proper, the court was not warranted in granting the motion for a certified execution.

Judgment affirmed.

ROBERTS et al. v. W. H. HUGHES CO. et al.
(Supreme Court of Vermont. Rutland. Feb. 14, 1913.)

1. APPEAL AND ERROR (§ 1207*)—MANDATE—CONSTRUCTION—FORECLOSURE OF MORTGAGE.

Under a mandate "that the orators have a decree of foreclosure in accordance with their several interests and rights as herein determined," the court of chancery had discretion to decree a strict foreclosure of their mortgages instead of a foreclosure sale, though the mandate also set out that a certain bond issue was prior to the rights of the orators, but made no provision for protecting the bonds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4696-4699; Dec. Dig. § 1207.*]

2. MORTGAGES (§ 487*) — FORECLOSURE—DECREE—FORM—RIGHT TO REDEEM.

Where it appeared, in a suit to foreclose an unrecorded mortgage on property afterwards conveyed to a corporation, organized to operate the property, that 1,860 of the 2,500 shares of stock were subject to the orator's mortgage, while the other 640 shares were superior thereto, a decree of strict foreclosure was erroneous in permitting the corporation, as such, to redeem, since, if it should do so, the holders of the 640 superior shares would necessarily be compelled to contribute to the redemption for the sole benefit of the 1,860 shares.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1412-1414, 1470; Dec. Dig. § 487.*]

3. MORTGAGES (§ 492*) — FORECLOSURE—DECREE.

Where no cross-bill is filed, a decree of strict foreclosure of mortgages need not make any disposition of a lien superior to that of the orators, other than to declare its superiority.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1438; Dec. Dig. § 492.*]

4. APPEAL AND ERROR (§ 984*)—DISCRETIONARY RULING—DECREE FOR COSTS.

Where the various issues in an action to foreclose a mortgage were so determined that the allowance of costs called for the exercise of discretion, an allowance of costs to the orators could not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3815, 3881-3888; Dec. Dig. § 984.*]

5. APPEAL AND ERROR (§ 801*)—MOTION TO DISMISS APPEAL—WAIVER.

Where a motion to dismiss an appeal was not argued, it could not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3161-3164, 3166; Dec. Dig. § 801.*]

6. RECEIVERS (§ 29*)—SUPREME COURT—JURISDICTION—APPOINTMENT OF RECEIVER.

Since the Supreme Court sits only as a court of errors in chancery appeals, it cannot appoint a receiver.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 38-42, 409; Dec. Dig. § 29.*]

7. APPEAL AND ERROR (§ 1099*)—LAW OF THE CASE—SECOND APPEAL.

On a second appeal in an action to foreclose a mortgage, the question of whether a different mandate should have been sent down on the first appeal could not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

Appeal in Chancery, Rutland County; Zel S. Stanton, Chancellor.

Petition by Robert J. Roberts and others against the W. H. Hughes Company and others to foreclose a mortgage. From a decree of strict foreclosure, the defendants appeal. Remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

J. B. McCormick, of Granville, N. Y., and Clarke C. Fitts, of Brattleboro, for appellants. Silas E. Everts, of Granville, N. Y., Henry L. Clark, of Castleton, and Thomas W. Moloney, of Rutland, for appellees.

HASELTON, J. This is a petition for the foreclosure of mortgages upon certain quarry lands and interests in the towns of Pawlet and Wells, in this state. As the case now stands, the orators are Robert J. Roberts, Ann Roberts, and Sarah Hughes. The defendants are the W. H. Hughes Company, E. R. and James E. Norton, and the Farmers' National Bank of Granville, N. Y.

The cause was heard in the court of chancery for Rutland county on the report of a special master, and a decree of strict foreclosure was rendered. The cause was brought to this court on appeal, and after hearing the decree was reversed and the cause was remanded, with a mandate that the orators have a decree of foreclosure in accordance with their several interests and rights as determined in this court. 86 Vt. 76, 83 Atl. 807. Thereupon the court of chancery, upon consideration, rendered another decree of strict foreclosure in favor of the orators, and the case is now here on appeal by the defendants from the latter decree.

The mandate was "that a decree be entered, adjudging that, as against the W. H. Hughes Company, the conveyances of W. H. Hughes to the orators are an incumbrance prior to his deed to said company; that eighteen hundred and sixty (1,860) shares of the stock of the W. H. Hughes Company are held subject to the rights of the orators; that the trust deed of the W. H. Hughes Company and the bond issue of \$32,000 are prior to the lien of the orators, but that as to the orators the bonds subsequently issued are invalid; that the orator Robert J. Roberts is estopped from asserting this invalidity as against the \$10,000 loan; that the oratrix Ann Roberts has a separate interest of \$2,550 in the decree; and that the orators have a decree of foreclosure in accordance

with their several interests and rights as herein determined."

The explanation of the references in the mandate is found in the opinion already referred to.

The defendants claim that under the mandate the decree should have been for a foreclosure sale, and for the distribution of the proceeds thereof according to the equities of the parties, and they claim this on the ground that in no other way can the equitable rights of the various parties in interest be safeguarded. A foreclosure sale is not wholly unknown in this state, though strict foreclosure is the rule here.

[1] It may be unwarranted to say that in sending down the mandate for foreclosure this court, in terms, confined the court of chancery to rendering a decree of strict foreclosure; but, to say the least, this court left it in the discretion of the court of chancery to decree a strict foreclosure, and so the latter court has not departed from the mandate in respect to the form of the foreclosure decreed. *P. S. 1296; Gale v. Butler, 35 Vt. 449; Wood v. Adams, 35 Vt. 300; Herrick's Adm'r v. Teachout, 74 Vt. 196, 202, 52 Atl. 432; Sargent v. Baldwin, 60 Vt. 17, 13 Atl. 854.*

The defendants call attention to the fact that our statute providing for the foreclosure of mortgages on petition in simple form expressly provides that a person may proceed by bill. But this does not affect the question; for the English practice of proceeding by bill, which prevailed here until 1852, looked, in general, to strict foreclosure, and our statute was intended merely to restrict costs and prevent prolixity. So when, in 1852, the statute in question was enacted, it was entitled "an act to diminish the expenses of foreclosing mortgages in equity," and foreclosure on petition, in the simple form provided, was made equivalent to what was termed "the prolix and expensive mode of foreclosing mortgages by bill in equity." Acts of 1852, No. 12.

The opinion of this court and the mandate sent down set out that a certain bond issue of \$32,000, secured by a trust deed, is prior to the lien of the orators. So no decree of foreclosure in favor of the orators can affect these underlying bonds; and the decree of the court of chancery, which we are reviewing, expressly excepts these bonds from the operation of the decree. This obviously is to prevent misunderstanding; for when a junior security is foreclosed the holders of a senior security are not ordinarily affected, though they are not mentioned in the decree.

The defendants say that the decree makes no provisions for the protection of the \$32,000 of bonds. But the law and the decree provide their protection by preserving the priority of their security.

[2] The mandate and opinion are to the effect that the rights of 1,860 of the shares of the stock of the company are subordinate to the rights of the orators. The language

used arose out of the holding, made obvious throughout the opinion, that the interest of the stockholders must be distinguished from the interest of the corporation. The opinion is to the effect that, so far as appears, the remaining shares of stock, 640 in number, are not subject to the rights of the orators. The result is that they cannot be required to contribute to the redemption of the orators' lien. The first clause of the decree, permitting the W. H. Hughes Company, as such, to redeem, permits a part of the burden of redemption to be thrown upon a minority of the stockholders, whose rights are not subordinate to those of the orators, and the value of their shares to be thus diminished, and this cannot be required. The decree of foreclosure should not have prejudiced the rights of the bona fide stockholders not affected by the orators' mortgage, and in doing so it departed from the meaning and intent of the mandate.

If the Hughes Company, as such, is let in to redeem, and does redeem, the shareholders without notice, whose interest is not subject to the lien of the orators will, of necessity, be compelled to contribute towards the payment of other people's debts. This they cannot be compelled to do. The defendants distinctly make this claim, and their position in that regard is impregnable.

The division of the stockholders into two classes, those with notice and those without, those affected by the orators' mortgage and those not, makes it impracticable to treat the W. H. Hughes Company as a distinct entity in the decree of foreclosure.

This is one of those cases where the courts must, to quote from the opinion, "look behind the corporation to the individuals composing it." The matter is fully discussed in the opinion in this case. See 86 Vt. 76, 88-91, 83 Atl. 807.

The mandate casts the burden of redemption upon the holders of the 1,860 shares, so that it is necessary for them to redeem to be put on a footing with the minority and bona fide shareholders; and under the mandate, if there is no redemption, the minority or bona fide stockholders are not foreclosed out of their proportionate interest in the property.

[3] The defendants' brief discusses somewhat the matter of a decree which will protect the Farmers' National Bank in respect to its holding of invalid bonds issued subsequent to the \$32,000 issue, and taken with notice of their invalidity. It is enough to say here that, as regards the orators other than Roberts, the bank has, in respect to such bonds, not an inferior lien, but no lien. Because Roberts is estopped to assert the invalidity of the \$10,000 issue of bonds, that issue constitutes a lien superior to his; but, since this is a strict foreclosure, no decree need be made as to this lien of the bank. Since there is no cross-bill, it is sufficient that the status of the lien as superior

to that of Roberts be adjudicated, as it has been, in the decision of this court; and it accords with good practice to go no further. By a decree in accordance with the mandate, this lien will stand unaffected, so far as it exists; will no more be affected than will the lien in favor of the bond issue of \$32,000. *Davis v. Davis*, 81 Vt. 259, 69 Atl. 878, 130 Am. St. Rep. 1035; *Haskell v. Holt*, 75 Vt. 413, 56 Atl. 99; *Buzzell v. Still*, 63 Vt. 490, 22 Atl. 619, 25 Am. St. Rep. 777; *Ward v. Seymour*, 51 Vt. 320; *Shaw v. Chamberlin*, 45 Vt. 512; *Carpenter v. Millard*, 38 Vt. 9; *Simonds v. Brown*, 18 Vt. 231.

It is seldom that the circumstances are such that a junior mortgagee is compelled, as a condition of a decree of foreclosure, to pay off a lien which has priority over his.

[4] The defendants, in oral argument, urge that the decree is wrong, in that it decrees costs to the orators. But, as the various issues were determined, the matter of costs called for the exercise of the discretion of the court of chancery; and it is to be presumed that they were awarded in the exercise of that discretion. *Doty v. Village of Johnson*, 84 Vt. 15, 77 Atl. 866; *Mead v. Owens*, 83 Vt. 132, 74 Atl. 1058.

[5] In this court the orators moved for a dismissal of the appeal, but did not argue the motion, and we give it no consideration.

[6] They further moved for the appointment of a receiver of the property in question, and this motion they somewhat discussed. But this court sits only as a court of error in chancery appeals, and so is without authority to appoint a receiver. *Dietrich v. Hutchinson*, 73 Vt. 134, 50 Atl. 810, 87 Am. St. Rep. 698.

The mandate directed that the orators have a decree according to their several interests as determined in the opinion. No claim is made but that these interests are correctly computed in the decree. In this respect, in respect to costs, and in respect to strict foreclosure, the decree is affirmed. Interest will, of course, need to be computed anew, and a new time, or new times, of redemption to be fixed.

In respect to the main matter of redemption, the decree is reversed; and it is directed that a decree be rendered that, unless the owners of the 1,860 shares of stock held with notice and subject to the lien of the orators pay to the clerk of the court, for the benefit of the orators according to their respective interests, the sums to be computed by the court of chancery and set forth as their respective interests, within a time, or within times, to be fixed by the court of chancery, the owners of such 1,860 shares, and all persons claiming under them, be foreclosed and forever barred from all equity of redemption in the premises.

To prevent misapprehension, let the decree set out, not only the prior and unaffected rights of the holders of the \$32,000 issue of

bonds, but also the prior and unimpaired lien of the Farmers' National Bank on the interest of Roberts in the premises. Such a decree will be a full compliance with the mandate.

[7] The question of whether a different mandate should have been sent down is not open for discussion. *Bell's Adm'r v. St. Johnsbury, etc., R. Co.*, 85 Vt. 240, 247, 81 Atl. 630.

Let the defendants be allowed their costs on this appeal, since the appeal was necessary to a decree in compliance with the mandate.

Cause remanded.

STATE v. SNYDER.

(Supreme Court of Vermont. Chittenden.
Feb. 14, 1913.)

1. CRIMINAL LAW (§ 1153*)—APPEAL—DISCRETIONARY RULING—LEADING QUESTION.

Where no abuse of discretion was shown, the court's action in allowing a state's attorney to ask a leading question could not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.*]

2. CRIMINAL LAW (§ 358*)—EVIDENCE—ADMISSIBILITY—ALIBI.

It was error in a prosecution for adultery to refuse to permit a witness who testified that defendant and the woman were at a place other than that charged at the time of the alleged offense to also testify to what they were doing at such place, though the excluded testimony would have tended to show an affray or an assault.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 763; Dec. Dig. § 358.*]

3. WITNESSES (§ 406*)—CONTRADICTION.

Where a witness claims to have been an eyewitness to the crime, the defense may introduce evidence to show that he could not have seen what he testifies to.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276-1279; Dec. Dig. § 406.*]

4. CRIMINAL LAW (§ 681*)—EVIDENCE—RECEPTION.

Where a witness in an adultery case testified that he was an eyewitness to the offense, the exclusion of a question on cross-examination as to where defendant was at a certain time was proper, where it did not clearly appear that the time inquired about was the time of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1611, 1612; Dec. Dig. § 681.*]

5. WITNESSES (§ 248*)—EVIDENCE—ANSWER NOT RESPONSIVE.

That a witness in an adultery case, in response to question of defendant's counsel, told of objectionable conduct of third persons on a certain occasion, and voluntarily added, "How would you like that?" did not present error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

6. ADULTERY (§ 11*)—EVIDENCE OF REPUTATION—ADMISSIBILITY.

In the prosecution of a man for adultery, evidence of the bad reputation of the woman

for chastity was admissible, though defendant did not know of such reputation.

[Ed. Note.—For other cases, see *Adultery*, Cent. Dig. §§ 20-23; Dec. Dig. § 11.*]

7. ADULTERY (§ 11*)—EVIDENCE OF REPUTATION—ADMISSIBILITY.

The rule that the state cannot attack a defendant's character unless he offers his good character in his defense will not, in the prosecution of a man for adultery prevent proof being made of the woman's bad reputation for chastity.

[Ed. Note.—For other cases, see *Adultery*, Cent. Dig. §§ 20-23; Dec. Dig. § 11.*]

Exceptions from Chittenden County Court; Willard W. Miles, Judge.

Sydney Snyder was convicted of adultery, and he excepts. Reversed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

John G. Sargent, Atty. Gen., and Henry B. Shaw, State's Atty., of Burlington, for the State. V. A. Bullard and J. J. Enright, both of Burlington, for respondent.

HASELTON, J. This is a prosecution of the respondent for adultery with a Mrs. Maynard. The respondent was convicted, and brings exceptions.

[1] In the examination of a material witness for the state, a leading question was put by the state's attorney upon a material point. The respondent interposed an objection on the ground that the question was leading, but the court allowed an answer. It was within the discretion of the court to do this, and, the contrary not appearing, it is to be presumed that the court allowed the answer as matter of discretion, and that there was no abuse of discretion. *Berry v. Doolittle*, 82 Vt. 471, 74 Atl. 97.

[2] The respondent claimed that at the time of the alleged adultery he and Mrs. Maynard, who were cousins, were not where the state claimed them to be, and in support of this alibi called certain witnesses, and offered to show by them where the respondent and Mrs. Maynard were, and that they were engaged in a controversy and "fracas" with a witness for the state who had testified to seeing them elsewhere at that time in the act of adultery. The court ruled that the respondent might show where he and Mrs. Maynard were at the time in question, but not what they were doing, and excluded questions in that regard. To this action of the court the respondent excepted. The ruling of the court was erroneous. When one undertakes to establish an alibi, a witness to his whereabouts cannot be limited to a bare statement of where he was. The circumstances in which he was and what he was engaged in doing may be given as a reason why he could not have been at the place of the alleged crime. A respondent in such case may show where he was and what he was doing (*State v. Bedard*, 65 Vt. 278, 284,

26 Atl. 719), and, where the offense charged is adultery, the same latitude must be allowed the defense in showing where the alleged particeps criminis was.

[3] Moreover, where a witness claims to have been an eyewitness to a crime, the defense may introduce evidence tending to show that the witness could not have seen what he testified to. In arguing the case, the state lays some stress upon the claim that, if the evidence excluded had been admitted, it would have tended to show an affray or assault. Assume this to be the fact, it did not circumscribe the respondent's right to defend himself against the crime charged.

[4] Much the same matter was offered to be shown in the cross-examination of a state's witness who had testified that he was an eyewitness of the crime charged, but it is not clear that the time inquired about was the time in question, and, though an offer was made, it is not clear that the question was in line with the offer in respect to time. The court excluded the offered evidence on the ground that it was not matter of cross-examination, and the respondent excepted. Adequate cross-examination is the prime test of truth, but, as this matter is presented in the exceptions, we cannot say that the court was in error.

[5] During the cross-examination of one of the state's witnesses, he was asked if he did not have some trouble with Mrs. Maynard the year before because she went in bathing near his cottage, and if he did not have some words about it with her. He said he did not with her, but with another woman whom he was asked by the respondent's counsel to name. He named the other woman, and stated her objectionable conduct and that of another man not the respondent, and said: "How would you like that?" An exception was taken to the part of the answer that was not responsive on the ground that it was not so, and that it was given for the purpose of injuring this respondent. The witness was in the hands of the respondent's counsel, and certainly neither the court nor the state's attorney is shown to have been in fault. Besides, it is far-fetched to say that the irresponsible testimony was prejudicial to the respondent. No error appears here.

[6] Two witnesses for the state testified to the bad reputation of Mrs. Maynard for chastity. It did not appear that the respondent knew that she had such a reputation, and the evidence was objected to on that ground. If she was an unchaste woman, that fact could be shown, although knowledge of it was not brought home to the respondent.

[7] The character of a respondent cannot be given in evidence unless he himself offers his good character in his defense, when the door is open for the state to introduce evidence of a like character, and this rule is ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

licable to cases like this. *State v. Plant*, 67 Vt. 454, 32 Atl. 237, 43 Am. St. Rep. 821. This rule does not go upon the ground that evidence of a particular criminal trait is not logically relevant, for, if it were not, there would be no reason in allowing a respondent to show his good character in respect to the matter charged. But, unless the respondent goes into the matter, the state cannot be permitted to do so lest, among other reasons, the respondent be convicted without much reference to the question of whether it is shown that he committed the very offense with which he is charged. But, where the character of some one not on trial is logically relevant to the issue, this rule loses its force, or, rather, does not apply, and the evidence may be received, unless some other rule calls for its exclusion. This whole matter is well discussed by Wigmore, more particularly in sections 55, 56, 57, 58, and 68 of his work. When a man has associated, or consorted, with a woman under circumstances calculated to suggest criminal conduct, the bad character of the woman, if it exists, is a subordinate fact which may be shown in connection with other evidence as a circumstance bearing upon the probability of the criminal conduct charged; and, when character becomes relevant, reputation tends to show it and may be given in evidence. So in *Commonwealth v. Gray*, 129 Mass. 474, 37 Am. Rep. 378, it was directly held that upon the trial of a man for adultery the reputation for chastity of the woman with whom the offense is charged to have been committed may be given in evidence, and in *Blackman v. State*, 36 Ala. 295, the same rule of evidence was asserted and applied. The reputation for unchastity of the particeps was held admissible as corroborative evidence.

The question of the admissibility of the evidence we are considering is fully considered in *Sutton v. State*, 124 Ga. 815, 53 S. E. 381, and, after careful consideration, the decision of the court is in favor of its admissibility. The case at bar and *State v. Nelburg*, 86 Vt. —, 85 Atl. 769, were under consideration at the same time, and were independently discussed, and that case is full authority on the point now under consideration. *State v. Cushing*, 86 Vt. —, 85 Atl. 770, is also authority for the position here taken.

There was evidence as to what took place after the alleged adultery. The court charged the jury that this evidence bore only upon the weight to be given to the testimony of the state's witnesses. To this restriction the respondent excepted, and his counsel say in their brief no more than that the court improperly restricted the use to be made of the testimony in question. The brief gives no reasons for this claim, and we have sought for none.

Sentence set aside, judgment reversed, and cause remanded.

LOWRY et al. v. ROY et al.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. EVIDENCE (§ 596*)—PAROL EVIDENCE AFFECTING WRITINGS—CONTEMPORANEOUS AGREEMENTS.

Evidence of a contemporaneous parol agreement modifying the terms of a contract between the parties, in order to prevail, must be clear, precise, and indubitable, and must carry a clear conviction of its truth and be sufficient to move the conscience of a chancellor to reform the instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2446-2448; Dec. Dig. § 596.*]

2. EVIDENCE (§ 441*)—PAROL EVIDENCE AFFECTING WRITINGS—COLLATERAL AGREEMENTS.

Where a contract between a water company and a contractor for laying the water pipe gave to the water company the right to change the location of the line, and this was known to the vice president of a trust company which became a surety of a subcontractor at the time of a conversation between the vice president of the trust company and the contractor, in which, the trust company alleged, the contractor had stated that the location of the line had been fixed and there would be no departure therefrom, but subsequently the vice president caused the contract between the subcontractor and the contractor and the bond of the trust company to be drawn without inserting any stipulation that the contract was based on the line as then actually located, the alleged parol agreement was inadmissible as a defense to a suit on the bond, since it was merged in the written agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719-1845, 2030-2047; Dec. Dig. § 441.*]

3. EVIDENCE (§ 441*) — ORAL NEGOTIATIONS AND WRITTEN CONTRACT.

A contract reduced to writing is understood as expressing the final conclusions of the contracting parties and as merging all prior negotiations and understandings, whether agreeing or inconsistent with it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

4. EVIDENCE (§ 429*)—PAROL EVIDENCE AFFECTING WRITINGS—CONTEMPORANEOUS AGREEMENTS.

To contradict or vary the terms of a written contract by an oral contemporaneous agreement, there must be allegation and proof, not only of the agreement, but of its omission through fraud, accident, or mistake from the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1969-1971, 1973, 1974; Dec. Dig. § 429.*]

Appeal from Court of Common Pleas, Cambria County.

Action of assumpsit on a bond by Frank Lowry and another, doing business under the firm name of Lowry & Mack, against Charles Roy and another. From a judgment for defendant the Title, Trust & Guaranty Company of Johnstown, Pennsylvania, plaintiffs appeal. Reversed and rendered.

The court charged, in part, as follows: "If you find that a contemporaneous parol agreement was entered into, and that relying solely upon that and upon that alone the trust company executed this bond, because

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the fact that there was a material change, whether it injured the trust company or not, in the line of this work, then you would find for the plaintiff for the amount of the claim as against Charles Roy. If you do not find from the evidence in this case that it measures up to the standard which the law requires, to make out such a contemporaneous parol agreement as would vary the terms of the written agreement in this case, considering all the evidence, considering all the statements of Mr. Mack, Mr. Rose, and Mr. Rhue and all other testimony on that point, then you would find for the plaintiffs in this case in the amount of the claim."

Plaintiffs presented this point: "(1) If you find from the evidence that the written agreement of August 12, 1908, executed by Lowry & Mack and Charles Roy, embraced and contained the entire contract between said Lowry & Mack of the one part and Charles Roy of the other part, relative to the water pipe line, then we instruct you that, by the terms of that contract, the engineer of the Windber Water & Power Company was authorized to make changes in the location of the pipe line from that shown on the plans either before or after the construction had begun, and the contractors, namely, Lowry & Mack, and Charles Roy, their subcontractor, were bound to complete the work according to the contract and specifications and according to the direction of said engineer; and the defendants, namely, Charles Roy and the Title, Trust & Guaranty Company, cannot be relieved by reason of changes made in the location of the line by authority of said engineer. Answer: We affirm the point and call to your minds at the same time what we have said in regard to the agreement, which, if you find affirmatively in favor of the defendant, would release them."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

H. S. Endsley, of Johnstown, and Charles F. Uhl, of Somerset, for appellants. John W. Kephart, of Ebensburg, and Percy Allen Rose, of Johnstown, for appellees.

POTTER, J. This was an action of assumpsit by Frank Lowry and E. M. Mack, doing business as Lowry & Mack, against Charles Roy, as principal, and the Title, Trust & Guaranty Company of Johnstown, Pa., as surety upon a bond in the sum of \$5,000, dated August 12, 1908, given to the plaintiffs to insure the faithful performance of a contract between them and Roy. This was a subcontract which covered the excavation and refilling of a ditch or trench for the laying of a line of water pipe for the Windber Water & Power Company, and it provided that the work should be done in accordance with the articles of agreement between plaintiffs, who were the principal

contractors, and the Windber Water & Power Company, "and in the location and of the width and depth as may be directed by the engineer of the said Windber Water & Power Company, and in the manner to be approved by the said engineer." It also provided that the price to be paid for the work was to be 35 cents per lineal foot, regardless of the depth or width of the ditch, and to be based on the measurements of the engineer, and that the engineer should "have the option of making changes in the location of the line from that shown upon the plans, either in dimensions or in materials contemplated in this contract, either before construction or after it has begun." The provision last quoted is contained in the original contract between the Windber Water & Power Company and plaintiffs, and is made part of the contract between plaintiffs and the defendant Roy. After doing part of the stipulated work, Roy abandoned the contract, and plaintiffs were compelled to complete the work at a cost of \$4,098.22 in excess of the contract price, which sum they sought to recover in this suit.

Upon the trial Roy made no defense to the action. The Title, Trust & Guaranty Company, however, defended on the ground that there had been an oral agreement between plaintiffs and a representative of the trust company, before the bond was given, that the trench should be located on a line which was then staked out upon the ground, and that there would be no change of location; but that subsequently the location of the trench was changed without the knowledge or consent of the trust company. It therefore claimed that this change of location was a breach of the oral agreement, and absolved it from its obligation as surety. That the location of the line was changed was admitted, but it was claimed that it was without detriment to the contractor, or the surety.

At the trial a verdict for the full amount of the claim was directed as against the defendant Charles Roy, but as against the trust company the jury were left to determine whether there was such a contemporaneous oral agreement as was alleged by defendant, and whether, if there was such an agreement, it was the inducement to the trust company for the execution of the bond. If they found both of these questions in favor of the trust company, they were instructed to relieve it of liability, and find a verdict against Charles Roy alone. Counsel for plaintiffs submitted a point requesting binding instructions in their favor as against both defendants, to which the judge answered, "We affirm this point, unless the surety is released." And he added further, in substance, that if the jury found there was a contemporaneous parol agreement as alleged by defendants, which was the sole inducement to the execution of the bond, the ver-

dict would be against Roy alone. The result was a verdict against Roy alone. Motions for a new trial and for judgment non obstante veredicto were made by counsel for plaintiffs, but were overruled by the court, and judgment was entered on the verdict. Plaintiffs have appealed.

The record shows no final judgment either in favor of or against the Title, Trust & Guaranty Company of Johnstown; but at the argument counsel for both sides agreed that the case should be considered by this court as though a verdict had been taken expressly in favor of the trust company and judgment entered thereon. It appears from the record that counsel for plaintiffs submitted a request for binding instructions in their favor, which the trial judge affirmed with a qualification which practically amounted to a refusal of the point. Counsel for plaintiffs were therefore entitled, under the Act of April 22, 1905 (P. L. 286), to move for judgment in their favor non obstante veredicto, upon the whole record; and they did so move. The denial of that motion is part of the final judgment which was here entered. If therefore the plaintiffs were entitled to binding instructions against the trust company, they can maintain their appeal under the provisions of the act of 1905.

[1] The principal question here raised is whether there was evidence sufficient to be submitted to the jury, of a contemporaneous parol agreement, modifying the terms of the contract between the parties. Counsel for the appellee concede in their argument that, under the authorities, the evidence of such an agreement, in order to prevail, must be clear, precise, and indubitable; that it must carry a clear conviction of its truth; and that it must be sufficient in weight to move the conscience of a chancellor to reform the instrument.

[2] The evidence was that Mr. Rose, the vice president of the defendant company, was thoroughly familiar with the provisions of the contract, and that he drew, or supervised the drawing of, both the contract and the bond; that, before agreeing to become surety on the bond, he called the attention of the plaintiff Mack to the provisions of the contract, giving to the engineer of the Windber Water & Power Company the right to fix and to change the location and the width and depth of the ditch, which was the subject of the contract; that Mack assured him that the engineer at that time had determined upon the location of the line and had indicated it by stakes in the ground; and that he further expressed the opinion that, so far as the trust company was concerned, it need have no apprehension as to a change, because the location was fixed and there would be no departure therefrom. The witness testified that he then spoke of investigating the location, and that the plaintiff Mack left him with the understanding

that the witness was to communicate with him after making the investigation. The company then sent Mr. Sheesley, a contractor, to examine the location, to ascertain whether it had been actually made by the engineer, and whether it was indicated on the ground in the usual manner, etc. The result of this investigation was reported to witness. He then again went over the question of the location with Mr. Mack, and states that Mack assured him that there would be no variation from it. It appears that Mack's statements were true in so far as anything had at that time occurred. The line had been located and staked out, and was then apparently established. Any statement that Mack may have made, that no change in the location was to be expected, was apparently made in good faith. He did nothing afterwards in violation of his statement but the engineer of the water company made a change in the location in accordance with the authority plainly conferred upon him in the contract. At the time of the conversation the representative of the defendant company knew of the clause in the contract between Lowry & Mack and the water company, which gave to the engineer of the water company the right to change the location of the line. It was not within the power of Mack to stipulate that the engineer would not exercise this privilege, and this the representative of the trust company well knew. But Mack could have been required to stipulate in the contract with Roy that it was based upon the line of the ditch as then actually located. It was after this time that the witness caused to be drawn the contract between Roy and these plaintiffs, and the bond which is the subject of this litigation; the former being but slightly changed in form from a contract which he had previously drawn, and the principal change consisting in the addition of a provision that moneys earned by the contractor in excess of the monthly pay roll should be paid to the trust company for its protection. It is evident therefore that the representative of the trust company had ample opportunity to incorporate in the written contract the inducing promise of the alleged parol agreement, if there had been a serious intention that it should form a part of the contract. It does not appear, therefore, that the alleged parol agreement between Mr. Mack and Mr. Rose, that the location of the ditch would not be changed, was contemporaneous with the execution of the bond. When it was alleged to have been made, neither the contract nor the bond had been prepared. It was after the plaintiff Mack had left his office that Mr. Rose, acting as he says for the trust company, had both the bond and the contract redrafted. The clause in the first contract to which he had objected, which gave to the engineer power to fix the location and the

dimensions of the trench, was reinserted in the new contract, and the bond was executed upon the part of the trust company, and the papers were sent to Mr. Mack, without calling his attention to the fact that the trust company would not consider itself bound by the clause which its representative had himself knowingly permitted to be incorporated in the contract.

We cannot regard this evidence of the oral agreement as sufficient to move the conscience of a chancellor to reform the instrument. Why should the court be asked to do that which the representative of the trust company did not do, when he had ample opportunity; that is, write into the last contract a clause making it applicable only to the line as then located? In view of the defendant's own evidence, how can it fairly be contended that the trust company executed and delivered the bond solely on the faith of the oral understanding? If that was the case, why was not the written contract altered, to make it express the fact? When the plaintiffs received from Mr. Rose the contract and bond executed by the trust company, we think they were justified in assuming that the trust company was satisfied with the contract as written, no matter what may have been said in the preliminary conversations, prior to its actual drafting. The last draft contained at least one material alteration, made for the benefit of the trust company, and if any others were intended they could readily have been made. We can only regard the conversations between Mr. Mack and Mr. Rose, before the drafting of the contract, as prior negotiations, not expressing the final conclusion between the parties, and, as they deliberately put their engagement into writing, these prior negotiations must be considered as having been merged in, and extinguished by, the written instrument, which was the final result of the bargaining.

[3] As long ago as *Rearick v. Rearick*, 15 Pa. 66, page 72, this court, speaking by Mr. Justice Bell, said: "It is recognized as a settled maxim that oral evidence of an agreement or understanding between parties to a deed or other written instrument entertained before its execution shall not be heard to vary or materially affect it. Accordingly, the settled rule is that, when a contract has been reduced to writing, it is understood as expressing the final conclusions of the contracting parties, and fully accepted as merging all prior negotiations and understandings, whether agreeing or inconsistent with it." In *Yaryan v. Glue Co.*, 180 Pa. 480, page 497, 36 Atl. 1080, page 1081, Mr. Justice McCollum said that the general rule is that "prior conversations between the parties are not admissible to vary the terms of a written contract." And in *Vito v. Birkel*, 209 Pa. 206, 58 Atl. 127, it is said, per curiam, that the general rule is that "all preliminary ne-

gotiations are merged and terminated by the execution of the written contract."

[4] In the case at bar there was neither allegation nor proof that the bond was executed through fraud, or that through accident or mistake the oral agreement was left out of the contract, when it was redrafted. In *Krueger v. Nicola*, 205 Pa. 38, page 42, 54 Atl. 494, page 495, our Brother Brown said: "To contradict or vary the terms of a written contract by an oral contemporaneous agreement between the parties, there must be allegation as well as proof, not only of it, but of its omission through fraud, accident, or mistake from the writing. This has been ruled so frequently that reference is hardly needed to one or two of the many authorities on the subject." He then cites the decisions in *Wodock v. Robinson*, 148 Pa. 508, 24 Atl. 73, and *Hunter v. McHose*, 100 Pa. 38.

We sustain the second, fifth, and sixth assignments of error. The judgment entered upon the verdict at the trial is set aside; and we now, after reviewing the action of the court below, enter judgment non obstante veredicto upon the whole record against Charles Roy and the Title, Trust & Guaranty Company of Johnstown, Pa., defendants, for the sum of \$4,656.27 with interest from September 8, 1911, being such judgment as we deem to be warranted by the evidence taken in the court below.

JONES v. SHARON BOROUGH.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. TAXATION (§ 561*)—BOROUGH—EXONERATION OF TAX COLLECTOR.

Where reports of borough auditors fix a liability on a borough tax collector for uncollected tax duplicates, the borough council may, under Act June 25, 1885 (P. L. 187), for proper reasons, exonerate a tax collector.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1083-1090; Dec. Dig. § 561.*]

2. TAXATION (§ 561*)—BOROUGH—EXONERATION OF TAX COLLECTOR.

Where a tax collector is exonerated from liability for uncollected tax duplicates under Act June 25, 1885 (P. L. 187), such exoneration has the same effect on his liability as if the parties had paid the taxes assessed against them.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1083-1090; Dec. Dig. § 561.*]

3. TAXATION (§ 557*)—BOROUGH—LIABILITY TO TAX COLLECTOR.

Final settlement by borough auditors showing liability of a borough to a tax collector in the settlement of his accounts is conclusive against the borough if it fails to appeal within the prescribed time.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1068-1073, 1075-1077; Dec. Dig. § 557.*]

Appeal from Court of Common Pleas, Mercer County.

Action by P. W. Jones against Sharon Borough. Judgment for plaintiff, and defendant appeals. Affirmed.

Williams, P. J., in the court below, charged, *inter alia*, as follows:

"This suit is brought by the administrator of W. W. Hanna, deceased, who was formerly tax collector of the borough of Sharon. It is admitted that he was the collector of taxes for that borough for the years 1902, 1903, and 1904. The testimony tends to show that while he was tax collector he paid money to the borough of Sharon voluntarily a good deal of the time, and that sometimes, when demands were made upon him, he made payments without any regard to his accounts, or without examining his accounts to see whether or not he was indebted to the borough, and without taking into consideration exonerations to which he would be entitled under the law. The testimony would tend to indicate that there was a charge against him at one time for the years 1902, 1903, and 1904, amounting to some \$1,500. It seems, however, that in March, 1907, the borough auditors of the borough of Sharon audited all of his accounts for the various years for which he had collected taxes, and, as a result of that audit, they found there was due to him the sum of \$3,424.84. That audit was made by the duly elected and qualified auditors of the borough of Sharon, and it seems to have been properly returned and filed and presented to the council, and no appeal was ever taken from the audit by either the tax collector or the borough. The matter stood in that way until Mr. Hanna died. It seems that there were some negotiations in regard to a settlement of the controversy, but it has never been settled; and Mr. Hanna finally became mentally deficient and had to be placed in an asylum. It seems that some negotiations were then made, by some person representing Mr. Hanna, with the borough council, when these matters were all gone over and the exonerations to which he was entitled were allowed.

"The plaintiff claims that there was due to Mr. Hanna this amount of \$3,424.84, as shown by this auditors' report of March 4, 1907, from which no appeal has been taken, and, as we view the matter, we think that would be true, and that the contention of the plaintiff is correct. We think that if the duly elected auditors went over all of these accounts, and there being nothing in the case to show that they disturbed or undertook to rake over the reports of the former auditors, but simply audited his accounts, taking the former years as the former auditors had found the accounts to be, and arrived at a result showing the borough to be indebted to the tax collector in the sum of \$3,424.84, the plaintiff would be entitled to recover that amount, and in addition to that he would be entitled to interest from that time up until the date of this suit. Counsel have computed the interest, and we think there is no dispute about the amount if the plaintiff is entitled to recover.

"By Mr. Davis: I would not agree that

they are entitled to anything. As to the amount of \$3,424.84, that is right.

"By the Court: Counsel for the plaintiff have computed interest on the sum of \$3,424.84 from the time it was adjudged to be due to him down to this date, and claim now the sum of \$4,460.85. Therefore, gentlemen, if you believe the testimony offered on the part of the plaintiff as to the audits of these various years, and especially as to the audit of March 4, 1907, showing this balance of \$3,424.84, the plaintiff would be entitled to recover that amount with interest, amounting in all to \$4,460.85."

Verdict and judgment for plaintiffs for \$4,460.85.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHISKER, JJ.

Horace W. Davis, of Sharon, for appellant Q. A. Gordon, of Mercer, and Fred A. Service and Roy Neville, both of Sharon, for appellee.

BROWN, J. W. W. Hanna, appellee's decedent, was the duly elected and qualified collector of taxes in the borough of Sharon for the years 1902, 1903, and 1904. His accounts as collector for these years were audited by the borough auditors, and their reports show the following liabilities: For the year ending March 2, 1903, the report of the auditors showed that the collector was then indebted to the borough on the tax duplicate of 1902 in the sum of \$2,998.52; the report for the year ending March 7, 1904, showed an indebtedness of the said collector to the borough on the tax duplicate of 1903 in the sum of \$5,262.96; and the report for the year ending March 7, 1905, showed an indebtedness of the said collector to the borough on the tax duplicate of 1904 in the sum of \$7,566.38. No appeal was taken from any one of these reports by the collector or by the borough, and the same, so far as they relate to the accounts of the collector, were spread upon the minutes of the borough council. The report of the borough auditors for the year ending March 3, 1906, shows a total indebtedness against the collector on the tax duplicates for the years 1902, 1903, and 1904 of \$8,502.05, against which he was given credit with payments made to the borough treasurer amounting to \$6,960.05, leaving a net balance of \$1,542 due to the borough on the duplicates for 1902, 1903, and 1904. No appeal was taken from this report, either by the collector or by the borough, and it was spread upon the minutes of the borough council. By due councilmanic action, at meetings held in February and March, 1907, Hanna was exonerated from the payment of certain taxes which appeared in his duplicates for the years 1902, 1903, and 1904, and by the report of the borough auditors for the year ending March 4, 1907, in which the exonerations allowed by the

borough authorities were taken into consideration, the borough was found to be indebted to Hanna, who was then out of office, in the sum of \$3,424.84. No appeal was taken by the borough from this report, and it forms the basis of plaintiff's claim.

It is true, as appellant insists, that the reports of the borough auditors for the years 1902, 1903, and 1904, not having been appealed from, became conclusive as to the liability of the tax collector; but conclusive of what liability? They were conclusive that, on the tax duplicates for the three years which had been placed in his hands and with which he was chargeable, there was a liability by him, after allowing him all credits to which he was entitled, for the respective sums found against him by the auditors. But the liability thus fixed against him, with the conclusiveness of a judgment, could have been subsequently discharged by him, and for all payments which he subsequently might have made on account of this liability he would have become entitled to credit at the next audit of his accounts, and his liability, fixed by the former reports of the auditors, would have been correspondingly reduced. In the duplicates placed in his hands for the years 1902, 1903, and 1904 taxes were assessed against various parties, and with these taxes he became charged, from liability for which he could be relieved only by payment or exoneration. Commonwealth v. Maxwell, 34 Pa. Super. Ct. 631.

[2] When the taxes thus charged against the collector, constituting a part of his liability as fixed by the borough auditors at the end of each year, were subsequently exonerated to his relief, the effect of the exonerations upon his liability was the same as if the parties taxed had paid into the borough treasury the taxes assessed against them, and such payments by them would have been in relief of the tax collector on his liability upon the duplicates placed in his hands. This is practically the situation before us. The liability of the tax collector, as fixed by the reports of the auditors, was not disturbed. It was simply discharged by credits from the borough for taxes with which he had been charged in the duplicates, and which, for reasons regarded as all-sufficient by the borough authorities, they exonerated to his relief.

[1] Had the borough council authority to make these exonerations several years after the accounts of the tax collector had been audited? No legislation has been cited specifically defining the power of borough authorities to grant exonerations from taxes in relief of a collector or fixing the time within which they must be granted, but the power to so exonerate is distinctly recognized in the Act of June 25, 1885, P. L. 187, regulating the collection of taxes in the boroughs of the commonwealth, the tenth section of

which provides that "exonerations may be made by the authorities and in the same manner as heretofore." From time immemorial—as is known to all of us—the power to exonerate collectors from liability for uncollected taxes, for reasons satisfactory to the taxing authorities, has been exercised by borough councils, and, in the absence of any statutory prohibition of the exercise of this power, impliedly recognized by the act of 1885, we shall not say it does not exist.

[3] This action is to enforce a liability against the defendant borough, which was fixed by the report of the borough auditors for the year ending March 4, 1907. From this report the borough took no appeal, and the liability fixed by it has been carried as a liability in every annual statement of the auditors of the borough since the year 1907. If a final settlement by an auditor is conclusive against the officer whose accounts are audited, "why is it not conclusive in his favor"? Northumberland County v. Bloom, 3 Watts & S. 542; Blackmore v. County of Allegheny, 51 Pa. 160; Commonwealth v. Scanlan, 202 Pa. 250, 51 Atl. 986. The moral obligation of the borough to relieve Hanna from liability for taxes which the municipal authorities felt could not or ought not to be collected became a legal one after the borough failed to appeal within the proper time from the report of the auditors for the year ending March 4, 1907.

The verdict for the plaintiff was practically directed upon undisputed facts, and the judgment on it is affirmed.

SNYDER v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Nov. 7, 1912.)

1. MASTER AND SERVANT (§ 78*)—RELIEF FUND—LOSS OF BENEFITS—"LEGAL REPRESENTATIVE."

Where by-laws of a railroad benefit association provide that, if the legal representative of a member sues the railroad company for his death, judgment in such suit shall preclude any claim on the relief fund, the widow of a member who sues the railroad to recover for the husband's death is the "legal representative" within the meaning of the by-laws.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 78.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4070-4079; vol. 8, p. 7704.]

2. MASTER AND SERVANT (§ 78*)—RELIEF FUNDS—LOSS OF BENEFITS—"JUDGMENT IN SUCH SUIT."

Where by-laws of a railroad benefit society provide that judgment against the railroad on account of the death of a member shall preclude any claim on the relief fund, where action against the railroad results in a nonsuit, the judgment of nonsuit is a "judgment in such suit" within the meaning of the by-laws, prohibiting a widow from suing the association for death benefits.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 78.*]

Appeal from Superior Court.

Action by Catharine L. Snyder against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Beaver, J., filed the following opinion in the court below:

"The appellant, who was the plaintiff below, being the beneficiary last designated by her husband, who was a member of the relief association of the defendant company, brought suit against the said company in trespass for the recovery of damages arising, as she claimed, out of the death of her husband, who was a conductor in its employ at the time of his death. Upon the trial of that cause a judgment of nonsuit against the plaintiff was entered, which the court, upon motion duly made, refused to take off, from which judgment no appeal was taken. Before the time for appeal had expired, the plaintiff entered, by præcipe in the prothonotary's office, without authority of the court first had, a withdrawal of 'the claim made in this case' and a discontinuance of the suit, directing the prothonotary 'to so mark the same of record.' She subsequently brought suit for the death benefit under the membership of her husband in the relief association. An affidavit of defense was filed by the defendant, and, upon motion for judgment for want of sufficient affidavit of defense, the court discharged the rule granted thereon, and filed a carefully prepared opinion. Upon the trial of the cause, the plaintiff's testimony established the facts set forth in the defendant's affidavit of defense, and, upon motion, at the conclusion of the plaintiff's case, the court granted a nonsuit which it subsequently refused to take off. The case before us for consideration is the appeal of the plaintiff from this refusal of the court.

"The sixty-fifth section of the rules governing the relief association of the defendant, which provides for the submission of a claim on the part of the beneficiary, first, to the superintendent of the association, and, in case of his decision against the beneficiary, by appeal to the advisory committee within certain time limits, is strenuously opposed by the appellant, on the ground that it is void, first, because the beneficiary has an inherent and constitutional right of trial by jury which she alone can waive, which she has not done and no one can do it for her; second, because, in effect, it constitutes the appellee company, a party in interest, the judge of its own suit; and, third, it is against public policy, because it ousts the jurisdiction of courts in advance of any controversy, and consequently 'robs the courts of their jurisdiction to finally determine the ultimate question of liability or nonliability under the contract as a matter of law.' It is not necessary for us to pass upon the question of the validity of the sixty-fifth section, because, as we view it, the question

is settled by the fifty-eighth section of the rules governing the relief fund, which is as follows: 'Should a member or his legal representative make claim, or bring suit, against the company, or against any other corporation which may be at the time associated therewith in administration of the relief departments, in accordance with the terms set forth in regulation No. 6, for damages on account of injury or death of such member, payments of benefits from the relief fund, on account of the same, shall not be made, until such claim shall be withdrawn or suit discontinued. Any compromise of such claim or suit, or judgment in such suit, shall preclude any claim upon the relief fund for benefits on account of such injury or death, and the acceptance of benefits from the relief fund by a member or his beneficiary or beneficiaries, on account of injury or death, shall operate as a release and satisfaction of all claims against the company and any and all of the corporations associated therewith in the administration of their relief department, for damages arising from such injury or death.'

[1] "The appellant claims that the action of trespass brought by the widow against the defendant for damages sustained by the death of her husband was not brought as his legal representative, and that the judgment of nonsuit entered therein was not such a judgment as is contemplated in this fifty-eighth regulation, so as to bar her claim upon the relief fund for the death benefits due because of the death of her husband. As we understand it, the widow was not the administratrix of the decedent. She brought her action under Act April 15, 1851 (P. L. 674) § 19, for damages by reason of his death. This question has been dealt with and practically settled in *Jack v. Penna. R. R. Co.*, 43 Pa. Super. Ct. 337, in which the fifty-eighth section of the rules governing the relief fund was considered and passed upon. It is, perhaps, true that ordinarily the phrase 'legal representative' refers to the administrators or executors of a decedent, but the term is not confined exclusively to such representatives. In the case under consideration, the law fixes the representative of the decedent as the widow, and, inasmuch as she is named by the law as the representative of the decedent, she, of course, is for that purpose the legal representative.

"As was said in *Hughes v. D. & H. Canal Co.*, 176 Pa. 254, 35 Atl. 190: 'Plaintiff had no claim until he died, and then the foundation of her claim was the injury to him, for which he might have sued in his lifetime. If the defendant would not have been liable to him in the first instance, it was not made liable to her after his death. We are not aware of any case, certainly our attention has not been called to any, in which a widow has recovered for injuries to her husband where he could not have done so himself, if he had survived. And on principle it is per-

fectly clear that she never can do so, for the original right of action is in him and hers is but the succession or substitution for his, where he has not asserted it himself. If he has done so, his action survives, if he has not, then by virtue of the statute she brings hers in its place, but for the same cause. *Birch v. Pittsburg, etc., Ry. Co.*, 165 Pa. 339 [30 Atl. 826].

"So in *Hill v. Penna. R. R. Co.*, 178 Pa. 223, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. Rep. 754, Mr. Justice Green, in considering the eighteenth and nineteenth sections of the Act of 1851, supra, says: 'It will be observed that in both these sections the right of action conferred is for the death of the party injured. The eighteenth section provides for the case of a party injured who has brought an action for his injury, but subsequently dies, and directs that in such case the action shall not abate by reason of the death but shall survive to his personal representatives. Section 19 provides that, if no action has been brought for the injury during the life of the party injured, the widow, or, if there is no widow, the personal representatives may maintain an action and recover damages for the death thus occasioned. Thus both classes of cases are provided for, the one, where an action was brought by the injured party during his life but the plaintiff died pending the action, and the other where no action had been brought at the time of the death of the party injured.'

"While it is very true that the injured party could in no circumstances recover damages for his own death, yet it is equally true that the cause of action provided for by both sections is death resulting from injuries. The act did not undertake to give a cause of action to the party injured for the injuries he had sustained, because such a right of action already existed, independently of the act. Hence it cannot be argued that the intention of the eighteenth section was to give one right of action to the party injured and another and independent right of action for the same injury to his widow. The cause of action is the same in both sections, to wit, the death of the party; the only difference being that the eighteenth section provided for an action already pending, that it should not abate, but should survive to the personal representative, and the nineteenth section provided that, in case no action has been brought before the death of the party, an action might be brought by the widow, or, if there was no widow, then by the personal representatives.' Whether by the widow, or, in the absence of such a party, by the personal representatives, they were both in their order legal representatives of the party, because their status was fixed by law and that law made them the legal representatives of the party for damages for the

death of whom the action could be brought.

[2] "Was the judgment of nonsuit a judgment in the case such as is contemplated in the fifty-eighth section supra? We think it was. The plaintiff exhausted her legal right in the presentation of her case. The court held that presentation insufficient for her recovery and entered a nonsuit upon which judgment was entered. This, of course, was conclusive, so far as it went. It carried the costs and settled the question, so far as that suit was concerned, and was a final judgment therein. True, the defendant had a right to bring another suit, and was not precluded from doing so by the judgment of nonsuit, but, so far as the suit then pending was concerned, the judgment of nonsuit was a final disposition of it, and in our opinion clearly constituted a conclusive judgment in the case. The plaintiff had a right to appeal, of course, but she did not appeal, and, as the court well says in its opinion discharging the motion for judgment for want of a sufficient affidavit of defense, her withdrawal of the suit and discontinuance thereof was a nullity, because there was nothing to withdraw and nothing to discontinue. The case had been ultimately disposed of by a conclusive judgment, and that was the end of it, so far as that suit was concerned.

"Prolonged discussion will not in any way clarify the judgment of the court, as expressed in its opinion upon the motion for want of a sufficient affidavit of defense, nor will it add to its logical conclusiveness. We are clearly of the opinion that the court gave the proper construction to the fifty-eighth section of the rule of the relief association and that being so the sixty-fifth section becomes unimportant, inasmuch as the superintendent and the advisory committee on appeal held that the judgment in the action in trespass for damages for the death of the plaintiff's husband was conclusive as to her right to share in the relief fund under her husband's membership in the association.

"The case has been most elaborately argued and every phase of it presented for our consideration. We think, however, that the question is fully met by the consideration of the fifty-eighth section and the conclusiveness of the judgment entered in the action of trespass brought by the widow for the death of her husband.

"Judgment affirmed."

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZISKER, JJ.

J. Fred Schaffer, of Sunbury, for appellant. J. Simpson Kline and Geo. B. Reimensnyder, both of Sunbury, for appellee.

PER CURIAM. The judgment of the superior court is affirmed for the reasons stated in the opinion of Judge Beaver.

JAXTHEIMER v. SHARPSVILLE BOROUGH et al.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. MUNICIPAL CORPORATIONS (§ 294*)—ADVERTISEMENT OF ORDINANCE—"CONTRACT."

A resolution of a borough council, accepting a bid of contractors subject to the entering into of a contract with the borough as provided in printed specifications, is not in itself a "contract," within Act April 8, 1851 (P. L. 323) § 3, providing that a contract cannot be entered into before the ordinance authorizing it has been posted and advertised for 10 days after its final passage.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 776-783, 791; Dec. Dig. § 294.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1513-1534; vol. 8, pp. 7615, 7616.]

2. MUNICIPAL CORPORATIONS (§ 294*)—CONTRACTS—ADVERTISEMENT OF ORDINANCE.

Where a borough enters into a formal contract with contractors, in strict conformity with printed specifications referred to in a resolution of the borough council accepting the bid of the contractors, 21 days after the passage of the resolution, 19 days after its posting, and 13 days after its publication, the contract is binding on the borough.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 776-783, 791; Dec. Dig. § 294.*]

3. CONTRACTS (§ 23*)—REQUISITES AND VALIDITY—ACCEPTANCE OF OFFER.

In order to be effectual, an acceptance of an offer must be identical with the offer and unconditional; and, where an acceptance is conditional or introduces a new term, it is either a mere expression of willingness to treat, or a counterproposal, and in neither case consummates a contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 68-71; Dec. Dig. § 23.*]

4. MUNICIPAL CORPORATIONS (§ 314*)—PUBLIC IMPROVEMENTS—CONTRACTS.

That the specifications for a paving contract were prepared or procured and reported to the council by the borough engineer and street committee, while the ordinance provided that they should be prepared or procured by the burgess and paving committee of council, is immaterial, where the street committee and paving committee for the current year were composed of the same members; the action of the borough engineer in place of the burgess being of no consequence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 827, 828; Dec. Dig. § 314.*]

Appeal from Court of Common Pleas, Mercer County.

Bill in equity by L. M. Jaxtheimer against Sharpsville Borough and others for an injunction. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The court below, after stating the facts as summarized in the opinion of the Supreme Court, discussed the questions involved as follows:

"The learned counsel contends that the contract between said borough and William McIntyre & Sons is illegal for the reasons set forth in the fourth and fifth paragraphs of the plaintiff's bill, and these reasons may

well be considered in the order stated by the learned counsel.

"(1) The first reason is stated in the fourth paragraph of the bill, as follows: 'The same day that said ordinance was passed bids were received and a contract awarded to said William McIntyre & Sons for the paving of that portion of Mercer avenue hereinbefore referred to.'

"The testimony shows that under the rules adopted by the council of said borough an ordinance must pass three readings before it is presented to the burgess for his approval, and, as stated in our fifth finding of fact, the ordinance here in question was introduced and passed by the council on first reading on June 20, 1911. It appears from the papers before us, although not shown by the testimony, that said ordinance was passed on second reading on July 18, 1911, and, as shown by the testimony and stated in our ninth finding of fact, was passed on its third reading on August 1, 1911. On August 15, 1911, the borough engineer and paving committee presented to council for its approval full and complete specifications for paving said Mercer avenue with tarvia, which, on motion duly passed, were approved by council, (4) and the secretary was directed to advertise for bids for paving said street in accordance with said specifications, said bids to be presented not later than 6 o'clock p. m. on September 5, 1911.

"On the same date that said specifications were approved and the secretary directed to advertise for bids, as above stated, the burgess of said borough, as stated in our thirteenth finding of fact, returned said ordinance to the council, accompanied by his veto thereof. Said veto was spread at large upon the minutes, and said ordinance was then laid over until the next regular meeting of council, to be held on September 5, 1911, as required by said act of May 12, 1911 (P. L. 288). At its next regular meeting, held on September 5, 1911, all of the members of council being present, said council proceeded to a reconsideration of said ordinance, and after such consideration it was passed by the unanimous vote of all the members elected to said council; the roll being called and the name and affirmative vote of each of the members of the council entered on the minutes.

"On the same date, after the passage of said ordinance over the veto of the burgess, the secretary, by direction of the council, proceeded to open the bids received for said paving in response to the notice to contractors published on August 22, 1911, as directed by council at its meeting held on August 15, 1911. As stated in our seventeenth finding of fact, the bid of said William McIntyre & Sons being the lower of the two bids received for the paving of said street, it was accepted, subject to certain conditions embodied in the motion or resolution of accept-

ance, and which, as shown by the minutes of the proceedings, are as follows: 'It was unanimously resolved that the bid of William McIntyre & Sons be accepted, subject to the entering into of a contract by them with the borough of Sharpsville, as provided for in the printed specifications, and the furnishing of bonds by them, as also required by said specifications.'

"The contention of the learned counsel for the plaintiff is that said bid and the acceptance thereof by the council constituted a contract between said borough and the firm of William McIntyre & Sons for the paving of said Mercer avenue; and that, as said ordinance had not been published and posted subsequent to its passage over the veto of the burgess, in accordance with the provisions of section 8 of the act of April 3, 1851 (P. L. 323), said contract is illegal. With this contention we are unable to agree, and to our mind it is wholly based upon the fundamental error of viewing the qualified and conditional acceptance of said bid as a contract. It seems to us that the very terms of the acceptance itself preclude the theory that said bid and its acceptance were to constitute a contract, and clearly evidence the fact that a contract was to be later entered into. That neither the borough authorities nor the firm of William McIntyre & Sons, whose bid was thus accepted, considered said bid and acceptance as a contract is evidenced by the fact that the execution of the formal contract for said paving was deferred until more than 10 days had elapsed after said ordinance had been published and posted subsequent to its final passage over the veto of the burgess, as is required by the act of April 3, 1851.

"In 20 Am. & Eng. Ency. of Law (2d Ed.) 1170, it is said in reference to municipal contracts: 'Though a bid made in response to an advertisement may be the lowest bid therefor, and in all respects regular and valid, no contract arises until the acceptance thereof by the city authorities. But where a bid has been accepted and the contract awarded, a binding contract is created, for the breach of which the city may be liable in damages, although, it has been held, it is not reduced to writing and signed. But a vote accepting a bid is not a contract, where a provision is distinctly made for the future execution of a formal contract.'

"The last paragraph of the language quoted expressly covers the facts of the case at bar, is directly in point, and is decisive against the contention of the learned counsel for the plaintiff. A number of cases are cited in support of the statement quoted, among them being those of *Edge Moor Bridge Works v. Bristol County*, 170 Mass. 528, 49 N. E. 918, *Jersey City Water Commissioners v. Brown*, 32 N. J. Law, 504, *Dunham v. Boston*, 94 Mass. (12 Allen) 375, and *People's Railroad Co. v. Memphis Railroad Co.*, 77 U. S. (10 Wall.) 38, 19 L. Ed. 844. We have ac-

cess only to the two cases last cited, both of which seem to support the language quoted.

"Assuming that section 8 of the act of April 3, 1851, required the publishing and posting of said ordinance subsequent to its passage over the veto of the burgess, it is clear that said ordinance was inoperative until the provisions of said section had been complied with. Hence the council was without power to make a valid contract until said ordinance had been published and posted for at least 10 days after its final passage. With this provision of said act of assembly in mind, the borough authorities deferred the execution of the formal contract for said paving until said provision had been complied with.

"It is argued by the learned counsel, however, that the validity of said contract is to be determined as of the date when said ordinance was passed over the veto of the burgess and the bid for said paving was accepted by the council; and that nothing done thereafter could validate the formal contract entered into between said borough and the firm of William McIntyre & Sons on September 26, 1911. As we view this case, said argument is unsound, and is not supported by either reason or authority. Suppose a borough council should determine to pave a street under the provisions of the act of 1911 (P. L. 288), and, in order to expedite the work, should have specifications prepared and advertise for bids for said paving while the ordinance providing for the same was pending in council, and then, when said ordinance had been finally passed and approved, accept the lowest bid received for said work, subject to the making of a formal contract at a later date, and then, in the meantime, between the acceptance of said bid and the execution of the formal contract, have said ordinance published and posted as required by the act of 1851, what would be irregular or illegal in such proceedings? We are unable to see how the preparation of specifications, the advertising for bids and an acceptance of one of the bids received prior to the publication, and posting of the ordinance providing for the work can affect the validity of a formal contract entered into after said ordinance had been published and posted. After the passage of the ordinance over the veto of the burgess in the case at bar, and after the same had been properly published and posted, the council undoubtedly could have entered into a valid contract for said work. How, then, can the preliminary work of preparing specifications, receiving bids, and the acceptance of one of the bids received, subject to the making of a formal contract, in any way affect said right?

"Suppose that after the conditional acceptance of said bid the contractors had expressed their willingness to enter into a formal contract, had tendered the bonds provided for, and then demanded that council proceed

to join with them in the execution of a formal contract, and the council had set up its lack of authority to make such contract until after said ordinance had been published and posted according to law, what standing would the contractors have had to enforce such a demand? It is clear that they would have no standing whatever; hence the mere acceptance of said bid, either conditionally or otherwise, prior to the publication and posting of said ordinance, would not and could not constitute a contract between the borough and the contractors.

"In the case of *Carpenter v. Yeadon Borough*, 208 Pa. 396, 57 Atl. 837, an ordinance was passed by council, vetoed by the burgess, and then passed over the veto, but was not published and posted, as required by the act of April 3, 1851. Said ordinance granted to Carpenter the right to use his land in the borough for cemetery purposes under certain conditions, one of which was that he pay \$6,000 to the borough. The ordinance also provided that a street should be laid out and opened for public use through the land, and that a portion of an avenue near the land should be vacated; that the ordinance should not become operative, unless Carpenter should, within 10 days after its passage, execute and deliver to the borough an agreement to comply with the terms of the ordinance, and should give security for the payment of the \$6,000. It was further provided that the ordinance should not be published until the execution and delivery of the agreement and the costs of publication had been paid to the borough. The agreement was delivered and the costs of publication of the ordinance were paid to the borough. Carpenter tendered security for the payment of the \$6,000, which was declined. He then applied for a writ of mandamus commanding the borough of Yeadon, the chief burgess, and the council of the borough 'to forthwith cause the ordinance of said borough entitled

* * * and known as Ordinance No. 50 to be published according to law, so as to render the same operative, or show cause why the same should not be done, or that a rule be granted on said respondents to show cause why a mandamus should not be issued for the purposes aforesaid.' The court having overruled a motion to quash the writ and directed the defendants to file a return, the case was tried by the court, without a jury, under the act of April 22, 1874 (P. L. 109). The court found a verdict in favor of the plaintiff against the corporate authorities of the borough of Yeadon, requiring them to advertise and publish ordinance No. 50 in accordance with the provisions of the third section of the act of Assembly of April 3, 1851.' From the judgment subsequently entered on said finding, the defendants appealed.

"In reversing said judgment and dismissing the writ of alternative mandamus, Mr. Justice Mestrezat, speaking for the Supreme

Court, said, *inter alia*: " * * * Publication is a duty imposed upon the corporate officers, and until it is performed no rights are granted, and the observance of no duties is enjoined, by the ordinance which can be enforced by or against the municipality. Before the statute has been complied with in this respect, the ordinance remains in the hands of the officers of the corporation awaiting the performance of an act by them essential to give it validity as a law of the borough. Conceding that the purpose and intention of the council was, by this enactment, to contract with the plaintiff on the terms therein set forth, yet if publication was necessary to make it operative, as is recognized by the plaintiff in instituting this proceeding, it is apparent that the contract was not consummated, and is not yet obligatory on the borough. A statutory prerequisite to its completion and validity is concededly wanting, and the power of the court is invoked to compel one of the parties, the borough, to consummate the agreement. In other words, we are asked to compel the corporate officers of the borough to complete negotiations pending between the parties, so that the negotiations will become effective as a contract and obligatory upon the borough. This, in effect, is the prayer of the petition for the mandamus. If, therefore, we award the writ commanding the borough to cause the ordinance "to be published according to law, so as to render the same operative," as prayed for in this application, the court will compel the execution of an agreement which is simply discretionary with the corporation. This we cannot do. The court will enforce, by mandamus, the performance of a mandatory ministerial duty; but it has no authority to compel a municipal corporation to execute an agreement which is a discretionary act, or to take any steps toward the consummation of such an agreement. * * *

"The case from which we have thus quoted is authority for at least three legal propositions: (1) That as to all ordinances within the third section of the act of April 3, 1851; the duty to publish and post said ordinances in the manner required by said act is mandatory, and until it has been performed the ordinance remains inoperative. (2) While the duty to thus publish and post such ordinances is mandatory, in order to make them valid and operative, the performance of said duty is, nevertheless, discretionary with the council, in the sense that it may decline to perform it, and thus render an ordinance inoperative. (3) Until such an ordinance has been published and posted as required by said act, it remains inoperative by the ordinance which can be enforced by or against the municipality.

"Applying these principles to the case at bar, it is clear that there was no contract between said borough and the firm of Wil-

liam McIntyre & Sons prior to the formal contract entered into on September 26, 1911, after said ordinance had become operative by virtue of its having been published and posted for a period of more than 10 days prior to said date, as required by the third section of the act of April 3, 1851. We are therefore unable to discover anything in the first reason urged by the learned counsel that would justify a finding that said contract is illegal.

"(2) The second reason is embodied in the fifth paragraph of the plaintiff's bill, and is there stated as follows: 'Said ordinance had never been advertised since its passage as required by law.'

"As no question has been raised as to the publication and posting of said ordinance while the same was pending in council, as required by the act of May 12, 1911, it is evident that the advertisement here referred to is the publication required by the third section of the act of April 3, 1851 (P. L. 320, 323), which provides, *inter alia*, as follows: '4. To publish in at least one newspaper, if such be printed in the proper county, and by not less than twelve advertisements, to be put up in the most public places in the borough, every enactment, regulation, ordinance or other general law, at least ten days before the same shall take effect.'

"The learned counsel is evidently mistaken as to this matter, as the testimony of Mr. Graber, the secretary of the borough council, shows that the street commissioner of said borough, acting under his instructions, posted said ordinance on September 9, 1911, which was four days after the final passage of said ordinance over the veto of the burgess on September 5, 1911. The testimony of Mr. Graber further shows that said ordinance was published in the Sharpsville Advertiser on September 13, 1911, which was eight days after its passage over the veto of the burgess on September 5, 1911. These matters are embodied in our eighteenth and nineteenth findings of fact. The presumption is that said publishing and posting was done by direction of the council of said borough, and that it was done in accordance with the requirements of said act of assembly. This reason, therefore, requires no further discussion.

"(3) The third reason is also embodied in the fifth paragraph of the plaintiff's bill, and is as follows: 'The burgess and paving committee did not procure or prepare any specifications of said paving after the passage of said ordinance, or at any other time, and did not submit specifications to the council for their ratification after the passage of said ordinance, or at any other time.'

"The second section of said ordinance is as follows: 'Sec. 2. The burgess and paving committee are hereby directed to prepare or procure full and complete specifications of said paving, and advertise for pro-

posals or bids for the contract therefor, which specifications and all proposals and bids received shall be submitted to the council for their ratification.'

"The testimony shows, as set forth in our ninth, tenth, eleventh, and twelfth findings of fact, that on August 1, 1911, the council of said borough passed said ordinance on the third or last reading prior to its presentation to the burgess for his approval; that on August 15, 1911, the borough engineer and the paving committee of the council presented to said council, at its regular meeting held on that date, full and complete specifications for the paving of said Mercer avenue; that on the same date, and at the same meeting, the council approved or accepted same and directed the secretary to have a sufficient number of copies thereof printed, and to advertise for bids for paving said Mercer avenue in accordance with said specifications; that the burgess did not act with said paving committee in the preparation or procuring of said specifications. The burgess was present at the meeting of council, however, when said specifications were presented and approved, and the secretary directed to advertise for bids for doing the work in accordance therewith, and made no objections whatever thereto.

"It thus appears that the only omission in the way of a strict and literal compliance with the terms of the second section of said ordinance is that the borough engineer, instead of the burgess, acted with the paving committee in the preparation or procuring of said specifications. The direction by the council that said specifications be prepared or procured by the burgess and paving committee relates merely to the form or manner in which said specifications were to be provided, and may therefore well be considered as merely directory. The real essence or substance of the thing desired was the specifications, and the manner of obtaining them was a mere incident. Hence, when specifications presented by the borough engineer and the paving committee were considered and accepted by the council, the provisions of the ordinance as to that matter were substantially complied with. There is no intimation that the burgess had any technical knowledge or special qualifications as to specifications for street paving not possessed by the borough engineer; nor is it alleged that the specifications presented to and accepted by council were not full and complete, or that they were in any manner defective. We are of the opinion, therefore, that there is nothing in the third reason that renders said contract illegal or invalid.

"(4) The fourth reason is that: 'Said burgess and paving committee did not advertise for proposals or bids for the contract thereof or submit any proposals or bids to the council for their ratification after said ordinance was passed or at any other time, as

provided by the second section of said ordinance hereinbefore referred to.'

"What we have said as to the third reason urged by the learned counsel is equally applicable here. The testimony shows that at the meeting of August 15, 1911, when said specifications were presented to and accepted by the borough council, said council directed the secretary to advertise for bids of proposals for the paving of Mercer avenue in accordance with said specifications; that in pursuance of said direction the secretary did advertise for bids, and when the bids were received he, by direction of said council at its regular meeting held on September 5, 1911, opened said bids in the presence of council, and one of the bids so received was accepted by the council at said meeting. This, we think, was a substantial compliance with the provisions of said ordinance; hence this reason does not require further discussion.

"As a summary of the facts shown by the testimony, we may say: That the evidence shows that said ordinance was regularly introduced at a regular meeting of the council of said borough; that it passed three separate readings at three separate regular meetings of said council; that while said ordinance was pending before said council it was regularly published and posted in the manner required by the act of May 12, 1911 (P. L. 288); that said ordinance was not finally adopted or enacted until after the expiration of more than 30 days after the date of its introduction; that after said ordinance had passed its third reading the borough engineer and the paving committee of said borough presented to said council full and complete specifications for the paving of said Mercer avenue; that said council approved said specifications at a regular meeting, and directed the borough secretary to advertise for bids or proposals for paving said Mercer avenue in accordance with said specifications; that in pursuance of said direction from the council the borough secretary did advertise for bids or proposals for said work, said bids to be presented not later than 6 o'clock, p. m., on September 5, 1911; that on August 15, 1911, the burgess of said borough returned said ordinance to the council, accompanied by his veto, and said veto was spread at large on the minutes of said meeting, and said ordinance was then laid over until the next regular meeting of the council, to be held on September 5, 1911; that at the regular meeting of said council on September 5, 1911, said ordinance was taken up for reconsideration, and, after such consideration, it was passed over the veto of the burgess by the unanimous vote of all the members elected to said council, the roll being called and the name and affirmative vote of each of said members entered upon the minutes of council; that after the passage of said ordinance over the veto of

the burgess the borough secretary, by direction of said council, opened the two bids received for said paving, and, it appearing that the bid of William McIntyre & Sons was the lower, said council accepted said bid, subject to the giving of the bonds and the making of the formal contract required by said specifications; that said ordinance was thereafter posted on September 9, 1911, and published in the Sharpville Advertiser on September 13, 1911, as required by the third section of the act of April 3, 1851 (P. L. 320, 323); and that on September 23, 1911, being more than 10 days after the publishing and posting of said ordinance, said borough entered into a formal contract with said firm of William McIntyre & Sons for the paving of said Mercer avenue in accordance with said specifications."

A decree was entered, dismissing the bill. Argued before FELL, O. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKE, JJ.

W. C. Pettit, of Greenville, for appellant J. P. Whittle, of Sharon, Thomas H. Armstrong, of Sharpville, and Horace W. Davis, of Sharon, for appellees.

POTTER, J. This was a bill in equity filed by L. M. Jaxthelmer, a citizen and taxpayer of the borough of Sharpville, Mercer county, Pa., in which he sought to restrain the borough authorities from carrying out a contract with the firm of William McIntyre & Sons for the paving of Mercer avenue, under authority of an ordinance passed by the borough council on September 5, 1911, over the veto of the burgess, in pursuance of the act of May 12, 1911 (P. L. 286). It is conceded that the ordinance was regularly adopted, but the legality of the contract for paving, made in pursuance thereof, is questioned. The trial judge made full and complete findings of facts, and concluded that the provisions of the acts of 1851 and 1911 have been complied with by the borough authorities, and that the plaintiff's bill should therefore be dismissed. Exceptions were filed to the findings of the trial judge, which were overruled, and the final decree was entered, dismissing the bill. The plaintiff has appealed. We think that the thorough discussion of the questions involved by the trial judge amply justifies his conclusion, and leaves but little for us to add.

[1] The first objection is that the contract was made too soon; that is, before the ordinance had been posted and advertised for a period of 10 days after its final passage, as required by the act of April 3, 1851 (P. L. 320) § 3. The validity of this objection depends upon whether the contract with William McIntyre & Sons is to be regarded as having been entered into by the passage by the council of a resolution of acceptance upon September 5, 1911, or whether the real con-

tract for paving was made upon September 26, 1911, which was the date upon which the written contract was executed. It appears from the seventeenth finding of fact by the trial judge that on September 5, 1911, after the passage of the ordinance over the veto of the burgess, bids for paving were received and opened, and "it was unanimously resolved that the bid of William McIntyre & Sons be accepted, subject to the entering into of a contract by them with the borough of Sharpsville, as provided for in the printed specifications." We agree entirely with the court below that the terms of the acceptance itself clearly imply that a contract was not intended to be entered into at that time, and that they show with equal clearness that a contract was to be entered into later on. The words of the resolution clearly contemplate the formal execution of a contract in accordance with the printed specifications, and the furnishing of bonds, as required by the specifications.

[2] A formal contract in strict conformity to these requirements was entered into between the borough and the firm of William McIntyre & Sons, on September 26, 1911, 21 days after the passage of the ordinance, 19 days after its posting, and 13 days after its publication. The work, whose performance appellant here sought to enjoin, is to be carried out under this written contract of September 26th, and not under any agreement arising out of the formal acceptance of the bid upon September 5th. That was evidently but a step in the negotiations intended to lead to a written contract which would fully comply with the specifications.

[3] A satisfactory statement of the law applicable to such a situation is found in 9 Cyc. 267, where it is said: "An acceptance, to be effectual, must be identical with the offer and unconditional. Where a person offers to do a definite thing and another accepts conditionally, or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat, or it is a counterproposal; and in neither case is there an agreement." The case of *Sparks v. Pittsburgh Co.*, 159 Pa. 295, 28 Atl. 152, illustrates the principle. There the plaintiff made a written proposition to drill oil wells. At the end of the proposition the officers of the defendant company wrote: "Accepted; contract to be drawn in accordance with the above proposition or bid." And the following words were added: "This is about right and will be satisfactory to the Pittsburgh Company." This court, speaking by Mr. Justice Thompson, said: "The appellant's contention is that the proposition itself constituted the contract, and the sinking of those wells at Ellwood the breach of it." The language at the end of the proposition, to wit, "Contract to be drawn in accordance with the above proposition or bid," and, "This is about right and will be satisfactory to the Pitts-

burgh Company," clearly imports that it was not intended to be the actual agreement, but simply the basis of one to be subsequently perfected by a contract properly prepared. In the present case we think it is equally clear that the resolution of acceptance adopted by the council was only intended as authority for the making of the written contract, which was executed on September 26th, at which time the ordinance had been posted and advertised more than the required 10 days.

[4] Another ground of objection to the contract is that, while it was provided in the ordinance that the specifications for the paving should be prepared or procured by the burgess and paving committee of council, they were in fact prepared or procured and reported to council by the borough engineer and the street committee. We see no merit in this objection. The court below found, as set forth in its opinion on the exceptions, from testimony taken after the original findings were made, that there was no special paving committee of the borough council, and that what was intended by that term was the standing street committee; and that for the current year the street committee and the paving committee were one and the same, and made up of the same members of the borough council. Whether the burgess or the borough engineer acted in preparing the specifications was of no special consequence. The committee were authorized either to prepare or procure specifications, and this gave them the right to call for such assistance as they might desire. We agree with the trial judge that the terms of the ordinance in this respect were merely directory, and we think that the council had the right to accept such specifications as seemed to them most fit, whether presented by the street committee or obtained from some other source. If the burgess and the committee, in literal compliance with the terms of the ordinance, had united in preparing and reporting specifications, it was still within the power of the council to reject such specifications, and to obtain and adopt others from another source.

The assignments of error are all overruled, and the decree of the court below is affirmed.

IN RE GOURLEY'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 6, 1918.)

1. WILLS (§ 684*) — VALIDITY — EFFECT OF PARTIAL INVALIDITY.

Where a will directed the sale of testator's realty and personalty, and the placing of the fund in a bank at interest for the maintenance and support of his two sisters, with authority to draw on the principal if the interest should not provide for their maintenance and support, and named a trustee who was to hold the fund at the death of either of the sisters for the support of the survivor, and at her death to pay the balance to a charity named, but the remainder failed because of the death

of the testator within 80 days of the execution of the will, the fund was not payable immediately to the sisters, but should be held by the trustee for the purposes named in the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614-1628; Dec. Dig. § 684.*]

2. WILLS (§ 610*)—CONSTRUCTION—INTEREST CONVEYED.

The rule that a bequest of personality with power to consume is presumed to be an absolute gift is not a rule of law, but one of construction only, in aid of discovery of the testator's intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1379-1385; Dec. Dig. § 610.*]

3. TRUSTS (§ 135*)—WILLS (§ 684*)—EXPRESS TRUSTS—VALIDITY—ACTIVE TRUST.

A trust to provide for the support of testator's sisters from the interest in a fund bequeathed, or from the principal if the interest were insufficient, is an active one, and does not fail because, through failure of a remainder to a charity, it became inoperative to protect the remainderman, nor does the failure of the remainder and the resulting intestacy advance the time for distribution.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 178; Dec. Dig. § 135.* Wills, Cent. Dig. §§ 1614-1628; Dec. Dig. § 684.*]

4. TRUSTS (§ 135*)—EXPRESS TRUSTS—CONSTRUCTION AND OPERATION.

Wherever it is necessary, in order to accomplish any object of the creator of a trust, that the legal estate should remain in the trustee, the trust is a special active one.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 178; Dec. Dig. § 135.*]

Appeal from Orphans' Court, Armstrong County.

In the matter of the Estate of Samuel H. Gourley. From a decree dismissing exceptions to an auditor's report, Belinda Gourley and another appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. L. Peart and H. N. Snyder, both of Kittanning, for appellants. H. A. Hellman, for appellee.

FELL, C. J. [1] The testator, after directing the sale of his real and personal property, provided as follows: "8. After all the expenses are paid from aforesaid sale, I request that the money remaining be placed in the Rural Valley National Bank at interest, to provide for the maintenance and support of my sisters, Belinda Gourley and Julia Gourley. Should interest not provide for their maintenance and support the principal is to be drawn on. 9. I request that John C. Berger act as trustee of such funds as are placed in Rural Valley National Bank for the support and maintenance of my two sisters. 10. At the death of either of my sisters, balance of money in bank to be held for survivor to be used for her support. 11. At the death of both my sisters the balance of moneys is to be paid to the Presbyterian Board of Foreign Missions." The bequest to the Board of Foreign Missions was void because of the death of the testator within 80

days of the execution of his will, and the entire fund was claimed by the sisters of the testator, the appellants, on the ground that since they were entitled to the whole income and privileged to use the principal in case of necessity, the gift was absolute. This claim was not sustained by the auditor, but he awarded to them the shares to which they would be entitled under the intestate laws. This award was set aside by the orphans' court, and the whole fund in the hands of the executors was awarded to the trustee for the purpose named in the will. From the order making this award, the appeal is taken.

[2-4] The rule that a bequest of personality with power to consume is presumed to be an absolute gift is not a rule of law, but a rule of construction only, in aid of discovery of the testator's intention. *Tyson's Estate*, 191 Pa. 218, 43 Atl. 131. The construction contended for by the appellants would defeat the manifest intention of the testator, who created a trust to provide for the maintenance of his sisters and the survivor of them for life, and to preserve the corpus of the estate for the remainderman. The trust was an active one, and it did not fail because it became inoperative for the latter purpose, nor did the failure of the charitable bequest and the resulting intestacy advance the time for distribution. "Wherever it is necessary for the accomplishment of any object of the creator of a trust that the legal estate should remain in the trustee, then the trust is a special active one." *Rife v. Geyer*, 59 Pa. 393, 98 Am. Dec. 351; *Moore's Est.*, 198 Pa. 611, 48 Atl. 884.

The decree of the orphans' court is affirmed at the cost of the appellants.

REITLER v. PENNSYLVANIA R. CO.
(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. RAILROADS (§ 350*)—ACCIDENTS AT CROSSING—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries at a grade crossing, where the evidence, though contradicted, showed that plaintiff stopped, looked, and listened, that the view was obstructed, that defendant's employé signaled him to cross when he was struck by an engine, the question of negligence is for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

2. DAMAGES (§ 216*)—PERSONAL INJURIES—EARNINGS.

In an action for personal injuries, it is error to instruct that plaintiff can recover the amount which he would likely earn during the remainder of his life, plaintiff being entitled to recover also for the loss of earning power during his life, which depends on whether he was permanently, or only partially, disabled.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

3. DAMAGES (§ 38*)—PERSONAL INJURIES—LOSS OF EARNING POWER.

Where a person is permanently disabled, he can recover for the loss of earning power during the remainder of his life, depending on his

state of health, habits of life, and character of his employment.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 237-241; Dec. Dig. § 38.*]

4. DAMAGES (§ 100*)—PERSONAL INJURIES—LOSS OF EARNING POWER.

Where the loss of future earning power is anticipated in a verdict, it should be the present worth of his future loss of earnings during his life expectancy.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 237-241; Dec. Dig. § 100.*]

5. DAMAGES (§ 100*)—PERSONAL INJURIES—PARTIAL LOSS OF EARNING POWER.

Where there is a partial loss of earning power, the jury should determine the number of years it is likely to continue, and then find its present worth.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 237-241; Dec. Dig. § 100.*]

Appeal from Court of Common Pleas, Cambria County.

Action by Daniel Reitler against the Pennsylvania Railroad Company. Judgment for plaintiff and defendant appeals. Reversed.

Trespass to recover damages for personal injuries.

At the trial it appeared that the accident occurred at 5 o'clock p. m. on December 6, 1909. The plaintiff and his driver approached in a two-horse empty hay wagon a grade crossing of the defendant where there were five tracks. Plaintiff and his witnesses testified that he and his driver stopped, looked, and listened at a point about 30 feet from the first track. Their view was obstructed to the left by an engine on the first track and by cars on the second track. Plaintiff offered further proof that while they were stopping one of defendant's employees motioned them to cross, and that they then proceeded and were caught by an engine on the third track which approached the crossing from behind the standing cars on the second track. Plaintiff and his driver testified that, when they stopped, they did not see nor hear anything approaching.

The court charged in part as follows:

"As we recall his (Mr. Nichol's) testimony, he says he saw an engine upon the railroad, and while the team was standing there he saw the signal given which the driver and Mr. Reitler testified to, and which they all interpreted as being the signal to the driver of his team to move on, indicating that the crossing was free from danger. That is the way the driver says he interpreted it."

"He (the driver) applied the whip to the horses. They plunged forward, and he says the engine caught a two by four piece of timber, which was used in connection with the brake and which projected some feet behind the wagon, pushing the wagon around with such force as to throw Mr. Reitler from the wagon."

"If you find from the weight of the evidence and considering all the evidence in the case that he did stop, look, and listen, then consider whether or not he stopped, looked,

and listened at the proper place—at the best place. Evidence that he stopped, looked, and listened at the usual place of stopping for that purpose is admissible and proper for the jury's consideration. Now, if you find that he stopped, looked, and listened, then consider whether or not he stopped, looked, and listened at the proper place—at the right place, at the best place."

"If the engine by its presence there, by its approaching that crossing in the way it did, resulted in the driver's whipping his horses in order to avoid a worse accident, and the engine struck the pole extending out in the rear of the wagon and, in the getting away, as testified to by the driver and Mr. Reitler, Mr. Reitler was thrown from his wagon and injured, then, if what the defendant company did through its servants amounted to negligence, the plaintiff would be entitled to recover."

"Now, gentlemen of the jury, the plaintiff is not only entitled to recover, if entitled to recover at all, for the amount which he would likely earn during the remainder of his life, but is also entitled to recover for any expense or outlay which he may have been put to in the way of payment of money as a direct result of the injuries complained of. He testified that he had paid \$50, we believe, for a doctor bill. We do not know that there is anything else specially that he has paid, but he is taking treatment yet in a certain degree. He is also entitled to compensation for any loss of time which he suffered since the injury was inflicted, as well as for pain, suffering, and inconvenience which he has endured and is likely to endure in the future, as a result of the injury."

Defendant presented *inter alia* these points:

"(1) If the jury believe plaintiff and his driver stopped, looked, and listened at any point between the bridge and the first track, which they testified they did, and admit that from such point they could not see a locomotive approaching on the third track, because an engine was standing on the first track and a long train of cars was also standing on the second track, therefore they were negligent in attempting to cross or go on the third track, and the verdict should be for the defendant company. A. (By the Court.) Refused."

"(3) Inasmuch as plaintiff admits he could not see the engine approaching on the third track by reason of the obstructions to his vision on the first and second tracks, it was his duty, or that of his driver, to have stopped the team before attempting to proceed and to have alighted and walked to the corner of the car where he could have had a clear vision line of 4,900 feet, and not having done so, the verdict should be for the defendant. A. (By the Court.) Refused."

Verdict and judgment for plaintiff for \$4,194.

Errors assigned were above instructions, quoting them, and refusal of binding instructions for defendant.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

H. W. Storey, of Johnstown, for appellant. J. Wallace Paul and E. T. McNeelis, both of Johnstown, for appellee.

ELKIN, J. [1] It may be conceded that upon the question of the contributory negligence of the appellee this is a close case, but, after a careful review of all the testimony, we have concluded it was for the jury. Whether the driver of the team stopped, looked, and listened at a proper place, or failed in the performance of any other duty required of him under the circumstances, were questions of fact for the jury, and not of law for the court. The testimony is conflicting, and the facts are not so clear as to warrant the court in declaring the plaintiff guilty of contributory negligence as a matter of law. We are all of opinion that the questions of negligence and of contributory negligence were for the jury.

The instruction of the trial judge on the question of the measure of damages which is made the subject of the seventh assignment of error calls for consideration and discussion. It is as follows: "Now, gentlemen of the jury, the plaintiff is not only entitled to recover, if entitled to recover at all, for the amount which he would likely earn during the remainder of his life, but is also entitled to recover for any expense or outlay which he may have been put to in the way of payment of money as a direct result of the injuries complained of. He testified that he had paid \$50, we believe, for a doctor bill. We do not know that there is anything else specially that he had paid, but he is taking treatment yet in a certain degree. He is also entitled to compensation for any loss of time which he suffered since the injury was inflicted, as well as for pain, suffering, and inconvenience which he has endured and is likely to endure in the future, as a result of the injury." This instruction as a whole is vague, indefinite, and inadequate in the sense of not calling the attention of the jury to the elements of damage which may be considered in arriving at a proper verdict based upon compensation for the injuries actually sustained.

[2] It is most important in the trial of this class of cases to carefully instruct the jury as to the true measure of damages that may be considered in arriving at a proper verdict, and the court should of its own motion give the proper instructions. A jury needs all the assistance a court can give when it undertakes to determine under the rules of law what compensation a person is entitled to receive for injuries sustained. We notice a tendency in the trial of recent cases to give

juries a very wide latitude in determining what amount of damages the injured party is entitled to in causes of this character. This practice is not to be encouraged. It overlooks and disregards the rule that compensation is the true standard by which the law measures such damages. What was said in *Collins v. Leafey*, 124 Pa. 203, 16 Atl. 765; *Goodhart v. Railroad Company*, 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705, and *McLane v. Pittsburgh Railways Company*, 230 Pa. 29, 79 Atl. 237, should be regarded as of first importance in instructing a jury as to the true measure of damages in this class of cases. That part of the charge in the case at bar in which the jury was instructed that the plaintiff was entitled to recover, if entitled to recover at all, the amount which he would likely earn during the remainder of his life is clearly erroneous. The plaintiff was entitled to recover, not what he was likely to earn during the remainder of his life, but for the loss of earning power during that period, and this depends upon whether he was permanently disabled or only partially so. Then, again, this instruction loses sight of the important fact that the loss of future earning power is anticipated in a present sum, the income of which the plaintiff will enjoy. In other words, when future payments are anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth. *Goodhart v. Railroad Co.*, supra. As an illustration of the importance of adhering to this rule, let us assume that, under the evidence in the present case, the jury would be warranted in finding the plaintiff permanently disabled, that his loss of earning power was \$400 a year, and that he had a life expectancy of 20 years. Under the instruction complained of the jury would simply multiply the loss of earning power for each year by the number of years of his life expectancy, making a total sum of \$8,000. This sum invested at 5 per cent. would produce an annual income equal to his total loss of earning power. He would then have an income from his investment, the full equivalent of his earning power each year, and, in addition, would have the principal sum from which the income was derived. This is not the law, and such a verdict ignores the rule of just compensation.

[3] The rule is that a person totally and permanently disabled by the negligent acts of another is entitled to recover as damages the loss of earning power during the remainder of his life. This does not mean that the earning power of the injured person would remain the same during the entire period of his life expectancy as it was at and before the time of his injury. State of health, habits of life, character of employment, the increasing disabilities of age, and many other things of like character, which in the course of nature reduce the earning power, must be taken into consideration

In determining what is proper compensation for the loss of future earnings. It is the loss of future earning power that is to be compensated in damages, and that loss may be distributed over a period of 10, 15, or 20 years. As men grow older and less able to work their earning power is not so great, and this fact is to be taken into consideration.

[4] When the loss of future earning power is determined in a verdict, it should be the exact equivalent, or present worth, of his future loss of earnings during the several years of his life expectancy. It is the duty of the court to so instruct the jury. *Wilkinson v. North East Boro.*, 215 Pa. 486, 64 Atl. 734; *McLane v. Pittsburgh Railways Company*, supra.

[5] When there is only a partial loss of earning power, the jury must determine what that partial loss is under the evidence, the number of years it is likely to continue, and then find the present worth of the amount so ascertained. In the present case, it is a question of erroneous instruction, not of inadequacy of the charge, and for this reason there must be a reversal.

The remaining assignments of error are of minor importance, and relate mainly to the rejection and admission of testimony. It will be unnecessary to discuss these assignments at this time. When the case is again tried, these matters can be called to the attention of the trial judge, and no doubt will be properly disposed of.

Judgment reversed and a venire facias de novo awarded.

PUNXSUTAWNEY BOROUGH et al. v. T. W. PHILLIPS GAS & OIL CO.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. GAS (§ 6*)—CORPORATIONS—CONSOLIDATION—EFFECT AS TO FRANCHISES.

A consolidated gas company, one of whose constituent companies was organized in 1883 under Act April 29, 1874 (P. L. 73), and supplied a borough with natural gas, and in 1886 accepted the provisions of the Natural Gas Act of May 29, 1885 (P. L. 29), while the other company had a right to serve the borough, but with restriction as to the price of gas, may serve the borough under the franchises of the first company without the restrictions imposed by the franchises of the other, where the latter company had never in fact furnished the borough with gas.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 1; Dec. Dig. § 6.*]

2. GAS (§ 6*)—CORPORATIONS—CONSOLIDATION—EFFECT AS TO FRANCHISES.

That the stock of one natural gas company was acquired by the owners of the stock of another, and the net proceeds from the sale of its product, after payment of proper corporate expenses, were turned into the treasury of the latter company, does not extinguish the individual franchise or rights of the former company.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 1; Dec. Dig. § 6.*]

3. CORPORATIONS (§ 589*)—CONSOLIDATION—EFFECT AS TO FRANCHISES.

A statute authorising the merger and consolidation of corporations, and giving to the consolidated company the rights and privileges of its constituents or making it subject to their obligations, does not in general extend the rights and obligations to all of the property of the consolidated company, but only severally to the property of each company taken over by the consolidated company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2354-2360; Dec. Dig. § 589.*]

Appeal from Court of Common Pleas, Jefferson County.

Bill in equity by Punxsutawney Borough and others against the T. W. Phillips Gas & Oil Company for an injunction. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

The court below found the facts to be as follows:

Findings of Fact.

"(1) The Mahoning Gas & Heat Company was a corporation formed under Act April 29, 1874 (P. L. 73), and its supplements, 'for the purpose of manufacturing gas and supplying light and heat to the public of the borough of Punxsutawney, and to persons, partnerships and associations, residing therein and adjacent thereto, as may desire the same.' Application for letters patent was approved March 5, 1883. Letters patent were issued by the commonwealth March 5, 1883.

"(2) The capital stock of the company was by due proceedings and consent of its stockholders increased from \$5,000 to \$100,000, certificate of such increase having been filed in the office of the Secretary of the Commonwealth on October 15, 1884.

"(3) Under color of its charter or letters patent, the Mahoning Gas & Heat Company had, prior to the passage of Natural Gas Company Act, May 29, 1885 (P. L. 29), in the year 1884, entered upon the streets of the boroughs of Punxsutawney and Clayville, and had been for some time and at the date of the approval of said act of Assembly, on May 29, 1885, actually engaged in the sole business of transporting and dealing in natural gas and supplying the same to consumers, and persons within said boroughs.

"(4) The Mahoning Gas & Heat Company, pursuant to the provisions of the fourteenth section of the said act of Assembly of May 29, 1885 (P. L. 29), by instrument in writing duly executed under its corporate powers, filed in the office of the Secretary of the Commonwealth, May 15, 1886, accepted the provisions of said act, and surrendered its charter, and upon said date new letters patent were issued by the commonwealth to the Mahoning Gas & Heat Company under said act of Assembly. The acceptance sets forth inter alia that the place or places to which gas is to be supplied are the boroughs of Punxsutawney and Clayville, and Young town-

ship, and persons and partnerships adjacent thereto.

"(5) The said company, the Mahoning Gas & Heat Company, continued in its said business of supplying natural gas to the public in said boroughs of Punxsutawney and Clayville, down to date of its merger with the T. W. Phillips Oil & Gas Company and the Citizens' Fuel Company, in the latter part of 1905, under merger agreement filed 'in the office of the Secretary of the Commonwealth January 11, 1906, and during said period was the only company so supplying the public and dealing in natural gas in said boroughs.

"(6) There was no provision contained in the charter of the Mahoning Gas & Heat Company as to price to be charged for natural gas, and no restriction had ever been imposed upon the company, and it had never made any agreement as to price to be charged for gas. Prior to May, 1905, the prices charged by the company for gas furnished, and for which bills were rendered monthly, were 30 cents per thousand cubic feet subject to a discount of 10 cents per thousand cubic feet if paid on or before the 10th day of the month in which bill was rendered for gas consumed during the previous month. And after May, 1905, down to the date of merger, the price was 22 cents per thousand cubic feet, the net price being 20 cents per thousand cubic feet if paid on or before the 10th day of the month.

"(7) Punxsutawney borough, by ordinance approved May 24, 1904, granted A. L. Cole the right to enter upon its streets, lay down and maintain pipes for transportation and furnishing of natural gas to consumers in said borough. Section 3 of the ordinance provides that said A. L. Cole or his assigns shall furnish the borough gas free of charge for heating and lighting the borough building, including council chamber and lock-up, and for 80 lamps. Section 4 is as follows: 'Said A. L. Cole or his assigns hereby covenants and agrees for himself and his assigns to furnish to the consumers of natural gas of the borough of Punxsutawney natural gas at maximum price not to exceed twenty cents (20c) per thousand cubic feet net during the time the privileges of this ordinance are exercised by the said A. L. Cole or his assigns.'

"(8) The borough of Clayville enacted a similar ordinance in practically same language upon June 9, 1904.

"(9) Section 8 of the ordinance provides that they shall only become operative upon said A. L. Cole or his assigns filing an acceptance of all the terms and conditions of the ordinance and other ordinances within 10 days, and the said A. L. Cole filed acceptances to such ordinance as follows: 'I, A. L. Cole, for myself or assigns, hereby accept the above and foregoing ordinance in all its terms and conditions and all other ordinances of said borough affected by the franchises granted by said ordinance.'

"(10) Section 6 of the ordinance provides that the franchise is granted with the intention that the same shall be assigned to a proposed corporation to be formed to be known as the Citizens' Fuel Company.

"(11) The Citizens' Fuel Company of Punxsutawney, Pa., was incorporated June 24, 1904, under the provisions of the act of Assembly of May 29, 1885 (P. L. 29), for the purpose of supplying natural gas, etc., to be mined for in Jefferson, Clarion, Armstrong and Indiana counties, and supplied to consumers in the boroughs of Punxsutawney, Big Run, Lindsey, and the townships of Beaver and other townships in Jefferson county, Pa., the articles of association therefor being recorded in the recorder's office of Jefferson county, Pa.

"(12) September 3, 1904, A. L. Cole, by writing as follows, conveyed his franchises to the Citizens' Fuel Company: 'For and in consideration of the sum of one dollar I hereby sell, assign, transfer and set over to the Citizens' Fuel Company of Punxsutawney, Pa., all rights and privileges granted and conveyed to me by virtue of the ordinance,' etc.

"(13) The Citizens' Fuel Company when organized had certain gas wells in Beaver township, Jefferson county, some 14 miles from Punxsutawney, and in July, 1904, commenced laying a gas line to Punxsutawney and also some lines in the borough of Punxsutawney, and also took contracts from a number of people in Punxsutawney to whom it proposed to furnish gas. Negotiations were shortly commenced with the stockholders of the Mahoning Gas & Heat Company, and before the gas line of the Citizens' Fuel Company was completed to Punxsutawney the capital stock of the Mahoning Company was purchased and transferred, 5 shares to five individual stockholders of the Citizens' Company and the balance, 995 shares, to another stockholder in trust for the stockholders of the Citizens' Company. The purchase was agreed upon in August, and the stock actually transferred September 27, 1904. The purchase money for this stock was furnished and paid by the Citizens' Fuel Company.

"(14) At the time of this purchase of the stock of the Mahoning Gas Company, the Citizens' Gas Company had not completed its gas line nor brought any gas to Punxsutawney, when subsequently it completed its line to the borough it connected its lines direct to the lines of the Mahoning Gas Company, and made no other connections, and the Mahoning Gas Company continued to transact all the business of furnishing gas to consumers as before, in its own name, making all contracts with consumers, increasing the number from 600 to say 1,100, by May, 1905. All moneys paid by consumers was paid to and collected by the Mahoning Gas Company and deposited to the credit of the company by its officers in the bank, and, after paying its

own bills for operating, it paid over the balance to the Citizens' Fuel Company up to May, 1905, and then to the T. W. Phillips Oil & Gas Company, which acquired the stock of the Citizens' Fuel Company about that time.

"(15) The Citizens' Fuel Company never sold any gas to consumers in Punxsutawney or Clayville boroughs, and never laid any service lines to consumers, and never did any business in said boroughs beyond supplying gas to the Mahoning Gas Company. It laid some lines in Punxsutawney, but these were used by the Mahoning Company, or were to connect the lines of the two companies. All the gas produced by the Citizens' Fuel Company during the existence of the company was delivered to the Mahoning Company, and the latter company marketed the same, and was the only company selling and marketing and supplying natural gas to consumers in the borough of Punxsutawney prior to the formation of the Consolidated Gas Company, defendant, in January, 1906. The gas produced by both companies was run into the lines of the Mahoning Company.

"(16) The T. W. Phillips Oil & Gas Company purchased the stock of the said Citizens' Fuel Company and Mahoning Gas & Heat Company in April, 1905. After this, the business of furnishing natural gas to consumers in the borough of Punxsutawney was continued by the Mahoning Company exclusively in its own name, and with contracts taken solely by it, and by no other company, down to November 29, 1906; the number of consumers in April, 1905, being 1,022. On November 29, 1905, a merger agreement was drawn between the three companies, and filed in the office of the Secretary of the Commonwealth January 11, 1906, and letters patent issued January 29, 1906, to the new Consolidated Company, T. W. Phillips Gas & Oil Company; and the latter company, being the defendant herein, has since carried on said natural gas business, using the gas supply formerly owned by the Mahoning and Citizens' Company, but principally the gas obtained by other sources.

"(17) The rate of 25 cents net per thousand cubic feet proposed to be charged by defendant for natural gas supplied by it to consumers in Punxsutawney borough is fair and reasonable considering the facts as shown by the testimony in this case.

"(18) Up to the summer of 1910 the defendant company continued to charge and render bills for gas at the rate of 22 cents per thousand cubic feet with a discount of 2 cents per thousand if paid on or before the 10th of the month, and in the summer of 1910 advanced the price to 27 cents per thousand cubic feet with a discount of 2 cents per thousand cubic feet if paid on or before the 10th of the month."

The court entered a decree dismissing the bill.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Raymond E. Brown, of Punxsutawney, and Charles Corbet, of Brookville, for appellants. T. O. Campbell, of Butler, and John E. Calderwood, of Punxsutawney, for appellee.

MOSCHZISKER, J. This was a proceeding in equity to restrain the defendant company from increasing the price of natural gas to consumers in the plaintiff borough. The bill averred, *inter alia*, as follows: That the plaintiffs are residents of the borough of Punxsutawney and patrons of the defendant company; that the defendant is a corporation organized under the provisions of Act May 29, 1885 (P. L. 29), for the purpose of supplying natural gas to the public in the borough of Punxsutawney and places adjacent thereto; that the defendant corporation is the only company authorized to furnish natural gas in the said borough; that the defendant acquired its franchises to occupy the streets of the borough, and to furnish natural gas to the inhabitants thereof through and by virtue of its merger or consolidation with the Citizens' Fuel Company, the assignee of one A. L. Cole; that, in the consolidation or merger of the Citizens' Fuel Company into the defendant company, the latter acquired all the rights and assumed all the obligations of the former, one of which was the obligation not to charge more than 20 cents per thousand cubic feet of natural gas; that the franchises acquired through the Citizens' Fuel Company are the only franchises owned or possessed by the defendant company authorizing it to occupy the streets of the territory formerly constituting the boroughs of Punxsutawney and Clayville, and now included in the borough of Punxsutawney; that, notwithstanding the provision in its franchise restricting the price of natural gas to 20 cents per thousand cubic feet, the defendant company has raised the price to 25 cents, and threatens to cut off the supply of any one refusing to pay the increased rate; that the 25 cent rate is "unreasonable, unjust, exorbitant, excessive, vexatious and oppressive," and that under the 20 cent rate the defendant would reap an ample profit on its investment.

The defendant company filed an answer admitting many of the allegations of the bill, but averring that its predecessors in title were in possession of the streets, etc., of the boroughs of Punxsutawney and Clayville (now the borough of Punxsutawney) for the purpose of laying and maintaining pipes and conduits for the transportation of natural gas to the citizens of these boroughs for heat, light, and manufacturing purposes, and were so furnishing natural gas prior to the alleged grants of permission by these boroughs to A. L. Cole; that the Citizens' Fuel

Company was not the sole predecessor in title of the defendant; that the Mahoning Gas & Heat Company was incorporated on March 5, 1883, under Act April 29, 1874 (P. L. 73), for the purpose of manufacturing gas and supplying light and heat to the public of the borough of Punxsutawney and of territory adjacent thereto; that under its charter the Mahoning Gas & Heat Company entered upon the streets and public ways of Punxsutawney and Clayville and supplied natural gas to the people thereof, with the consent of both municipalities, unaffected by any agreement or stipulation as to the price to be charged for gas; that on May 14, 1886, the Mahoning Gas & Heat Company accepted the provisions of Act May 29, 1885 (the natural gas company act), the place or places where gas was to be supplied being the boroughs of Punxsutawney and Clayville and Young township, and that letters patent for that purpose were granted to it on May 14, 1886; that on June 24, 1904, a charter was granted to the Citizens' Fuel Company; that the latter company laid a short line of pipe to the streets of Punxsutawney, but never supplied gas to either the citizens of that borough or of the borough of Clayville; that on or about December 15, 1905, the T. W. Phillips Gas & Oil Company, a corporation organized under the provisions of Act May 29, 1885, was consolidated with the Mahoning Gas & Heat Company and the Citizens' Fuel Company, as the T. W. Phillips Gas & Oil Company, under the provisions of Act May 29, 1901 (P. L. 349); that the last-named company supplied gas to the public of the boroughs of Punxsutawney and Clayville until the consolidation of those boroughs in March, 1907, since which time it has supplied gas to the inhabitants of the new borough of Punxsutawney; that the privileges or franchises granted to Cole and assigned by him to the Citizens' Fuel Company are not the only ones "owned, possessed, enjoyed, or exercised" by the defendant to enter upon the streets or highways of Punxsutawney; that no gas was ever furnished to the boroughs of Punxsutawney or Clayville by the Citizens' Fuel Company, but that it was first furnished by the Mahoning Gas & Heat Company, and, since the latter's merger with the T. W. Phillips Gas & Oil Company, by the consolidated company; and, finally, that the charges for gas intended to be made by the defendant company are not "unreasonable, unjust, unfair, exorbitant, excessive, vexatious, burdensome and oppressive," as alleged by the plaintiffs, but that they are "reasonable, fair and just," concluding with a prayer to dismiss the plaintiffs' bill with costs. After hearing, the court below found the disputed facts substantially as set forth in the answer, and entered a decree that the bill be dismissed at the cost of the plaintiffs. The latter have appealed.

The principal question is: Did the defendant company acquire the right to occupy the streets of the borough of Punxsutawney and to furnish natural gas to the inhabitants thereof from the Citizens' Fuel Company or from the Mahoning Gas & Heat Company? For upon this depends the further question of whether or not the defendant company's franchise carries with it the obligation not to charge more than 20 cents per thousand cubic feet of natural gas to the consumers in that borough.

[1] A review of the evidence satisfies us that the court below was right in finding that the defendant company was furnishing gas in the plaintiff borough by virtue of the franchise theretofore exercised by the Mahoning Company, and not under the franchise of the Citizens' Company, and in concluding that the defendant was not fixed with the restriction or limitation contained in the latter. The Mahoning Company was actually engaged in furnishing and marketing gas in the territory of the plaintiff borough prior to the passage of the act of 1885, and within that territory it was possessed of and continued to exercise all the rights conferred upon it by that act down to the time of its merger into the defendant company in 1905. *Phila. Co. v. Freeport Boro.*, 167 Pa. 279, 31 Atl. 571; *Allegheny City's Appeal*, 11 Atl. 658.

[2] The fact that the stock of the Mahoning Company was acquired by owners of the stock of the Citizens' Company, and that the net proceeds from the sale of its product, after payment of all its proper corporate expenses, were turned into the treasury of the latter corporation, would not serve to extinguish its individual franchise or rights. The business of the Mahoning Company continued to be conducted in its own name and by its own duly elected officers, and the Citizens' Company never marketed its gas in the territory in question, except by a sale in bulk to the Mahoning Company; in other words, it did not exercise the right to supply gas to the citizens, etc., granted to it by the municipal authorities.

[3] The corporation merger and consolidation act of May 29, 1901 (P. L. 349), provides in section 3 that the new corporation shall be possessed of "all the rights, privileges and franchises" theretofore vested "in each of its constituent corporations, and that "all debts, duties and liabilities of each of said constituent corporations shall thenceforth attach to the new corporation." As stated by the learned court below: "The weight of the authorities seems to be that, when the act of consolidation gives to the consolidated company the rights and privileges of the constituent companies or makes the consolidated company subject to the obligations of the constituent companies, the rights and obligations are not extended by the act to all of the property of the consolidated company.

not only apply severally to the property of each constituent company taken over by the consolidated company." And the following authorities seem to sustain this rule: 2 Morwetz on Private Corporations, §§ 947, 950; 6 Cyc. 305, par. 2; 89 Am. St. Rep. 632, note; Phila. & Wilmington R. R. Co. v. Maryland, 51 U. S. (10 How.) 876, 13 L. Ed. 461; *Domlinson v. Branch*, 82 U. S. (15 Wall.) 460, 1 L. Ed. 189; *Minot v. Railroad Co.*, 85 U. S. (18 Wall.) 206, 21 L. Ed. 888; *Chesapeake & Ohio R. R. Co. v. Virginia*, 94 U. S. 718, 4 L. Ed. 810; *Pullman's Palace Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; *People's Gaslight & Coke Co. v. Chicago*, 194 U. S. 1, 24 Sup. Ct. 20, 48 L. Ed. 851. On this subject also see our own cases, *Gould v. Langdon*, 48 Pa. 365, and *Brown v. Susquehanna Boom Co.*, 109 Pa. 57, 1 Atl. 156, 58 Am. Rep. 708. But it is only necessary to decide the present case on its own facts. Since the Citizens' Company had not exercised its right to supply gas to the inhabitants of the plaintiff borough and the defendant was operating in that territory under the franchise of the Mahoning Company, we conclude that the court below committed no error in deciding that under our act the consolidated company had all the rights of the Mahoning Company in the territory in question free from the limitation contained in the franchise of the Citizens' Company.

The only other point of importance raised by the assignments of error concerns the reasonableness of the charge for gas made by the defendant company. As to this, it is sufficient to state that we agree with the court below "that the rate of 25 cents per thousand cubic feet proposed to be charged by the defendant for natural gas supplied by it to consumers in Punxsutawney borough is fair and reasonable considering the facts as shown by the testimony in this case."

The assignments of error are all overruled, and the decree is affirmed, at the cost of the appellant borough.

COHEN v. SMITH.

[Supreme Court of Pennsylvania. Jan. 6, 1913.]

LANDLORD AND TENANT (§ 5*)—RECEIPT ON LEASE.

A paper stating: "Received of C. and L. \$25 as payment for rent on storeroom at M. street, at the rate of \$87 per month, store to be fitted up to suit the business, namely, two windows two feet deep, shelving, painting, papering, etc., furnish heat; the building to be completed and ready for business August 1, 1910. E. W. Smith"—is a receipt, and not a lease; it not being signed by the lessee, and there being no provision as to the payment of the rent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 3-9; Dec. Dig. § 5.*]

Appeal from Court of Common Pleas, Jefferson County.

Action by Reuben Cohen against E. W. Smith. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKE, JJ.

W. M. Gillespie, of Lindsey, and Jacob L. Fisher, of Punxsutawney, for appellant. W. B. Adams, of Punxsutawney, and Charles Corbet, of Brookville, for appellee.

BROWN, J. Appellant's claim for damages is based upon what he alleges was the failure of the appellee to give him possession of a storeroom in accordance with the terms of a written lease. The following is a copy of what he avers is the lease from the appellee: "Punxsutawney, Pa., June 22, 1910. Received of Cohen and Lewis \$25 as payment for rent on storeroom located at Mahoning street (building formerly occupied by Spirit Publishing Co.), at the rate of \$87 per month. Store to be fitted up to suit the business, namely, two windows two feet deep, shelving, painting, papering, etc., furnish heat. Lease on storeroom to be for five years from April 1, 1911. The building to be completed and ready for business Aug. 1, 1910. E. W. Smith." Lewis dropped out of the transaction shortly after Smith signed the paper, and whatever rights were granted by it passed to Cohen, who is entitled to recover, if the appellee is liable for a breach of contract.

The main contention of the appellant is that the written instrument which forms the basis of his claim is an unambiguous lease, and the court below should have so construed it, instead of permitting a jury to determine whether it was a mere receipt for \$25, to be credited as rent on a lease subsequently to be entered into by the parties. In submitting this question to the jury they were instructed as follows: "The first question for you to determine is whether or not this paper of June 22d is a lease or receipt. If it is a receipt, and the parties contemplated a lease subsequently to it, which they were to sign, then it will be your duty to find a verdict for the defendant, and you will have nothing whatever to do with damages. If, on the other hand, you conclude from the weight of the evidence that the paper of June 22d was a lease, that the parties believed that it was a finality so far as the leasing was concerned, and that there was a meeting of the minds, then it will be your duty to go into the second question of determining the damages that the plaintiff has sustained."

The paper signed by the appellee is not, as appellant contends, "a clear, plain, unambiguous contract of lease," and the learned trial judge would have erred if he had so interpreted it in the face of appellee's objection to it as a formal lease. It is not

signed by a lessee, and does not embrace the ordinary terms of a lease. On the contrary, it apparently contemplated the subsequent execution of a lease, if the natural meaning is to be given to the words "Lease on storeroom to be for five years from April 1, 1911"; and again, there is no provision as to the payment of the rent. There is a mere statement that the rent is to be "at the rate of \$87 per month." To a landlord there is no more important item in a lease than the provision for the payment of the rent, and it is equally important to the tenant that he know when he is to pay; but, from the paper which the appellant insists is a lease, who can tell when the rent was to be payable? Was it to be monthly, quarterly, or yearly? If there was a completed contract between the appellant and the appellee for the lease of the storeroom for a term of five years, it may be safely assumed that they would have entered into it in writing in the ordinary way, signed by them respectively as lessor and lessee, and containing, among other provisions, one as to the time the rent would be payable. In this connection it may be proper to note that an averment in plaintiff's statement of claim is that the appellee "did not make, execute, and deliver to plaintiff the lease contemplated by the contract of the parties, as evidenced by the foregoing receipt."

The jury found upon ample evidence that the appellant and appellee had not entered into a lease, and that the paper given by the latter to the former was not a completed

contract. A brief reference to the testimony will suffice to vindicate the verdict. The appellant, when called as a witness on his own behalf, admitted that it was his understanding that when the storeroom was finished a lease was to be drawn, that he himself, after June 22, 1910, had submitted a written memorandum of the provisions which he wished to be incorporated in the lease, and that he did not wish to sign a lease until the building was completed; and the testimony of the appellee was that he said to the appellant: "Now, maybe this is a little fast, and we will not agree when we come to writing out a lease; and if we cannot agree I will pay you the \$25 back." This was not contradicted by the appellant.

The receipt given by the appellee is too vague, indefinite, and uncertain to be enforced as a formal lease. All matters important in every contract of lease were clearly intended to be taken up and determined by the parties when the final agreement was made. This, in effect, was the finding of the jury, and there was therefore no breach of a contract on the part of the appellee entitling the appellant to damages. *James v. Penn Tanning Co.*, 221 Pa. 634, 70 Atl. 835; *Way v. Fraser*, 230 Pa. 49, 79 Atl. 154. The question of fact involved in this controversy was submitted to the jury in a charge free from error; and, as there is nothing in the assignments complaining of the court's rulings on matters of evidence which calls for reversal, the judgment must be affirmed.

Judgment affirmed.

NELSON v. BOCK et al.

(Supreme Court of New Jersey. March 5, 1913.)

1. REPLEVIN (§ 50*)—REBONDING REMEDIES.

Where defendants in replevin rebond, the suit is turned into an action for damages for the value of the property, or for the return of the goods to the plaintiff, at his option.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 186; Dec. Dig. § 50.*]

2. BANKRUPTCY (§ 436*)—EVIDENCE OF DISCHARGE—ASSERTIONS OF COUNSEL.

A mere assertion of counsel that the district court did not have jurisdiction, because defendant, at the time of the trial, was a bankrupt, in the absence of evidence to support it, was properly disregarded.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 840-842, 865; Dec. Dig. § 436.*]

3. REPLEVIN (§ 108*)—JUDGMENT FOR DAMAGES—SUFFICIENCY.

Under District Court Act (2 Comp. St. 1910, p. 1994) § 127, providing that, where defendant has rebonded, the plaintiff can recover both for the value of the goods and their detention, the judgment need not specify how much is awarded for the value of the goods and how much for the detention.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 422; Dec. Dig. § 108.*]

4. APPEAL AND ERROR (§ 1012*)—REVIEW—WEIGHT OF EVIDENCE.

An objection that a judgment is against the weight of the evidence cannot be considered if there is any evidence to support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.*]

5. PROPERTY (§ 9*)—OWNERSHIP—EVIDENCE—POSSESSION.

Possession of personal property is prima facie evidence of ownership.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9.*]

6. EVIDENCE (§ 374*)—BILL OF SALE—PRELIMINARY PROOF—NECESSITY.

The refusal to receive a bill of sale in evidence was proper, where there was a subscribing witness who was not produced, nor proof made that he could not be obtained.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1583, 1584, 1587-1612; Dec. Dig. § 374.*]

7. REPLEVIN (§ 52*)—CLAIMS OF THIRD PERSONS—STATUTES.

A person, who, after levy in replevin, filed with the constable a claim of property pursuant to District Court Act (2 Comp. St. 1910, p. 2008) § 190, relating to claims of third persons and abandonment thereof, but who had failed to follow it up by applying for a jury trial, was not estopped from setting up ownership in the replevin suit, except as against the constable; such statute being only intended to protect the officer.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 183; Dec. Dig. § 52.*]

8. EXECUTION (§ 264*)—SALE—TITLE OF PURCHASER.

The purchaser at judicial sales under execution takes only the interest of the defendant in execution; the doctrine of caveat emptor applying.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 747-758; Dec. Dig. § 264.*]

Appeal from District Court of Jersey City.

Suit by John Nelson against George L. Bock and others. Judgment for plaintiff, and defendants appeal. Reversed.

Argued November term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

T. A. Spraggins and E. R. Hayne, both of Jersey City, for appellants. Frank G. Turner, of Jersey City, for appellee.

PARKER, J. [1] This was a replevin suit. The property was taken under the writ, and the defendants rebonded and thereby secured its return. The result of this was to turn the suit into an action of damages for the value of the property, or for the return of the goods to the plaintiff, at the option of the plaintiff. Lembeck & Betz Brewing Co. v. Tarrant, 79 N. J. Law, 372, 75 Atl. 474.

It appeared that the goods claimed, consisting of an automobile and some office furniture, had been levied on by a constable under a district court execution as the property of the Communipaw Motor Car Company at its place of business, and after due advertisement were sold, the furniture to one Moore, who by his bill of sale transferred it to plaintiff, Nelson, and the automobile to Nelson at the constable's sale.

At the trial of that replevin suit the defendant Cecilia Bock claimed to be the owner of the property; but her claim was disallowed and certain evidence in support of it overruled, and a judgment given for plaintiff in the sum of \$300.

[2] The first ground of appeal is that the district court was without jurisdiction to try the action, because the defendant George L. Bock, at the time of the trial, was a bankrupt. It suffices to say that there was absolutely no proof of this in the case, and the mere assertion of the fact by counsel at the trial was properly disregarded by the court.

[3] The next point is that the judgment is in violation of section 127 of the District Court Act (2 Comp. St. 1910, p. 1994), in that the court did not find the value of the goods and chattels, as well as the damages of the plaintiff, and render a judgment in damages, as well for the value of the goods and chattels as for taking and detaining them. This objection is without substance. The claim seems to be that the judgment should specify how much is awarded for the value of the goods and how much for the detention. But we see no reason for holding that these items should be separated in the judgment any more than that the jury, in an action in debt, should return a verdict specifying how much is awarded for the principal of the debt and how much for the interest thereon. The statute is intended to prescribe the elements of which the total of the judgment is composed, not to require a specification of those elements in the judgment.

[4, 5] The point that the judgment is against the weight of evidence is, of course, not one to be considered in this court, if there is any evidence to support the judgment, as, in our opinion, there was. The possession of the property by the Communipaw Motor Car Company was *prima facie* evidence of the title of that company. Wigmore on Evidence, § 2515. That *prima facie* title was apparently transferred by the constable at the sale under execution and levy (all properly proved) and then passed to the plaintiff, Nelson. The finding of the court on the question of property, therefore, cannot be disturbed. This also covers the fourth point urged in the brief.

The fifth point challenges an alleged ruling of the trial court on evidence to which we are not cited by the brief, and which we have been unable to find on examination of the case. It may be well to add, irrespective of the alleged ruling of the court, that there was other competent evidence which will be sufficient to support the finding of the court.

[6] The sixth point is that the court refused to receive evidence as to the execution of the bill of sale by the Communipaw Motor Car Company to the defendant Cecilia Bock. This refusal was manifestly proper, in view of the fact that the bill of sale had a subscribing witness, and the subscribing witness was not produced, and no proof was made that indicated that such witness could not be obtained. *Corlies v. Vannote*, 16 N. J. Law, 324-329; *Worman v. Seybert*, 78 N. J. Law, 176, 73 Atl. 529; *Boyle v. Knauss*, 81 N. J. Law, 330, 335, 79 Atl. 1025.

[7] Upon the last point, however, the judgment must be reversed. The defendant Cecilia Bock was sworn, and was asked whether, at the time of the levy, she was the owner of the property. This was objected to, on the ground that after the levy Mrs. Bock had filed with the constable a claim of property pursuant to section 190 of the District Court Act (C. S. 2008), and had failed to follow it up by applying for a jury trial; and that therefore she was estopped from setting up ownership of the property in the replevin suit. This ruling of the district court was, in our judgment, erroneous. The statute in question reads as follows: "In all cases where any constable or sergeant-at-arms shall, by virtue of any writ of execution or attachment issuing out of any district court, levy on, attach or take into his possession any goods or chattels which shall be claimed by notice in writing, delivered to said constable by any other person than the judgment debtor, he shall, immediately upon such claim, delay his sale of the same ten days, that the said claimant may, within the said time, apply to the judge of such court for a venire to summon a jury of six lawful men as jurors to try the right of such claimant to such property; and it shall be lawful for such judge to order a venire to issue the

same and direct a return thereof to be made and to proceed therein as in other cases of trial by jury, but the claimant shall, in all cases, give two days' notice in writing to the judgment creditor of the time and place of the said trial; but if the claimant shall not, within ten days, apply to said court and have his right tried as aforesaid, the said claim shall be considered abandoned and the constable shall proceed as if it had not been made and shall not be liable in any action therefor thereafter."

A similar provision is found in section 62 of the Justice Court Act (C. S. 2999), except that the latter section does not contain the words, "and shall not be liable in any action therefor thereafter." The section of the Justice Court Act was considered in the case of *Berry v. Chamberlain*, 53 N. J. Law, 463, 23 Atl. 115. In that case there had been a trial on the claim of property and a verdict against the claimant, and this was held conclusive, so as to bar the claimant from any action against the purchaser under the execution. Chief Justice Beasley remarked at page 465 of 53 N. J. Law, at page 116 of 23 Atl.: "The claimant has the option of presenting his claim, or to vindicate his rights of property by an action of replevin or in trespass *de bonis asportatis*; plaintiff in execution may give bond and delay a sale under his execution, and thus leave the question of title for trial to the ordinary tribunals. But the parties can waive such rights and, at their option, accept the easier method of litigation proffered by the Legislature; and in such event the rule applies *volenti non fit injuria*."

In *Van Marter v. Lucas*, 64 N. J. Law, 182, 44 Atl. 865, a claim of property was filed; but no trial was demanded, and the constable proceeded to sell, after waiting for the statutory time. After the sale the claimant sued the constable in tort, and recovered a judgment for the value of the property. Judgment was reversed in this court, on the ground that the constable was protected by the statute; the court holding that "if, within 10 days after service of the statutory claim, the claimant takes no action in vindication of his right, and the officer proceeds to sell, in reliance upon the implied abandonment of the claim, he is exonerated from responsibility in tort to the claimant."

In *Masters v. Champion*, 74 N. J. Law, 323, 65 Atl. 899, a similar state of facts existed, and the court followed the ruling in *Van Marter v. Lucas*. The case was carried to the Court of Errors and Appeals, and is reported in 75 N. J. Law, 768, 69 Atl. 224. At page 770 of 75 N. J. Law, at page 224 of 69 Atl., Chancellor Pitney, writing the opinion of the court, remarked: "Whether the estoppel inures to the benefit of purchasers at the constable's sale, or of any person other than the plaintiff himself, is a question not presented by the assignments of error, and therefore not decided. In *Berry v. Chamber-*

lain, 53 N. J. Law, 463 [23 Atl. 115], the Supreme Court held that, where, under a claim of property, the right of property is tried, the verdict is conclusive for all purposes as between the claimant and the plaintiff in execution. So far as we are reminded, this question has not yet been passed upon by this court."

Nor do we find any case in which it has been passed upon by the Supreme Court. The object of the statute, however, appears to be fairly clear. It is intended for the protection of the claimant by enabling him, through the service of claim of property in due form, to secure a reasonable delay of the sale and a right, if he chooses to exercise that right, of trying the title before a jury in a summary way; and it is intended for the protection of the constable, in case the claim is not followed up by a trial, by barring in such case any action after the sale as against the constable. But we find nothing, either expressly or by implication, in the act which is intended to preclude the claimant from bringing an action against others than the constable for the recovery of the property or its value.

[8] The fundamental rule in this state with respect to judicial sales under execution is that the purchaser takes such title as the officer is in a position to convey by virtue of the proceedings; and the doctrine of caveat emptor applies in full force, and the invariable practice in such sales is to offer simply the right, title, and interest of the defendant in execution.

Under these circumstances, to say that the act of a claimant to the property in formally asserting that claim by notice served on the officer is to have the effect, in cases where the right of property has not been subsequently tried out before a jury, of barring the assertion of the claim, not only as against the officer, but as against any other person found subsequently in possession of the property, is, in our view, stretching the statute far beyond its plain intent. We deem it competent for such claimant, whether plaintiff or defendant, in an action for replevin or trespass, to set up his claim as against any other person but the officer that made the sale. Consequently the trial court was in error in excluding the testimony of Mrs. Bock as to her ownership, and for this reason the judgment must be reversed and a new trial had.

IN RE GRUNOW.

(Supreme Court of New Jersey. March 4, 1913.)

1. WITNESSES (§ 196*)—PRIVILEGE—GROUNDS—TESTIMONY BEFORE GRAND JURY.

Where a newspaper published a libelous article and a reporter testified before a grand jury that he wrote the same from information furnished by others, he was not privileged, by

reason of the fact that he was a reporter, to refuse to disclose the sources of his information.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 744-746; Dec. Dig. § 196.*]

2. GRAND JURY (§ 26*)—PROCEEDINGS—INVESTIGATION.

Where a libelous article, concerning alleged graft by a public commission, was printed in a newspaper, all those in any way concerned in its publication were offenders against the law, and hence it was a proper subject of investigation by the grand jury.

[Ed. Note.—For other cases, see *Grand Jury*, Cent. Dig. §§ 64, 65; Dec. Dig. § 26.*]

3. GRAND JURY (§ 36*)—INVESTIGATION—MATERIAL QUESTIONS—"CONTEMPT."

Where a grand jury was lawfully investigating the publication of a libelous article in a newspaper, a question asked of a reporter who wrote the article to disclose the names of the persons from whom he obtained his information was both relevant and material to the investigation, to enable the grand jury to ascertain who were concerned in the publication of the article, and hence the reporter's refusal to disclose the names of his informants constituted a "contempt."

[Ed. Note.—For other cases, see *Grand Jury*, Cent. Dig. §§ 75-78; Dec. Dig. § 36.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1489-1492; vol. 8, p. 7614.]

Appeal from Court of Oyer and Terminer, Bergen County.

Contempt proceedings by Julius Grunow. From an order of the Bergen Oyer & Terminer Court adjudging respondent guilty of contempt, he appeals. Affirmed.

Argued June term, 1912, before SWAYZE, VOORHEES, and KALISCH, JJ.

George L. Record and Merritt Lane, both of Jersey City, for appellant. Wendell J. Wright, of Hackensack, for the State.

KALISCH, J. [1] The appellant was adjudged guilty of contempt by the court of oyer and terminer of Bergen county, and fined \$25. The facts out of which the appellant's contumacy arose are briefly these: The appellant is a newspaper reporter connected with the Jersey Journal, a newspaper published in Bergen county. On the 12th of December, 1911, there appeared in the Jersey Journal an article under the caption, "Graft Charges Starts Talk of a Commission," which, in substance, charged that one of the Ridgefield Park village trustees named Ayers had, in open meeting of the board of trustees charged that a claim of \$703 for grading presented by Surveyor S. J. Shaw had been paid for in a previous bill rendered. Grunow was subpoenaed to appear before the Bergen county grand jury of the December term, 1911, and after having been duly sworn testified before that body that he was the author of the article in question. He was then asked who gave him the information that led to the writing of the article, but he refused to answer. This question was not propounded to the witness until he had tes-

tified that he had written the article upon information obtained from other persons. It was the appellant's refusal to answer this question which moved the grand jury, through the prosecutor of the pleas, to apply to the court of oyer and terminer for an attachment against the appellant for contempt of court. A rule to show cause was issued, and upon examination of the defendant, who appeared in answer to the rule, it appeared that he was sworn and examined in a certain matter of *State v. Evening Journal Association* and others, then and there being under investigation by the said grand jury; that he testified before said body that he knew the name or names of the person or persons who furnished the information upon which he wrote the article, and that he refused to testify as to the name or names of such person or persons who furnished the information upon which the said article was prepared. The appellant gave as his reason for refusing to answer the question the following: "I declined to give the sources of my information or the names of any person or persons who gave me any information about it, and gave as my reason for such refusal that I was a newspaper reporter, and therefore could not give up my sources of information." In effect he pleaded a privilege which finds no countenance in the law. Such an immunity, as claimed by the defendant, would be far-reaching in its effect, and detrimental to the due administration of law. To admit of any such privilege would be to shield the real transgressor and permit him to go unwhipped of justice.

[2, 3] The appellant further claims that there was no proceeding then pending before the grand jury which made the testimony relevant and material. It appears that the grand jury was conducting an investigation regarding the publication of the article in the *Jersey Journal*. The article upon its face is libelous. All those who were in any way concerned in its publication were offenders against the law. It was both material and relevant to the investigation had before that body to ascertain who were concerned in the publication of the article. By what has been said it is not to be inferred that a grand jury may not, without any complaint made before it, upon its own initiative investigate matters relating to the conservation of the public peace, and to the protection of the health, morals, and safety of the community, and in this regard subpoena witnesses and examine them.

The appellant challenges the good faith of the grand jury in making the investigation and the proceedings thereunder, but, even if this were conceded, it does not afford any legal excuse for the appellant to refuse to answer the question propounded to him by that body.

Judgment will be affirmed.

ISTVAN v. NAAR.

(Supreme Court of New Jersey. March 4, 1913.)

(Syllabus by the Court.)

1. HEALTH (§ 3*)—ABOLITION OF BOARDS OF HEALTH.

The act relating to regulating and providing for the government of cities, etc. (P. L. 1911, p. 462), does not have the effect of abolishing boards of health organized under the general act of 1887 (2 Comp. St. 1910, p. 2656 et seq.) in municipalities which adopt it as a governmental scheme.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. § 2; Dec. Dig. § 3.*]

2. CRIMINAL LAW (§ 1015*) — CERTIORARI — MULTIFARIOUSNESS.

A writ of certiorari, bringing up two convictions in separate proceedings for separate violations of municipal regulations, is multifarious.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1015.*]

Certiorari by Blasius Istvan to review a conviction for violating an ordinance of the Board of Health of Trenton. Conviction set aside.

Argued June term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Scott Scammell and Joseph L. Bodine, of Trenton, for prosecutor. Charles E. Bird, of Trenton, for defendant.

PARKER, J. [1] The important question raised by this certiorari is whether, by the adoption of the act known as the "Walsh Act" (P. L. 1911, p. 462), as the law regulating the municipal affairs of the city of Trenton, the general scheme of statutory regulation of the public health was superseded so far as related to the local board of health, and not only the terms of office of the members of that board terminated, but the board of health as a corporate entity wiped out of existence. The question arises directly as bearing on the legality of two convictions brought up by the writ, both for violations of the local Sanitary Code. Prior to the adoption by Trenton of the act of 1911, suits to recover penalties for such violations must have been brought in the name of the local board of health. 2 C. S. p. 2686, § 18. After the adoption of the act, the new government of five commissioners by resolution declared that the "services" of the members of the board of health were "discontinued and ended, to the end that the powers and duties pertaining to the public health now vested in this board (i. e., the board of commissioners), by reason of the operation of chapter 221 of the Laws of 1911, may be exercised and discharged by this body." And, evidently upon the theory that the board of health itself no longer existed as such, the suits on which the convictions were had were brought in the name of "the inhabitants

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the city of Trenton," being the corporate name of that city.

Apart from the Walsh Act, the matter is controlled by the Health Act of 1887 (2 O. S. p. 2686). Section 18 of that act gives to local boards of health power to prescribe penalties for violation of their ordinances, and provides, among other things, that certain courts, on receiving sworn complaint, may "issue process at the suit of any such board" and hear the case. This is the fundamental provision relating to enforcement of penalties for violation of the local Sanitary Code, and is found in a comprehensive scheme of legislation to protect the public health over the entire state, which, at the time the Walsh Act was passed, had been in full operation for about a quarter of a century, and applied to all municipalities alike. How far, if at all, was this scheme altered in Trenton by the adoption of the Walsh Act by popular vote? The pertinent provisions of that act are these: "The city council or other governing body or bodies heretofore acting as governing body or bodies and having any other functions shall be ipso facto abolished, and the terms of all councilmen, or aldermen, and all other officers whether elective or appointive, shall immediately cease and determine." Section 2. "The board of commissioners shall have and possess all administrative, judicial and legislative powers and duties now had and possessed by the mayor and city council and all other executive or legislative bodies in said city, and have complete control over the affairs of the city adopting the provisions of this act." The departments of public affairs, revenue and finance, public safety, streets and public improvements, and parks and public property are created. There is no department of public health, and no mention of any board of health. The act provides that the board of commissioners shall assign the powers and duties of the several departments; also that it shall create such subordinate boards and appoint such officers as it may deem necessary for the proper conduct of the affairs of the city. Section 4. By section 8 all cities adopting the act are empowered to enact and enforce, by fine or imprisonment, ordinances necessary for the protection of life, health, and property; to declare and prevent, and summarily to abate, nuisances, etc. Section 17 makes an exception as to formalities of enactment in favor of ordinances "for the immediate preservation of the public peace, health, or safety." The word "health" does not occur elsewhere in the act.

It can hardly be denied that the Legislature intended to confer on cities adopting the act of 1911 some power to legislate in matters of public health. But there is much greater difficulty in gathering, from the general provisions creating the board of commissioners and defining their powers, and naming the five departments, an intent to transfer to

such board all the legislative and administrative jurisdiction previously exercised by the board of health under the Health Act. Granting that the Legislature, by the enactment of the statute of 1911, wished to create a scheme for the centralization of responsibility and authority, we should pause before construing the act as meaning, in the absence of plain words to that effect, that, after its adoption, there was to be no such thing as a board of health in the city of Trenton, and that the state-wide system of health boards, which had existed for nearly a quarter of a century, was to be abrogated in cities adopting the act of 1911. The very catalogue of the departments would indicate that no interference with the Health Act was intended, for the functions of a board of health have no special relevancy to any one of those departments, though they are in some aspects germane to all of them.

The secondary control of the board of commissioners, however, over the public health, is ample. By the Health Act itself (section 9), the members of the local board of health are "appointed in such manner and hold office for such terms as the governing body may by ordinance provide." By the Walsh Act the terms of all officers expire upon the organization of the board of commissioners. This left that board in absolute control of the situation, with power to fill the vacancies and to fix the terms of office of members of the board of health, subject to certain limitations. What the board of commissioners seems to have done by its resolution was to appoint its members as a board of health; at least, we deem this to have been the effect of their action. But, when so appointed and so acting, they were the board of health of Trenton, and not the board of commissioners, and as such board of health should have appeared as plaintiff. This result makes it unnecessary to consider the sufficiency of the title of the Walsh Act as indicating a legislative intent to alter or amend the Health Acts by abolishing boards of health in certain cities. See *Board of Health v. Railroad Co.*, 77 N. J. Law, 15, 71 Atl. 259.

[2] The convictions will be set aside. We do not wish, however, to be understood as sanctioning sub silentio the practice of bringing up two convictions in different proceedings by one writ of certiorari. In *Crombie v. Engle*, 19 N. J. Law, at page 85, it was said the writ was not multifarious because the two orders brought up were in the same proceeding. Such a saving condition does not exist in this case. There should have been two writs presented for allowance. In *Bakely v. Nowrey*, 68 N. J. Law, 732, 54 Atl. 833, a similar point was noted by the Court of Errors and Appeals, but not passed upon, because not mooted in this court; but we think there can be no question as to the impropriety of reviewing separate proceedings by one certiorari, just as it would be im-

proper to review separate judgments by one writ of error. *Licari v. Carr*, 86 Atl. 421, Court of Errors and Appeals, November term, 1912, not yet officially reported.

STATE v. KUEHNLE.

(Supreme Court of New Jersey. March 8, 1913.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 174*)—OFFICERS—CRIMINAL RESPONSIBILITY.

A statute declared it to be a misdemeanor for any member of a board of commissioners of any city to be directly or indirectly concerned in a contract for any public improvement to be constructed or made for the public use or at public expense. The defendant was convicted under an indictment which set out facts showing that he was indirectly concerned in a contract made by the board of commissioners of the city of which he was a member with a corporation of which he was at the time a stockholder and officer. The indictment concluded, after stating the facts, by charging "that he was unlawfully and corruptly interested and directly concerned" in the contract. *Held* that, where the facts set out in the indictment clearly disclose a violation of the statute of being indirectly concerned in such a contract, the indictment is sufficient in form to sustain a conviction of being indirectly concerned. The conclusion of the pleader that the facts show that the defendant was directly concerned is of no importance, where the facts stated clearly show that the defendant was indirectly concerned in a forbidden contract, and the words expressing the conclusion of the pleader may be treated as surplusage.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 410-414; Dec. Dig. § 174.*]

Error to Court of Quarter Sessions, Atlantic County.

Louis Kuehnle was convicted of crime, and brings error. Affirmed.

Argued June term, 1912, before GUMMERE, C. J., and GARRISON and BERGEN, JJ.

Bourgeois & Coulcomb, of Atlantic City, and Gilbert Collins, of Jersey City, for plaintiff in error. Edmund Wilson, Atty. Gen., for the State.

BERGEN, J. The offense of which this defendant was convicted is defined in section 32 of "An act for the punishment of crimes (Revision of 1898)"—2 C. S. p. 1755—which declares that any member of "any board of commissioners of any county, township, city, town or borough in this state, who shall be directly or indirectly concerned in any agreement or contract for the construction of any bridge or building of any kind whatsoever, or any improvement whatever to be constructed or made for public use or at the public expense, shall be guilty of a misdemeanor." The indictment which the state claims supports the judgment which the defendant, by his writ of error in this cause seeks to reverse, charges that at the

time the defendant committed the offense of which he was convicted he was a member of the board of water commissioners of the city of Atlantic City, and "that said city was then and there the owner of waterworks directly managed and controlled by it, and the said board of water commissioners was duly authorized and empowered by law to purchase all necessary plants, materials, and supplies for the maintenance, extension, and improvement of such waterworks, and to expend for such purpose such moneys as were appropriated therefor by the city council of Atlantic City; that on the day and year aforesaid, at the city and county aforesaid, and within the jurisdiction of this court, the said board of water commissioners of Atlantic City, pursuant to the power and authority vested in it, the moneys therefor to be expended by said board having been appropriated by the said city council, entered into a contract on behalf of the said city with one F. S. Lockwood for the construction of a water main, commonly known as the 'Timber Water Main,' for the extension and improvement of the waterworks of said city; that, in fact, the said Lockwood was an employé of the United Paving Company, a corporation organized under the laws of the state of New Jersey, and that said contract for the construction of said water main was, in fact, the contract of the said United Paving Company, in which the said Lockwood was named as the party for the purpose of concealing the fact that the said United Paving Company was interested therein, as he, the said Louis Kuehnle, then and there well knew; that the said Louis Kuehnle was then and there a stockholder, director, and officer of the said United Paving Company, and as such was unlawfully and corruptly interested and directly concerned in said contract for the construction of said water main to be constructed and made for the public use of said city and at the public expense of said city, and to be paid for by the said board of water commissioners of which the said Louis Kuehnle was a member, contrary to the form of the statute in such case made and provided."

The second count in the indictment charges that Lockwood was an employé of the United Paving Company at the time the contract was entered into between him and the city, and that the contract was, in fact, the contract of the United Paving Company, in which Lockwood was named as a party for the purpose of concealing the fact that the United Paving Company was interested therein, and "that, after the execution of said contract by said board with said Lockwood, the said United Paving Company entered upon the performance thereof, and is still engaged in performing the same and during the performance of said contract has from time to time received the compensation paid therefor; that the said Louis Kuehnle is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a stockholder, director, and officer of the United Paving Company and unlawfully and corruptly interested and directly concerned in said contract."

Briefly stated, the facts which the indictment sets out are that the defendant was a member of the board of water commissioners of Atlantic City, and as such entered into a contract for the making of a public improvement with a person by the name of Lockwood, who was not the real contractor, but that, in truth and in fact, he was acting for the United Paving Company of which corporation the defendant was a stockholder and officer, and that the contract was carried out by the United Paving Company, the proceeds accruing to that company, and that the use of the name of Lockwood as a contractor had no purpose other than to conceal the truth, which was that a contract had been made by a municipal board, of which the defendant was a member, with a corporation in which the defendant was also interested.

One of the errors assigned challenges the legality of the trial court in disqualifying the sheriff and in appointing jurors by whom the grand jury, which found this indictment, were selected and summoned. This contention has been determined by the Court of Errors and Appeals adversely to the defendant's claim in the case of *State v. Zeller*, 85 Atl. 378.

The next point the plaintiff in error urges is that the trial court should have directed a verdict of acquittal at the close of the state's case, and also at the close of the whole case, "because all the testimony was circumstantial and was consistent with innocence." The argument in support of this proposition is rested mainly upon the theory that there was evidence that Lockwood and a man by the name of Cherry, who the defendant claims were the real contractors, borrowed from the United Paving Company the money necessary to carry on the work, and that this evidence conclusively showing, as claimed, that the Paving Company was not investing money in the contract, but simply loaning it, and that this, being consistent with the innocence of the defendant, should prevail over an inference to be drawn from other testimony that the alleged borrowing was in furtherance of the scheme of concealing the real contractor, which the state claims was the United Paving Company. Whether Lockwood & Cherry were the real contractors depends upon the inference to be drawn from all the facts proven in the case. It appeared that Lockwood was an employé of the Paving Company, that he was without the means necessary to carry out the contract, that the day after the contract was made with Lockwood he assigned 99 per cent. of it to Mr. Cherry, the president of the Paving Company, that nearly all of the warrants were indorsed to the Paving Company, who received the mon-

ey, that the workmen were paid by the agent of the Paving Company, and that the tools of the Paving Company were used in the prosecution of the work, from all of which an inference may be properly drawn that the Paving Company was the real and substantial party to the contract. We have no doubt about the correctness of the ruling of the trial court on this branch of the case.

The next reason suggested why this judgment should be set aside is that "the evidence was not sufficient to support a conviction under the indictment," and this because, as it is urged, the proofs do not show the defendant to have been directly interested as charged in the indictment. The court was asked to charge: "There is no evidence that the defendant was directly concerned in such contract; therefore, he must be acquitted." This the court refused, but instructed the jury that, if there was no evidence that the defendant "was directly concerned in the contract between the Board of Water Commissioners and Lockwood, then if you find that he was indirectly concerned in such contract you may convict him. You need not find that he was directly concerned. If you find that he was indirectly concerned you may convict him under this form of indictment." This the defendant insists was erroneous, and in his brief urges that "the words 'directly interested' are the only words which charge a crime under the statute in question." The court was subsequently requested to charge: "The fact that the defendant was a stockholder, director, and officer of the United Paving Company did not make him directly concerned in the contract mentioned in the indictment within the purview of such section." In dealing with this request the court instructed the jury that he did "not think it did either, but it is not necessary that he should be directly concerned in the contract." The plaintiff in error claims that under the law of the case, as laid down by the trial judge, the jury would not have been justified in convicting this defendant of being directly interested, and therefore, if the crime of being "indirectly interested" is not charged in the indictment, defendant was not charged with any crime which the evidence supports, and that the words "directly interested" are the only words that charge a crime under the statute. To adopt this contention as a legal rule would require us to hold that if this indictment had simply charged the defendant with being "directly interested" in a contract made between a municipality, of which he was one of the officers, and himself to furnish materials for the municipality, it would be a sufficient charge of the crime described in the statute, without a statement of the facts by which the crime is constituted, a procedure condemned in *State v. Spear*, 63 N. J. Law, 179, 42 Atl. 840, in which Mr. Justice Collins, speaking for this court, said: "There must be a description of

the crime of which the defendant is accused and a statement of the facts by which it is constituted, in order to identify the accusation, so that the accused may prepare his defense or so that he may be enabled to plead a previous conviction or acquittal of the same offense, in bar of any subsequent proceedings." And therefore in the present case it was required that the indictment should set forth such facts as would show, if true, that the defendant had been concerned in an agreement or contract forbidden by the statute. Whether the defendant was directly or indirectly concerned or interested must appear from the facts stated, and, if the pleader describes the legal effect of the facts as constituting a direct concern or interest, when it should have been an indirect interest, it is of no consequence, for, if an indictment states facts which constitute a violation of the statute, it would be good if the pleader's deduction therefrom had been omitted. That this indictment charges this defendant with the commission of certain acts, which, if true, show that he was indirectly concerned in a contract between the municipality, of which he was an officer, and another corporation of which he was also an officer, we have no doubt, and whether he was so concerned was a question of fact which was properly submitted to the jury by the trial court, and therefore we find no error in the procedure complained of. Most, if not all, the cases cited by the defendant arose on questions relating to the sufficiency of the indictment on motions to quash, and they are not pertinent here, for there was no motion to quash upon the ground now pressed, and therefore the only question is whether evidence of an indirect concern or interest in a contract is sufficient to justify a conviction under this indictment. We think the facts set out show that the interest or concern was at least indirect, and therefore a crime against the statute was exhibited in the indictment, which is not affected by the allegation therein that the acts of the defendant indicate a direct concern, rather than an indirect one, and the application by the pleader of one name rather than another is but his conclusion of what the facts charge, and should therefore be treated as surplusage.

Another assignment of error is based upon a part of the charge of the court, viz.: "If you can reconcile all these books, documents, and circumstances on which the state relies with the innocence of the defendant, you are to do so, and you should do so. The law requires you to do so. Although they may be consistent with the innocence of the defendant, they are not inconsistent with guilt, but you are not to adopt the guilt of the defendant on that account, you must adopt that which is innocent." The objection made to this part of the charge is that

it puts upon the defendant the burden of establishing his innocence. This we do not think is a correct deduction. The state had made a case which it claimed overthrew the presumption of innocence, and the instruction given to the jury was that they were bound to reconcile the proof with the innocence of the defendant, if they could.

Instead of putting the burden on the defendant, it directed the jury, if they could, to reconcile the facts with the innocence of the defendant, and, although the court said that the facts might be consistent with innocence, they nevertheless were not inconsistent with guilt. This was only an expression of his opinion, but the jury were further instructed not to adopt the guilt of the defendant on that account. We fail to see how the defendant suffered any wrong or injury from this.

The next point argued challenged the admission of testimony tending to show that the amount due for extra work that is, work done not provided for in the contract with Lockwood, but performed by him and Cherry—was assigned to the Paving Company. The objection urged is that as it was not in the original contract the proof of assignment was no evidence of the crime charged. The court refused to strike it out and properly, as we think, for it was some evidence tending to show that the work done under the contract, to which this extra work was an addition, was being done by the Paving Company. If the work was done as an addition to the contract and its price went to the Paving Company, it was some evidence tending to throw light upon the matter in dispute.

We have examined very carefully the other assignments of error and causes for reversal, and find in them no error which requires that this judgment should be reversed, and it is therefore affirmed.

WOODS v. PUBLIC SERVICE CO.
(Supreme Court of New Jersey. March 3, 1913.)

(Syllabus by the Court.)

STREET RAILROADS (§ 99*)—OPERATION—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE—EFFECT OF ORDINANCE.

The driver of a fire apparatus, on the way to a fire, approached a street upon which he knew cars were running at frequent intervals, and his management of the team of horses drawing the apparatus was such that he was guilty of contributory negligence in colliding with a trolley car, unless a city ordinance which made it a misdemeanor for any one in or upon or owning any vehicle to refuse the right of way or in any way obstruct any fire apparatus abrogated the rule relating to contributory negligence, and thus excused him from the application of the rule. *Held*, that such an ordinance, which simply imposes a liability for the non-observance of its terms, does not abrogate the rule relating to contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 200-216; Dec. Dig. § 99.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Circuit Court, Hudson County.
Action by Alfred J. Woods against the Public Service Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial awarded.

The plaintiff was a fireman in the service of the Jersey City Fire Department, and while driving a team of horses attached to a fire engine, in response to a fire alarm, collided with a trolley car belonging to the defendant, resulting in injuries to the plaintiff for which he brought his suit and recovered a judgment, and the defendant has appealed for the following reasons, viz.: Refusal to allow nonsuit upon defendant's motion, the admission of evidence over the objection of the defendant, and failure to charge the jury as requested. The accident happened at the junction of Montgomery street and Varick street in the city of Jersey City. The defendant operates a trolley line through Montgomery street along two sets of tracks, one for east-bound and the other for west-bound cars. Varick street crosses Montgomery street at approximately right angles. On the day of the accident the plaintiff was driving the team at full speed along Varick street towards Montgomery street. As he approached Montgomery street he saw a trolley car running along Montgomery street nearly, if not quite, at the corner of Varick street, and in order to avoid a collision turned his horses sharply around the Montgomery street corner, but not quickly or sufficiently enough to prevent the trolley car from striking the engine and injuring him. An ordinance of the city provides that the officers and men of the fire department "when on duty, shall have the right of way at any fire and in any highway, street, or avenue, over any and all vehicles of any kind, except those carrying the United States mail. And any person in or upon or owning any vehicle who shall refuse the right of way, or in any way obstruct any fire apparatus, or any of said officers while in the performance of duty, shall be guilty of a misdemeanor."

Argued November term, 1912, before GUMMERE, C. J., and GARRISON and BERGEN, JJ.

Edwards & Smith, of Jersey City, for appellant. Peter & John Bentley, of Jersey City, for appellee.

BERGEN, J. (after stating the facts as above). The motion for a nonsuit should have been allowed, and its refusal requires a reversal of this judgment. We think it must be admitted that if a person, in the usual course of business or pleasure, was driving this team of horses at the speed and in the manner plaintiff admits he was driving when the collision occurred, a nonsuit should have been granted. So the only question presented is, Does the fact that the plain-

tiff was driving a fire engine, and entitled to such a right of way against all other conveyances, as is described in the ordinance of the city, absolve him from the legal effect resulting from contributing by his negligence to the accident? We are of opinion that the ordinance does not have this effect. The plaintiff knew that there was a line of trolley tracks in Montgomery street along which cars were being run at frequent intervals, and he had no right to assume that he could drive his apparatus across that street without the slightest regard to the movement of the trolley cars thereon; but, on the contrary, he was bound to exercise reasonable care with reference to conditions which he well knew.

The city ordinance does not justify the driver of a fire engine, even while on duty, in entirely disregarding the rights of others on the public highway. It is intended, by its terms, to prevent the operators of other vehicles from refusing the right of way to a fire apparatus, on its way to a fire, and declares a refusal thereof by any one to be a misdemeanor, but it is no authority for the negligent running down by such apparatus of any other vehicle; and, when this driver approached a street upon which he knew he was liable to find a car in his pathway, or so close thereto that it might be impossible to stop it, he should have had his team under such control as to be able to stop, if necessary, to prevent a collision with another vehicle lawfully upon the street.

An ordinance which imposes a liability for the nonobservance of its terms does not abrogate the rule of contributory negligence. 33 Cyc. 991. To give full effect to the argument of the plaintiff in this case, he would have been absolved from contributory negligence if, seeing the car in ample time to stop his team, he had nevertheless, relying upon his claim to a right of way, driven directly into the trolley car. Such a doctrine has no support in the law.

The right of way, such as the plaintiff claims in this case as his justification for the speed at which he was driving at the point of the accident, did not excuse him from exercising care and prudence in driving across the trolley tracks of the defendant, and as it is not pretended that he exercised ordinary care in the premises, the ordinance evoked affords him no protection, and as, in the absence of such ordinance, he was clearly guilty of contributory negligence, defendant was entitled to the allowance of his motion for a nonsuit.

As the result which we have reached requires a reversal of this judgment, it is not necessary to consider the other questions raised by the plaintiff in error.

The judgment will be reversed, and a new trial awarded.

STATE v. GEHRMANN.

(Supreme Court of New Jersey. March 3, 1913.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 1111*)—RECORD—CONCLUSIVENESS.**

Where after conviction of a defendant it appears from the record that the giving of judgment and imposition of sentence has been regularly postponed, it is not error to impose the sentence at the future day to which the final disposition of the case has been adjourned. The record, being in due form, implies verity, and it cannot be assailed collaterally.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2894-2896; Dec. Dig. § 1111.*]

Error to Court of Oyer and Terminer, Hudson County.

Johanna Gehrmann was convicted of crime, and brings error. Affirmed.

Argued November term, 1912, before GUMMERE, C. J., and GARRISON and BERGEN, JJ.

Alexander Simpson and Isaac F. Goldenhorn, both of Jersey City, for plaintiff in error. Pierre P. Garven, of Jersey City, for the State.

BERGEN, J. The record which is submitted shows that the defendant was indicted at the April term, 1909, of the Hudson county oyer and terminer, of the crime of administering a medicine or noxious drug with intent to cause and procure the miscarriage of a woman pregnant with child; that the indictment was regularly and in due form handed down for trial to the court of quarter sessions of said county of Hudson April 21, 1909; that on the 28th day of April, 1909, the defendant entered a plea of non vult contendere; that thereupon the cause was continued to the 17th day of June, on which day an order was entered that the sentence, of the law be postponed, and that the cause, having been continued to the 9th day of August, 1911, was then continued until the 21st day of September, 1911, on which day it was adjudged that the said defendant be confined in the state prison for the term of five years. This judgment has been removed to this court by a writ of error, and the error assigned is that the court, notwithstanding it had postponed sentence, did thereafter pronounce a new judgment against the defendant. Unless it be assumed that the order of the court postponing the day of sentence is a judgment, then it is impossible to conceive upon what theory the plaintiff in error can maintain that a new judgment was pronounced against the defendant.

That the postponement of the day of sentence is not a final judgment seems to us to be beyond debate in this state, and the cases cited by the plaintiff in error as hold-

ing otherwise are not pertinent. All we have before us is a record which shows that after conviction the imposition of the sentence was regularly and in due form continued until the sentence was regularly imposed. The record brought here by this writ of error shows that no judgment or sentence was entered or imposed by the court until the last day to which the cause was postponed or continued, and as that record implies verity, and is not subject to collateral assault we can perceive no foundation for this writ of error.

Therefore the judgment below will be affirmed.

AULL v. LEE.

(Supreme Court of New Jersey. March 3, 1913.)

*(Syllabus by the Court.)***MUNICIPAL CORPORATIONS (§ 816*)—TORTS—DEFECTS IN STREETS—LIABILITY OF ADJOINING OWNER.**

The plaintiff in her declaration averred that the defendant, for his own convenience, removed from the sidewalk of a public street adjoining his premises a large quantity of snow, which had naturally fallen there, and deposited it upon his adjoining premises and there permitted it to remain for a long time; that as a consequence the snow melted, and the water therefrom ran upon the sidewalk where it was congealed into ice; and that the plaintiff, as she was walking along the sidewalk, stepped upon this ice and was thereby thrown and injured. Held, that a cause of action was set out and the declaration not subject to a demurrer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1716, 1718-1720-1723; Dec. Dig. § 816.*]

Action by Elizabeth M. Aull against Albert W. Lee, executor, etc. Heard on demurrer to declaration. Overruled.

Argued November term, 1912, before GUMMERE, C. J., and GARRISON and BERGEN, JJ.

Martin P. Devlin, of Trenton, for plaintiff James & Malcolm Buchanan, of Trenton, for defendant.

BERGEN, J. The cause of action disclosed by the declaration in this cause is that the defendant's testatrix was in her lifetime the owner of a lot of land adjoining a public highway or street in the city of Trenton, the sidewalk of the street being paved with flagstones; that adjoining the sidewalk pavement she maintained an open lawn between the line of the pavement and the front wall of her house; that during a snow-storm great quantities of snow fell and lodged upon the sidewalk in front of said lawn, where it remained until the following day, when she caused it to be removed from the sidewalk, and for her own convenience deposited it upon the lawn and there permitted it to remain for a long space of time.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

and, not regarding her duty in that behalf, did not use due and proper care in the placing of sufficient guards or protection about the said snow so that water, resulting from the melting of the snow, could not run along and upon the said sidewalk in front of said premises and there congeal into ice, but wholly neglected and failed so to do, thereby permitting the water resulting from the melting of the snow to run along and upon the said sidewalk, where it hardened and congealed into ice; that by reason of the premises the plaintiff, while lawfully and carefully walking upon the said sidewalk, slipped on the ice so formed, and was thereby thrown to the ground and suffered severe injuries. To this declaration the defendant filed a demurrer, the principal and only reason necessary to be considered in disposing of this cause being that the facts set forth in the declaration disclose no legal duty resting upon the defendant's testatrix in her lifetime, for the breach of which she, or her estate after her death, could be held liable in damages.

It is not claimed by the plaintiff that if the snow had been permitted to remain on the sidewalk, and while there it had melted and the water resulting therefrom had frozen, forming ice upon which the plaintiff had stepped and fallen, the defendant would be liable, and therefore the only material question presented is whether the piling of snow, in large quantities, upon the defendant's property adjacent to the sidewalk, from which the conditions stated resulted, charges sufficient negligence to support an action for the injuries the plaintiff suffered.

We are of opinion that a party is responsible for the results flowing from the artificial accumulation of snow upon his premises, adjoining a sidewalk, and there left to discharge water at times when the natural result would be to form ice upon the sidewalk. The proposition as stated in 28 Cyc. 1439, is: "But an abutting owner or other person may be liable for a special and peculiar injury caused by his own artificial accumulation of snow or ice upon the sidewalk, as by the discharge of water at times when the natural result would be to form ice. The liability is confined as to what a reasonable man might anticipate, and the owner is required to do only what is reasonably necessary to prevent injury."

In *Davis v. Rich*, 180 Mass. 235, 62 N. E. 375, the plaintiff was thrown and injured by ice formed on the sidewalk, due to water which escaped from a defective pipe on defendant's premises, and defendant was held liable for such results as a reasonable man might anticipate.

In *Dahlin v. Walsh et al.*, 192 Mass. 163, 77 N. E. 830, 6 L. R. A. (N. S.) 615, it was held that where defendant piled snow upon any part of the sidewalk of a public street in such an accumulated mass that, by means of

natural causes, which he ought to have foreseen, a danger would be created by melting and freezing, and ice did form therefrom on the sidewalk, whereby plaintiff, exercising due care, was injured, the defendant would be responsible therefor.

While a party would not be responsible at all times for conditions resulting from natural causes, still if, for his own convenience or benefit, he undertakes to store snow, which has fallen in another place upon his own property, he is responsible for any injury which might reasonably be expected to result therefrom. It seems to be well settled that where one maintains upon his own property buildings which collect and temporarily hold snow and ice so that it may be reasonably expected that it will fall from such building to the sidewalk, or upon adjacent buildings of other property owners, and injury results therefrom, a cause of action exists.

In *Davis v. Niagara Falls Tower Co.*, 171 N. Y. 336, 64 N. E. 4, 57 L. R. A. 545, 89 Am. St. Rep. 817, it appeared that the defendant had constructed a tower on its land; that during the winter ice formed on the structure from sleet, melting snow, and spray from the Falls of Niagara, and when a thaw occurred large quantities of ice fell from the tower upon the roof of plaintiff's building in size, and with velocity, sufficient to endanger human life, by means whereof the plaintiff's building and property had been injured, and an action brought to recover damages for such injuries was sustained.

So, also, in *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318, where the plaintiff was injured by the falling of snow which had accumulated on the roof of a building so constructed as to permit such accumulations to fall into the street, the defendant was held liable for injuries which the plaintiff suffered from that cause; Mr. Justice Ames, speaking for the court, saying: "It will not be contended that they would have a right purposely to throw the snow or ice from the roof into the street at the risk of passengers without warning or precaution of any kind. Have they the right to so construct their building that the roof in consequence of alternate freezing and thawing, and under the influence of natural laws, will in a like sudden and dangerous manner pour down an avalanche upon the sidewalk at the risk of the passing crowd? The plaintiff, at the time of the accident, was where she had a right to be, and was not guilty of any want of due and reasonable care. For the purpose for which she was using the sidewalk, her rights were exactly the same as if she owned the soil in fee simple. The case in our judgment depends on the same rules, and is to be decided on the same principles, as if it raised a question between adjoining proprietors in which the lands or buildings of one were injured by the manner in which

the other had seen fit to occupy or use his own land and buildings. In contemplation of law, the person is at least as much entitled to protection as the estate. The right to discharge snow and ice from one's own house upon the person of the next door neighbor is certainly no better or stronger than the right to subject that neighbor's building or land to the same kind of inconvenience."

We can see no reasonable distinction between the erection of a building so constructed as to accumulate large quantities of snow or ice, which it may be reasonably anticipated will be thrown upon the adjoining property through natural causes, and the storage of large quantities of snow in such a position and under such circumstances as will from natural causes render the adjoining sidewalk dangerous to persons lawfully passing along the same, for, as said in *Shibley v. Fifty Associates*, supra, "whoever for his own purpose brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril."

Manifestly, if one should cart upon his lot large quantities of snow and leave it there to melt and discharge water over the sidewalk, at a time when it might reasonably be expected that such water would congeal on the sidewalk and render it a dangerous place for the public to travel over, he would have created a condition from which he might reasonably anticipate that persons who used the sidewalk would be thrown and injured, and, if so, he would be chargeable with the injuries that resulted from his conduct.

There is a distinction between surface water and the natural fall of snow, conditions over which one has no control, and the collection of snow and ice by physical means in unusual quantities for the convenience and benefit of the party making the accumulation. This cause has been considered and disposed of without passing upon the effect of municipal ordinances requiring the removing of snow from public streets, for the reason that no such element appears in this case.

Having concluded that the declaration discloses a cause of action, the demurrer will be overruled.

**MEGIE et al. v. BOARD OF CHOSEN
FREEHOLDERS OF MORRIS
COUNTY.**

(Supreme Court of New Jersey. March 3, 1913.)

(Syllabus by the Court.)

**BRIDGES (§ 5*)—CONSTRUCTION—STATUTORY
PROVISION.**

To an alternative mandamus requiring the board of chosen freeholders of the county of Morris to erect and construct a bridge over and across the waters of Lake Hopatcong as a part of a public highway recently laid out,

the respondent by its return set up that the bridge extended over and across an arm of Lake Hopatcong, which was navigable waters. To this return the relators filed a demurrer thereby admitting that the proposed bridge would cross navigable waters. *Held* that, under the statute approved March 23, 1892 (P. L. p. 308), and the amendment thereto (P. L. 1906, p. 93), a board of chosen freeholders is not compelled to bridge navigable waters. It may do so if it determines that it is advisable, and, as in the return it sets up that it has considered the matter and decided that the utility and necessity of the bridge was not required, it is not compellable to build it.

[Ed. Note.—For other cases, see *Bridge*, Cent. Dig. § 5; Dec. Dig. § 5.*]

Application by Oscar F. G. Megie and another for mandamus to the Board of Chosen Freeholders of the County of Morris. Demurrer to return overruled.

Argued November term, 1912, before GUYMERE, C. J., and GARRISON and BERGEN, JJ.

King & Vogt, of Morristown, for relators. George G. Runyon, of Morristown, for respondent.

BERGEN, J. The board of chosen freeholders of the county of Morris, being called upon to build a bridge over part of Lake Hopatcong, refused to comply, and thereupon the relators caused to be issued an alternative writ of mandamus. This writ set out that the surveyors of the highways of the county of Morris laid out a public highway, which, for part of its length, is laid over and across the waters of Lake Hopatcong, lying between Henderson Point on the mainland and Raccoon Island in said lake; that the waters of Lake Hopatcong, where the road is laid out, are impassable, except by boat, and that, unless a bridge is erected, the road will be of no practical use or benefit, and will be incapable of being used; that an application was made in due form to the respondents to provide a bridge so as to make the road passable. Upon due service of the writ of mandamus, the respondent made its return in which it set up many reasons why it should not be required to erect the bridge; but the only part of the return which is necessary to be considered in disposing of this case, is that the distance across the lake from Henderson Point to Raccoon Island, along the center line of the road, is 723.82 feet, excluding all necessary bridge approaches, and that the arm of the lake at said point is navigable. The respondent further returns that it has duly considered the matter in the exercise of the discretion, which, by the statute in such case made and provided, is reposed in it, and decided, and, by way of return to the said writ, respectfully says that the utility and necessity of the bridge required is not such as to justify the erection thereof. To this return the relators have filed a demurrer. As the return expressly avers that the arm

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

of the lake, over which the respondent is asked to build the bridge, is navigable, the demurrer admits that fact.

The only statute applicable to the present situation is entitled: "An act to enable the boards of chosen freeholders of any of the several counties of this state, to construct and reconstruct bridges over and across navigable rivers or streams therein, in certain cases and providing for the regulation thereof." P. L. 1892, p. 808, as amended in 1906 (P. L. 93). The first section of this act provides that whenever it shall be necessary or advisable to erect a bridge over and across a navigable stream or river in said county, or whenever any draw or other bridge of said county, under the operation and control of the board of chosen freeholders thereof, which extends over and across any navigable river or stream in such county, shall be in a state of dilapidation, or unsuitable for the purpose, and such board shall deem the erection of a bridge, or the reconstruction of the old bridge, or the construction of a new bridge to take the place of such bridge in such state of decay, a public necessity, and shall so declare at a regular meeting, adopted by an affirmative vote of not less than a majority of all the members of such board, then the board may, by resolution, to be adopted in like manner, order and provide for and proceed with the erection of such bridge. The second section provides for the issuing of bonds to defray and meet the cost and expense of such a bridge. The fifth section repealed all acts and parts of acts inconsistent with the provision of the act.

We think that under the law the respondent is not required to bridge the navigable parts of Lake Hopatcong. It may do so if it determines that it is advisable; but there is no statute which compels it to be done. The Legislature could not have had in mind, when it required the county to provide bridges necessary for the use of the public highways, that such obligation extended to providing bridges with draws for navigable waters.

The respondent is entitled to have the demurrer overruled.

SCHNITZER v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of New Jersey. March 1, 1913.)

TELEGRAPHS AND TELEPHONES (§ 42*)—DELAY — MESSAGE RELATING TO UNLAWFUL DEALINGS—PUBLIC POLICY.

The addressee of a telegram who was trading on a margin and dealing in differences could not recover for delay in the delivery of a telegram from his brokers with reference to be condition of the market, by reason of which he did not buy until the next day, since

such dealing is against public policy, and any loss therein cannot be made the measure of damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 57; Dec. Dig. § 42.*]

Appeal from District Court of East Orange.

Action by Edward O. Schnitzer against the Western Union Telegraph Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued November term, 1912, before SWAYZE, VOORHEES, and KALISCH, JJ.

William A. Lord, of Orange, for appellant. Kinsley Twining and William K. Flanagan, both of Newark, for respondent.

SWAYZE, J. This is an action for damages for delay in the transmission of a telegram. The plaintiff was speculating in cotton seed oil. The telegram was from his brokers with reference to the condition of the market. The plaintiff's claim is that, by reason of the delay in the delivery, he did not buy until the next day when the price had gone up. He testified that he had been trading on a margin of \$2,600; that the purchase in question amounted to \$27,352; that he would buy and sell, and, when he made it, was credited, and, when he lost, he put up more margin. He also testified distinctly that he was dealing in differences. The trial judge found that he was dealing in differences, and that any loss in such dealings could not legally be made the measure of damages in this action. We think that the trial judge was right, and are unable to make the distinction which the plaintiff asks us to make between the enforcement of a contract as in *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308, and the allowance of damages for the breach of a contract as in the present case. The ground upon which *Flagg v. Baldwin* was decided was that the enforcement of a contract of this character would violate the plain public policy of this state. That policy is violated quite as much when damages are allowed to be recovered as when the contract or securities given in connection therewith are enforced. Ordinarily the only way in which contracts are enforced in a court of law is by an award of damages for their breach. In justification of our result we need cite no other authority than those cited by the respondent in his brief. *Cothran v. Western Union Tel. Co.*, 83 Ga. 25, 9 S. E. 836; *Kiley v. Western Union Tel. Co.*, 39 Hun (N. Y.) 158; *Gist v. Western Union Tel. Co.*, 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 763; *Morris v. Western Union Tel. Co.*, 94 Me. 423, 47 Atl. 926; *Weld v. Postal Tel. Cable Co.*, 199 N. Y. 88, 92 N. E. 415. The last case is particularly important because it establishes that under the law of New York such con-

tracts are illegal, even when the transactions are in another state.

The judgment is affirmed, with costs.

SCOTT v. SCOTT.

(Court of Chancery of New Jersey. Feb. 25, 1913.)

(Syllabus by the Court.)

DIVORCE (§ 79*)—NOTICE FOR PUBLICATION—STATEMENT OF GROUND OF SUIT.

Where notice of the order for publication stated that the object of the suit was to obtain an absolute divorce from the bonds of matrimony for desertion, and the fact was that the suit was brought for an absolute divorce on the ground of adultery, *held*, that notice of the order had not been published as required by the statute. P. L. 1907, p. 474.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 258-263; Dec. Dig. § 79.*]

Action by Hattie A. Scott against Edward Scott for divorce. Application for order of reference and a special master for want of an answer. Application denied, and order for publication entered.

Ward & McGinnis, of Paterson, for petitioner.

BIDDLE, Adv. M. The defendant not being found for the purpose of being served with process within this state, an order for publication and substituted service was taken, notice published in the designated newspaper, and service made of the notice and petition, as required by Chancery Rule 224a, par. 4, under a special direction. The published notice, intended to conform with Chancery Rule 58, states the object of the suit as follows: "The said petition is filed against you for an absolute divorce from the bonds of matrimony for desertion." It appears from the petition that the petitioner seeks an absolute divorce for the defendant's adultery.

In *Brant v. Brant*, 71 N. J. Eq. 66, 71 Atl. 350, a decision under the divorce act of 1902 (P. L. 1902, p. 502), the petitioner was not satisfied with specifying strictly the object of the suit, but stated, though incorrectly, the kind of divorce sought, and inaccurately the intended statutory charge. It may be said to have been intimated that if there had been statutory warrant for service upon the defendant of a certified copy of the petition, and such service had been made, the defects would have been cured. This view, if indeed entertained, could have regarded merely the nature of the official information to be given by the petitioner privately to the absent defendant.

But the divorce act of 1907 makes jurisdiction to depend upon publication of the order or notice thereof, "to be followed" by service of the petition and order or notice thereof, if practicable. P. L. 1907, p. 477, § 7; page 479, § 14. "To be followed" are

words not implying that one or more insertions in the newspaper of the order or notice thereof must precede the fact of service at point of time. The term has another and more important legal significance. Publication is primary; service (though necessary, if practicable) is secondary. Publication must be made even when personal service under such order is obtained. It accomplishes a legislative purpose not attainable by private service. Now this court never makes an order in a suit the object of which was that the petitioner might "obtain an absolute divorce from the bonds of matrimony for desertion." No such suit is pending. The general statement of the object is unnecessarily, but effectually, qualified.

Jurisdiction is not acquired for the purpose of divorce. Another order for publication and substituted service must be taken, and regularly prosecuted.

BEERS et al. v. EDWARDS, State Comptroller.

(Supreme Court of New Jersey. Feb. 24, 1913.)

(Syllabus by the Court.)

TAXATION (§ 868*)—TRANSFER TAX—PROPERTY SUBJECT.

In fixing the transfer tax on stocks of New Jersey corporations which had belonged to a decedent domiciled in New York, it is erroneous, for the purpose of ascertaining the entire tax on the estate, to include in the valuation real estate situated in New York. Act April 20, 1909 (P. L. p. 332), requires that the entire tax shall be that to which the estate would have been subject if the nonresident had been a resident of this state, and New York real estate could not in that event have been included in the valuation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1685-1687; Dec. Dig. § 868.*]

Certiorari by Lucius H. Beers and Henry De Forest Baldwin, executors, against Edward I. Edwards, State Comptroller, to review a transfer tax assessment. Assessment corrected.

Argued November term, 1912, before SWAYZE, VOORHEES, and KALISCH, JJ.

Stephen H. Little, of Morristown (Herbert C. Lakin, of New York City, on the brief, for prosecutors. Theodore Backes, of Trenton, and Edmund Wilson, Atty. Gen., for the State.

SWAYZE, J. The only question raised in this case is the proper construction of section 12 of the Transfer Tax Act of 1909 (P. L. 1909, p. 332). The decedent was a resident of New York. A large part of his property was real estate in that state. In fixing the tax on the transfer of stocks in New Jersey corporations, the Comptroller computed the entire tax of the estate upon an amount which included the value of the New

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

York real estate. To this inclusion of the New York real estate the prosecutors object. The language of the statute with which we are concerned is: "Such property located within this state shall be subject to a tax, which said tax shall bear the same ratio to the entire tax which the said estate of such decedent would have been subject to under this act if such nonresident decedent had been a resident of this state, as such property located in this state bears to the entire estate of such nonresident decedent wherever situated." Stated more narrowly, the case turns on the meaning of the clause "the entire tax which the said estate of such decedent would have been subject to under the act if such nonresident decedent had been a resident of this state." When the exact question is thus stated, we think the difficulty in answering it disappears. If the decedent had been a resident of this state, no tax could have been imposed on real estate situated in New York, since that portion of his property was beyond the jurisdiction of New Jersey, and to tax it would violate the rights secured by the fourteenth amendment to the federal Constitution. It suffices to cite *Louisville, etc., Ferry Co. v. Kentucky*, 188 U. S. 385, 23 Sup. Ct. 463, 47 L. Ed. 513, and *Union Transit Co. v. Kentucky*, 190 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493, as to the general principle, and in *Re Swift's Estate*, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709, and *Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350, as to the applicability of the principle to inheritance taxes. The result follows logically from the legal theory upon which inheritance taxes are justified that the rights of testamentary disposition and of succession are creatures of law upon the exercise and operation of which the lawmaker may impose terms. *Nelson v. Russell*, 76 N. J. Law, 27, 69 Atl. 476; *Id.*, 76 N. J. Law, 655, 71 Atl. 286, 19 L. R. A. (N. S.) 887, 131 Am. St. Rep. 673. The succession to land in New York whether by will or intestacy depends upon the law of New York, and that privilege not being the creature of New Jersey cannot be made subject to terms by this state. Since no tax could have been imposed by reason of the New York real estate if the decedent had resided here, that real estate cannot under the language of the statute be included in estimating the entire tax upon the estate for the purpose of ascertaining the amount to be imposed on the New Jersey stocks. We do not mean to say that the Legislature would not have adopted another basis for the computation of the entire tax. It might perhaps have enacted that the entire tax should be the amount to which the estate would have been subject if the decedent had been a resident of New Jersey, and all his property had been situated here. Instead of so enacting, the Legislature made a distinction. It took as one term of the pro-

portion the tax to which the estate would have been subject if the decedent had been a resident. It took as another term of the same proportion "the entire estate of such nonresident decedent wherever situated." The Legislature therefore had in mind the distinction between the estate taxable by reason of the decedent's domicile and the entire estate wherever situated. In the one clause it used the words "entire tax," in the other clause the words "entire estate."

The same line of reasoning is applicable to the devises and bequests for life with remainder over. If the decedent had resided in New Jersey, the tax on those remainders would have been governed by sections 2 and 3 of the act. The same rule must be applied for the estimation of the entire tax, although he resided in New York.

The state does not question the right of the prosecutors to have the assessment corrected by reason of the fact that the tax as assessed has been paid. If counsel cannot agree upon the proper amount, we will fix it upon application.

HARRIS v. HEILIG et al.

(Supreme Court of New Jersey. Feb. 24, 1913.)

(Syllabus by the Court.)

PARTNERSHIP (§ 146*)—DISSOLUTION—LIABILITY OF PARTNER.

The defendant was a partner with others in the building of two houses, which were completed four years before the negotiable note in suit was given. *Held* that, in the absence of proof that it was customary in the locality for a firm in that business to give negotiable notes, and that the authority of one partner to sign notes in the firm name continued after the object of the partnership was accomplished, a partner who did not sign was not liable thereon.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 242-255; Dec. Dig. § 146.*]

Appeal from District Court of Jersey City.

Action by Michael Harris against Henry Heilig and others. From a judgment for plaintiff, defendant Heilig appeals. Reversed and remitted for new trial.

This is an action upon a promissory note of M. Feinstein & Co., to the order of Morris Schultz, which was transferred by Schultz to the plaintiff in payment of his individual debt. The question is whether the appellant, Heilig, can be held as a member of the firm. The trial judge found as facts that the signature was made by Max Feinstein; that the firm was composed of Max Feinstein, Morris Schultz, Charles Schultz, Henry Heilig, and Harris Cowen; that it was organized seven years ago to erect two buildings in Jersey City, which were completed four years ago. Schultz had informed the plaintiff that the firm owed him for work on the buildings under a partnership agreement. Plaintiff knew that Schultz was a member of the firm; that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

he had received a note of the firm for \$500 in payment of his claims, which he wanted plaintiff to accept in settlement of his debt, paying Schultz the difference. The plaintiff was unwilling to do this, and the note was exchanged for smaller ones, of which the note in suit is one. By the agreement of settlement, the firm agreed to pay Schultz \$500 when the houses were sold. The plaintiff did not know of this agreement. The houses have not been sold.

Argued November term, 1912, before SWAYZE, VOORHEES, and KALISCH, JJ.

Collins & Corbin, for appellant. Clarence Kelsey, for respondent.

SWAYZE, J. (after stating the facts as above). The general principles underlying this case are well stated by Mr. Justice Matthews in *Irwin v. Willmar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225, as follows: "The liability of one partner, for acts and contracts done and made by his copartners, without his actual knowledge or assent, is a question of agency. If the authority is denied by the actual agreement between the parties, with notice to the party who claims under it, there is no partnership obligation. If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, the authority for each transaction may be implied from the nature of the business according to the usual and ordinary course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the actual, though exceptional, course and conduct of the business of the partnership itself, as personally carried on with the knowledge actual or presumed, of the partner sought to be charged." This rule has been applied to the case of a negotiable instrument. *Dowling v. Exchange Bank*, 145 U. S. 512, 12 Sup. Ct. 928, 38 L. Ed. 795. In the present case, since there is no actual agreement of partnership, and no proof that, in the actual course of business, negotiable instruments had been issued by the firm, the authority of Feinstein to bind Hellig must be implied from the nature of the business. The business was not a commercial one, and did not necessarily involve the giving of negotiable notes. It was a mere partnership in the building of the houses. It may be that it is customary in Jersey City for a firm, engaged in such a work, to give notes for expenses incurred in the construction; but the state of the case fails to show that Schultz's claim was for such work. Finding that he so informed the plaintiff is no evidence of the actual fact. Even if this gap in the evidence were supplied, it would still be a question whether the authority continued four years after the object of the copartnership had

been accomplished. That object, as the judge found, was the erection of the buildings. Naturally, with the accomplishment of that object, the authority of one partner as general agent of the other, for the purposes of the partnership, would be at an end. This case, moreover, involves more than the attempt to give a firm note after the object of the partnership has been accomplished. The note was given to one of the partners to pay a debt said to be due to him. This fact was known to the plaintiff, and was sufficiently out of the usual course to make it his duty to inquire into the authority of one partner to bind the others. The plaintiff, too, was taking the note of the firm to one partner in payment of the individual obligation of the partner; and although the case is not exactly that of using the firm's property to pay an individual debt, since the claim is that the original consideration was the firm's debt to Schultz, nevertheless the circumstances, as known to the plaintiff, coupled with the fact that, upon his refusal to take the \$500 note, others were made, ought to have led to inquiry. Inquiry would have disclosed the agreement of settlement under which the \$500 was not payable until the buildings were sold. The note was an absolute obligation to pay three months after its date. We think the facts, as found, did not suffice to establish Hellig's liability; and as to him there should have been a nonsuit. The judgment must therefore be reversed, and the record remitted for a new trial.

WAHL v. BOARD OF WATER COMRS OF ATLANTIC CITY et al.

(Supreme Court of New Jersey. Feb. 24, 1913.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 1014*)—CLAIMS—ALLOWANCE—REVIEW.

A false bill was rendered to the water commissioners of Atlantic City containing items for cost of assistant engineer when none was employed, and the bill was not verified as required by statute. *Held*, on certiorari, that an approval of the bill by the water commissioners would be set aside.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2186; Dec. Dig. § 1014.*]

Certiorari prosecuted by William F. Wahl to review the action of the Board of Water Commissioners of Atlantic City and others. Approval of claim for cost of concrete bridge set aside.

The prosecutor seeks to set aside the action of the board of water commissioners of Atlantic City in approving and ordering paid a claim of the West Jersey & Seashore Railroad Company for the cost of a concrete bridge under the railroad tracks in connection with a water main of the city. The Railroad Company gave the city a license to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

construct and maintain the water pipe. The work was to be done by the Railroad Company or its agents at the expense of the city. The company employed Lockwood to do the work and furnish the material. Lockwood assigned to Cherry $\frac{99}{100}$ part or interest in the contract, and the work is claimed by the defendants to have been done by the firm of Lockwood & Cherry. The prosecutor insists that this arrangement was a mere sham intended to conceal the fact that the real contractor was the United Paving Company, of which Louis Kuehnle, one of the water commissioners, was a stockholder and officer. The money required to carry on the work was provided by the United Paving Company. The offices of Lockwood & Cherry were with the Paving Company, and the employes of the partnership and the corporation were the same. When the work was done, an itemized bill for labor and material was rendered to the Railroad Company, in which an additional 20 per cent was charged as contractor's profit. This bill was rejected because the Railroad Company insisted that no more should be charged for contractor's profit than 10 per cent. on the labor and 5 per cent. on the materials. A new bill was then presented, in which the items for labor were padded so as to make the total amount, notwithstanding the lower percentage for contractor's profit, the same as the first bill. This bill the railroad rejected because it could not check the items with its own account. A third bill, similar in character, was then presented and rejected for the same reason. Finally, a fourth bill was presented, in which the same total was reached by adding charges of \$9.24 a day for 100 days for assistant engineers, draftsmen, and clerical work in main office, and \$6.30 a day for use of tools and machinery. This bill satisfied the Railroad Company's officials, but, instead of paying it, they first sent it to the water commissioners for approval, and it was approved by two of the commissioners, of whom Kuehnle was one. In fact, there was no assistant engineer, but there is evidence that 20 per cent. was a proper charge for contractor's profit to Atlantic City, and that the added charges of \$9.24 and \$6.30 were reasonable. The claim presented by the Railroad Company to the water commissioners was not verified by any one on their behalf. It referred to a detailed bill of Lockwood & Cherry submitted therewith, and this bill had affidavits annexed in each of which the affiant swore "that the amounts set forth in the attached bill rendered by Lockwood & Cherry to West Jersey & Seashore Railroad Company were absolutely true and correct as shown by the time books and accounts kept and checked by him, with the exception of the items comprising the aggregate amount of \$574.92, which is covered by bill rendered against said Lockwood & Cherry by said West Jersey & Seashore Rail-

road Company for materials used and labor employed by said company in the construction of said work."

Argued November term, 1912, before SWAYZE, VOORHEES, and KALISCH, JJ.

F. Morse Archer, of Camden (Grey & Archer, of Camden, and Charles S. Moore, of Atlantic City, on the brief), for prosecutor. Harry R. Coulomb, of Atlantic City (Bourgeois & Coulomb, of Atlantic City, on the brief), for defendant West Jersey & Seashore R. Co.

SWAYZE, J. (after stating the facts as above). The bill rendered was a false bill. It does not help the Railroad Company to prove that 20 per cent. was the usual charge to the city for contractor's profits, and that the added charges were reasonable. The law required a true bill, and takes pains to secure that result by requiring an affidavit. By the act of 1902 governing Atlantic City (1 C. S. p. 1145, pl. 1974), expenditures for the waterworks are to be under the authority and direction of the water commissioners, and disbursements on account of the water department are to be made in payment only of bills duly approved by them. The act of 1871 (3 C. S. p. 3665, pl. 726) makes it unlawful for commissioners of any city to disburse moneys, unless the person claiming or receiving them first presents a detailed bill of items with the affidavit of the party claiming payment that the same is correct. The claimant must also specify the dates and names of the persons to whom the amounts composing the bill were paid. We think the water commissioners are within the designation "commissioners" in the act. Since they have control of the finances of the water department and the city comptroller would probably issue a warrant upon their approval of the bill, it is necessary, if the act of 1871 is to have any real effect, that they should withhold their approval until the bill is properly verified. One object of the act of 1871 is to protect the body that audits the bills by giving them the protection of a sworn claim. It has been held to be irregular for a common council to pass a bill, which had been in fact duly sworn to, before the officer had signed the jurat. *Berry v. Rahway*, 50 N. J. Law, 356, 13 Atl. 6. The case is much stronger where there is no affidavit such as the statute requires. In this case there could be no such affidavit at the time of approval by the commissioners since the money had not yet been paid by the claimant—the Railroad Company. The return to our writ shows, indeed, affidavits verifying the claim of Lockwood or Lockwood & Cherry against the Railroad Company, but this does not comply with the statute which requires a verification by the party claiming payment of the city, and no officer or representative of the Railroad Company attempts to verify their bill. This is no idle form, for an examina-

tion of the affidavits annexed to Lockwood & Cherry's bill against the Railroad shows that, at most, they purport to verify only the charges that correspond with the time books and accounts kept by the cashiers on the works. Literally read the affidavits except from the verification altogether the sum of \$574.92. It is probable that the affiants meant to say that this sum is to be excepted from the amount shown on the time books and accounts of the cashier. Assuming this in favor of the defendants, the affidavits still fall short of verifying the amount. To say as they do that it "is covered by bill rendered against said Lockwood & Cherry by said West Jersey & Seashore Railroad Company for materials used and labor employed by said company in the construction of said work" is no verification. The city was entitled to have some one having knowledge make affidavit on the part of the Railroad Company that the "bill rendered" to Lockwood & Cherry was correct. The Railroad Company is therefore in the position of having rendered a false bill in which items were inserted for the purpose of increasing the bill to a certain amount after other bills for the same amount had been rejected because the items could not be checked, of refusing or neglecting to comply with the statute requiring verification, and of securing an approval of its bill before it had paid out its own money. We think an approval had under such circumstances cannot be sustained as an exercise of lawful power by the water commissioners, and must be set aside, with costs.

CITY OF CAMDEN v. CAMDEN SAFE DEPOSIT & TRUST CO. et al.

(Supreme Court of New Jersey. Feb. 24, 1913.)

(Syllabus by the Court.)

TAXATION (§ 386*)—ASSESSMENT—TRUST COMPANY.

In the taxation of a trust company, it is proper to compute the whole value of the capital stock at the proper price per share, and to deduct from the total valuation the value of real estate, exempted securities, and nontaxable mortgages, even in a case where the total of capital, surplus, and undivided profits is less than the value of real estate, exempted securities, and nontaxable mortgages.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 637-647; Dec. Dig. § 386.*]

Certiorari by the City of Camden against the Camden Safe Deposit & Trust Company and others, to review a tax assessment. Affirmed.

Argued November term, 1912, before SWAYZE, VOORHEES, and KALISCH, JJ.

E. G. C. Bleakly, of Camden, for prosecutor. George J. Bergen, of Camden, and Gilbert Collins, of Jersey City, for defendants.

SWAYZE, J. The question to be decided is the correct method of valuation of stock of the Camden Safe Deposit & Trust Company. The total valuation of its capital stock at \$391 a share is \$1,564,000. The value of real estate, exempted securities, and nontaxable mortgages is \$1,539,997.85. The balance of \$24,002.15 would be the value of the capital stock for purposes of taxation; but at the hearing before the State Board of Equalization the trust company "voluntarily remitted from its claim for exemption such sum as would make its assessment \$114,225" and thereupon the board reduced the assessment to that amount. This judgment seems to have been in entire accord with the rule laid down by the Court of Errors and Appeals in *Lippincott v. Lippincott*, 75 N. J. Law, 795, 69 Atl. 502. Its justice is now attacked by the city upon the ground that the total of capital surplus and undivided profits is only \$1,172,470.95, and it necessarily follows that a large part of the assets deducted must be investments of deposits or of trust funds. The claim is that it is unjust to allow a deduction from capital stock and surplus of securities exempt from taxation which does not represent an investment of the capital, surplus, and undivided profit. It would perhaps be enough to say that it is not for us to question the justice of a rule of taxation prescribed by the Legislature, as its act is construed by the court of last resort. The argument, however, involves a fallacy. The valuation is not the same as the amount of the capital, surplus, and undivided profits, but exceeds that amount by the difference between \$1,564,000, the value of the capital stock at the market value, and \$1,172,470.95, the book value of the capital stock, surplus, and undivided profits. Taxation of bank stock at market value has been sustained (*Newark v. Tunis*, 81 N. J. Law, 45, 78 Atl. 1086; affirmed 82 N. J. Law, 461, 81 Atl. 722), although it includes elements of value, such as good will and business repute, which do not figure in the statement of assets. The Legislature may well have thought that justice required that, in return for this additional burden to which individual taxpayers are not subject, the banks and trust companies be allowed to deduct exempt securities held by them as investments of their deposits and trust funds, since the intangible elements of value in the stock—good will and business repute—must be in whole or in part the result of the profits to be derived from the handling of the deposits and trust funds.

It is inaccurate to assume that this results in a double exemption. If the banks following the literal language of the act of 1905 (C. S. p. 5098, pl. 17a) should seek to deduct their deposits and trust funds as debts (as in fact they are) because such deductions are allowed "from the value of other taxable property owned by individuals," and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

should at the same time claim that the securities in which those deposits and trust funds are invested are exempt from taxation, an interesting question would indeed be presented. That, however, is not the present case. No claim for deduction is made by reason of the \$60,700,000 due depositors. That amount, in theory of law, is taxed to the depositors themselves, regardless of whether the bank has invested it in United States, state and municipal bonds or in taxable securities. If, as the prosecutor argues, the exempt securities are to be treated as specific investments set apart for these specific obligations of the bank, it would in justice follow that the depositors should not be taxed on their deposits, because to tax them would violate the legal provisions exempting the securities in which they are invested. The prosecutor's argument does not accord with the facts. All the assets of the bank are commingled. None are set apart for a specific purpose as an investment of capital, or of surplus, or of deposits. If the bank were taxed strictly as an individual, all its taxable assets would be put on one side, all its debts, except those to stockholders, would be set on the other, and the balance would represent the book value of the stockholders' interest; this balance would be taxed to stockholders; the debts would be taxed as obligations of solvent debtors to the persons to whom they were owing; and in this way all the assets of the bank would be in effect taxed. The difficulty arises from the attempt of the Legislature to tax banks and trust companies under sections 17 and 18 upon the market value of their stock, including the intangible elements, and then to allow deductions as in the case of individuals under the act of 1905.

We think the case was properly dealt with by the Board of Equalization.

No question was made in the argument before us by reason of the fact that the amended statement of the trust company was not made until October 31st. We agree that section 13 of the tax act (C. S. p. 5094) is not applicable. The statement is the one required by section 17 (C. S. p. 5097) to be given on the application of the assessor. There is nothing to show that it was not promptly given.

The tax as fixed by the board of equalization is therefore affirmed with costs.

JAMES A. BANISTER CO. v. KRIGER.
(Supreme Court of New Jersey. Feb. 24, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 250%, New, vol. 16 Key-No. Series)—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT.

An employe earning \$8.50 per week lost the first phalange of the index finger. *Held*, that he was entitled under the Workmen's

Compensation Act (P. L. 1911, p. 134) to \$5 per week for 35 weeks, besides the cost of reasonable medical and hospital services and medicines for 2 weeks.

2. MASTER AND SERVANT (§ 250%, New, vol. 16 Key-No. Series)—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT.

In commuting the periodical payments under the Workmen's Compensation Act (P. L. 1911, p. 134) to a lump sum, it is erroneous to multiply the weekly minimum by the prescribed number of weeks. A deduction must be made sufficient to reduce the lump sum to the present value of the periodical payments.

Certiorari to Court of Common Pleas, Essex County.

Certiorari prosecuted by the James A. Banister Company to review a judgment in favor of Hyman Kriger. Reversed and remitted for further proceedings.

Argued November term, 1912, before SWAYZE, VOORHEES, and KALISCH, JJ.

Kinsley Twining, of Newark, for prosecutor. Charles Elin, of Newark, for defendant.

SWAYZE, J. [1] Kriger claimed compensation for the loss of the first phalange of the index finger. His wages were \$8.50 a week. The judge awarded him at the rate of \$5 a week for 35 weeks under section 11c of the act of 1911 (P. L. 137). This can be sustained only in case the provision of section 11a for a minimum compensation of \$5 per week is applicable. If it is, the compensation is the same in this case for the loss of a phalange as for the loss of a finger. The prosecutor claims that this conflicts with the clause providing that the loss of the first phalange of any finger shall be considered to be equal to the loss of one-half of the finger, and the compensation shall be one-half of the amount specified for a finger. The claimant relies on the clause at the end of the section providing that the amounts specified in section 11c are all subject to the same limitations as to maximum and minimum as are stated in clause "a."

This recital of the material provisions of the act indicates that all the amounts are subject to the provision of a minimum. The use of the word "all" certainly includes the amount previously fixed for the loss of a phalange. It is said, however, that both provisions can be given effect by holding that the minimum is \$5 per week, and that the number of weeks shall in the case of loss of the phalange be only half the number in the case of the loss of a finger. The difficulty with this contention is that it is the amount, not the time, that the statute says shall be divided by two. We think the construction of the judge was correct.

The next objection is that section 13 of the statute does not allow any compensation for the first two weeks after the injury except reasonable medical and hospital services and medicines not to exceed \$100 in value. The prosecutor seems to contend that the ef-

fect is to reduce the compensation from an allowance for 35 weeks to an allowance for 33 weeks. This is not the language of the statute, and we think is not the intent of section 13. It is more probable that the intent of that section was to exclude allowance for compensation in the case of a temporary disability lasting less than two weeks except for medical and hospital services and medicines. If it was meant to reduce the allowance for permanent injuries by two weeks in each case, the language was singularly inapt. Medical attendance would hardly be necessary except temporarily, while the periods of time fixed in section 11b and section 11c seem to have been meant as a gauge of the extent of the compensation for injuries permanent in quality. Since those injuries might require medical attendance, section 14 expressly required it, and is applicable to all cases.

[2] The trial judge erred, however, in commuting the periodical payments to a lump sum. He simply multiplied the weekly minimum by the number of weeks, and made the necessary credits. This is not a commutation, but an allowance of compensation in excess of that fixed by the act. A present payment of the whole amount exceeds in value a weekly payment to be paid in future installments. A deduction should have been made sufficient to make the lump sum equal to the present value of the periodical payments.

By section 20 our right to review is limited to questions of law. Under section 21 the award is subject to review within one year, evidently by the tribunal that originally fixed the compensation. We ought, therefore, to reverse the judgment and remit the record for further proceedings in accordance with this opinion. No costs should be allowed.

NEWARK & B. R. CO. et al. v. TOWN OF MONTCLAIR.

(Supreme Court of New Jersey. Feb. 24, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 392*) — STREETS—VACATION—ASSESSMENT OF DAMAGES.

Under section 61 of the Town Act of 1895 (P. L. p. 243), damages cannot be assessed for the vacation of a portion of a street in favor of owners of land not abutting on the vacated portion.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 936; Dec. Dig. § 392.*]

2. MUNICIPAL CORPORATIONS (§ 392*) — STREETS—VACATION—INTEREST OF ABUTTING OWNERS.

The interest of owners of land abutting on a public street in the public easement in the street is not the private interest of part owners, but an interest shared with the whole public who have occasion to use the street; and the abandonment by the public authorities of the public easement in a portion of the street on

which they do not abut is not a taking of property of the abutting owners.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 936; Dec. Dig. § 392.*]

Certiorari prosecuted by the Newark & Bloomfield Railroad Company to review an assessment for damages by the Town of Montclair. Assessment set aside.

Argued November term, 1912, before SWAYZE, VOORHEES, and KALISCH, JJ.

M. M. Stallman, of Newark, for prosecutor. Robert M. Boyd, Jr., of Montclair, for Town of Montclair.

SWAYZE, J. [1,2] The town of Montclair, upon the petition of the railroad company, vacated that portion of Pine street where it crossed land of the railroad, in pursuance of a contract to abolish a grade crossing, and to substitute for that portion of the street a foot bridge above grade. The railroad company agreed to pay all damages that might be lawfully awarded for the vacation. Under section 61 of the Town Act of 1895 (4 C. S. p. 5539, § 402), an assessment of damages has been made in favor of owners of land along Pine street not abutting on the vacated portion, and of land on Cherry street, which crosses Pine street at a right angle, and runs nearly parallel with the line of the railroad.

The right of land owners to compensation for damages caused by the vacation of a public street is wholly statutory. *Newark v. Hatt*, 79 N. J. Law, 548, 550, 77 Atl. 47, 3 L. R. A. (N. S.) 637. The right in this case rests upon section 61 of the Town Act of 1895, as amended in 1910 (4 C. S. p. 5539, § 402). Prior to the amendment, the power given did not extend to the vacation of streets. The insertion of that power seems to have been the sole object of the amendment. The town had, however, had the power so far as necessary for the abolition of grade crossings since 1901 at latest. 3 C. S. p. 4266, § 114. It may therefore well be doubted whether the mere vacation of a portion of a street occupied by a railroad for the purpose of getting rid of a grade crossing is to be regulated by section 61 of the Town Act. That section gives a veto power upon the proposed improvement to the owners of property subject to more than two-thirds of the assessment, and it would be most extraordinary if the absolute right to contract for the abolition of grade crossings given in 1901 could be qualified by a subsequent amendment of an act passed six years before. Although the amending act of 1910 does not indicate any intent to provide generally for the assessment of damages caused by vacation of a street except in cases where the course pointed out by the act is followed, we assume in favor of the contention of the town that damages may be assessed where the act is

not followed. The question, then, is, Do the clauses relating to damages reach the case of a vacation? An examination of section 61 makes it clear that it does not provide for damages to owners whose land is not taken. The commissioners are required to make a map showing all the lands, real estate, and improvements to be taken, to ascertain the names of the owners of said real estate to be taken, to ascertain the value of the interest of each known owner of real estate to be taken and the damage done to such owner by taking the same, and upon the passage of a resolution directing the awards to be paid the fee simple of the real estate taken is declared to be vested in the town. This language is appropriate only to cases where land is actually taken. It is quite inappropriate to the case of damage done to other landowners whose land is not taken, and whose only injury is that which follows from the discontinuance of a public easement by action of the public authorities. The history of the legislation shows why the language is inappropriate to the case of mere vacations. As originally enacted (P. L. 1895, p. 243), it applied only to the laying out, opening, straightening, extending, widening, or otherwise changing as to their boundaries of streets or sections of streets. These acts all might require the actual taking of land. When in 1910 the word "vacated" was inserted, no change was made in the language as to assessment of damages. Vacation of a street is the very antithesis of laying out and of the other similar acts authorized by the original enactment. Vacating a street, instead of requiring land to be taken, is necessarily the giving up of the public easement and freeing the land from a burden. Language that was applicable to the acts authorized in 1895 is not applicable to the additional act authorized in 1910. Counsel for the town contends with great ingenuity that the real estate of the owners to whom these awards were made is in fact taken, since they have an interest in the public easement. They have, but it is not the private interest of part owners, but the interest they share with the whole of the public, who may have occasion to use the street; and this public interest is so entirely in the control of the public authorities that they may abandon it when authorized by the Legislature so to do, without making compensation to property owners whose lands may be thereby diminished in value. If the rights of the landowners were property rights, the Legislature would under our constitutional limitations be powerless to take them without compensation. In *Newark v. Hatt* the Court of Errors and Appeals, although it evinced anxiety to protect the landowners, expressly recognized the right of the Legislature to authorize the vacation of streets without compensation. They said: "The right of the state to destroy public im-

provements of this class without compensation is not limited by the Constitution, and except for the statute, as expressed in the charter of the city, this street could have been vacated without the slightest consideration of its effect upon any land lying along it, or the payment by the city of compensation to any landowners for damages."

The language of the Town Act is very different from that used in the Newark charter and that involved in the English cases cited by counsel. For instance, under the English statute all who were "injuriously affected" were entitled to compensation. *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; 43 L. J. C. P. 385. So, also, in the Scotch appeal, *Caledonian Railway Co. v. Walker*, 7 App. Cas. 259. Cases from states which take a different view of the effect of the constitutional limitation from that taken by our courts are, of course, not in point.

The awards of damages and the resolution so far as it confirms the amounts must be set aside, with costs.

STREETER v. BOARD OF HEALTH OF BOROUGH OF VINELAND.

(Supreme Court of New Jersey. Feb. 24, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 90*)—JURISDICTION—RECORDERS IN BOROUGH.

Recorders in boroughs have no jurisdiction of proceedings for the violation of the sanitary code of the board of health, and the fact that the recorder is also a justice of the peace does not confer jurisdiction when he does not assume to act in that capacity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129-136; Dec. Dig. § 90.*]

Certiorari by John J. Streeter to review conviction of a violation of the Sanitary Code of the Board of Health of the Borough of Vineland. Reversed.

Argued November term, 1912, before SWAYZE, VORHEES, and KALISCH, JJ.

S. W. Hurd, of Vineland, and John Boyd Avis, of Woodbury, for prosecutor. Charles P. Brewer, of Vineland, for defendant.

SWAYZE, J. The prosecutor was convicted by the recorder of the borough of Vineland of a violation of the sanitary code adopted by the board of health. The point now made is that the recorder had no jurisdiction. The procedure is that prescribed by the board of health act (2 Comp. St. 1910, p. 2656). *Board of Health v. New York*, etc., R. R. Co., 77 N. J. Law, 15, 71 Atl. 259. By that act jurisdiction is conferred upon district courts, police justices and recorders in cities, and justices of the peace. No authority is conferred upon recorders in boroughs. It is suggested that the recorder of Vineland was also a justice of the peace. It is enough

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to say that he did not assume to act in that capacity.

The conviction must be set aside, with costs.

MILLER v. PUBLIC SERVICE RY. CO.

(Supreme Court of New Jersey. Feb. 14, 1913.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 250%, New, vol. 16 Key-No. Series)—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—"ACTUAL DEPENDENTS."

The words "actual dependents," as used in section 12 of "An act prescribing the liability of an employer to make compensation for injuries received by an employé in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911 (P. L. 1911, p. 139), mean dependents in fact. The contrast in the statute is between those who are actually dependent and those who are not dependent.

Certiorari to Court of Common Pleas, Essex County.

Action by Ada Maude Miller against the Public Service Railway Company. From a finding for plaintiff, defendant brings certiorari. Reversed.

Argued June term, 1912, before SWAYZE, VOORHEES, and KALISCH, JJ.

Leonard J. Tynan and Lefferts S. Hoffman, both of Newark, for plaintiff. John P. Manning, of Newark, for defendant.

VOORHEES, J. The question propounded to the court for answer in this case arises under the act entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employé in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911 (P. L. 1911, p. 134).

The facts in the case are that the petitioner came before the court of common pleas of the county of Essex, and showed that she was the widow of John R. H. Miller, who was employed by the Public Service Railway Company, under a written contract, and that in the course of such employment he met his death, on the 17th of October, 1911; that, besides his widow, the petitioner left a father and certain brothers and a sister. No proof was made of the actual dependency of the father, or of the brothers or sister upon the decedent. The court held that because the decedent left a father, the widow being childless, it increased the compensation.

Section 12 of the act provides for compensation in case there shall be death, which compensation shall be computed but not distributed on the following basis: (1) To "ac-

tual dependents," the compensation shall be distributed, according to the laws of this state providing for the distribution of personal property of an intestate decedent; (2) where there are "no dependents." The court below ruled that the childless widow being left with a father, 50 per cent. of the wages should be allowed, although the case failed to show that the father was in any way actually dependent.

It seems to me that the contrast in the statute is between those who are actually dependent; that is, dependent in fact upon the decedent, and those who are not dependents. Actual dependency, to my mind, means dependence in fact, and is a question of fact, and the enumeration of certain persons after this heading should not be held to place them in the relationship of actual dependents. Their enumeration after these words indicates that they must bring themselves by proof into dependency in fact as distinguished from theoretical dependency; otherwise the words are superfluous. The act not only prescribes the employer's liability, but sets out an elective schedule of compensation. It excludes, in section 12 (1), "Incapacitated brothers or sisters," and in subsection 2 of the same act includes "orphans or other children," except those under 16 years of age. It thus appears that at least theoretical compensation is the object of the statute. The statute plainly marks the contrast not between dependents and no dependents, but between actual dependents and no dependents.

The ruling of the court of common pleas was made in error, and for this purpose the finding should be reversed.

BLANZ v. ERIE R. CO.

(Supreme Court of New Jersey. March 1, 1913.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 250%, New, vol. 16 Key-No. Series)—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—"ACTUAL DEPENDENT."

Under the Workmen's Compensation Act of 1911 (P. L. 134), compensation may be awarded to a mother who is an "actual dependent" upon a deceased son, although the son leaves no widow.

Certiorari to Court of Common Pleas, Bergen County.

Action by Lennia Blanz against the Erie Railroad Company. Judgment for defendant and plaintiff brings certiorari. Reversed and remanded.

Argued November term, 1912, before SWAYZE, VOORHEES, and KALISCH, JJ.

John A. Bernhard and Benjamin F. Jones, both of Newark, for prosecutor. Collins & Corbin, of Jersey City (George S. Hobart, of Jersey City, on the brief), for defendant.

SWAYZE, J. As we understand the stipulation in this case, the only question before us is whether compensation under the Workmen's Compensation Act of 1911 (P. L. 134) can be awarded to a mother of the deceased employé where he has left no widow. The judge of the common pleas held that subdivision 1 of section 12 of the act (that relating to actual dependents) did not apply, and that judgment could only be entered under subdivision 2 (that relating to a case where there are no dependents). He therefore ordered judgment against the defendant for the sum of \$200 only. The question whether the mother in this case was an actual dependent is reserved by the stipulations and open to further litigation upon the reversal of the present judgment.

It is true, as counsel urge, that no specific amount is fixed by way of compensation to the mother where the decedent leaves no widow. From this omission they argue that no compensation can be awarded in this case. This argument is based upon a narrow reading of the section, and takes into account only the words "if widow and father or mother, fifty per centum of wages." If we look at the section more broadly and as a whole, it appears that it provides that: "In case of death compensation shall be computed, but not distributed on the following basis:

(1) Actual dependents." Then follows the schedule fixing specific percentages in the specified cases. The object of the section, however, clearly was to award compensation to actual dependents. It contains language apt for that purpose, and it contains no language which expressly excludes the mother where there is no widow, provided, of course, that she is an actual dependent. The particular schedule and the percentages specified are, as the statute says, intended as a basis for the computation. The right to compensation of actual dependents is fixed by the earlier words of the statute. If the schedule affords no basis for the computation, the right to compensation may fail; but that is not the present case. A basis of computation in the case of a mother alone is found in the fact that 25 per cent. of the wages is to be awarded where there is a widow alone, and 50 per cent. where there is a widow and father or mother. A comparison of these two clauses leads almost irresistibly to the conclusion that the intent of the Legislature was to allow a compensation of 25 per cent. where there was a mother alone or a father alone. Such a construction is in harmony with the general scope of the section, since it provides for a father or mother and does not leave them without provision in a remedial statute where grandparents and brothers or sisters are specifically provided for. It would be absurd to construe the act, which by its very language secures compensation to actual dependents, in such

a way as to give that compensation to more remote relatives and not to nearer relatives. We can think of no reason that would justify such an exclusion. That it was not intended is indicated by the fact that express provision is made for the father or mother where there is a widow. The Legislature cannot have meant to provide compensation where the decedent was under the double obligation to wife and parent, and to deny it when he was only under the single obligation to father or mother. We realize the danger of attempting to read into an act of the Legislature words that are not there. We have not done so, since we base the right to compensation upon the words "actual dependents." We may upon legal principles read into the basis of computation words that are essential to effectuate the main intent. In *Eyston v. Studd*, cited in 9 Bacon's Abridgment, Statutes 1, 6, it was held that a statute giving a remedy against executors might be extended by an equitable construction to administrators, because they are within the equity of the statute. This has been followed and applied in our courts in *Hoguet v. Wallace*, 28 N. J. Law, 523, in which Chief Justice Whelpley collects the early authorities, and the principle has recently been applied by the Court of Errors and Appeals in *State v. Alderman*, 81 N. J. Law, 549, 79 Atl. 283, in which it was held that a statute forbidding objections to an indictment for defects apparent on its face unless taken before the jury was sworn, applied to a case where the defendant pleaded *nolo contendere* in which therefore no jury could be sworn.

We think that the present case is within the remedy of the statute, and that if the mother was an actual dependent she would, upon proof of the other necessary facts, be entitled to 25 per centum of the wages for the number of weeks fixed by the statute. This results in a reversal of the judgment. The record must be remitted to the common pleas for further proceedings.

AMERICAN SURETY CO. OF NEW YORK v. SPICE.

(Court of Appeals of Maryland. Dec. 5, 1912.)

1. JUDGMENT (§ 386*)—MOTION TO STRIKE—DEFENSES—LACHES.

Laches could not be urged as a defense to a motion to strike a fiat judgment, unless the defense made the ground of the application could have been made available as against a *scire facias* by the use of proper diligence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 735-744; Dec. Dig. § 386.*]

2. APPEAL AND ERROR (§ 178*) — PRESENTATION BELOW.

A defense not presented at trial will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1120; Dec. Dig. § 173.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. BANKRUPTCY (§ 426*)—DEBTS DISCHARGED—JUDGMENT—ACTION FOR FRAUD.

Bankruptcy Act July 1, 1898, c. 541, § 17, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), provides that a discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as are judgments in actions for fraud, etc., or were created by the bankrupt's fraud while acting as an officer or in any fiduciary capacity. The narr. in an action of assumpsit alleged that defendant contracted with plaintiff to indemnify it against all expenses sustained under its independent agreement of guaranty with certain insurance companies guaranteeing defendant's honesty, and that defendant made default upon his contract with the companies, and had refused to perform such independent contract with plaintiff to repay it whatever it should be required to pay on his account to said companies, and the pleas were those appropriate to a contract action, but inappropriate to a tort action. *Held* that, whenever a debt had been reduced to judgment before discharge in bankruptcy, only such judgments were excepted from the discharge as were obtained in actions for fraud, etc.; and, when a debt has not been reduced to judgment before discharge, only such debts are excepted as were created by fraud while acting in a fiduciary capacity, etc., and the judgment in the action alleged that the narr. was not one in an action for fraud, so that the discharge was not a defense to a scire facias upon the judgment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787-807; Dec. Dig. § 426.*]

4. FRAUD (§ 41*)—PLEADING.

Fraud must be distinctly alleged and proved to be available.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.*]

5. BANKRUPTCY (§ 426*)—DISCHARGE—EXEMPTION.

Only such debts created by a bankrupt's fraud which were so created while he was acting as an officer in a fiduciary capacity, etc., are excepted from the operation of a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787-807; Dec. Dig. § 426.*]

6. BANKRUPTCY (§ 426*)—DISCHARGE—EXCEPTIONS—FRAUD IN "FIDUCIARY CAPACITY."

The words "fiduciary capacity," as used in Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), excepting from a discharge in bankruptcy debts created by the debtor's fraud while acting in any fiduciary capacity, refer to technical or express trusts, and do not include conversions or fraud by agents, etc.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787-807; Dec. Dig. § 426.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2756-2760; vol. 8, p. 7663.]

Appeal from Baltimore City Court; Walter I. Dawkins, Judge.

Action by the American Surety Company of New York against Horace L. Spice. From an order striking out a judgment of fiat rendered for plaintiff, it appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

James U. Dennis, of Baltimore, for appellant. William H. Hudgins and James McEvoy, both of Baltimore, for appellee.

PEARCE, J. This is an appeal from an order of the Baltimore city court, passed

April 20, 1912, striking out a judgment of fiat rendered March 12, 1901, in favor of the appellant against the appellee. The record in the present case embraces all the proceedings from the institution of the original suit between the parties down to the order here appealed from. It appears that on August 10, 1888, the appellant sued the appellee in assumpsit in the Baltimore city court. The narr. contained the common counts for money payable, and a special count alleging that the defendant, the present appellee, was an insurance agent, and in that capacity desired to represent certain insurance companies named in the narr., and that the plaintiff, the present appellant, upon the application of said insurance companies, and in the course of its usual business as a guarantor, guaranteed said companies against loss which they might sustain from the dishonesty or culpable negligence of the defendant while acting as their agent, this guarantee being given for a valuable consideration; and in further consideration that the defendant should contract to indemnify the plaintiff against loss by reason of such guarantee, and that the defendant did so contract with the plaintiff, and thereafter became the agent of said companies, and, while so engaged, defaulted and failed to account to said companies for money received by him as their said agent, whereby the plaintiff was compelled to pay large sums of money to said companies by reason of such default. The pleas were: (1) Never indebted as alleged; (2) never promised as alleged; (3) that plaintiff never paid said companies any money, at defendant's request, or which it was legally compellable to pay them; and (4) that he did not know, in fact, that the plaintiff had ever paid said companies any money on his account, and issue was joined on these pleas. Testimony was taken in New York City under a commission; and extracts from the bond given one of these companies is embraced in the return of said commission, and is incorporated in the record in this case. One of the conditions of this bond was that the guarantor should make good any loss sustained by the company "by reason of any act of fraud or dishonesty on the part of the agent in connection with the duties of the office or position herein referred to." The trial resulted in a judgment for the plaintiff for \$5,409.62.

Two writs of scire facias were issued on this judgment, one on February 2, 1901, returnable to the February return day, and the other on February 12, 1901, returnable to the March return day, both of which were duly returned nihil; and on March 12, 1901, judgment of fiat executio was entered. On January 13, 1912, the defendant therein moved to strike out this judgment, assigning, as a reason, that on March 23, 1900, he, be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing then a resident of the state of Iowa, was adjudicated a bankrupt by the United States District Court for the Southern District of Iowa, and subsequently received a discharge from all debts contracted by him prior to the institution of proceedings in bankruptcy, provable under the bankrupt act, and not excepted by such statutes from the effect of such discharge; that the plaintiff's judgment against him was returned to the bankrupt court, in the list of defendant's debts, together with the last address of the plaintiff known to the defendant; that he had never since assumed or promised to pay said judgment; that he had no notice of the scire facias proceedings mentioned, or of the judgment of fiat thereon, until September, 1911; that his said discharge in bankruptcy would have been a good and valid defense to the scire facias under which the judgment of fiat was obtained, but because of want of notice of the pendency of the same, and without fault or laches on his part, no opportunity was allowed him to plead such discharge, and the deposition of the defendant was taken February 28, 1912, in due form, supporting the facts alleged in the motion. The plaintiff answered the motion to strike out the judgment of fiat, alleging only that the discharge mentioned "was not good and complete defense to said scire facias, the debt represented by said judgment being excepted from the operation of said discharge by the provisions of section 17 of the Bankruptcy Act of the United States passed in the year 1898, and for other reasons to be shown at the hearing"; and on April 20, 1912, an order was passed striking out the judgment of fiat.

[1] The appellant first contends that the appellee was guilty of laches in not filing his motion to strike out until January, 1912, 11 years after the judgment of fiat, and for this he cites *Gorsuch v. Thomas*, 57 Md. 339; but it is manifest, from the language of that case, that laches could not be urged, except where the defense made the ground of the application could have been produced and made available as against the scire facias by the use of proper care and diligence.

[2] Moreover, it does not appear from the record that this point was made or considered in the court below; and it is therefore not open for review here.

If the method of proceeding is questioned in this case, that is settled by the cases of *Starr v. Heckart*, 32 Md. 267, and *Jones v. George*, 80 Md. 298, 30 Atl. 635. In the former case, the original judgment in question was recovered in 1858 in Anne Arundel county, and in 1859 the judgment debtor removed to Baltimore, and was finally discharged under the insolvent law the same year. In 1866 a scire facias was issued on the judgment, and a fiat was entered after two returns of nihil. It was held that the discharge was a good and valid defense to the

scire facias by the insolvent debtor; he being without fault or laches on his part, no opportunity having been allowed him to plead the same. The proceeding in that case was by bill for injunction to restrain an execution issued and levied on his property; and the court observed that in some cases relief might be obtained by a summary motion to strike out the judgment, or to quash the execution, if one should be issued, but held that in that case equitable jurisdiction of the court was properly invoked. In the latter case (*Jones v. George*, supra), the court expressly approved the proceeding by motion to strike out the judgment in order to give the defendant an opportunity to plead the statute of limitations to the original judgment, although it was 17 years after its rendition.

[3] The question before us is thus reduced to this: Was the defendant's discharge in bankruptcy on March 23, 1900, a valid defense to the scire facias upon the original judgment of March 26, 1899? and this depends upon the construction to be given to section 17 of the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), which, so far as relates to the case before us, is as follows: "Section 17. Debts Not Affected by a Discharge.—A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are judgments in actions for fraud, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; * * * or (4) were created by his fraud, embezzlement, misappropriation or defalcation, while acting as an officer, or in any fiduciary capacity." The natural construction of this act would seem to be: (1) That, whenever the debt has been reduced to judgment before the discharge is obtained, then only such judgments are excepted from the operation of the discharge as were obtained in actions for fraud, or for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; and (2) that, whenever the debt has not been reduced to judgment before the discharge is obtained, then only such debts are excepted from the operation of the discharge as were created by the debtor's fraud, embezzlement, misappropriation, or defalcation, while acting as an officer or in any fiduciary capacity. The distinction that is made is between debts that have, and those that have not, been reduced to judgment; and, in each of these classes, certain exceptions are made, based upon differing considerations.

The provable debt in this case being a judgment, the only proper inquiry is whether it comes within the class of judgments excepted from the operation of the discharge. In determining this (and inverting

the order of the exceptions), it is obvious that the judgment was not obtained in an action for willful and malicious injuries to the person or property of another, nor in an action for obtaining property by false pretenses or false representations. The only remaining exception is where the judgment was obtained in an action for fraud; and there the test is whether the action was one for fraud, and not whether a different action, one for fraud, might have been brought, if the creditor had so elected. Looking, then, to the record of the original case, we find the form of action was *assumpsit*—the form appropriate for breach of an agreement not under seal, but wholly inappropriate for recovery on a tort or a fraud. The narr. avers that the defendant contracted and agreed "with the plaintiff to indemnify it against all expenses it might sustain under its independent contract of guaranty with the insurance companies; that the defendant had made default under his contract with the companies, and had failed and refused to perform his independent contract with the plaintiff to repay to it, whatever it should be required to pay on his account to said companies. The account or bill of particulars attached to the narr. is an ordinary open account such as is responsive to a demand for particulars, under the common counts, without any suggestion of fraud as an element in the case. The pleas were those appropriate to an action of contract, but would not have been permitted in an action sounding in tort. The words "fraud" or "fraudulent" nowhere occur in this narr.

[4] To be availed of for any purpose, fraud must be distinctly charged and proved, and cannot be inferred here from the allegation that the defendant defaulted and failed to account properly to his principal. Failure to account properly is not necessarily a fraudulent failure, and is often attributable to misfortune, unmixed with fraud; and it is to be noted here that there is no averment that the defendant had embezzled or misappropriated any moneys which the plaintiff had been required to pay to said companies. We do not think, therefore, that action can be held to be an action for fraud, as is essential under the section we are considering to except the judgment from the operation of the statute.

We have not been referred to, nor have we found, any case in conflict with the view we have expressed that section 17 of the act of 1898 broadly distinguished between debts which had, and those which had not, been reduced to judgment before discharge; but there are numerous cases, both in the state and federal courts, in which are discussed the question whether a given judgment was one "for fraud," and there may be some difficulty in reconciling these various cases. The principle established, however, by the best-considered cases is thus stated in Collier

on Bankruptcy (8d Ed.) p. 195: "Clause 2 of section 17 does not except from the effect of the discharge claims created by fraud, or by obtaining property by false statements or by willful or malicious injury to the person or property of another, but does except judgments rendered upon causes of action of that nature. The judgment, read in connection with the pleadings upon which it is based, must establish the fact that the claim sued on, and merged in the judgment, was created through fraud, or by false pretenses or by willful or malicious injury to the person or property of another."

In *Re Rhutassel* (D. C.) 96 Fed. 597, the judgment under consideration was obtained upon two promissory notes, and the court said the judgment was founded on the express promise to repay the money loaned by the bank, and, in reply to the argument of the bank that the notes were procured by false property statements, said: "If the bankrupt act provided that claims created by fraud, false statements or false pretenses were excepted out from the bar of a discharge, then the mere fact that the claim had been put into judgment would not preclude the holder thereof from proving its original or essential nature in order to enable the court to determine whether it came within the exceptions of the statute."

In *Hargadine-McKiltrick Dry Goods Co. v. Hudson* (C. C.) 111 Fed. 361, the court cited the earlier act, and said: "If the question at bar had arisen under the section just quoted, a decided conflict of authority might readily be cited; but the present law reads as follows" (quoting section 17 of 1898), and then said: "The difference in language is striking. Under the old law, no debt created by the fraud or embezzlement of the bankrupt was discharged by the proceedings in bankruptcy; but in the present act it is 'judgments in actions for fraud' which are not released by the discharge in bankruptcy."

* * * The Legislature had some object in view in making this change. Its object, therefore, must have been to change the law in this respect. * * * Where a note is founded in fraud, two remedies exist. The holder may waive the contract and sue for the fraud, or he may sue upon the note and waive the fraud. The plaintiff in this case chose the latter course and took its judgment on the notes. Under this statute, it must be bound by that record, and cannot go back of it." This is equivalent to saying that the judgment must have been in an action *ex delicto* grounded on the fraud, and not in an action *ex contractu*, where a fraud might have been incidentally shown.

[5] But, even if it were competent to go behind the record of the judgment in this case, it would not avail the appellant, since it is settled by the decisions that only such debts (whether reduced to judgment or not) created by the fraud of a bankrupt as were

so created, while he was acting as an officer or in a fiduciary capacity, are excepted from the operation of a discharge in bankruptcy. It will be sufficient for that purpose to cite *Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, where the question was carefully considered.

[8] It is not contended here that the defendant was acting as an "officer"; and it cannot be successfully contended that he was acting in a "fiduciary capacity." Collier on Bankruptcy, vol. 2, § 2785, lays it down as settled law that this term refers to technical or express trusts, and "excludes conversions and frauds by commissionmen, brokers, agents, partners, etc., and other implied trustees." Numerous authorities sustaining this text are collected in a footnote by the author. Among these is *In re Wenham* (D. C.) a conversion by a ticket agent of proceeds of sales of tickets, reported in 16 Am. Bankr. Rep. 691, 153 Fed. 910. In *Crawford v. Burke*, supra, it was held that stockbrokers who converted to their own use shares of stock held by them for a customer, on an account, crediting him with amounts received as margins, and charging him commissions and interest, were not acting in a fiduciary capacity, and that the debt was not excepted from the effect of the discharge; and the court said such had been the view of that court ever since the case of *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236.

This case was argued for the appellants with zeal and ability; but we have not been able to agree with the argument, and for the reasons stated the order will be affirmed.

Order affirmed, with costs to the appellee above and below.

SUPREME CONCLAVE IMPROVED ORDER OF HEPTASOPHS v. REHAN.

(Court of Appeals of Maryland. Dec. 5, 1912.)

1. INSURANCE (§ 710*) — MUTUAL BENEFIT ASSOCIATIONS — CONTRACTS — SUICIDE — RETROACTIVE LAWS—INSANITY.

Where, at the time a beneficial association issued a certificate of membership to the plaintiff's deceased, there was no by-law regarding suicide, a condition that the death benefit would only be paid if the member complied with laws thereafter enacted did not give the order power to later bind a beneficiary by a law that no full benefit should be paid where the member committed suicide while insane, but did give power to pass a law providing that no benefit would be paid if the member committed suicide while sane; no sane person having a vested right to commit suicide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.*]

2. INSURANCE (§ 815*)—MUTUAL BENEFIT ASSOCIATIONS—SUICIDE—PLEADING.

In an action against a benefit association by a beneficiary of a deceased member, an answer to the complaint that the member committed suicide was demurrable, where it did not allege that the member was not insane at the

time, where a by-law, providing that no full benefit would be paid where the member committed suicide, was not binding on such beneficiary if the member committed suicide while insane.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.*]

Appeal from Court of Common Pleas.

Action by Annie Rehan against the Supreme Conclave Improved Order of Heptasophs. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

John C. Tolson, of Baltimore, and Olin Bryan, of Philadelphia, Pa., for appellant. George Washington Williams and John H. Richardson, both of Baltimore, for appellee.

BURKE, J. On the 10th day of November, 1898, the Supreme Conclave of the Improved Order of Heptasophs, a fraternal beneficiary association (a corporation duly organized and doing business in this state), issued its certificate of membership of John P. Rehan. The certificate provided for the payment from the benefit fund of the association, under certain conditions hereafter mentioned, of \$1,000 to his wife, Annie Rehan, the plaintiff in this case and the appellee on this record. The certificate was issued upon the condition, among others, "that the said member complies in the future with the laws, rules, and regulations now governing said conclave and fund, or that may be hereafter enacted by the supreme conclave to govern said conclave and fund."

In 1903 the association enacted the following law: "Sec. 257. No benefit shall be paid the beneficiary or beneficiaries of any member committing suicide (sane or insane): Provided, however, that where such suicide has completed one year of membership (although the supreme conclave shall by his act be released from all claims represented by the benefit certificate), his beneficiary or beneficiaries shall, nevertheless, receive from the supreme conclave a sum of money in full discharge of all demands, which he, she or they might otherwise have upon said supreme conclave, equal to an equitable proportion of the total benefit, such equity to be determined by the number of years the suicide was a member of the order, as related to his expectancy of life when admitted." In the absence of anything to the contrary appearing in the record, we will assume that the law was regularly and properly passed conformably to the constitution and laws of the association.

John P. Rehan died on the 6th day of September, 1911. The benefit was not paid; and this action was brought to recover the amount named in the certificate. The case was tried in the court of common pleas, and resulted in a verdict and judgment for the

plaintiff for \$1,000, and from this judgment the defendant has appealed.

When this certificate was issued and accepted, there was no suicide law of the association in force. The defense relied on was that John P. Rehan committed suicide, and that the law we have transcribed governed the case, and that under that law the plaintiff was entitled to receive only the sum of \$471, which amount the defendant tendered itself ready to pay. The plaintiff, however, contends that this after-enacted law is not binding upon her, and does not affect her rights under the certificate.

[1] The precise questions presented, which were raised by demurrer to the defendant's fourth and fifth pleas and by the plaintiff's demurrer to the defendant's rejoinder to the replication to the third plea, are these: First. Was it within the power of the defendant, by the enactment of this law, to reduce the amount payable to her as expressed in the certificate? Secondly. If the by-law is valid and binding upon her, do the defendant's pleadings disclose a defense within its terms? This is a narrow question, and is one which has not heretofore been passed upon by this court. It is an important question both to societies of this character and to their members. The trial court sustained the demurrers, and held that the defendant's pleadings did not disclose a good defense to the suit. It, however, granted leave to the defendant to plead over within 10 days. The defendant declined to plead further; and judgment was entered upon the demurrers in favor of the plaintiff.

There appears to be a general concurrence of authority in support of these two propositions: First, that a general power to amend the laws reserved either by the constitution or by-laws of a fraternal benefit society does not authorize an amendment which impairs the vested rights of the members. Secondly, that where a member of a fraternal benefit society agrees in his application for membership to be bound by the rules, or laws then in force, or which might be thereafter adopted, the society, after he has become a member, may enact reasonable rules and amendments, and bind him to their observance. *Brown v. Grand Fountain, etc.*, 28 App. D. C. 200; *Strang v. Camden Lodge*, 73 N. J. Law, 500, 64 Atl. 93; *Lange v. Royal Highlanders*, 75 Neb. 188, 106 N. W. 224, 110 N. W. 1110, 10 L. R. A. (N. S.) 666, 221 Am. St. Rep. 786; *Fraternal Union of America v. Zeigler*, 145 Ala. 287, 39 South. 751; *Court of Honor v. Hutchens* (Ind. App.) 79 N. E. 409; *Zimmerman v. Supreme Tent*, 122 Mo. App. 591, 99 S. W. 817; *Ayers v. Grand Lodge*, 188 N. Y. 280, 80 N. E. 1020; *Sautter v. Supreme Conclave*, 72 N. J. Law, 325, 62 Atl. 529; *Olson et al. v. Court of Honor*, 100 Minn. 117, 110 N. W. 374, 8 L. R. A. (N. S.) 521, 117 Am. St. Rep. 676, 10 Ann. Cas. 622; *Mathieu v. Mathieu*, 112 Md. 625, 77 Atl. 112.

In *Lange v. Royal Highlanders*, *supra*, the court said that a member of a fraternal benefit society, "who agrees in his application, or has the agreement incorporated in his policy or benefit certificate, that he will comply with the by-laws of the company then in force or thereafter to be adopted, is bound by subsequent by-laws the same as those in force at the time his certificate was issued, provided that such subsequent by-laws are reasonable in their nature, and are properly adopted in conformity of the rules of the order and the statutes governing such associations."

In *Ayers v. Grand Lodge*, *supra*, the court said: "An amendment of by-laws, which formed part of a contract, is an amendment of the contract itself; and, when such a power is reserved in general terms, the parties do not mean, as the courts hold, that the contract is subject to change in any essential particular at the election of the one in whose favor the reservation is made. It would be not reasonable, and hence not within their contemplation, at least in the absence of stipulations clearly specifying the subjects to be affected, that one party should have the right to make a radical change in the contract, or one that would reduce its pecuniary value to the other. A contract which authorizes one party to change it in any respect that he chooses would in effect be binding upon the other party only, and would leave him at the mercy of the former; and we have said that human language is not strong enough to place a person in that situation." The two cases from which we have quoted express the practically unanimous view of the courts upon the two propositions stated.

Although these general principles are well settled, there is a diversity of opinion as to what are reasonable changes or amendments. Confining our attention to the precise legal question first presented for consideration in this case, viz., the right of the defendant, by the after-enacted law transcribed, to reduce the amount payable to the beneficiary named in the certificate, the plaintiff in this case, in the event the insured committed suicide, "sane or insane," we find some conflict in the authorities.

In some jurisdictions it is held that a subsequently adopted amendment, partially or totally depriving the beneficiary of rights under the certificate in the event of suicide of the insured while sane or insane, is reasonable and valid. Other courts hold that such an amendment is wholly ineffective as to outstanding certificates issued when there was no suicide law in force, notwithstanding the insured had agreed in the contract to be bound by after-adopted laws. In other jurisdictions it is held that such a retroactive law is valid so far as it relates to members committing suicide while sane, but is invalid so far as it attempts to affect the rights of

the beneficiary where the member has taken his own life while insane. This is the position taken by the New York, Virginia, Minnesota, and some other courts, and is based upon reasons manifestly sound and just to both parties to the contract.

The crucial question in all the cases has been one of construction, the courts, however, differing upon the reasonableness vel non of the new law; and, in deciding this question, reference has always been had to the nature and purposes of the contract, read in the light of the objects of the order. These contracts, like other contracts, confer vested rights and interests upon the member; and it would be most unreasonable and unjust to hold that, under a general reserved power to amend, or upon a general stipulation of the insured that the society might amend, one party to the contract had the power to destroy the rights of the other. Such a construction would put the rights of one party to the contract wholly at the mercy of the other.

In *Olson v. Court of Honor*, 100 Minn. 117, 110 N. W. 374, 8 L. R. A. (N. S.) 521, 117 Am. St. Rep. 676, 10 Ann. Cas. 622, the insured in his application expressly agreed that he would strictly comply with the constitution, laws, and rules then in force or thereafter to be enacted or adopted. When the certificate was issued and delivered, a by-law of the association then in force provided that: "This order will not pay the benefits of members who commit suicide, whether sane or insane, except it be committed in delirium resulting from illness, or while the member is under treatment for insanity, or has been judicially declared to be insane; but in all cases not within said exceptions the amount of money contributed to the benefit fund by such member shall be returned and shall be paid to the beneficiary out of said fund in lieu of the benefit." The application for membership contained this provision: "I further understand and agree that the laws of the order now in force, or hereafter enacted, enter into and become a part of every contract of indemnity by and between the members of the order and govern all rights thereunder." In the place of the original by-law, the association, after the issuance of the certificate, adopted the following: "If a benefit member commits suicide, whether sane or insane, voluntary or involuntary, there shall be payable to the beneficiaries entitled thereto five (5) per cent. of the face of the certificate for each year he shall have been continuously a member of the society, and after twenty (20) years of continuous membership the certificate shall be payable in full." The assured committed suicide, and suit was brought upon the certificate by the beneficiary. The trial court held that the by-law in force when the certificate was issued governed the case, and instructed the jury that the plaintiffs were

entitled to recover the full amount named in the certificate, unless the insured committed suicide; but, if she did, then the defendant was entitled to a verdict, unless the jury further found that she was at the time under treatment for insanity. In passing upon this prayer, the court said: "It is the contention of the defendant that it was by virtue of the provisions of the original contract that the society might change its by-laws, and that the members should be bound thereby. It is obvious that such a provision must receive a reasonable construction. It would be unreasonable to construe it as giving the society plenary power to change its by-laws in any manner it might elect, for, if such construction were to obtain, then the original contract would be simply one to the effect that the society would pay the beneficiary, in case of the death of a member, in accordance with the terms of the contract or in accordance with such new, other, or further contract as it might elect thereafter to make for the parties. It seems clear that where the member—that is, the insured—gives in advance the general consent to a change in the by-laws, and agrees in his certificate to abide by all the laws thereafter enacted by the society, he does not intend thereby that the society shall have the power to impair, in essential particulars, the contract for the payment of a specific sum to his beneficiary which it agreed by its certificate to pay; or, in other words, he does not consent that the society may make, without consulting him, a new contract for the parties. It has accordingly been held by this court, in accordance with the weight of judicial authority, that the general consent and agreement of a member of a mutual benefit society, in his application and certificate, to be bound by any future changes in the constitution, by-laws, and rules of the society that it may enact in the future are subject to the implied condition that they must be reasonable. * * * The precise question in this case is whether the change in the by-laws of the society was reasonable whereby it attempted to relieve itself from liability to pay the stipulated benefit when the death of the member resulted from suicide while under treatment for insanity, which it contracted for by its certificate and original by-laws. There are a number of cases which hold, in effect, that a mutual benefit society may legally make such a change in its by-laws, where a general power to change its laws has been reserved. See *Supreme Commandery, etc., v. Alinsworth*, 71 Ala. 436 [46 Am. Rep. 332]; *Hughes v. Wisconsin Odd Fellows Mutual Ins. Co.*, 98 Wis. 292 [73 N. W. 1015]; and *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203 [20 South. 712, 55 Am. St. Rep. 310]. The change, however, in the by-laws in the case at bar is quite as fundamental as the respective changes of *Thibert v. Supreme Lodge*, etc. [78 Minn. 448, 81 N. W. 220, 47 L. R.

A. 136, 79 Am. St. Rep. 412], supra, and *Tebo v. Supreme Council*, etc. [89 Minn. 3, 93 N. W. 513], supra; and, unless we overrule those cases, we must hold that the change in the by-law in this case was also unreasonable." This case and the case of *Plunkett v. Supreme Conclave*, 105 Va. 643, 55 S. E. 9, followed the cases of *Shipman v. Protected Home Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347, and *Weber v. Supreme Tent*, etc., 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753.

In the last-cited case, one of the precise questions now under consideration was decided. Chief Justice Parker, speaking for the court, stated the question and the reasons upon which the decision of the court permitting a recovery was rested. This case was directly approved in *Shipman v. Protected Home Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347, in which the court said that the conclusion reached was not in conflict with the doctrine announced in *Weber's Case*, supra, "for in that case there was a finding that the deceased member took his own life while insane; and, as already pointed out, that was a risk which was included in his contract, and therefore his beneficiary was entitled to claim the fund." "At the time Weber joined the order and received his policy," said Judge Parker, "the rules of the defendant and the contract of insurance provided that the contract should be void if the party committed suicide within one year, whether sane or insane. Before Weber's death, defendant undertook to amend its by-laws and rules so as to extend the time from one year to five within which self-destruction, whether the result of an insane act or an intentional one, should operate to destroy the policy; and it insists that the amendment was legally accomplished, and that the self-destruction of the defendant within the five years, although an insane act, operated to deprive this plaintiff of all right of recovery. Plaintiff challenges the alleged amendment and insists that it was not legally accomplished, and hence is not available as a defense. But the disposition which we deem it necessary to make of this appeal renders it unnecessary to pass upon that question; and hence we shall assume, without deciding, that defendant took all the steps necessary to bring about this change in its laws. This brings us directly to the question whether defendant had the power by amendment, long subsequent to the taking out of the policy by its member, to deprive his beneficiary of all rights under the policy in the event of unintentional self-destruction on the part of the insured; for, in the eye of the law, the taking of life by an insane person, whether it be his own or that of some other person, is not an act for which he is responsible. In the *Century Dictionary*, a suicide is defined to be: 'One who commits suicide; at common law, one who, being of the years

of discretion and sound mind, destroys himself.' And the act itself is defined to be: 'Designedly destroying one's own life. To constitute suicide at common law the person must be of years of discretion and of sound mind.' This distinction was evidently in the minds of the draftsmen of the rules of the defendant, for they provided that members who should commit suicide within one year from the time of their admission, whether sane or insane, should not secure to others any benefits from the membership. It was entirely competent, of course, for defendant to provide in the contract between it and its members that there should be no recovery in the event that, within a given period, the insured should take his own life, although insane; and it could as well have provided that the effect of death by consumption should be to avoid the policy and deprive it of all force, and the same could be said of typhoid fever or any other disease. But it did not see fit to include any of these diseases, nor even unintentional self-destruction after a period of one year. The query, therefore, is whether one who has become a member of this order, and entered into a contract with it, may be deprived of rights under it by a subsequent amendment of the by-laws, providing that unintentional self-destruction shall avoid the policy. It needs no amendment to the by-laws to accomplish that result, where a person of sound mind deliberately takes his own life, for in such case, as the Supreme Court of the United States held in *Ritter v. Insurance Co.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693, it is an implied condition of the policy that insured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some cause other than deliberate, willful self-destruction. So, if the proof were that the defendant, while of sound mind, intentionally took his own life, there could be no recovery, although the policy were silent upon the subject. But unintentional self-destruction, whether due to insanity or accident, after the lapse of a year from the making of the contract, was as much insured against as death from typhoid fever or consumption; and an amendment to its by-laws, providing that the death of an existing member from any of these causes should render the policy void, would deprive the party of vested contract rights. An amendment which effects such a result, we have recently held, may not be made, because it is an unreasonable amendment, destroying contract rights instead of regulating the administration of the corporation and its members within reasonable bounds. *Parish v. New York Produce Exchange*, 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149. The division line between proper and improper amendments, and the authorities bearing thereon, were sufficiently considered in that case. In this one it suffices in conclusion

to say that this defendant cannot, by amendment to its rules, deprive persons already insured, or their beneficiaries, of their rights under contracts of insurance in the event that death should ensue from specified causes necessarily insured against by the original contract. This contract insured Weber against unintentional self-destruction after one year; and the defendant had not the power to take away the right thus secured without his consent. As against him and the beneficiary under his contract, therefore, that part of the amendment which provided, in effect, that self-destruction while insane, within five years from the date of the policy, should render the policy void, was unreasonable and ineffectual."

In the Shipman Case, *supra*, the question was, as one of the questions is here, as to the binding effect of a new law upon the wife of a member who had committed suicide while sane; the member having agreed to be bound by after-enacted laws of the society. The court held the by-law valid so far as it related to members committing suicide while sane, saying, "to the extent that the amended by-law provides for a forfeiture of contract rights in event of suicide by the insured while sane, it is valid: First, because it invades no vested right of the insured; and, second, because it is a fundamental, though unexpressed, part of the original contract that the insured should not intentionally cause his own death. If we assume, therefore, that the original contract and by-laws were silent upon the subject of suicide by the insured while sane, the amended by-law is valid, because there could be no such thing as a vested right to commit suicide, and for the further reason that there is nothing more than the written expression of a provision which the law had read into the contract at its inception."

We therefore hold, upon what we regard as the safer, sounder, and more reasonable rule upon this question, that the after-enacted by-law before us is not binding upon the plaintiff, if her husband took his own life while insane, but that it is binding upon her if he committed suicide while sane. There is nothing in the case of Mathieu v. Mathieu, 112 Md. 625, 77 Atl. 112, in conflict with this doctrine. That case related to changes in the by-laws invalidating a previous designation of a beneficiary. The court found the change to have been reasonable upon the facts of the case. After quoting the by-laws and referring to the provisions of the application for membership, the court, in assigning its reasons for holding the by-laws reasonable, said: "The amended by-laws imposed no hardship upon the member. They gave him the right to make a new designation of his beneficiary, if he desired to do so, in all cases in which the original designation became inoperative by their passage, and also made it lawful for him to redesignate the same beneficiary. It was

only in the event of his failure to exercise his right of making a redesignation or a new designation that the fund became payable on his death to the members of his immediate family in the order of precedence under which his widow was first entitled to it."

[2] 2. This brings us to the consideration of the only remaining question: Do the allegations of the defendant's pleadings disclose a defense, under the valid and binding provision of this law, which we have held to operate upon her rights under the certificate? There is no allegation that the member was sane or insane at the time he took his own life; nor is it alleged, as it was in Plunkett's Case, *supra*, that the deceased "died from the effects of a pistol wound inflicted by himself with suicidal intent; nor as in Tisch v. Protective Home Circle, 72 Ohio St. 233, 74 N. E. 188, that the death of the insured "was caused by a pistol shot fired purposely by herself with suicidal intent," which fact in that case was admitted by the plaintiff; nor is there any allegation that the member intentionally or purposely destroyed his own life. The defense rests upon the by-law and the mere allegation that the member committed suicide. The case of this appellant v. Miles, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528, shows that this court has been careful to protect the rights of certificate holders in the defendant association.

In the Miles Case this court held that the mere fact that the insured had committed suicide would not bar a recovery under the contract. Judge Jones, speaking for the court, said: "The court refused to instruct the jury that, notwithstanding there was no condition in the contract between the defendant and the assured that the defendant should be exempt from liability to pay the insurance to the beneficiary in case the death of the assured occurred by suicide, the plaintiffs were not entitled to recover, if the jury found the cause of death to be suicide. We think this ruling is in accordance with what has been the generally accepted doctrine in regard to suicide as a defense in cases the nature of this. In the present case this doctrine was very justly applied. The charter of the defendants stated the object of the incorporation thereunder to be for 'beneficial purposes, and to provide an endowment fund to be paid to the family or friends of a deceased member.' Its constitution described one of the objects of the order to be 'to create and maintain, by stated and fixed contributions, a benefit fund from which, on satisfactory evidence of the death of a member, who has complied with all the lawful requirements of the order, a sum not exceeding \$5,000 shall be paid to his beneficiary or beneficiaries.' The whole spirit and design of the order is, according to its professed object, to assist members and relieve them in sickness while they live, and to provide for the needs of their families and friends in

case of their death—those of the families and friends of the deceased members who are made the objects of care by the order but have no more control over the cause of death than have the members of the order. Their need of assistance is the same, whatever the cause of death. To refuse them this assistance for a cause over which they have no control would not accord with the expressed objects of the order, and would be contrary to the spirit which professedly prompted its organization."

Had the defendant's pleadings showed that the insured, while sane, had intentionally or designedly taken his own life, they would have disclosed an excepted cause of liability within the terms of the by-law.

In *Travelers' Insurance Co. v. Nicklas*, 88 Md. 470, 41 Atl. 906, the provision in the policy, upon which the defendant relied, was as follows: "If the insured shall die by suicide, whether the act be voluntary or involuntary, felonious or otherwise, or whether the insured be sane or insane at the time of the act, then. * * * this policy shall be null and void and of no effect, except in the case provided for in the sixth section of his policy." There was no question of insanity in the case. The evidence showed that the insured was found dead on the floor of his bathroom, fully dressed, with a pistol shot wound over his right ear, and the pistol on the floor near by. The court, at the instance of the plaintiff, instructed the jury "that, where death results from a pistol shot wound, self-destruction is not to be presumed; but the law presumes the wound was the result of accident, and the burden of proof is upon the defendant to show, by a preponderance of testimony, the wound was intentionally self-inflicted, and that it was not the result of accident, and that, unless the jury find, from the evidence, that the insured intentionally shot himself, their verdict must be for the plaintiff." This instruction was approved; the court saying: "We do not understand that it was seriously contended that the propositions of law set forth in this prayer are not sustained by authority."

A full discussion of suicide provisions in policies of insurance, and a review of the decisions upon them, may be found in 2 *Bacon on Benefit Societies and Life Insurance* (3d Ed.). In section 336 the author says: "To avoid the effect of these decisions, it has become customary with life insurance companies to insert in their policies a stipulation that the contract shall be void if the insured shall 'die by suicide, felonious or otherwise,' 'sane or insane,' or 'by suicide, sane or insane.' These conditions have been generally upheld, and successfully eliminate the element of suicide, so that no kind or degree of insanity will prevent the avoidance if the insured had the intent to do the act, even though the intent of an unbalanced

mind, or realized the physical consequences of his act."

Being of opinion, for the reasons stated, that the defendant's pleadings were insufficient, and that the judgment for the plaintiff was properly entered, it will be affirmed.

Judgment affirmed; the appellant to pay the costs above and below.

MATTHEWS v. WHITEFORD et al.

(Court of Appeals of Maryland. Dec. 5, 1912.)
APPEAL AND ERROR (§ 1082*)—COURT OF APPEALS—APPEAL FROM BALTIMORE CIRCUIT COURT—SCOPE OF REVIEW.

Since a justice of Baltimore county had jurisdiction of a landlord's suit for restitution, and the circuit court for that county had jurisdiction to review the justice's judgment, the Court of Appeals, on appeal from the judgment of the circuit court, can only consider whether that court had jurisdiction to render its decision, and not whether its decision was correct.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1133-1136, 4270, 4283, 4292; Dec. Dig. § 1082.*]

Appeal from Circuit Court, Baltimore County; Wm. H. Harlan, Judge.

Proceedings by Dennis M. Matthews against John S. Whiteford and another. From a judgment for defendants, plaintiff appeals and defendants move to dismiss the appeal. Appeal dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, and STOCKBRIDGE, JJ.

Laurie H. Riggs and J. Marsh Matthews, both of Baltimore, for appellant. James J. Archer, of Bel Air, for appellees.

PEARCE, J. This is an appeal from the circuit court for Baltimore county. The proceeding was instituted by the appellant under section 1 of article 53 of the Code of 1912, before a justice of the peace of Baltimore county, against the appellees, for restitution of the possession of a farm in said county theretofore leased by the appellant to the appellees, for the period of one year, ending on the 28th day of February, 1912. The complaint of the appellant complied with the requirements of section 1 of article 53, and summons was issued accordingly for the appellees, who appeared on the day set for trial, and upon trial the justice rendered judgment in favor of the plaintiff for the restitution of the possession of the premises demise, and costs. Appeal was prayed from that judgment, and the papers were sent up to the circuit court for Baltimore county. The docket entries in the circuit court show: That the papers sent up by the justice were filed with the clerk of the court April 9, 1912. That on April 11th, "Petition and order of court thereon filed," but neither the petition nor order appears in the record. April 13, 1912, "Answer of defendants filed." April

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

24th, "Defendants' defenses filed." April 24, 1912: "Case was heard by Judge Harlan, upon the written notice, lease, and letters, but declined to hear the evidence bearing directly upon the written notice in question. Held sub curia." May 10, 1912, "Proceeding in the above-entitled case quashed; opinion and order of court filed." May 21, 1912, "Order for an appeal to the Court of Appeals filed." September 9, 1912, "Approved bond filed." It appears from the opinion of the court, incorporated in the record, that the court held the notice to quit, which was given by the appellant to the appellees, was defective in that it fixed a date for the appellees to quit different from that fixed by the lease as the expiration of the term, the lease being for the year ending February 28, 1912, and the notice requiring the appellees to quit April 28, 1912, and the court held that the tenancy was not thereby terminated, and that jurisdiction to order restitution of the premises could not be conferred on the justice by the clause in the lease waiving any notice to quit. The appellees have moved to dismiss the appeal, for want of jurisdiction in this court to review the judgment of the circuit court for Baltimore county, the right of appeal therefrom not being given by any statute.

There can be no question that the justice was in the exercise of his rightful jurisdiction to hear and determine the complaint, and that the circuit court of Baltimore county had jurisdiction on appeal to review the judgment of the justice. It is equally clear that in reviewing the judgment of the justice, the circuit court had power to decide upon the sufficiency of the notice to quit, and also of the effect of the clause in the lease waiving any notice to quit. It is firmly settled by numerous decisions that the only question in such cases which this court can consider is whether the circuit court had the right to decide what it did decide, and that we cannot consider whether it decided rightly or not. *Rayner v. State*, 52 Md. 368; *Clark v. Vannort*, 78 Md. 221, 27 Atl. 982; *Mining Company v. Midland Company*, 99 Md. 506, 58 Atl. 217; *Smith Premier Co. v. Westcott*, 112 Md. 146, 75 Atl. 1052; *Queen v. State*, 116 Md. 678, 82 Atl. 656.

The appeal must therefore be dismissed.

Appeal dismissed with costs to the appellees above and below.

BOARD OF COM'RS OF HOWARD COUNTY v. PINDELL.

(Court of Appeals of Maryland. Dec. 5, 1912.)

1. HIGHWAYS (§ 213*)—INJURIES FROM DEFECT—TRIAL—QUESTION FOR JURY.

On conflicting evidence, in an action against a county for damages for injuries to plaintiff's person, horse, wagon and harness from a de-

fective road, *held*, that the question of defendant's liability was for the jury.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 535-537; Dec. Dig. § 213.*]

2. DAMAGES (§ 208*)—INJURIES FROM DEFECT—QUESTION FOR JURY—PERMANENT INJURIES.

In an action for personal injuries from a defective highway, *held*, on the evidence, that whether plaintiff's injuries, if any, were permanent and calculated to disable her from engaging in employment for which she would otherwise have been qualified, was for the jury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 208.*]

3. TRIAL (§ 203*)—INSTRUCTIONS—THEORIES OF CASE.

In an action against a county for injuries to plaintiff's person, horse, and wagon from a defective highway, the evidence was conflicting on all material questions of fact, and defendant requested instructions that if the hole in the road, if any, in which plaintiff's horse stepped before he fell, was caused by heavy rains and usual thawing, plaintiff could not recover, unless defendant had sufficient time to have had notice of such defect by the exercise of ordinary diligence, so as to have repaired it before the accident, and that, if plaintiff's horse stepped into a hole which could not have been seen by a traveler along the road, defendant had no notice of it, and could not have learned of it by the exercise of due diligence, and was not liable. *Held*, that refusal to so charge was erroneous, in that it took defendant's theory of the case from the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 477-479; Dec. Dig. § 203.*]

4. TRIAL (§ 260*)—REQUESTED INSTRUCTIONS—INSTRUCTION ALREADY GIVEN.

The rejection of a prayer which is substantially the same as one already given is not reversible error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from Circuit Court, Anne Arundel County; Jas. R. Brashears, Judge.

Action by Antonette Pindell against the Board of County Commissioners of Howard County. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Robert Moss, of Annapolis, for appellant. John G. Rogers, of Ellicott City, for appellee.

BRISCOE, J. The record in this case presents the defendant's exception to the ruling of the court below in granting the plaintiff's first and second prayers, in rejecting the defendant's first, second, third, fourth, sixth, tenth, and eleventh prayers, and in overruling the defendant's special exceptions to the granting of the plaintiff's first and second prayers. The defendant's fifth, seventh, eighth, twelfth, thirteenth, and fourteenth prayers were granted as offered, and, the judgment being in favor of the plaintiff, the defendant brings this appeal.

The suit was instituted by the plaintiff against the defendant, the county commissioners of Howard county, in the circuit

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court of that county, but was subsequently removed to the circuit court for Anne Arundel county, where upon trial the plaintiff recovered a judgment of \$600 and costs.

The declaration contains two counts, and the suit was brought to recover damages for personal injuries received by the plaintiff and for injuries to her horse, wagon, and harness while driving on one of the public highways of Howard county, commonly called "the Beechwood avenue," in the First election district of that county. The declaration avers that the county commissioners negligently allowed and permitted the county road where the accident happened to be and to remain out of repair and in an unsafe and dangerous condition; that the plaintiff while driving along this highway using due care and caution was thrown from the vehicle in which she was driving and painfully injured, and her horse, then being driven and drawing the vehicle, was badly cut and injured by reason of his having trod into a large and dangerous hole in the road maintained by the defendant corporation, which hole was well known by the defendant to exist, yet the defendant did not repair the hole and the dangerous place, but permitted it to remain so unrepaired and unfixed, well knowing the same to be a dangerous place and a constant menace to those driving along and using the road. The second count relates to the injury to the person, the damage to the vehicle and horse, and the same negligence is averred as in the first count.

[1] The plaintiff testified that on or about the 15th of February, 1910, while being driven by a colored boy in a phaeton on the public road where the accident occurred, her horse suddenly plunged in a mud hole, and she was thrown on the dashboard, then back again, and then out against the wheel; that the hole was a deep one, but she had no idea of its size or depth; that the horse was now valueless, and that the harness and vehicle were injured; that she was bruised and began to suffer with pain in her hip, and had to give up teaching for nine days, and one year later, consulted a physician, and had to wear a plaster case from that time until now. She further testified that the road had been left in an unfinished condition in the fall of 1909, and no work had been done on the road from that time to the day of the accident, and it was filled with mud, and you could not tell what was there; that at the time of the accident Mr. Grovenoe Hanson, one of the county commissioners, drove up, and exclaimed, "Did you ever see such a terrible road?" and that when her team left the macadam road and had gone about 20 feet, going upgrade very slowly, the horse fell. Upon cross-examination she testified that she had been over the road four or five times that winter; that she went to see Dr. Riley on the 11th of February, and had been there three or four times since; that she lost no

time, and did not employ any one to teach for her.

The colored boy who drove the vehicle on the day of the accident testified: That after leaving the macadam road, and going 20 feet upgrade, all at once, while the horse was walking, he went down and struggled, and when, "I got him out of the hole help came. The hole was as deep as my arm and about six or eight inches wide." That the hole was filled with water, and it was in the daytime. That he could see nothing there to show that it was dangerous. That the plaintiff was thrown out and he went to the horse. She was down in the mud and the shaft strap was broken. The road there was all right but the whole road was muddy. He further testified on cross-examination that the hole was deep; that he could tell by the horse's knee; that both feet went down, one deeper than the other.

Dr. Riley, who attended the plaintiff, testified, in substance, that the plaintiff had been compelled to wear a plaster case, but that he did not consider the injury permanent.

Miss Pindell, a sister of the plaintiff, testified that her sister was well and strong before the accident, but that since that time she was practically an invalid, unable to do home work, or to attend to her ordinary duties and that she had lost flesh.

On the part of the defendant, Mr. Hanson one of the county commissioners, testified that he rode over the road where the accident occurred twice a week; that the state had macadamized the road except about 600 feet, and this had been graded, rounded up, rolled, and left in a smooth and nice condition in the fall of 1909; that it was a good road in the month of December, and was in fairly good condition up to the time of the thaw; that on the day of the accident, in returning from Ellicott City, he rode up to the road, where he overtook Miss Pindell: that the road was upgrade and macadam, and that he followed her team to the end of the macadam, and it struck muddy road: that he heard her horse wheeze, then the horse suddenly turned and fell. The colored boy, who was driving, jumped out. Then Miss Pindell jumped out, and went up in the path at the side of the road, and Miss Pindell said to the boy, "Why didn't you carry out my instructions, and put on the horse's collar, instead of the breast strap?" The condition of the road had never been complained of. At the time of the accident the mud in the road was six or seven inches deep, and the road was in good condition, and that there were no holes except the ruts usually made by wagon wheels in a dirt road.

The witness Kreager, who saw the accident, testified that Miss Pindell placed her hand on the wheel and jumped out: that he did not see any mud on her, and that she did not fall out; that the road at that point

was 30 feet, and that he saw no hole, although he looked for it, and could have seen one had there been one, and that he used the road twice a day going to and from work, and that there was no worse than other parts of the road.

George Arter, a witness for the defendant, who also saw the accident, testified that he used the road with a pair of mules, and it was all right, except muddy.

The witness Turner, who lived near the road, testified that he used the road at least four times a day going in vehicles to and from the depot; that he was over it five minutes before the accident and saw no hole; that the road was no worse that day than any other time; that it was muddy; that this road had been harrowed, dragged, shaped up, and rolled the previous fall and left in a fine condition; that the road was wide at that point, and that no grading had been done there, nor had any stone been taken out there that could leave a hole of any size; that he had his teams employed on the road, and was there in person daily, while work was going on, and that he was well and thoroughly acquainted with the road. There was a slight fill at that point from two to six inches but no more.

The witness Mullin testified that he used the road frequently hauling over it; that he saw no hole; that the road where the accident happened was in no worse condition than other parts of the road.

There was also testimony to the effect that no complaint had been made or reported to the county commissioners as to the bad condition of the road.

There being then a clear conflict in the evidence in this case upon the material questions of fact, the case was one for the jury, and the court committed no error in rejecting the defendant's first, second, third, and fourth prayers, which were in the nature of a demurrer to the evidence.

The plaintiff's first prayer, although somewhat involved, we think sufficiently stated the law as applicable to the plaintiff's theory of the case. A somewhat similar prayer was approved by this court in *Hartford County v. Hause*, 106 Md. 444, 67 Atl. 273, as presenting the law applicable to the plaintiff's theory of the case. The defendant's first prayer, however, in that case, was amended so as to submit the law bearing upon the defendant's theory of the case. It was granted as amended and approved by this court.

[2] We find no error in the ruling of the court in granting the plaintiff's second prayer as to the measure of damages. There was a conflict in the evidence as to the nature and character of the injury, if the jury found there had been an injury to the plaintiff, and the question, "Whether the same was in its nature permanent and how far, if at all, it was calculated to disable her from engaging in employment for which, in

the absence of such injury, she would have been qualified," was properly left to the finding of the jury. The verdict in the case was not excessive, and the defendant could not have been injured by the granting of this prayer.

The court could not say under the evidence in the case as a matter of law that there was no evidence of permanent injury. The special exception to this prayer was also properly overruled.

[3] We think there was error in rejecting the defendant's sixth prayer, which submitted the defendant's theory of the case to the finding of the jury. The prayer is as follows: "If the jury find from the evidence that the hole in the road complained of, if they find there was a hole in the road, in which the plaintiff's horse stepped before he fell, and shall find that said defect in the road was caused by the heavy rains and the thawing usual in February, the plaintiff is not entitled to recover, unless the jury shall find that the defendant had sufficient time to have acquired notice of said defect in the said road by the exercise of ordinary diligence so as to have repaired the hole in the road before the accident complained of, and in this connection the jury are entitled to take into consideration all the surrounding circumstances." Practically the same prayer was approved by this court in *Hause Case*, 106 Md. 444, 67 Atl. 273, as presenting the theory of the defendant's case. In *Eureka Fertilizer Co. v. Baltimore Copper Co.*, 78 Md. 179, 27 Atl. 1035, this court said the case presented opposite and conflicting theories founded upon the opposite and conflicting evidence introduced by the contesting parties, and each of these parties, if the evidence supported his theory, was entitled upon making such a request to have the legal principles involved in that theory announced to the jury upon a hypothetical statement of the facts upon which it was founded. In the *Eureka Case* the judgment was reversed and a new trial was awarded, and the court said the result was that the defendant's theory was eliminated from the case, though both that theory and the plaintiff's were entitled to be passed on by the jury. This was not only error, but was injurious to the appellant. The facts of the case at bar bring it directly within the rulings in the *Eureka Case*, *supra*, and other cases decided by this court. *Deford v. Dryden*, 46 Md. 248; *Corbett v. Wolford*, 84 Md. 426, 35 Atl. 1088; *Singer Sewing M. Co. v. Lee*, 105 Md. 673, 66 Atl. 628; *Caledonian Ins. Co. v. Traub*, 86 Md. 98, 37 Atl. 782.

The defendant's tenth prayer was also rejected. It is as follows: "If the jury shall find from the evidence that the plaintiff's horse while being driven by the plaintiff's driver attached to the vehicle in which the plaintiff was seated stepped into a hole in the road as testified to in this case, which

hole had a depth of about two feet, and fell down and threw the plaintiff from the vehicle, and injured the plaintiff, and the vehicle, harness, and horse, and shall further find that said hole in the road could not be seen by a traveler passing along said road, and that the defendant, the county commissioners, had no notice directly or indirectly of said hole being in the said road, and could not have learned of said hole being in the road by exercise of due diligence, then the verdict of the jury must be for the defendant." This prayer contained material questions to be passed on by the jury, and it was error to have rejected this prayer.

The defendant's sixth and tenth prayers, however, it will be seen presented the theory of the defendant's case, and practically submitted the same questions. The granting of either of these prayers, in connection with the plaintiff's granted prayers, would have covered the law of the case, but the rejection of both eliminated entirely the defendant's theory of the case from the consideration of the jury. *Whiteford v. Burckmyer*, 1 Gill, 127, 39 Am. Dec. 640; *Adams v. Capron*, 21 Md. 205, 83 Am. Dec. 566; *Jackson v. Jackson*, 80 Md. 192, 30 Atl. 752; *Higgins v. Carlton*, 28 Md. 139, 92 Am. Dec. 666; *Day v. Day*, 4 Md. 262.

[4] It is well settled that, where the granted prayers contain the law of the case, the judgment will not be reversed, if other prayers, although correct, are rejected, and this is so because the law of the case has been sufficiently covered by the granted prayers. *Insurance Co. v. Robinson*, 115 Md. 420, 80 Atl. 1085; *Regester v. Medcalf*, 71 Md. 528, 18 Atl. 966; *Balto v. Pendleton*, 15 Md. 12; 2 Poe, Pleading and Practice, §§ 292, 292A; *Rosenkovitz v. United Ry. & Elec. Co.*, 108 Md. 306, 70 Atl. 108. Nor would it be reversible error to reject a prayer which is substantially the same as an instruction already given. *Caledonian Fire Ins. Co. v. Traub*, 86 Md. 98, 37 Atl. 782; *Goodman v. Saperstein*, 115 Md. 684, 81 Atl. 695. There was no error in the ruling of the court in rejecting the defendant's eleventh prayer, or in overruling the special exceptions to the plaintiff's prayers.

No point was made as to the defendant's fifth, seventh, eighth, ninth, twelfth, thirteenth, and fourteenth prayers, and they appear to have been granted without objection. The principles of law applicable to this character of case have been so recently applied and passed upon by this court that we deem it unnecessary to discuss them here, but refer to some of the adjudged cases, where the principles are announced and settled. *Hartford County v. Hause*, 106 Md. 444, 67 Atl. 273; *Adams v. Somerset County*, 106 Md. 203, 66 Atl. 695; *County Com'rs v. Wilson*, 97 Md. 207, 54 Atl. 71, 58 Atl. 596; *County Com'rs v. Blackburn*, 105 Md. 226, 66 Atl.

31. For the error in rejecting the defendant's sixth and tenth prayers, the judgment will be reversed, and a new trial will be granted.

Judgment reversed, and new trial awarded, with costs to the appellant.

HERRMAN et al. v. COMBS.

(Court of Appeals of Maryland. Dec. 5, 1912.)

1. TRIAL (§ 420*)—EXCEPTIONS—WAIVER.

An exception to the overruling of a prayer made at the close of plaintiff's testimony, that there was no evidence entitling plaintiff to recover, was waived where the prayer was renewed at the close of the case after defendants had proceeded with testimony in their own behalf.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 983; Dec. Dig. § 420.*]

2. TRIAL (§ 45*)—EVIDENCE—ADMISSIBILITY.

In an action on a note, an objection to a question whether a third party had loaned the defendants any money, and, if so, when, was properly sustained where there was no offer to show the materiality of such inquiry.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 110-114; Dec. Dig. § 45.*]

3. BILLS AND NOTES (§ 503*)—EVIDENCE—WANT OF CONSIDERATION.

In an action between the original parties on a note, it was error to exclude evidence that the note was given for a debt which had been discharged by a release, since lost, with the understanding that it should be destroyed if the lost release were found, and to exclude other related evidence of circumstances attending the execution of the note and bearing on its consideration; such evidence being in effect proof of want of consideration and admissible under Code Pub. Civ. Laws, art. 13, §§ 47, 77, providing that total or partial failure of consideration is a defense against persons not holders in due course.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1733-1739; Dec. Dig. § 503.*]

4. BILLS AND NOTES (§ 537*)—EXCLUSION OF EVIDENCE—RELEASE.

In an action between the original parties to a note, claimed by defendant to have been given for a debt from which she had been discharged by a release, since lost, the understanding being that the note should be destroyed if the release were found, it was error to exclude the release and the circumstances of its execution from evidence on the assumption that it was either a forgery or obtained by improper means; these questions being for the jury and not for the court.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1862-1894; Dec. Dig. § 537.*]

5. BILLS AND NOTES (§ 511*)—EVIDENCE—RELEASE OF DEBT.

Where, in an action on a note given for a debt due a deceased person, the defendant claimed that deceased gave her a release which recited that the money for which the note was given was given to defendant as a gift and was intended to compensate her for services rendered while she lived at his house, evidence that defendant lived with deceased a number of years and did certain work for him was material.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1760-1770; Dec. Dig. § 511.*]

6. TRIAL (§ 89*)—EVIDENCE—RELEASE OF DEBT.

Where, in an action on a note, a defendant claimed that the note was to be destroyed if a lost release given of the original debt should be found, it was improper to strike out her testimony that she and her husband on being requested to give a new note replied that they found the release and could not give a new note.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228-234; Dec. Dig. § 89.*]

7. TRIAL (§ 62*)—ORDER OF PROOF—REBUTTAL.

It was error to permit plaintiff to testify in rebuttal, after defendants had closed their case, as to new matter upon which defendants were denied the right to introduce evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.*]

8. TRIAL (§ 64*)—ORDER OF PROOF—SURREBUTTAL.

It was error to refuse to permit defendants in surrebuttal to introduce evidence on new matter introduced by plaintiff in rebuttal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 154, 155; Dec. Dig. § 64.*]

9. BILLS AND NOTES (§ 489*)—PLEADINGS AND PROOF—SIGNATURE.

Where the signatures to the note sued on were not denied in the pleas, plaintiff was relieved under the express provisions of Code Pub. Civ. Laws, art. 75, § 24, subsec. 108, from any necessity of proving the signatures.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1587-1642; Dec. Dig. § 489.*]

Appeal from Circuit Court, Baltimore County; W. H. Harlan, Judge.

Action by Eliza Combs against J. Henry Herrman and another. From judgment for plaintiff, defendants appeal. Reversed, and new trial awarded. Defendants excepted to the granting of plaintiff's first prayer and to the overruling of defendants' first prayer, which prayers are as follows:

"Plaintiff's First Prayer. The plaintiff prays the court to instruct the jury that if they should find from the evidence that J. Henry Herrman and Caroline Herrman signed and delivered the note offered in evidence, and should further find that either at the time of the delivery of said note, or any time prior thereto, the defendants, or either of them, received from the plaintiff the \$2,000 represented by said note, then their verdict should be for the plaintiff. (Granted.)"

"Defendants' First Prayer. The defendants pray the court to instruct the jury that there is no evidence legally sufficient in this cause to entitle the plaintiff to recover against these defendants, and therefore their verdict must be in favor of the defendants. (Denied.)"

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Edward L. Ward, of Baltimore, for appellants. Robert F. Stanton and Z. Howard Isaac, both of Baltimore, for appellee.

PEARCE, J. This is an action brought by the appellee in the circuit court for Baltimore county upon the following note: "\$2,000. Gardenville, February 1, 1908. Two years after date we promise to pay to the order of Eliza Combs two thousand dollars at value received. J. Henry Herrman. Caroline Herrman. No. Due with interest." Eighteen exceptions were taken to the rulings upon the evidence and two to the rulings upon the prayers; the first exception being to the rejection of a prayer to take the case from the jury at the close of the plaintiff's evidence, and the twentieth to the rulings on the prayers at the close of the case. The narr. contained the common counts for money payable and a special count upon the note, and the pleas were the general issue. There was a verdict for plaintiff and judgment thereon for \$2,060, from which the defendants have appealed.

[1] At the trial, there was an agreement of counsel that Mr. Stanton, counsel for plaintiff, had in his possession the original note filed with the narr., which had been withdrawn under an order of court, and this note was offered in evidence and read to the jury, and the plaintiff rested. Thereupon the defendant submitted a prayer that there was no evidence legally sufficient to entitle the plaintiff to recover, which was rejected, and this constitutes the first exception; but as this prayer was renewed at the close of the case, after defendants had proceeded with testimony in their own behalf, that exception was thereby waived.

[2] J. Henry Herrman, being sworn, testified that Caroline Herrman was his wife, and before their marriage lived with her uncle John Combs, the husband of the plaintiff, but now deceased in January, 1909. He was then asked, "Will you tell us whether or not you, or your wife, or both of you, borrowed any money from Mr. Combs, and, if so, when?" to which the plaintiff objected, and the objection was sustained, and this is the second exception. This question was asked without any proffer of testimony to show how that inquiry could be relevant or material in a suit for money alleged to be due Eliza Combs, and at that stage of the case the ruling was correct.

[3] The witness then further testified that, at the time of the death of John Combs, neither he nor his wife owed anything to Eliza Combs, and he was then asked "to explain to the jury why that note was given, and when, and all the circumstances connected with the giving of it," counsel for defendants stating to the court "that they expected to prove that about 1887, John Combs, plaintiff's husband, loaned the defendants \$2,500; that in 1895 they paid him \$500 on account, leaving due \$2,000; that in 1905 John Combs gave the female defendant a paper

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

releasing her from the payment of this balance; that, after John Combs' death, the plaintiff, who was his executrix, demanded from the defendants the money borrowed from her husband, and, when told by them that Mrs. Herrman had a release which had been mislaid, she suggested that they give her a note for the \$2,000, as though the money was due her individually, and that if the lost receipt was found the note could be destroyed and they need not pay the \$2,000; that this suggestion was accepted, and the note in suit was given accordingly." This question and proffer was objected to, and the court refused to permit the question to be answered. This constitutes the third exception.

This was in effect an offer to prove that there was no consideration whatever for the note in suit, and under sections 47 and 77 of article 13 of the Code of 1912, total or partial failure of consideration is a defense against any person not a holder in due course. We think it is quite clear, *in view of the proffer made in connection with the question propounded*, that there was error in this ruling. It has been held in numerous cases in this court that, in suits between the payee and maker of a note, the parties may show all the facts and circumstances surrounding its execution and relating to the existence of a consideration, although, where a consideration is shown, the legal import and operation of the note, as such, cannot be controverted by parol testimony. *Cline v. Miller*, 8 Md. 275; *Ingersoll v. Martin*, 58 Md. 72, 42 Am. Rep. 322; *Bradford v. Harris*, 77 Md. 154, 26 Atl. 186; *Spies v. Rosenstock*, 87 Md. 16, 39 Atl. 268; *Fisher v. Diehl*, 94 Md. 112, 50 Atl. 432; *Burke v. Smith*, 111 Md. 627, 75 Atl. 114. The language of the court in *Spies v. Rosenstock*, supra, may be cited in illustration of the principle declared in all. It was there said: "The defendant was permitted to state the circumstances under which the note was given. It is clear there was no error in this ruling, for it is settled that as between two immediate parties, as here, between the maker and payee, while the note itself is prima facie evidence of the consideration, the question of consideration is always open."

The fourth exception was to the refusal to permit this question, "Now, Mr. Herrman, tell us when this note was signed."

The fifth exception, after this witness, without objection, had said the note was executed at his home, was to the refusal to permit this question: "You say there was no consideration for the note. Tell us how you came to give it."

The sixth exception, after the witness had again testified there was no consideration for this note, was to the refusal to permit him to say, "Why, then, was the note given?"

After Mrs. Herrman had testified that she remembered the day when the note was signed in the dining room of her home, and had

stated who was present at that time, and that she neither then nor at any other time received any money or promise of money from Mrs. Combs, and that she could fix the actual date upon which the note was signed, the twelfth exception was taken to the refusal to permit this question, "Kindly tell us what that date was."

In each of these exceptions it was sought to show some of the circumstances attending the execution of the note, the consideration of which was denied, and for the reason given as applicable to the third exception there was error in each of these rulings.

Mr. Herrman being asked if he had paid any interest on this note, said, "One payment only at the time the note was given," and he was then asked whether Mrs. Combs, after the giving of the note, ever returned it to him, and the refusal to allow that question constitutes the seventh exception. This may properly be classed with the third, fourth, fifth, sixth, and twelfth exceptions, since, at the time it was given, according to the proffer of testimony excluded, the note was to be returned upon production of a release, and the inquiry therefore related directly to a circumstance attending the execution of the note, and the question of its consideration, and for the same reason it was error to exclude the question.

[4] Mr. Herrman further testified that after giving the note he did not see it again until September, 1911, when Mrs. Combs came to his house with the note and demanded a new note; that he told her then he had a paper to prove what he had before told her about a release, and she gave him the note, but the same afternoon she returned with her counsel, Mr. Stanton, who was shown the paper referred to, and he said it was no good and to let the lady have the note, and it appears from the testimony of Mrs. Herrman that it was then surrendered to Mrs. Combs. The alleged release was then shown to Mr. Herrman, who identified it as the paper he had referred to. His counsel then asked if he knew by whom the paper was signed, to which defendant's counsel objected, that the paper spoke for itself. Plaintiff's counsel then offered the paper in evidence, which is as follows:

"I hereby certify this 18th day of March, 1905, that the \$2,000, which I have heretofore given to my niece Caroline Herrman (wife of J. Henry Herrman) is a gift from me to her, and also intended for compensation for her services rendered to me while she lived at my house, and that I have no claim against her for any portion of said amount so given and paid to her.

his
 "Signed] John X Combs.
 mark

"Witness the signature and his mark: J. Henry Herrman."

And upon plaintiff's objection to its admission, it was excluded. This is the eighth

exception. The witness was then asked if he knew whose signature was attached to this paper, and whether he saw it executed by the person purporting to have signed it, but he was not allowed to answer. This is the ninth exception.

He was then asked if he knew who witnessed the signature purporting to be that of the person who appeared to have executed the paper, and he was not allowed to answer. This is the tenth exception.

Mrs. Herrman, being put on the stand, was shown this paper and was asked if she was able to state by whom it was signed, and she was not allowed to answer. This is the thirteenth exception.

The object of all this rejected testimony was to prove the execution of this paper by John Combs, and enable the defendants to offer it in evidence. If it was a genuine paper, and not a forgery, it was proper evidence, and a good defense to an action on the note, if shown that it referred to the same \$2,000 which defendants offered to prove was secured by the original note for \$2,500 given by them to John Combs. The evidence excluded in the eighth, ninth, tenth, and thirteenth exceptions was offered in a confused order; but, taken together, it was an offer to prove by competent testimony the signature of John Combs and of the attesting witness, and, this proof being given, to put the paper in evidence. Its execution was a question of fact for the jury, and there was error in each of these rulings. The proof offered could not be excluded upon the *assumption* that the paper was either a forgery or was obtained by any improper means or influence; these questions being for the jury and not for the court.

[5] When Mrs. Herrman was on the stand, after testifying that she lived with her uncle 11 years before her marriage, which occurred when she was 22, she was not allowed to testify whether she worked during that period for him and what was the character of the work done. This was material as bearing upon the statement contained in the alleged release that it was in consideration of her services. The form of the question is somewhat leading; but, if properly framed, we see no objection to the inquiry. This constitutes the eleventh exception.

[6] In the fourteenth exception Mrs. Herrman was testifying to the interview with Mrs. Combs in September, 1911, when she said she demanded a new note, and she was asked what she or her husband told her in reply to this demand, and she said, "We told her we had found this paper and could not give her a new note," and upon motion of plaintiff's counsel the answer was stricken out. We can perceive no reason why this should have been done.

[7] The defendants having closed their case, the plaintiff herself was called, and, upon being sworn, defendants objected to her testifying except in strict rebuttal of the testimony offered by them; but their objection was overruled, and this is the fifteenth exception. This objection may have been premature, and, if it can be supposed the court meant only that she was a competent witness in rebuttal, the ruling would be correct; but if it meant, as it apparently did mean, that she was not to be confined to rebutting testimony, it was clearly error. Reference to the sixteenth and seventeenth exceptions taken by the defendants during the testimony of Mrs. Combs, and which cover nearly seven pages of the record, show that she was allowed to go at length into the consideration of the note in question, and all the circumstances attending its execution, although the defendants had not been allowed to enter into that field of inquiry at all. The specific questions objected to by defendants in these two exceptions, but allowed by the court, were directed to the consideration of the note in suit, and both objections should have been sustained, because this was not rebuttal testimony. None but rebutting testimony was then proper, and it is difficult to conceive how an inquiry, which had been consistently and emphatically refused upon defendants' offer, could be thrown open to plaintiff in rebuttal.

[8] Plaintiff's rebutting testimony being closed, J. Henry Herrman was called in sur-rebuttal, and in the eighteenth and nineteenth exceptions was not permitted to contradict the testimony of Mrs. Combs that 10 or 12 years previously she had given defendants, through her husband, \$2,000, which constituted the consideration for this note. It does not appear upon what ground this right was denied, and we are at a loss to imagine one.

[9] The twentieth exception is to the ruling on the prayers, which the reporter will set out. We discover no error in any of the prayers. The defendant's prayer to take the case from the jury which was renewed at the close of the whole case, it is presumed, was based upon the failure to prove the signatures of the defendants to the note sued on; but, these signatures not having been denied in the pleas, proof of these signatures was not required. Article 75, § 24, subsec. 108, Code of 1912.

But, because of the errors in the rejection of defendants' offered testimony, and in the admission of plaintiff's testimony in rebuttal, the judgment must be reversed, and a new trial be awarded.

Judgment reversed, with costs to the appellants above and below, and new trial awarded.

BAGAGLIO et al. v. PAOLINO et al.†
(Supreme Court of Rhode Island. March 5, 1913.)

1. ACTION ON THE CASE (§ 1*)—GROUNDS OF ACTION.

Trespass on the case is not limited to actions purely *ex delicto*, but, in its more comprehensive significance, includes both assumption and case, and so will lie for unliquidated damages from failure to perform a contract, the amount of which can only be determined by a verdict based on evidence adduced at the trial.

[Ed. Note.—For other cases, see *Action on the Case*, Cent. Dig. §§ 1-41; Dec. Dig. § 1.*]

2. MECHANICS' LIENS (§ 240*)—PAYMENT OF CLAIMS BY OWNER—RECOVERY OF CONTRACTOR—BURDEN OF PROOF.

Where building contractors have defaulted in their contract and left unpaid bills for labor and material, for which liens may be had, the owners may pay them, without waiting for liens to be established, and recover of the contractors; but to recover it is not enough to show that the amounts they paid were the amounts claimed, but they have the burden of showing they were the amounts to which the claimants were entitled.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 422; Dec. Dig. § 240.*]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Action by Michele Bagaglio and others against Joseph Paolino and others. Verdict for plaintiffs, motion for new trial denied, and defendants bring exceptions. Exceptions sustained and case remitted, with directions for new trial.

Irving O. Hunt, of Providence, for plaintiffs. Frank H. Wildes, of Providence, for defendants.

VINCENT, J. The plaintiffs, husband and wife, on January 4, 1911, entered into a written contract with the defendants for the construction of a house, upon land owned by the plaintiffs in the town of Barrington, for the sum of \$2,000. Under the terms of the contract the house was to be completed by April 30, 1911.

The contract also provided for the payment of the contract price in four installments of \$500 each; the first three payments to be made, from time to time, as the work progressed, and the last payment when the house was completed. The plaintiffs made two payments to the defendants, the first of \$500 and the second of \$400; a deduction of \$100 having been allowed by the defendants on account of unsatisfactory work. The house was not completed by April 30, 1911. After waiting a month, observing the disinclination of the defendants to finish it, and learning that they had not paid for the lumber and materials already used in the construction thereof, and that some of the creditors of the defendants had filed, and others were contemplating the filing, of liens for the recovery of the amounts

due them, the plaintiffs notified the defendants to proceed no further with the work, and thereupon undertook to finish the same themselves as nearly in accordance with the original plans as the work already done would permit, and to discharge such liens as had been placed upon the property and pay such claims as might be made the basis of liens thereafter.

The plaintiffs have now brought suit to recover the amount in excess of the contract price which they were compelled to pay to complete the work, together with such other and further amounts as were paid by them in discharging the liens and claims aforesaid.

The case was tried in the superior court, and a verdict rendered for the plaintiffs in the sum of \$516.20. The defendants filed a motion for a new trial on the following grounds: (1) Because the verdict was against the law; (2) because the verdict was against the evidence and the weight thereof; (3) because the verdict was against the law and the evidence; and (4) because the damages were excessive. This motion was heard and denied by the superior court, and the defendants thereupon filed their bill of exceptions embracing 22 statements of alleged error. They now rely, as stated in their brief, upon their exceptions numbered 2 and 21, which are as follows:

"Second. The justice presiding during the trial of said cause denied the defendants' motion to dismiss the case, on the ground that the plaintiffs have misconceived their cause of action, to which denial the defendants duly excepted. The defendants submit that this ruling denying the defendants' motion to dismiss was erroneous, and ask that their exception, duly taken at the time, may now be allowed."

"Twenty-first. At the conclusion of the charge of the justice presiding, the defendants excepted to that portion of the charge to the jury which states that, under those circumstances, the parties did not have to wait until they established a lien, but if the parties claimed a lien, and were in a position and had given notice and could establish a lien, and if the plaintiffs then paid the claims, they could recover from the defendants, and all matters in connection with that part of the charge, and ask that their exception, duly taken at the time, may now be allowed."

[1] The defendants claim, through their second exception, that the plaintiffs, in bringing their suit, misconceived their form of action, which, being in trespass on the case, is not maintainable for the recovery of damages arising out of a breach of duty on the part of the defendants relating to the performance of their contract, and they cite some cases in support of such contention.

In *Malone v. Ryan*, 14 R. I. 614, which was a suit for breach of promise of marriage, the form of action was trespass on the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

†For opinion on motion for reargument, see 85 Atl. 1136.

case, and the writ was served by arrest, without being indorsed with any affidavit. The declaration set out a simple breach of promise to marry; and the action was therefore *ex contractu*, and not *ex delicto*. The court did not find that the form of action was bad, but that, inasmuch as the declaration set up a simple breach of contract, an arrest without the affidavit provided for in the third clause of section 11, c. 299, Gen. Stat. of 1909, was not authorized. The court clearly expressed its opinion that the action of "trespass on the case," which warrants an arrest under the second clause of section 11, c. 299, Gen. Stat. of 1909, is an action *ex delicto*, or in tort, and not in *assumpsit*, *assumpsit* being commonly denominated an action of the case, the word "trespass" being omitted as more appropriate to tort, and consequently that a defendant in *assumpsit* for a breach of promise of marriage cannot be arrested without the affidavit prescribed by the third clause of section 11, before referred to, *notwithstanding that the action may technically be properly denominated trespass on the case*. In other words, the court found that, while the form of action was technically correct, the plaintiff could not, through its employment in an action *ex contractu*, neutralize the statute requiring an affidavit as a basis of arrest.

In *Royce, Allen & Co. v. Oaks*, 20 R. I. 418, 39 Atl. 758, 39 L. R. A. 845, the defendant, having acted as the servant and agent of the plaintiffs in collecting money for them, neglected, on demand, to pay over the amount. The plaintiffs brought an action of trespass on the case, in which the declaration was in form *ex delicto*; the plaintiffs alleging that the refusal of the defendant to pay over the amount collected was negligent, fraudulent, and in violation of his duty. In its decision the court was not concerned because the form of action was trespass on the case, but because the plaintiffs were attempting to recover for money had and received by a tort action. The plaintiffs' declaration clearly set forth that their claim was simply for a liquidated sum received by the plaintiffs for their use. They were only entitled, therefore, to maintain an action for money had and received. The plaintiffs could not, through the form of their declaration, convert such a claim into a tort.

The difficulty under which the defendants seem to labor in the case at bar arises from their apparent assumption that trespass on the case is a form of action which is only adapted to actions purely *ex delicto*; whereas, in its more comprehensive signification, it also includes both *assumpsit* and case. *Alberts, Ex'x, v. Blue*, 10 B. Mon. (Ky.) 92. Referring to the older forms of pleading, we there find that trespass on the case was the form of action commonly used where we now, presumably for brevity, make use of *assumpsit* and case.

The case at bar is for the recovery of un-

liquidated damages arising through the failure of the defendants to perform the obligations of their contract. The amount can only be ascertained through a verdict of the jury, based upon the evidence adduced at the trial. We think that the plaintiffs have a right to proceed by way of an action of trespass on the case, and that the defendants' exception numbered 2 must be overruled.

[2] The defendants' twenty-first exception is taken to that portion of the charge of the presiding justice wherein and whereby the jury were instructed that the plaintiffs might recover the amounts paid out by them in the discharge of liens without waiting until such liens were established, and that the plaintiffs were entitled to recover for such sums as they had paid out to parties claiming, or who might be entitled to, liens, and were in a position and had given notice and could establish their liens.

We think this constitutes reversible error. The erroneous theory upon which the trial of the case proceeded is likewise further evidenced by the statement of the court, during some discussion as to the admissibility of evidence, that "if, as a matter of fact, these claims were owing, and the creditor was in a position where he might establish a mechanic's lien and had taken steps to do so, the plaintiffs had a right to liquidate that claim, * * * without waiting for the court to pass upon that lien; * * * the man has a right to liquidate those claims and protect his property and charge it up against the defendants."

Undoubtedly the plaintiffs would have the right to discharge a perfected lien—that is, one which had been carried to a final judgment—and charge the amount paid to the defendants. In the case at bar the defendants had placed the plaintiffs in a most embarrassing position through their failure to pay for the materials and labor furnished them in the construction of the house which they had contracted to build and had left the plaintiffs to get out of their difficulty as best they could. Under these conditions the plaintiffs must either discharge such claims for material and labor as might be the subject of liens, or suffer all the losses and disadvantages of delay, together with the additional burden of further expenses which would be incurred in perfecting the liens, for all of which the defendants might be financially irresponsible. We think that in this situation the plaintiffs might pay such claims as would be collectible through lien proceedings, and charge the same to the defendants. The plaintiffs, however, in settling such claims must limit each payment to the amount justly and fairly due the claimant. They cannot charge to the defendants anything more than the defendants were legally obligated to pay themselves. In order for the plaintiffs to recover for such payments, it is incumbent upon them to establish the justness of the claims. The plaintiffs would

not be justified in paying a claim, without proper investigation as to its merits, and then charging the amount so paid to the defendants. The mere preferment of a claim does not prove its validity. If the plaintiffs, in the settlement of claims, pay more than the claimants were properly and legally entitled to, the excess would be a loss which they must bear themselves. The plaintiffs, in substantiation of their charges against the defendants on account of claims paid, must assume the burden of proving that the claimants were clearly and legally entitled to the several amounts contained in their respective accounts in much the same manner as proof is required in a suit for recovery on book account.

In the case at bar the plaintiffs seem to have proceeded upon the theory that they had the right to pay whatever amounts were claimed by the several parties for materials and labor, and to charge the same to the defendants without further proof as to the propriety or correctness thereof. That a similar theory was adopted by the trial court in the conduct of the case seems clear from the portion of the charge excepted to, and from the statement of the law by the court during the progress of the trial.

Assuming that the plaintiffs were dealing with these matters with honest intentions, it would open the door to fraud, dishonesty, and collusion should we hold that the plaintiffs could pay these claims, and then charge them to and collect them from the defendants, without evidence satisfactorily showing that such charges were just and reasonable.

The defendants' twenty-first exception is sustained, the other exceptions are overruled, and the case is remitted to the superior court, with direction to grant the defendants a new trial.

CANHAM v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. March 1, 1913.)

1. EVIDENCE (§ 123*)—RES GESTÆ—STATEMENTS.

Relevant evidence of what a motorman said with reference to the accident immediately thereafter, and after he had stopped the car and ran up the track a short distance in an agitated condition, was admissible as *res gestæ*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 851-868; Dec. Dig. § 123.*]

2. EVIDENCE (§ 121*)—ADMISSIONS OF AGENT—RES GESTÆ.

The admissions of an agent or employé, made while acting within the scope of his authority, may be given in evidence against his employer, when a part of the *res gestæ*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 308, 307-338, 1117, 1119; Dec. Dig. § 121.*]

3. EVIDENCE (§ 472*)—OPINION EVIDENCE—INTENTION.

Evidence, in an action for decedent's death, while crossing a street car track, that he step-

ped down "to go across the track" was properly excluded, as purporting to show decedent's intention.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

4. WITNESSES (§ 248*)—QUESTIONS—RESPONSIVENESS.

An answer to a question, asked in an action for decedent's death by being struck by a street car, as to what was done as to signaling the approaching car, that decedent stepped down to the track to cross it was not responsive.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

5. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Any error in excluding evidence was harmless, where the same facts were fully shown by other evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.*]

6. EVIDENCE (§ 539*)—WITNESSES (§ 236*)—INDEFINITE QUESTIONS—TECHNICAL KNOWLEDGE.

In an action for death by being struck by a street car, which decedent was waiting to board, questions as to whether the headlight of the particular car was the same or of greater candle power than the lights of cars used around the city, and whether it was stronger and brighter than the headlights on the cars on the city streets, were properly excluded as being indefinite, and, with respect to the inquiry as to "candle power," as calling for technical knowledge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2349-2352; Dec. Dig. § 539.* Witnesses, Cent. Dig. §§ 817-826; Dec. Dig. § 236.*]

7. EVIDENCE (§ 474*)—KNOWLEDGE OF WITNESS—SIMILARITY OF CONDITIONS.

In an action for decedent's death by being struck by a street car, while on a station platform awaiting a car, the evidence showed that the track curved at a point north of the station; that decedent crossed the west track while the car that struck him was approaching; and that the distance from which he could be seen, if crossing the center of the west track, might be less than the distance at which he might be seen on the west rail of the east track, where he was. *Held*, that a question as to how far north from a person standing in the center of the west track, and opposite the station, witness could observe such person, if the latter was also standing, in the center of the west track, was properly asked of an engineer, who had made measurements in the vicinity of the accident; a general objection that the measurements were taken in the daytime, while the accident happened at night, only going to the weight of the evidence as to such measurements.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

8. CARRIERS (§ 317*)—PASSENGERS—INJURIES—ADMISSIBILITY OF EVIDENCE.

In an action for decedent's death by being struck by a street car while waiting at a station to take a car, evidence of a former motorman as to the distance which the headlight on cars operated on that line cast their rays was not admissible, not relating to the headlight of the car in question.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. § 317.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

9. CARRIERS (§ 287*)—PASSENGERS—DUTY OF MOTORMAN.

Where three persons, standing on an interurban car platform, signaled a car to stop, and it was necessary for them to cross the track before boarding, the motorman was charged with notice that some one was relying on the car stopping, so that he should have used every effort to stop the car to avoid striking them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1154-1159, 1161-1166; Dec. Dig. § 287.*]

10. CARRIERS (§ 317*)—PASSENGERS—INJURIES—EVIDENCE.

In an action against a street car company for decedent's death by being struck while crossing the track to board the car, plaintiff could show that the motorman, after being put upon notice that decedent intended to cross, could have stopped the car in time to have avoided the injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. § 317.*]

11. EVIDENCE (§ 553*)—HYPOTHETICAL QUESTIONS—COMPLETENESS.

A hypothetical question should embody all the conditions upon which it was based.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.*]

12. EVIDENCE (§ 553*)—OPINION EVIDENCE—SPEED.

Questions to an expert as to the proper and reasonable speed of approaching an interurban street car station, without referring to any rules of the company, or the surrounding conditions, were properly excluded as too general.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.*]

13. CARRIERS (§ 317*)—PASSENGERS—INJURIES—ADMISSION OF EVIDENCE—RULES OF COMPANY.

If, in an action for decedent's death by being struck by a street car while crossing the track to board, plaintiff showed that rules as to the proper speed of cars were in force at the time of the accident in 1907, evidence as to what such rules were for five years prior to 1905 was admissible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. § 317.*]

14. CARRIERS (§ 317*)—PASSENGERS—INJURIES—ADMISSION OF EVIDENCE—RULES OF COMPANY.

In an action for decedent's death by being struck by a street car while crossing the track to board, evidence as to the company's rules at the time of the accident, as to the proper speed of the car at stations, was admissible on the question of negligence, though not conclusive thereon.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. § 317.*]

Exceptions from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

Action by Alfred G. Canham, administrator, against the Rhode Island Company. Verdict for defendant, and plaintiff excepts. Exceptions sustained in part, and case remitted for new trial.

Comstock & Canning and Henry C. Hart, all of Providence, for plaintiff. Joseph C. Sweeney and Alonzo R. Williams, both of Providence, for defendant.

PARKHURST, J. The plaintiff, administrator of the estate of John S. Canham, deceased, sues in an action on the case for negligence for the benefit of the children of said John S. Canham for damages arising from the death of said John S. Canham, resulting from his being struck by a car of the defendant company at Silver Hook station in the town of Warwick, about 6 p. m., October 20, 1907. The case was tried before a justice of the superior court and a jury, October 24-25, 1910. The defendant put in no testimony; but, at the conclusion of the plaintiff's case, the justice directed a verdict for the defendant.

The record testimony in brief established the following facts and circumstances in connection with the accident, which is the basis of the suit. About 4 o'clock in the afternoon of October 20, 1907, John S. Canham, a tailor, left his home on Warwick Neck Road, in the town of Warwick, R. I., with two friends and customers, John E. Fitzgerald and John F. O'Brien, both jewelers of Providence. The three men rode on the electric car to Hoxsle station, and from this place they walked in the road and across fields to Silver Hook station, stopping on the way to pick chestnuts, and at one time to get two small glasses of beer and a cigar each, and at another time to get two small glasses of beer and a cigar each. The beer is not shown to have had any intoxicating effect, or any effect, on the ability of any of the persons mentioned to walk steadily. By the time the men arrived at Silver Hook station, it was drizzling rain. Fitzgerald and O'Brien each had an umbrella; but Canham had none. The three waited for a car on the platform adjoining the station house at Silver Hook, which is situated on the east side of the tracks. Mr. Fitzgerald and Mr. O'Brien were bound northerly to Providence, and Mr. Canham southerly to Warwick. At this point the electric line of the defendant company runs on a private right of way, and there are double tracks running nearly north and south; the rails projecting above the roadbed. North-bound cars run on the east track, and south-bound cars on the west track. The station platform on the east side of the right of way was, on the night in question, lighted by electricity. On the west side of the track at this point was also a small platform, but no building or overhead covering. The approach to the station from the road was on the east; and this approach was the one commonly used by the public in going to and from the station.

Soon after the three men arrived on the station platform, a south-bound car passed without stopping, although the men, while remaining on the platform, signaled it to stop. The next car to approach the station was traveling southerly, about 10 minutes later. The two companions of Mr. Canham saw the car when it was rounding the curve

about 200 yards north of the station. The three men were then standing near the edge of the platform, about opposite the station door. The approaching car was of the electric suburban type, and carried a "very bright intense" headlight, the rays of which were shed quite vividly on the party at a distance of 100 yards away. When the car appeared on the curve mentioned, Mr. Fitzgerald and Mr. O'Brien each put down his umbrella, and from then on continuously waived it at the car in an endeavor to signal the motorman to stop. While thus signaling, Mr. Fitzgerald stepped onto the track and proceeded west as far as the west rail of the north-bound track. Mr. O'Brien remained on the west edge of the station platform about opposite the door, and a little to the south of Mr. Fitzgerald. Mr. Canham was just south of Mr. O'Brien, and he stepped from the station platform down onto the track, and proceeded directly across the track to the west. Mr. O'Brien last saw Mr. Canham facing west and walking in that direction across the west rail of the north-bound track.

The car did not stop at the station, but went by at a rate estimated at about 20 miles an hour. There was no slackening of the speed of the car, and no signaling or warning of any kind from the car as it approached or passed the station. The car did stop at a distance of about six lengths of the car south of the station. After the car stopped, Mr. Fitzgerald and Mr. O'Brien saw the motorman of the car running back up the track toward the station, and they, with him, discovered the dead body of Mr. Canham 8 or 10 feet west of the west rail of the south-bound track, and about 20 feet south of the south end of the west platform. Mr. Canham's head was crushed in on the right side.

There is an upgrade going south toward the Silver Hook station from a distance of about 200 feet north of the station on the railroad tracks. The roadbed between the two platforms at this station is about 21 feet wide. Each track is five feet one inch wide, and it is six feet between the inner rails of the two tracks.

The plaintiff's bill sets up 19 separate exceptions, which fall into groups, and may most conveniently be so considered.

Exceptions 1, 2, and 3. The first three exceptions noted are based on the rulings of the trial court excluding evidence of what the motorman said to witness Fitzgerald immediately after the accident. The testimony was that, immediately after the accident and the stopping of the car, the motorman of the car ran up the track toward Mr. Fitzgerald; and while yet seven or eight or nine feet from Mr. Fitzgerald, and still moving toward him and very much worked up, he made a statement to Mr. Fitzgerald in reference to the accident in which the deceased, Canham, figured. The

questions asked Mr. Fitzgerald and ruled out were: "Q. 100. What did he say?" (Exception No. 1.) "Q. 107. Now what did he say to you at that time?" (Exception No. 2.) "Q. 108. Whether or not the statement that he made to you at that time related to the injury to Mr. Canham." (Exception No. 3.)

[1] We are of the opinion that the evidence sought to be introduced here was part of the *res gestæ*, and therefore admissible. This court, in *Havens v. R. I. Suburban Ry. Co.*, 26 R. I. 48, 51, 58 Atl. 247, 3 Ann. Cas. 617, and in *Champlin v. Pawcatuck Valley St. Ry. Co.*, 33 R. I. 572, 578, 82 Atl. 481, 483, has quoted and approved Mr. Wharton's definition of *res gestæ*, which is as follows: "Res gestæ are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants, under the immediate spur of a transaction, becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participants in the transaction, thus instinctively spoke or acted. What they did or said is not hearsay; it is part of the transaction itself."

[2] The admissibility of the evidence, in the case at bar, cannot be questioned on the ground that it was a statement made by an agent of the defendant company, who had no power or authority to bind the company. This court, in regard to that question, in *Havens v. R. I. Suburban Ry. Co.*, 26 R. I. 48, at page 50, 58 Atl. 247, at page 248 (3 Ann. Cas. 617), said: "That the declarations or admissions of an agent, made while acting within the scope of his authority in regard to the transactions depending at the very time, may be given in evidence against his principal, as a part of the *res gestæ*, is a well-settled rule of law. For where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constituting a part of the transaction." The case of *Champlin v. Pawcatuck Valley St. Ry. Co.*, 33 R. I. 572 et seq., 577, 82 Atl. 481, 483, is decisive of the questions here involved. That case arose from a collision between an electric car and a horse and wagon. A statement that no one had denied that the railroad was to blame for the accident made by the motorman six or seven minutes after the collision, in reply to a statement by a bystander that "the railroad company is to blame for this," was testified to by a bystander, and held proper evidence as part of the *res gestæ*. This court says (33 R. I. 578, 82 Atl. 483): "As a participant in the transaction, would not his statement to that effect, made six or seven minutes after the accident, when the car was at a standstill by reason of the accident, and the

plaintiff was just being picked up or had just been picked up, be admissible as a part of the *res gestæ*? We think it would." Another witness in that case testified as to a further statement in regard to the accident made by the motorman three or four minutes after the accident; and still another witness repeated a third statement of the motorman in regard to the accident made just after the accident. It was held that this testimony was all proper as part of the *res gestæ*. This case was fully considered upon a review of the earlier cases in this state; and it would be superfluous to cite similar cases from other jurisdictions, in view of such recent ruling of this court. The testimony which was ruled out was admissible. Exceptions 1, 2, and 3 are sustained.

[3] Exception 4. The witness O'Brien answered, in part, to question 34, as shown on page 37 of the transcript: "And Mr. Canham was standing on my left, and he stepped down to the track to go across the track." The trial justice (page 38) ordered struck out "that part showing his intention." Plaintiff's exception numbered 4 is to this ruling.

[4] The question was as to what was done with reference to the signaling of the approaching car. This portion of the answer was not responsive to the question, and might have been stricken out on that ground, as well as upon the ground indicated.

[5] The matter involved in this portion of the answer is immaterial in any event, because it is amply shown, by other testimony, that Mr. Canham did cross the track, and that he intended to take the south-bound car to go to his house. This exception is overruled.

[6] Exceptions 5 and 6 are based, respectively, upon the exclusion of question 137, on page 45, and question 138, on page 46, of the transcript of testimony. By these questions Mr. Fitzgerald was asked to compare, as to strength and brightness, the headlight on the car which figured in the accident with the headlights on the cars used in the city streets. "Q. 137. Now, whether or not that light was of the same or of greater candle power than the lights on the cars used around the city?" This question, by the use of the words "candle power," called for technical knowledge which the witness did not appear to possess; furthermore, it was indefinite as to the standard of comparison in the use of the words, "the lights on cars used around the city?" "Q. 138. Whether or not the light that came from that headlight was stronger and brighter, or of less brightness, than the lights which are cast from headlights of the cars used on the city streets?" The standard of comparison suggested was too indefinite. Furthermore, the important question was as to the brightness of the headlight on the car which figured in the accident; and that was fully shown by the same witness in later questions, when he

testified that "It was a very bright intense light"; that he observed the headlight as the car was approaching, and the distance to which the light was thrown, and that "the rays of that light were shed on us quite vividly at 100 yards." We think that the witness was permitted to testify fully as to the facts, and that the evidence sought by the excluded questions, by way of comparison with other lights, was properly excluded, and was immaterial. Exceptions 5 and 6 are overruled.

[7] Exception 7 was taken to the exclusion of the answer to question 35, on page 54, put to Mr. McSoley, a civil engineer, who made certain measurements in the vicinity of the scene of the accident. The question asked was how far north from a person standing in the center of the west track, and opposite the center of the Silver Hook station, the witness could observe such person; he also standing in the center of the west track. It was in testimony that the railroad tracks curved at a point north of the station, and the purpose of this inquiry was to show at what point, rounding that curve, the motorman on a south-bound car could first see a person crossing the west track. The objection was that it was not shown by positive testimony that Canham ever stood in the center of the west track. But it does appear that he (Canham) must have crossed the west track at about this point before he was struck by the car, and while the car was approaching. The curve in the track ran northwesterly, and consequently the distance toward the north from which Canham could be observed, if passing across the center of the west track, might be less than the distance at which he could be seen on the west rail of the east track, where he was shown by positive testimony to have been. The question was pertinent, and should have been admitted. It was in the same line of inquiry as other questions which had been admitted without objection. The general objection that the measurements were taken in the daytime, while the accident happened after dark, only goes to the weight of the testimony, and not to its admissibility. Exception 7 is sustained.

[8] Exceptions 8 and 9 were taken to the exclusion of testimony by a former motorman of the defendant company, as to the headlight equipment of the cars on the Buttonwoods line (exception 8, q. 24, p. 64), and the distance which such a light sends its rays (exception 9, q. 25, p. 65). The questions were general and not confined to the car involved; and testimony as to the particular headlight on the car involved had already been given by an eyewitness. The testimony here in question was rightly excluded as being immaterial. Exceptions 8 and 9 are overruled.

Exceptions 10, 15, 16, and 17 relate to the exclusion of the answers, respectively, to question 26, on page 66, questions 38 and 39,

on page 83, and question 40, on page 84, of the transcript of testimony. These were hypothetical questions put by the plaintiff's counsel to the expert witness, Saunders, who had been a motorman on this line for two years, to show within what distance the car which figured in this accident could have been stopped at or just north of Silver Hook station just previous to the accident. The witness was shown to be familiar with the type of car and its equipment, and also with the roadbed at this point, from actual experience in running this type of car on that line; and the questions embraced (with the exception of question 38, ex. 15) all the essential elements of the situation, as they appeared in evidence. The inquiry was pertinent. It had been shown that the car was signaled to stop by three men at a point at which the public were invited to cross the track to take the cars; that it was necessary for either of these men to cross the track before being in a position to board the car; and that one of the three men started across the track for that purpose.

[9, 10] Here were circumstances constituting notice to the motorman that a man crossing the track was relying on the stopping of the car. In this situation, it was the duty of the motorman to use every effort to stop his car, and thereby avoid a fatality; and it is the plaintiff's right to show that, if such a situation became evident, or should have become evident, to the motorman, he could have stopped his car quickly enough to have avoided the fatality.

[11] Question 38, which is the subject of exception 15, was too indefinite, in that it did not state all the conditions, and was properly excluded, and exception 15 is overruled. The other questions involved in exceptions 10, 16, and 17 were properly asked, as based upon the conditions, and should have been allowed; and exceptions 10, 16, and 17 are sustained.

[12] Exceptions 11 and 18 relate to the exclusion of the opinion of expert witness, Saunders, as to the proper and reasonable manner and speed of approaching the Silver Hook station with a suburban car bound south. These questions simply asked the opinion of the witness; and, while it is evident from the context that it was in the mind of counsel to examine this witness as to what was the proper method of handling a car at that station with reference to the rules of the company, yet the questions under consideration do not mention the rules, nor any of the conditions surrounding the accident. They are too general and indefinite in form, and were rightly excluded. Exceptions 11 and 18 are therefore overruled.

Exceptions 12, 13, and 14 were taken to the exclusion of testimony as to whether the defendant company, previous to and at the time of this accident, had a rule with reference to how a motorman should handle his

car when approaching Silver Hook station and other stations on the Buttonwoods line, and, if so, what the rule was.

[13] Exception 12 was to the exclusion of a question asked of the witness Saunders as to what was the rule of the defendant company relating to the speed of cars approaching the Silver Hook station; he having testified that he knew of such a rule in force for five years prior to 1905, at which time he left the employ of the defendant. If the plaintiff was unable to show that the rule a question continued in force down to the time of the accident in 1907, it might be said that it was immaterial what the rule was in 1905 and for five years prior thereto; but, as it appears from the record that the plaintiff offered to show, by a superintendent in the employ of the defendant company, what rules of the defendant in regard to this subject were in force in 1907 at the time of the accident, it would have been pertinent to show what those rules were for five years prior to 1905. We think the testimony of Saunders on that point might have been admitted, subject to the condition that the plaintiff should show by other testimony that such rule, if pertinent to this inquiry, remained in force in 1907, covering the period of the accident. Plaintiff's counsel, however, did not make any such offer, and therefore the testimony of Saunders on this point was rightly excluded, and exception 12 is overruled.

[14] Exceptions 13 and 14 relate to exclusion of testimony, sought to be obtained from Mr. Searle (pages 80-82 of the transcript), as to the rules of the defendant company in force in 1907, at the time of the accident. Mr. Searle was superintendent of the Elmwood division, and knew about the rules in force in regard to the speed at which cars should approach stations on the Buttonwoods line (which included the Silver Hook station); but he was not allowed to tell what the rules were. This was clearly error. It sufficiently appears from the transcript for what purpose these rules were offered; and this court is of opinion that the evidence was clearly admissible and pertinent. The case of Desautelle v. Nasonville Woolen Co., 2 R. I. 261, 66 Atl. 579, was an action for negligence in operating a mill at night without providing a person to supervise the water power. "The evidence showed that always during the daytime, while the mill was running, some officer or employé of the defendant made frequent inspection of the regulator and water supply, and that on the night when the accident occurred, which was the first night that the mill had been operated no such officer or employé was present. In determining whether such a person ought to have been supplied in the nighttime, it was proper for the jury to consider that such service was treated by the defendant as necessary when the mill was run by day." The jury had been charged that such omission

was not negligence, but that they might take it into consideration in determining the question of negligence; and the charge was approved. This is clearly analogous to the principle of the case at bar, and of the other cases hereinafter cited.

The question of the admission in evidence of rules of the defendant carrier, governing the operation of its trains or cars, and issued to its employes, when such rules have been offered by the plaintiff, has been passed upon in many jurisdictions; and, almost without exception, the courts have held such to be proper evidence, although not conclusive evidence of negligence. Some judges have said that these rules of the defendant company are part of the transaction, *res gestæ*, and some have likened them to municipal ordinances regulating the operation of trains or street cars. The prevailing ground, however, upon which such evidence is admitted is that these rules to employes indicate the necessity of care under the particular circumstances covered by the rules, and are in the nature of an admission by the railroad that due care, under the circumstances, required the course of conduct prescribed by the rule.

Stevens v. Boston Elevated Ry. (1904) 184 Mass. 476, 478, 69 N. E. 333, involves a collision between a carriage and a car on which it was alleged the motorman did not sound his gong. After verdict for the plaintiff, the only exception on review was to the admission in evidence of the rules of the company, issued to conductors and motormen, requiring that a gong be sounded when passing, or about to pass, a vehicle. The Supreme Judicial Court approved the ruling below, and upon this point said: "The decisions in different jurisdictions are not entirely harmonious upon the question now raised; but we are of opinion that the weight of authority and of reason tends to support the ruling of the judge in the present case. * * * A violation of rules previously adopted by a defendant, in reference to the safety of third persons, has generally been admitted in evidence as tending to show negligence of the defendant's disobedient servant, for which the defendant is liable. The admissibility of such evidence has often been assumed by this court without discussion." After stating the analogy between such rules and ordinances or statutes regulating the running of cars, violations of which, by defendant or its servants, are always received as evidence, although not conclusive, of defendant's negligence, the opinion proceeds (184 Mass. 479, 69 N. E. 339): "So a rule made by a corporation for the guidance of its servants, in matters affecting the safety of others, is made, in the performance of a duty, by a party that is called upon to consider methods and determine how its business shall be conducted. Such a rule, made known to its servants, creates a duty of obedience as be-

tween the master and the servant, and disobedience of it by the servant is negligence as between the two. If such disobedience injuriously affects a third person, it is not to be assumed, in favor of the master, that the negligence was immaterial to the injured person, and that his rights were not affected by it. Rather ought it to be held an implication that there was a breach of duty towards him, as well as towards the master, who prescribed the conduct that he thought necessary or desirable for protection in such cases. Against the proprietor of a business, the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety."

The only case to the contrary cited in the opinion last above quoted, and the only case to the contrary which has come to the attention of this court, is that of *Fonda v. St. Paul City Ry.*, 71 Minn. 438, at page 449, 74 N. W. 166, 70 Am. St. Rep. 341; and an examination of this latter case shows that no authorities are cited upon this point in support of its decision. The case is criticized in *Cincinnati St. Ry. v. Altemeier*, 60 Ohio St. 10, 18, 53 N. E. 300; and no case is cited to this court in which it has been followed. The doctrine of the case of *Stevens v. Boston Elevated Ry. Co.*, supra, has been followed in numerous cases in other jurisdictions. See *Boldt v. San Antonio Traction Co.* (Tex. Civ. App.) 148 S. W. 831; *Partelow v. Newton & Boston St. Ry. Co.*, 196 Mass. 24, 81 N. E. 894; *Burns v. Worcester Consolidated St. Ry.*, 193 Mass. 63, 78 N. E. 740; *Crowley v. Boston Elevated Ry. Co.*, 204 Mass. 241, 90 N. E. 532; *Larson v. Boston Elevated Ry. Co.* (1912) 212 Mass. 262, 98 N. E. 1048; *Georgia R. R. v. Williams*, 74 Ga. 723; *Atlanta Consolidated St. Ry. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41; *Lake Shore & M. S. Ry. Co. v. Ward*, 35 Ill. App. 423, affirmed in 135 Ill. 511, 26 N. E. 520; *Chicago City Ry. Co. v. Lowitz*, 119 Ill. App. 360, affirmed in 218 Ill. 24, 75 N. E. 755; *Coates v. Railway Co.*, 62 Iowa, 486, 17 N. W. 760; *So. Kan. Ry. Co. v. Pavey*, 48 Kan. 452, 29 Pac. 593; *B. & O. R. R. Co. v. State*, 81 Md. 371, 32 Atl. 201; *Texas Traction Co. v. Hanson* (Tex. Civ. App. 1912) 143 S. W. 214; *Frizzell v. Omaha St. Ry. Co.*, 124 Fed. 176, 181, 59 C. C. A. 382; *Chicago, Milwaukee & St. Paul Ry. v. Lowell*, 151 U. S. 209, 217-218, 14 Sup. Ct. 281, 38 L. Ed. 131; *Warner v. B. & O. R. R.*, 168 U. S. 339, 345, 18 Sup. Ct. 68, 42 L. Ed. 491.

It should be said that, in the many cases where proof of the rules of the defendant and of the violation thereof has been held to be properly admissible as evidence of defendant's negligence, it is uniformly held that such evidence is not conclusive evidence of negligence, but only to be considered by the jury as evidence in connection with the other evidence in the case. And such evidence has been generally held admissible in cases of injury to third persons, as well as to pas-

sengers. The evidence offered and rejected as to the rules of the defendant, which is the subject of exceptions 13 and 14, was admissible and should have been admitted; and those exceptions are sustained.

Exception 19 was taken to the direction of a verdict for the defendant at the close of the plaintiff's testimony. This raises the question of the sufficiency of the evidence produced, the chief features of which have already been stated above. A considerable portion of the plaintiff's brief has been devoted, in the consideration of this exception, to a discussion of the proof as to due care of the plaintiff's intestate, in the endeavor to show that the deceased was not, as a matter of law, upon the evidence as it stands, guilty of contributory negligence, and that the defendant was guilty of negligence causing death of Mr. Canham. Inasmuch as certain evidence, which may have a very important bearing upon these questions, as well as upon the application of the doctrine of the last clear chance, was erroneously excluded by the trial court, and it becomes necessary to grant a new trial, it would be futile to discuss these questions at length, until this court shall have before it all of the evidence which the parties may see fit to introduce upon such new trial. It is sufficient to say that, in our opinion, the record, as it stands, does not conclusively show, as a matter of law, that the deceased was guilty of contributory negligence, which was the proximate cause of his death, as was decided by the trial judge upon the motion to direct a verdict for the defendant; nor does it show conclusively that the defendant was not guilty of negligence causing his death; nor does it show conclusively that the doctrine of the last clear chance could have had no application. Sufficient testimony as to the facts of the case does appear, in our opinion, to require the defendant to put in its defense to the case; and we are of the opinion that the trial judge erred in directing the verdict for the defendant. Exception 19 is therefore sustained.

Exceptions 1, 2, 3, 7, 10, 13, 14, 16, 17, and 19 are sustained; exceptions 4, 5, 6, 8, 9, 11, 12, 15, and 18 are overruled; and the case is remitted to the superior court for a new trial.

IN RE OPINION TO GOVERNOR.

(Supreme Court of Rhode Island. Feb. 24, 1913.)

1. CONSTITUTIONAL LAW (§§ 19, 20*)—CONSTRUCTION—CONTEMPORANEOUS CONSTRUCTION.

The court, in construing an ambiguous provision of the Constitution, may seek extrinsic aid in determining its meaning by ascertaining the contemporaneous construction placed on the clause at the time of its adoption and since then by those whose duty it has

been to construe, execute, and apply it in practice.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 14, 15; Dec. Dig. § 19, 20.*]

2. STATES (§ 59*)—LEGISLATURE—COMPENSATION—CONSTITUTIONAL PROVISIONS.

Under article 11 of the Articles of Amendment, adopted in 1900, providing that the senators and representatives shall receive eight cents per mile for traveling expenses "in going to and returning from the General Assembly," the members of the General Assembly are not entitled, in view of a contemporaneous and continuous construction, to mileage going to and returning from the General Assembly each day up to the limit of 60 days' attendance in any calendar year.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 37, 62; Dec. Dig. § 59.*]

3. STATES (§ 32*)—LEGISLATURE—ADJOURNMENT.

Const. art. 4, § 9, limiting the power of adjournment of each house of the General Assembly to not more than two days without the consent of the other house, implies that the General Assembly, after once being lawfully in session, can only adjourn by the joint action of the two houses; and each house may adjourn, at its convenience, from time to time for a period not exceeding two days.

[Ed. Note.—For other cases, see States, Cent. Dig. § 40; Dec. Dig. § 32.*]

4. CONSTITUTIONAL LAW (§ 20*)—CONSTRUCTION—LEGISLATIVE AND EXECUTIVE CONSTRUCTIONS—EFFECT.

Where the practical construction placed on an ambiguous constitutional clause by the Legislature or executive department has been uniform and of long standing, and has been acquiesced in by the people, the construction may determine the question of its meaning.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 14, 15; Dec. Dig. § 20.*]

5. STATES (§ 59*)—LEGISLATURE—COMPENSATION—CONSTITUTIONAL PROVISIONS.

The proviso in article 11 of the Articles of Amendment to the Constitution, adopted in 1900, that no compensation or mileage shall be allowed any senator or representative for more than 60 days' attendance in any calendar year, is restrictive, and does not enlarge the right to mileage prescribed by the proviso giving mileage to the members of the General Assembly in going to and returning from the General Assembly.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 37, 62; Dec. Dig. § 59.*]

Opinion of the Supreme Court in response to a question submitted by the Governor.

We have received a communication from your excellency referring to article 11 of Amendments of the Constitution of the state of Rhode Island, and asking our opinion as the question: "Are the members of the General Assembly entitled to mileage going to and returning from the General Assembly each day up to the limit of 60 days' attendance in any calendar year?"

[1] The language of said article 11, creating the right to mileage, is: "The senators and representatives shall . . . receive . . . eight cents per mile for traveling expenses in going to and returning from the General Assembly." This same language is

contained in the Constitution of 1842, in section 11 of article 4 thereof. Considering the language itself only, and taking the words used in their ordinary meaning, we are strongly inclined to the opinion that they do not contemplate mileage for daily attendance. But, inasmuch as the words "in going to and returning from the General Assembly" stand without other words of explanation or qualification, it may be urged that they are susceptible of differences in interpretation as relates to the amount of mileage due hereunder. The clause therefore may, perhaps, be taken as ambiguous in this respect. In such case it is proper to seek extrinsic aid in the determination of its meaning by ascertaining the contemporaneous construction placed upon the words at the time of their adoption and since by those whose duty it has been to construe, execute, and apply them in practice.

[2] The Constitution of 1842 provided for two sessions of the General Assembly, one at Newport on the first Tuesday of May; the other, the last Tuesday of October, to be held once in two years in South Kingstown and the other years alternately at Bristol and East Greenwich, and an adjournment of the October session annually in Providence. The first General Assembly elected under the Constitution met in Newport on the first Tuesday in May, 1843, and after sitting five days adjourned to the fourth Monday of June, 1843, to meet in Newport, where, after a further sitting of six days, the session ended. The October session was held in South Kingstown and was adjourned to Providence, to meet in January, 1844. A special session of two days met in Providence in March, 1844. An examination of the reports of the State Treasurer, as printed in the schedules for 1843 and 1844, and an analysis of the payments to members of the General Assembly show that one travel to and from the Assembly only was allowed for each session and each adjourned session; that is to say, for the May session in Newport, for the adjourned session thereof in Newport in June, for the session in South Kingstown in October, for the adjourned session in Providence in January, 1844, and for the special March session in 1844, mileage for only one going to and returning from the General Assembly was allowed in each instance. Fifteen of the members of this first General Assembly, under the Constitution, were also members of the convention which framed the Constitution. Among them were George A. Brayton, Sylvester G. Shearman, and Elisha R. Potter, all afterwards Justices of the Supreme Court, and such well-known members of the bar as Wilkins Updike, Charles F. Tillinghast, Henry Y. Cranston, William P. Sheffield, and Richard K. Randolph.

[3, 4] In November, 1854, article 3 of the Articles of Amendment to the Constitution

was adopted, by which it was provided that one session of the General Assembly should be held annually, commencing on the last Tuesday of May, in Newport, and continuing by adjournment annually in Providence. But the custom of allowing mileage for one "going to and returning from the General Assembly" for each session and, in addition, for attendance upon adjourned sessions thereof has been followed, as we understand, from 1844 to the present time. Undoubtedly there have been at times in the past adjournments of the General Assembly for short periods without the allowance of mileage in consequence thereof, although since 1900 it has been uniformly otherwise. But we know of no instance in the 70 years which have elapsed since the adoption of the Constitution showing that, in addition to the allowance of one mileage in a given session for "going to and returning from the General Assembly," other mileage has ever been allowed and paid during the said session, except in cases when the session has been interrupted and broken into parts by the adjournment of the General Assembly. In practice this has not been limited to the adjournments provided for by the Constitution; for, as has already been shown, the General Assembly, at its first session under the Constitution, of its own motion, adjourned the May session for about six weeks and collected mileage for the adjourned session thus brought about. In other words, the allowance of mileage beyond one taxation thereof in a session has apparently always followed and depended upon an actual break in the session, caused by an adjournment of the General Assembly. Section 9 of article 4 of the Constitution, in expressly limiting the power of adjournment of each house to not more than two days without the consent of the other house, in effect implies that the General Assembly, after once being lawfully in session, can only adjourn by the joint action of the two houses. Each house may, at its convenience, adjourn itself from time to time for a period not exceeding two days, irrespective of whether the other house may have adjourned for the same time or not; but the General Assembly, as such, would not be adjourned by such independent acts of the two houses. As already stated, it can only adjourn by the joint or concurrent action of both houses. There is no evidence, therefore, showing that at any time since the adoption of the Constitution mileage based upon daily attendance has ever been allowed. When the practical construction placed upon an ambiguous constitutional clause by either legislative or executive department has been uniform, of long standing, and has been acquiesced in by the people, such construction may determine the question of its meaning.

[5] Article 11 of the Articles of Amendment to the Constitution was adopted in

November, 1900. It requires that a session of the General Assembly shall be held annually in January at Providence. Unless modified by the proviso contained in this article, but not hitherto a part of the Constitution, namely "that no compensation or mileage shall be allowed any senator or representative for more than sixty days' attendance in any calendar year," it is clear that article 11 makes no change in the mileage due members. What effect has the proviso in this respect? Does it enlarge or restrict? It seems apparent that the general purpose of the proviso is restrictive. This is expressly so as to the total amount of compensation receivable by members of the General Assembly for attendance. Up to 1901 members received \$1 for every day of attendance however long the session or sessions of the General Assembly continued. Article 11 increases the daily compensation from \$1 to \$5, but the proviso limits and restricts the total amount of compensation receivable for attendance to 60 days in any calendar year a maximum. With such a restrictive purpose clearly manifest as to compensation can the proviso be reasonably construed as intended to increase the amount of mileage hitherto paid? On its face the limitation or restriction seems to apply equally to mileage and to compensation. And while the limitation may not always come into operation respecting compensation and mileage under precisely the same circumstances, no sufficient reason is suggested for the proviso being otherwise than restrictive as to both.

We are of the opinion, therefore, that the reasonable construction of said proviso is that it is both as to compensation and mileage, one of limitation and restriction, and not one of enlargement. We find, therefore, that the contemporaneous and long-continued, uniform construction of the words "in going to and returning from the General Assembly," as above set forth, has been in a manner entirely inconsistent with the allowance to members of the General Assembly of mileage for each day's actual attendance. Such construction is confirmatory of our view of the meaning of the words, above quoted, in their relation to the rest of the article of the Constitution. We therefore are of the opinion that the members of the General Assembly are not entitled to mileage going to and returning from the General Assembly each day up to the limit of 60 days, and accordingly answer the question submitted by your excellency in the negative.

CLARKE H. JOHNSON.
C. FRANK PARKHURST.
WILLIAM H. SWEETLAND.
WALTER B. VINCENT.
DARIUS BAKER.

POTTLE et al. v. LIVERPOOL & LONDON & GLOBE INS. CO.

(Supreme Judicial Court of Maine. Feb. 28, 1913.)

1. INSURANCE (§ 665*)—ACTIONS ON POLICIES—SUFFICIENCY OF EVIDENCE.

In an action on a fire insurance policy, evidence held to show that plaintiffs, in their proofs of loss and in their testimony, falsely and fraudulently misstated the quantity and value of the goods destroyed.

[Ed. Note.—For other cases, see Insurance. Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.*]

2. INSURANCE (§ 553*)—PROOFS OF LOSS—FRAUD OR FALSE SWEARING.

No recovery could be had under a fire insurance policy where the insured parties, in their proofs of loss and in their testimony, in an action thereon, falsely and fraudulently misstated the quantity and value of the goods destroyed.

[Ed. Note.—For other cases, see Insurance. Cent. Dig. §§ 1362-1366; Dec. Dig. § 553.*]

On motion from Supreme Judicial Court Washington County, at Law.

Action by James W. Pottle and others against the Liverpool & London & Globe Insurance Company. On motion to set aside verdict for plaintiffs. Motion sustained, and verdict set aside.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and BIRD, JJ.

Ashley St. Clair, of Calais, W. R. Pattergall, of Waterville, and R. J. McGarrigle, of Calais, for plaintiffs. C. B. & E. C. Donworth, of Machata, for defendant.

PER CURIAM. Action of assumpsit to recover \$1,250 fire insurance on a stock of general merchandise belonging to the assured and contained in their 1½-story frame store situated at the Four Corners, so called, in North Perry, Me.

This case was originally tried in 1911, the chief grounds of defense being: (1) That the fire originated by the voluntary act, design, and procurement of the plaintiffs; (2) that their proof of loss was false and fraudulent; (3) that they did not use reasonable exertions to save and protect the property after the fire started; and (4) that they falsely and fraudulently understated the amount and value of the property that was saved. That trial resulted in a verdict for the plaintiffs, which upon motion was set aside by this court, because "the proof of loss was so clearly false and fraudulent that the plaintiffs' right of recovery was thereby forfeited." *Pottle v. Insurance Co.*, 108 Me. 401, 405, 81 Atl. 481, 482.

The case has again been tried, with the same issues involved, resulting in a verdict of \$1,390 for the plaintiffs; and it is again before this court, on defendants' motion, that this verdict be set aside as being unwarranted by the evidence.

[1] With painstaking care the court has examined the voluminous record in this case, containing more than 400 printed pages; and it is of the opinion that no other conclusion is justified by the evidence than that this verdict in the plaintiffs' favor is unmistakably wrong.

North Perry, where the plaintiffs' store was situated, is a small rural community, about $4\frac{1}{2}$ miles from the railroad, and in which the only manufacturing industry giving employment to labor was a sawmill. The store building was 24 by 36 feet, $1\frac{1}{2}$ -story, and without a cellar. The lower story, or store proper, was about 8 feet in height, and fitted in the usual manner for a country store, with shelving on three sides, a long counter on the northerly side at the left of the entrance, a short counter at the rear end, with drawers and bins under some of the shelving and counters. On the southerly side heavy goods, such as molasses and kerosene oil, were kept. The space in the middle of the store was open and unoccupied. The second story, or upper part, was finished in one room, being about 7 feet in the clear under the eaves. There was a hatchway in the second floor through which goods could be hoisted and lowered. A flight of stairs, at the top of which was a trap door, connected the two floors. The plaintiffs had been carrying on business at this store for some years. They were unmarried and slept in the upper room, taking their meals at the home of their parents, distant about three-quarters of a mile from the store.

About 6 o'clock in the morning of October 18, 1909, after the plaintiffs had gone from the store for their breakfast, smoke was discovered issuing from the roof of the building, and the neighbors and mill crew immediately came to the rescue; and while some were engaged in putting out the fire, which was then chiefly, if not wholly, confined to the top of the building, the rest were at work carrying the goods from the store. A team was sent for the plaintiffs, and it was some little time before they came back to the store. After working for some time, it was assumed that the fire was out, and the mill crew went back to the mill, and practically all the other helpers left. But shortly after that the building, with whatever was then in it, was wholly consumed. There had been a fire in the stove in the store the evening before, but none was built on the morning of the 18th, and the plaintiffs claimed they saw no evidence of fire when they left the store.

The total insurance on the stock was \$2,500, \$1,250 of which was written by the defendant company and is the subject of this action. There was an insurance of \$1,000 on the store building.

In their proof of loss, the plaintiffs state that the value of the goods in the store at the time of the fire was \$3,496.87, and that

the value of the goods saved was \$224.10. James W. Pottle, one of the plaintiffs, and who had always had the chief management of the store, and who made up the proof of loss, testified at both trials that he afterwards recalled additional articles of merchandise that were in the store and burned (of which he claimed to have made a list, but it is not produced) amounting to \$800 or \$1,000. Accordingly the plaintiffs' statement is, as contained in their proof of loss and in their testimony, that the amount of the goods in the store, at the time of the fire, was substantially from \$4,300 to \$4,500.

An examination and consideration of the evidence in this case shows conclusively, we think, that that statement as to the amount and value of the goods was a gross exaggeration.

It would serve no useful purpose to attempt here any extended analysis of the voluminous evidence in this case; and therefore we refer only to a few suggestive features of it.

1. The statement in the proof of loss of the quantity and value of many of the articles, claimed to have been in stock in this country store, is so excessively and unreasonably large as to be quite unbelievable.

2. The amount of the stock carried, as claimed by the plaintiffs, is so out of proportion with the volume of business they were apparently doing that it quite overwhelmingly discredits their proof of loss and testimony. After the fire they procured reports of goods purchased by them from 33 firms covering, as they claimed, a period of two years previous to the fire. These purchases aggregate \$11,789.84. But we find, upon examination of these detailed reports, that about \$2,000 of this amount represented purchases made prior to two years before the fire, and that less than \$10,000 of the amount was covered by the preceding two years, leaving their annual purchases from these firms about \$5,000. And, from further computation, it appears that the purchases from these firms, during the year next preceding the fire, was only a little in excess of \$5,000. James W. Pottle, however, testified that these reports did not include all their purchases, and that they purchased grain and other articles of others. That is probably true to some extent. But we note the first report listed is \$995.93 from a dealer "in corn and meal." If they had been large buyers of grain of other firms, it is unexplained why they did not obtain their reports also. At the time of the fire they had no grain whatever in stock. It seems reasonable to conclude from the evidence, therefore, that their annual business for the two years previous to the fire was about \$6,000. And this is quite fully confirmed by the testimony of James W. Pottle as to the amount of their gross annual sales, which he estimated to be \$15 per day on the average. At first he stat-

ed the amount to be from \$20 to \$40, then called the average "\$10 or \$12 anyway," explaining that they were small in the winter and larger in the summer, but finally, on being urged by his counsel for an estimate for the year, put it at \$15. At that estimate their gross yearly business was \$4,500, practically the same as the amount of stock they claimed to have at the time of the fire. But assume that his estimate was too low, and that \$20 per day, or \$6,000 per year, would be more nearly correct, then it would be quite consistent with the apparent amount of their purchases. It is certainly incredulous, to say the least, that the experienced proprietors of a country store, situated in a sparsely settled rural community, within $4\frac{1}{2}$ miles of a railroad, would carry a stock in trade equal in value to two-thirds or more of their gross yearly business. And it is not to be overlooked, in this connection, that this amount of stock, which the plaintiffs stated was in the store at the time of the fire, did not include a particle of grain, and practically no so-called heavy goods, except 5 barrels of flour.

3. James W. Pottle testified that the stock was divided practically even between upstairs and downstairs. "But I think," he said, "I had a little the most upstairs. I know I did." It has already been noted that the plaintiffs slept in the upper room. There was also in that room a "refrigerator," a "kitchen cabinet," and a work bench. Mr. Pottle was asked if in the former trial he did not testify that he built a wagon sled in that upper room at one time, and he answered, "No, sir; no such thing. I didn't build—I never built a sled in my life. * * * I had a wagon sled stored there for one night only, and that was brought right from the blacksmith shop, and, it being rainy, I took it up there and took it away the next day."

Considering all the facts and circumstances disclosed as to the upper room in the store building, its size, the uses that had been made of it other than the storage of goods therein, and especially the fact that the plaintiffs had occupied it for their sleeping apartment for 17 years, we think it is inherently improbable, at least, that there was in it the quantity of goods, as stated by the plaintiffs, amounting to upwards of \$2,000.

4. But, in the opinion of the court, the evidence is conclusive that there was not, at the time of the fire, in the store proper, the quantity and value of goods as stated by the plaintiffs. We need not refer in detail to the proof of loss and the testimony of Pottle to the effect that there were, in the store proper, goods amounting to at least \$2,000. He stated that, of the goods specified in the proof of loss, "perhaps \$1,800 worth" were downstairs. There were also \$800 or \$1,000 worth of additional goods that he afterward recalled, and a substantial part of those

goods must have been downstairs. Further, with reference to the plaintiffs' statement and claim as to the quantity of goods downstairs, their learned counsel in his brief says that there were "probably \$2,000 worth altogether."

Goods amounting to only \$224.10 were removed from the store. Why were goods amounting to nearly \$1,800 left in the store proper, if they were there? There was plenty of help to remove them, and ample time to do it. It was daytime, and there was no smoke to materially interfere with the work. No one forbade their removal, and it was necessary that they should be removed. Men who worked in removing the goods testified that they were all removed, so far as they could see. The evidence leaves no doubt that the mill crew, about 30 men, did not leave the store until their services were supposed to be no longer necessary. In the light of these facts, and considering that the show-cases, the post office boxes, the safe, the stove, and the telephone were all removed, there can be no reasonable doubt as to the thoroughness with which the men worked in removing the contents of this burning store; and it is therefore inconceivable and unbelievable that any material articles of merchandise were left in the store proper.

[2] The conclusion is irresistible from all the evidence that the quantity and value of goods, as stated by the plaintiffs, were not in the store, and that their statement as to the quantity and value of the goods, made in their proof of loss and in their testimony, was false and fraudulent. The law is well settled that in such cases no recovery can be had.

Motion sustained.

Verdict set aside.

STATE v. INTOXICATING LIQUORS.

(Supreme Judicial Court of Maine. Feb. 23, 1913.)

INTOXICATING LIQUORS (§ 248*)—UNLAWFUL KEEPING—SEARCH AND SEIZURE—COMPLAINT—REQUISITES.

Under Rev. St. c. 29, § 49, which requires a complaint, in a proceeding to search for and seize intoxicating liquors unlawfully kept, to state the name of the keeper, or that it is unknown, a complaint, stating the keeper's name fictitiously as "John Doe," without stating that his real name is unknown, is void.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 368-375; Dec. Dig. § 248.*]

Exceptions from Supreme Judicial Court, Oxford County, at Law.

Proceeding by the State of Maine to forfeit intoxicating liquors claimed by the Boston & Portland Despatch Express Company. On exceptions of claimant. Exceptions sustained.

Argued before WHITEHOUSE, C. J., and CORNISH, KING, BIRD, and HANSON, JJ.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

R. T. Parker, County Atty., of Rumford, for the State. Wm. C. Eaton, of Portland, for claimant.

KING, J. Proceedings for the forfeiture of intoxicating liquors seized under a search and seizure process. The Boston & Portland Despatch Express Company appeared as claimant of the liquors, and contended (1) that the complaint and warrant under which they were seized did not conform to the express requirements of the statute, and were accordingly illegal; and (2) that the liquors were in transit as interstate commerce.

Section 49, c. 29, Revised Statutes provides:

"If any person competent to be a witness in civil suits makes sworn complaint before any judge of a municipal or police court or trial justice, that he believes that intoxicating liquors are unlawfully kept or deposited in any place in the state by any person, and that the same are intended for sale within the state in violation of law, such magistrate shall issue his warrant, directed to any officer having power to serve criminal process, commanding him to search the premises described and specially designated in such complaint and warrant, and if said liquors are there found, to seize the same, with the vessels in which they are contained, and then safely keep until final action thereon, and make immediate return on said warrant. The name of the person so keeping said liquors as aforesaid, if known to the complainant, shall be stated in such complaint, and the officer shall be commanded by said warrant, if he finds said liquors, to arrest said person and hold him to answer as keeping said liquors intended for unlawful sale. * * * If the name of the person keeping such liquors is unknown to the complainant, he shall so allege in his complaint, and the magistrate shall thereupon issue his warrant as provided in the first sentence of this section," etc.

The claimant contends that the statutory requirements that the name of the person keeping the liquors, "if known to the complainant, shall be stated in such complaint," and, if not known to him, that "he shall so allege in his complaint," were not complied with in this case; and therefore that the seizure was illegal and void.

In the complaint the name "John Doe" is stated as the person keeping the liquors, and the warrant commands the arrest of said John Doe, if liquors are there found. It is not contended in behalf of the state that the name John Doe was stated in the complaint and warrant as designating any real person.

It is an essential to the validity of a complaint and warrant, or indictment, that the party against whom it is issued should be described therein sufficiently, so that he may be thereby identified as the person on whom it is to be served. If his name is not known, he must be otherwise sufficiently described.

And when a precept contains a sufficient description of the real person against whom it is issued, the fact that he is also referred to therein by a fictitious name, or that his name is stated to be unknown, is harmless. But a warrant to arrest a person described fictitiously as John Doe, without any further description or means of identification of the person to be arrested, is void. *Commonwealth v. Crotty et al.*, 10 Allen (Mass.) 403, 87 Am. Dec. 669. Unless there is some description or other means of identification contained in the warrant, it would be as applicable to one person as to another.

The complainant testified that he did not know by whom the liquors were kept. This, then, is not a case where the fictitious name was intended to designate a real person, whose name was unknown. The name "John Doe" was not intended to stand for the name of any one. It was used as a mere fiction. And there was no other description or names of identification of a real person as the keeper of the liquors contained in the complaint and warrant. Although the warrant contained a command to arrest John Doe, no one could have been arrested thereon. We do not perceive wherein the effect of the complaint with the name John Doe therein is different from what it would have been if no keeper's name had been inserted therein. It must be conceded that the name of the person keeping the liquor was not stated in this complaint; moreover, according to the evidence of the state, it was not known to the complainant.

But the statute expressly declares that, "if the name of the person keeping the liquors is unknown to the complainant, he shall so allege in his complaint, and the magistrate shall thereupon issue his warrant," etc. This provision of the statute was not complied with. The statement of a fictitious name is not the equivalent of an allegation, under oath, that the real name of the keeper of the liquors is unknown to the complainant.

The search and seizure process should strictly follow the express requirements of the statute authorizing it. "It has been repeatedly held by this court, and in this class of cases, that a failure to follow the requirements of the statute renders the warrant not merely voidable, but absolutely void." *State v. Whalen*, 85 Me. 469, 472, 27 Atl. 348, 349, and cases cited.

If there was no legal seizure, then there could be no judgment of forfeiture. "The very foundation of the judgment of forfeiture is a legal seizure; until this is had, no further proceedings are authorized." *Guptill v. Richardson*, 62 Me. 257, 263; *State v. Riley*, 86 Me. 144, 146, 29 Atl. 920. See *State v. Intoxicating Liquors*, 64 Iowa, 300, 20 N. W. 445.

In the case at bar the court is of the opinion that the liquors in question were not legally seized, because the complaint and

warrant did not conform to the express requirements of the statute authorizing the search and seizure process. Accordingly the exceptions must be sustained.

This conclusion renders a consideration of the other contention of the defendant unnecessary.

Exceptions sustained.

INHABITANTS OF STRONG v. STRONG WATER COMPANY.

(Supreme Judicial Court of Maine. March 1, 1913.)

1. TOWNS (§ 46*)—DEBTS—CONSTITUTIONAL LIMITATIONS.

The raising of money by a town exceeding its constitutional debt limit for the purchase of a waterworks plant by means of temporary loans to be paid out of money raised by taxation during the same year, followed by the formation of a water district to take over the property, and to issue bonds from the proceeds of which the town debt would be paid, the tax for its payment to be then abated, would violate Const. art. 22, providing that no city or town shall create debts or liabilities exceeding 5 per centum of its valuation, but that this shall not apply to temporary loans to be paid out of money raised by taxation during the year in which they are made.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 81-84; Dec. Dig. § 46.*]

2. TOWNS (§ 46*)—DEBTS—CONSTITUTIONAL LIMITATIONS.

Under Const. art. 22, providing that cities or towns shall not create debts or liabilities exceeding 5 per centum of the valuation of such city or town, a vote by a town at a town meeting to purchase the plant of a water company, and to issue its promissory note for the amount necessary to provide the funds for such purchase, was unauthorized and invalid, it being conceded that the amount required would exceed the debt limit.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 81-84; Dec. Dig. § 46.*]

3. TOWNS (§ 30*)—CONTRACT FOR ACQUISITION OF WATERWORKS BY PUBLIC AUTHORITIES—CAPACITY OF PLAINTIFF TO PERFORM.

Under a contract between a town and a water company providing that, if the town should vote to purchase the company's waterworks, the company on tender of the cost of construction with accrued interest, less net income, would convey the waterworks to the town, the town could not maintain a bill for specific performance, or have the cost of construction ascertained, until it first lawfully voted to purchase, at the same time providing means of payment not violating the constitutional debt limit.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 69; Dec. Dig. § 36.*]

Report from Supreme Judicial Court, Franklin County, in Equity.

Action by the Inhabitants of Strong against the Strong Water Company. On report from the trial court. Bill dismissed.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, KING, BIRD, and HANSON, JJ.

Frank W. Butler, of Farmington, for plaintiff. Symonds, Snow, Cook & Hutchinson, of Portland, for defendant.

SAVAGE, J. There is now in force a contract between the parties, dated June 27, 1904, which provides, among other things: "That should the said town at a meeting duly called for that purpose vote to purchase the waterworks of said company, at any time within ten years of the completion of said works, then and in that case the said company on tender of the amount of the cost of constructing the said works with accrued interest at five per cent. less net income will convey and make over to the said town the said waterworks in their entirety as they then exist."

On February 3, 1912, at a town meeting duly called for that purpose, the plaintiff town voted (1) "that the town purchase the entire water plant of the Strong Water Company in accordance with the terms and conditions of the contract existing between said town and said water company;" (2) "to choose a committee to ascertain the cost of the waterworks," which committee was appointed; (3) "to authorize and empower the committee to employ counsel and commence either legal or equitable proceedings to ascertain the cost of said water company's plant and the sum the town will be required to pay therefor in accordance with the terms of the contract between said town and said water company;" and (4) "that the town issue its promissory note for such an amount on such time and at such rate of interest as may be necessary to provide the funds to pay for said water plant in accordance with the terms and conditions of the existing contract between said town and said water company."

In the pending bill it is alleged, and in the answer admitted, that the parties are unable to agree upon the amount of the cost of construction of the waterworks under the terms of the contract. The bill prays for the appointment of a master to ascertain the cost of construction, and, that cost being ascertained, for a specific performance of the defendant's agreement to convey.

The cause came on to be heard upon a motion for the appointment of a master, to which the defendant objected in limine, on the ground that the vote of the town which we have recited was ineffective and void, because it provided for the creation of a debt in excess of its constitutional debt limit of 5 per cent. of its valuation (Constitution of Maine, art. 22), and that the town, under that vote, could not constitutionally raise the money proposed to be raised to pay for the defendant's works.

Thereupon, after taking out evidence relative to that issue, the cause was reported to the law court with the stipulation that, if the bill is maintainable upon the relevant and material evidence, it is to be remanded for the appointment of a master, and further proceedings; otherwise the bill is to be dismissed with costs.

The only question presented is whether the

It is maintainable in view of the effect of the debt limit provision of the Constitution. The case shows that the constitutional debt limit of the town of Strong, at the time of the vote referred to, did not exceed \$11,000, and that the indebtedness then existing was \$4,000 or more. The evidence seems to warrant the conclusion that the cost of the construction of the waterworks when ascertained will not be less than \$20,000 or \$25,000. But it is conceded that in any event it must be in excess of the \$11,000 limit.

[1] It is plain, then, that the town then had no constitutional authority to incur an indebtedness by borrowing, as proposed in the vote, sufficient money to pay for the defendant's waterworks. The plaintiff town, however, says that, even granting this to be true, it ought not to prevent the relief sought. It is contended in its behalf that the only thing required of it under the contract was to "vote to purchase." This is not accurate. We think the vote cannot be considered piecemeal. It must be taken as a whole. The town must tender the price before it is entitled to a conveyance. But it is said, until the price is determined, it is impossible to tell whether the debt limit will be exceeded or not. And it is said, further, that the town may still raise the necessary money by "temporary loans to be paid out of money raised by taxation during the year in which they are made"; such loans being excepted in the Constitution from the 5 per cent. limit. And it is suggested that a water district may then be formed to take over the property, and that the proceeds of water district bonds will pay the town debt. Then the tax can be abated. These latter propositions are not only conjectural, but, as bearing upon the power of the town to incur the indebtedness, they are extraconstitutional, and cannot receive the sanction of the court.

As to the primary proposition, it is sufficient to say, as we have already said, that it was conceded at the hearing that there was no question but that the purchase price in any event must exceed the town's present limit, and its present limit is all that we have to consider in this case. And, as to the proposition for "temporary loans" to be repaid out of money raised by taxation during the year in which they are made, that is not this case. No such loans were made, and no tax was levied out of which the money authorized to be borrowed could have been repaid. The vote of the town was a straight vote to purchase, and to borrow money to pay. And, even if it were relevant to the discussion, it cannot be assumed that, because the town then voted to borrow money, it would have voted then, or will vote now, to assess the tax necessary to pay it, as the Constitution provides.

[2, 3] But we think the inherent infirmity of the plaintiff's case lies in the beginning

of its proceedings. It voted to purchase. To purchase involved an obligation to pay. It could not purchase without paying. It could not pay without exceeding its debt limit. In that situation the Constitution forbade it to pay, or to borrow the money with which to pay, unless it raised a tax to be levied that year to provide for the repayment. This it did not do. The town, then, attempted to do something which it could not do. It attempted to purchase, to borrow the means of payment, and not to provide taxation for its repayment. The vote of the town to purchase was nugatory and invalid. It was not such a "vote to purchase" as the contract must be understood to have contemplated.

The plaintiff cites and relies upon Farmington Village Corporation v. Farmington Water Co., 93 Me. 192, 44 Atl. 609. But that case is not like the one at bar. In that case the contract provided that the village corporation should "have the right to purchase" the company's works at an appraisal, and, further, that the "appraisal shall be the sum at which said corporation shall have the right to buy said works and for which said company agree to sell the works." The question in that case was whether the village corporation could move for an appraisal before it voted to purchase. And, under the language of the contract, it was held that it could. But in the case before us the contract did not give the plaintiff town merely a right to buy at an appraisal first had. It made a valid vote by the plaintiff to purchase a prerequisite to any obligation on the part of the defendant to convey. The distinction is manifest.

As the defendant's contract duty of making conveyance was conditional upon the town's first legally voting to purchase, and as the town's vote was unauthorized and invalid, it is clear that no award of specific performance can be made. In accordance with the stipulation the certificate will be:

Bill dismissed, with costs.

STATE v. STAPLES.

(Supreme Judicial Court of Maine. March 3, 1913.)

1. LICENSES (§ 16*) — CRIMINAL OFFENSE — SALE OF NURSERY STOCK.

The mere offer to take, or solicitation or reception of, an order for nursery stock by one who has no license and no stock with him, is not a violation of Pub. Laws 1907, c. 15, § 6, as amended by Pub. Laws 1909, c. 34, § 3, and Pub. Laws 1911, c. 84, § 1, and chapter 178, § 3, making it an offense for agents or other parties, except growers, "to sell nursery stock" without an agent's license, and without filing with the state horticulturist the names and addresses of nurseries or parties from whom they "purchased their stock," especially where defendant never acquired any title to the stock for which the order was taken.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 36-40; Dec. Dig. § 16.*]

2. LICENSES (§ 8*)—CRIMINAL OFFENSE—SALE OF NURSERY STOCK—CONSTRUCTION OF STATUTE.

Pub. Laws 1907, c. 15, § 6, as amended by Pub. Laws 1909, c. 34, § 3, and Pub. Laws 1911, c. 84, § 1, and chapter 176, § 3, requiring persons who wish to sell nursery stock to procure an agent's license, and prescribing a penalty for its violation, being a penal statute, must be strictly construed.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 16, 17; Dec. Dig. § 8.*]

Report from Supreme Judicial Court, York County, at Law.

Nicholas Staples was convicted of unlawfully selling nursery stock without a license, and he appealed. On report from the supreme judicial court of the county. Complaint dismissed.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and BIRD, JJ.

Nathaniel B. Walker, Co. Atty., of Biddeford, for the State. Sidney St. F. Thaxter, Roscoe T. Holt, of Portland, and McGuire & Wood, of Rochester, N. Y., for defendant.

BIRD, J. The complaint in this case charges respondent with selling nursery stock at and to an inhabitant of Kennebunk, in York county; the respondent not being at the time of the sale either a grower of or licensed to sell such stock. The complaint is brought under chapter 15, § 6, of the Public Laws of 1907, as amended by Public Laws, 1909, c. 34, § 3, and 1911, c. 84, § 1, and chapter 176, § 3. The respondent, pleading not guilty and waiving hearing, was found guilty and sentenced to pay a fine by the municipal court of Biddeford. From this judgment, he duly appealed to the supreme judicial court for the county, and the case is now here upon report on agreed statement of facts.

[1, 2] The last amendment of section 6 of chapter 15 of the Public Laws of 1907 is as follows:

"Sec. 3. Section six of chapter fifteen of the public laws of nineteen hundred and seven, as amended by section three of the public laws of nineteen hundred and nine, is hereby amended by striking out the word 'entomologist,' in the third and fifth lines of the first paragraph of said section, and substituting therefor the word 'horticulturist,' so that said paragraph shall read as follows:

"Section 6. Agents or other parties excepting growers who wish to sell nursery stock shall make an application for an agent's license and shall file with the state horticulturist the names and addresses of nurseries or parties from which they purchase their stock. On receipt of such application the state horticulturist shall issue an agent's license valid for one year in such form and with such provisions as the commissioner of agricul-

ture may prescribe. Such license may be revoked at any time for failure to report names and addresses of nurseries from which stock is purchased or for such other cause as may in the opinion of the commissioner of agriculture be deemed sufficient. Any violation of this requirement shall be fined not less than ten nor more than fifty dollars for each offence." Public Laws 1911, c. 176.

It is difficult to ascertain what act, done by others than those who have applied for or obtained a license, is denounced by this section, as amended, for the violation of which the sanction of a fine is annexed. The act of selling, or offering for sale, is not in terms prohibited. A wish to sell may or may not rise to the grade of an intent; but an intent harbored in the mind is not punishable, and, even if expressed, unless the words employed are libelous, seditious, obscene, or provocative of breaches of the peace, is not the subject of penal, judicial action. *U. S. v. Riddle*, 5 Cranch, 311, 312, 3 L. Ed. 110; 1 Whart. Cr. Law, § 174. It is only by inference or implication that it can be pretended that the act of selling without a license, with which respondent is charged in the complaint, was intended to be forbidden by the Legislature. *State v. Barker*, 98 Me. 387, 389, 57 Atl. 95. As a penal statute, the section must be strictly construed.

But even if it be assumed that the selling of nursery stock without a license is made penal by the section in question, we think the facts agreed do not render the respondent amenable. He at most made an offer to take, or solicited and received, an order for nursery stock. It is clear that he had no nursery stock with him. It cannot be contended that here was a transmutation of property from respondent's principal to the person giving the order. 2 Bl. Com. 446. See *Commonwealth v. Farnum*, 114 Mass. 267, 271; *State v. Wells*, 69 N. H. 424, 425, 45 Atl. 143, 48 L. R. A. 99. In *State v. Montgomery*, 92 Me. 433, 439, 440, 43 Atl. 13, 16, a prosecution under a former hawkers and peddlers act (Laws 1889, c. 298), the court says: "Unless he had the goods with him, he cannot expose them for sale; he cannot sell them, within the meaning of the statute." If this construction of section 6, as amended, needs further support, it is found in its provision requiring the filing of the names and addresses of the nurseries or parties from whom the "agent or other parties . . . purchase their stock"; the stock for which the order was taken in the case under consideration being the property of the principal, to which respondent had no title by purchase or otherwise.

Complaint dismissed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

GAGE v. MAINE CENT. R. CO.

Supreme Judicial Court of Maine. March 4, 1913.)

**RAILROADS (§ 275*)—INJURY TO PERSON
LOADING CAR—LIABILITY.**

Where a railroad company's servants directed plaintiff to unload his potatoes into a car standing in the railroad yard, the company was liable for injuries to him from an engine being backed against the cars without warning.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 873-877; Dec. Dig. § 275.*]

**APPEAL AND ERROR (§ 1004*)—AMOUNT OF
AWARD—EVIDENCE.**

Where the amount of the award for personal injuries was authorized by plaintiff's testimony, it could not be disturbed on appeal, though from the entire evidence it seemed improbable that plaintiff was injured to that amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

RAILROADS (§ 443*)—FRIGHTENING OF ANIMAL—EVIDENCE.

Evidence in an action against a railroad company held insufficient to sustain a finding that the disposition of plaintiff's colt was injured by being frightened by the negligent shifting of a car into which plaintiff was loading potatoes.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.*]

On Motion from Supreme Judicial Court, Penobscot County, at Law.

Action by Henry M. Gage against the Maine Central Railroad Company. Verdict for plaintiff, and defendant moves for new trial. Motion overruled conditionally.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Martin & Cook, of Bangor, for plaintiff. Forrest Goodwin, of Skowhegan, and John Wilson, of Bangor, for defendant.

HALEY, J. The 4th day of May, 1911, the plaintiff hauled a load of potatoes to Unity station, and backed his cart up against a freight car in the defendant's yard for the purpose of unloading them. Before backing his cart up to the car, he was instructed to unload into the car that he backed against. The horses the plaintiff was using at the time were a pair of colts, four and five years old. The plaintiff had used them together only two weeks at the time of the accident. He unloaded the bags of potatoes into the car, and then entered the car to help carry the bags to the end of the car and empty them. The team was left backed against the car, the horses unhitched and unattended. While plaintiff was in the car, carrying the potatoes to the rear end, the shifting engine of the defendant made a hitch to the string of cars, one of which was the car the plaintiff was in, and the plaintiff claimed at the trial that, when the engine came in contact with the car, the car he was in was forced violently back, that his toe caught under the scales,

and he was thrown over the scales, and upon them, and received injuries which consisted of a bad spot on his hip, and that his knee was twisted, which caused him to be lame, and that he had not recovered from the injury to his knee at the time of the trial. The horses were startled by the movement of the car against which the cart was resting, and ran or trotted about 20 rods. The plaintiff got up from the floor of the car, jumped from the car, and started after the horses. The horses ran or trotted about 8 rods, and then turned and ran on another street about 12 rods. The plaintiff ran across the triangular-shaped lot between the two roads the horses passed over, and was near to the horses when they stopped.

The plaintiff claims damages for injuries received by reason of his fall in the car, although his attorney, when he made the claim upon the defendant for damages, in June, after the accident, did not claim any injury to the plaintiff, and for injuries to the disposition of the four year old colt, which he claims has become unsafe to use by reason of the fright received and by the fact that he had run away.

The ad damnum of the writ was \$500, and the jury found for the plaintiff with damages assessed at \$500. At the request of counsel the court directed special findings as to the damages, and the jury assessed damages for the plaintiff's personal injuries at \$337.50, and damages to the disposition of the horse at \$162.50.

The case is before this court upon a motion for a new trial, and it is claimed that the plaintiff assumed the risk of injury arising from the ordinary shifting of the cars; that he knew, or ought to have known, that the cars were liable to be shifted; that there was no rough handling of the cars and nothing out of the ordinary, usual, and proper method of shifting cars; that if he was injured, as he claims he was, that he, by voluntarily going into the car, assumed the risk of the ordinary handling of the car, and was guilty of contributory negligence in not guarding against the result of the ordinary shifting, and was guilty of contributory negligence in leaving his horses unhitched and unattended, and also because he backed his cart solidly against the freight car, and should have known any movement of the car would have had a tendency to frighten them; that the horses were not frightened to any unusual extent; that they merely trotted a short distance and stopped of their own accord; and that the damages for the injury to the disposition of the four year old colt was unwarranted.

[1] The plaintiff, having been directed by the defendant's servants to unload the potatoes in the car, had the right to back his cart up to the car for the purpose of unloading them into the car, and the defendant should have known that he would naturally back

close to the car to unload, and that if they backed an engine against the train, of which the car that plaintiff was directed to unload into was one, that the shock might throw an inexperienced man from his feet, and move the car so that the horses might be startled or frightened.

They owed him the duty while he was lawfully in the car to do no act that might cause him injury, without sufficient notice to him to enable him to guard against injury.

The plaintiff was lawfully in the car by the defendant's direction, and in the exercise of due care, and the defendant, by backing its engine against the string of cars without warning to him, was not exercising due care toward him, and for damages sustained by him to his person, or property, by reason of the defendant's want of due care, the defendant is liable in this action.

[2] From a reading of the evidence, it seems improbable that the plaintiff was injured by the fall in the car to the amount awarded by the jury; but it was a question of fact for them, and, if they believed the plaintiff's testimony, the damages awarded by them were authorized.

[3] What evidence was there to support the plaintiff's contention that the disposition of the four year old colt was injured at that time? He was a spirited animal on the road, according to the testimony, and before the trouble at the car he "was a little nervous," and "wanted to go along." At the station he was undoubtedly the same, and started with his mate when the car pushed the cart. If they had been frightened, they would have run more than from 300 to 325 feet with blankets fastened around their necks and dragging on the ground under their feet before stopping of their own accord. It does not seem possible that what took place at the railroad station could have so injured the horse's disposition that he became unsafe to use by reason of the fright and running 300 feet, and, if there has been any injury of the kind complained of, it is more than probable that it was caused the Sunday after, when the horse ran away.

The only evidence that the horse was uneasy when anything came up behind him or unsafe to use is of his conduct after the following Sunday.

The accident was Thursday May 4, 1911. There is no evidence that the colt was used again until Sunday, May 7th, when he was driven to the residence of Mr. Cook, a witness called by the plaintiff, who testified as follows: "Q. What do you know about the horse since the accident; have you observed him? A. I saw him run away one Sunday. Q. About what time was this? A. Well, I couldn't say for positive, but I think it was the first Sunday after the accident; I think it was; I couldn't— Q. Where was this? Tell the circumstances? A. Mr. Gage came out to my place and wanted to know if I

would go up and finish grafting. I live about two miles— Q. I want to know about the horse running away, or anything on that day? A. We done our business, were talking what we had to do, and he started for home, and I live at the top of quite a steep little hill, and the horse started. I think the rattling of the wagon made him nervous, and he went down the hill and kicked several times down the hill, and broke the harness, and Mr. Gage and the horse and the wagon landed out in the side of the road among some trees at the foot of the hill."

There was testimony that the horse was uneasy and restless when anything came up behind him, but all of the testimony of that nature was after the runaway testified to by Mr. Cook, and, if the change in the conduct of the horse was caused by his being frightened and running away, it is impossible to find from the evidence that it was caused by the fright at the railroad station; but, if true that his disposition has been changed, all of the probabilities bear out the position of the defense that it was caused by the runaway Sunday as detailed by the witness Cook. The evidence and probabilities did not authorize the finding that, if there was any change in the disposition of the colt, it was caused by the fright Thursday at the station, instead of by his running away on the following Sunday. Whether the finding of the jury was the result of prejudice or bias and a desire to give the plaintiff the amount of the addendum of the writ, or a failure to properly weigh the evidence, we cannot tell; but there is no evidence that justifies the award for injury to the disposition of the horse, and the mandate should be:

If the plaintiff, within 30 days after the certificate is filed, remits all of the verdict in excess of \$337.50, motion overruled; otherwise motion sustained.

CITY OF ROCKLAND v. ANDERSON.

(Supreme Judicial Court of Maine. March 4 1913.)

MUNICIPAL CORPORATIONS (§ 225*)—SALE OF PROPERTY.

The sale by a municipal corporation of an old horse, in consideration of the purchaser's agreement to keep her during her life, give her a good home, avoid overworking her, and when her usefulness was over to put her out of the way and bury her, was valid, upon a sufficient consideration, and, in the absence of fraud, not subject to repudiation, although the horse could have been sold for a cash consideration, and although the purchaser by giving her proper care and medical treatment was able to work her.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 626-643; Dec. Dig. § 225.*]

Report from Supreme Judicial Court, Knox County, at Law.

Replevin by the City of Rockland against John W. Anderson. On report. Judgment for defendant.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Edward K. Gould, of Rockland, for plaintiff. Arthur S. Littlefield, of Rockland, for defendant.

HALEY, J. This is an action of replevin, brought to obtain possession of the horse called in the writ "Winona," and is before this court on report.

The defendant pleaded title in himself. Prior to the 17th day of January, 1906, the city of Rockland was the owner of a sick horse, presumably used by the city for municipal purposes. The horse was coughing and discharging from the nose. The board of mayor and aldermen discussed the question of disposing of her. The chairman of the committee on city property stated that she was not worth more than \$20. The aldermen discussed chloroforming, and some one suggested that somebody might be found who would take her and give her a home. The committee on city property was instructed to look into the matter.

The defendant offered to give \$20 for the horse, but the committee wished to make a contract fixing the manner of use and burial of the horse at her death, and made a contract in writing with the defendant to take the horse, keep her during the rest of her life, give her a good home, avoid overworking her, and, when her usefulness was over, to put her out of the way and bury her, and sold her to him upon those conditions, to which he agreed. On February 5th the city government approved and ratified the contract, and the defendant took the horse upon those terms. The defendant doctored the horse, and she improved to the extent that she could do the work of an old horse. This action was brought by another city government to obtain the horse.

The horse, being the property of the city, could be sold by the city, and the purchaser obtain a good title, if the transaction was without fraud. There is nothing in the agreed statement to raise a suspicion of fraud. The city was the owner of what was apparently a worthless horse, probably grown so in the service of the city. It was a question of whether the city would go to the expense of feeding and doctoring her, or of putting her out of the way and burying her, or, by placing her where she would have a good home and be properly used, avoid expense. As public officers it was their duty to deal with the city's property as prudent men would deal with their own property. It is true that the city could have gotten \$20 for her in her disabled condition; but an ordinary man, who had a horse that had

grown old and disabled in his service, would not sell that horse for the paltry sum of \$20, to be traded about and abused for the rest of her life. It would not be humane to do so, and the municipal officers had the right to treat the city's animals in a humane manner. The defendant's agreement as to the care and the treatment to be given the horse by him was a sufficient consideration for the sale, in the condition in which the horse was turned over to him. The city and the defendant made the contract, the defendant took the horse by virtue of that contract, and was bound by its terms, and, by giving the horse proper care and medical treatment, the amount of which does not appear in the case, got her so he could use her, and after his expenditure for the horse's benefit, the city has no right to repudiate its contract, made in good faith, and a contract that the law would uphold if made between individuals. The title to the horse passed to the defendant when she was delivered to him under the agreement, and, according to the stipulation, the mandate should be,

Judgment for the defendant, and return of property replevied, damages to be assessed at nisi prius.

FICKETT v. LEWISTON, A. & W. ST. RY.
(Supreme Judicial Court of Maine. March 4, 1913.)

1. STREET RAILROADS (§ 103*)—LIABILITY FOR INJURIES IN COLLISION.

A street railroad company was liable for injuries caused by its motorman running the car, which he had under control, against a wagon proceeding in the same direction close to the track, although the driver failed to look back to see if a car was coming.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. § 103.*]

2. STREET RAILROADS (§ 90*)—LIABILITY FOR INJURIES IN COLLISION.

A street railroad company was liable for injuries caused by its motorman's negligence in attempting to pass a team and wagon so near the track that a slight turn of the horses would throw the wagon against the car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190-192; Dec. Dig. § 90.*]

On Motion from Supreme Judicial Court, Cumberland County, at Law.

Action by John E. Fickett against Lewiston, Augusta & Waterville Street Railway. On motion to set aside verdict for plaintiff. Motion overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

Wheeler & Howe, of Brunswick, for plaintiff. Newell & Skelton, of Lewiston, for defendant.

HALEY, J. This is an action on the case, brought to recover damages for injuries alleged to have been received by the plaintiff

October 7, 1911, by reason of the negligence of a motorman in the employ of the defendant, while operating an express car of the defendant upon its street railway in Brunswick. The case was tried at the April term of the Supreme Judicial Court at Portland, and the jury returned a verdict for the plaintiff, and is before this court upon a motion to set aside the verdict, as against law and evidence.

The plaintiff, on the 7th day of October, 1911, was driving a span of horses attached to a dump cart down Main street, Brunswick, on that part of the street known as Mill Hill. The railroad tracks of the defendant are located in said street, and a portion of the highway between the rails was used by teams passing up and down the street and hill. As the plaintiff was driving down the hill, he turned to the right to pass a team coming up the hill, which brought him close to the defendant's track in the street. There were three other teams standing in the highway on the plaintiff's left-hand side. After the plaintiff had turned to the right to avoid the passing team, he continued down the hill close to the defendant's track. The defendant's express car was following the plaintiff's team down the street, and the motorman had a plain view of the plaintiff's team for 350 feet before the accident, and the last 20 feet of which at least the car was close to the cart, and following it down the hill, while the plaintiff's horses were walking. When near the bottom of the hill, the car and the plaintiff's team collided, and the plaintiff was thrown to the ground and received injuries for which he claims damages. The motorman testified he sounded his gong repeatedly, to warn the plaintiff to move away from the track. The plaintiff and his witnesses testified that they did not hear the gong. The only dispute of fact in the case is: How did plaintiff's team and defendant's car collide?

The plaintiff claims that he did not know the defendant's car was behind him, and that he did not look back to see if a car was coming up behind him, but was looking ahead to see that no car approached him in front, and that the first he knew of the car in the rear was when the car struck the back of his cart, pushing forward and upward the pole between the heads of the horses, at which time he was thrown from his seat on the cart and received the injuries complained of.

The defendant claimed that the motorman had the car under perfect control, and the motorman so testified, and that the plaintiff was driving along with clearance enough, but that, in swinging his horses away from the track, it brought the hind wheels of the cart against the side of the car, and that, by the noise or impact, the horses became frightened, and the plaintiff slipped from the seat astride the tongue and received the injuries from which he is now suffering, and that the

plaintiff should have looked for a car in the rear as well as in front.

The defendant, to prove its contention, relied upon the testimony of the motorman and a man in charge of the freight in the car, who did not see the accident but heard a scraping against the side of the car, and there were marks on the side of the car as if a wheel had scraped against it. This was attempted to be explained by the plaintiff by testimony that there were other marks of a similar character on the car, and testimony that frequently when teams backed up to unload freight from the car, the wheels, in turning, made the same marks on the car and the witness testified were upon the car.

The plaintiff relied upon his own testimony and that of two witnesses who saw the car and team, as testified to by the plaintiff, immediately before they came together, and when they heard the crash they looked at the team and car were in the same position, the team ahead of the car. Another witness also testified to practically the same thing. The defendant's motorman and the man in charge of the freight were impeached by two witnesses beside the plaintiff, who testified that both the expressman, called by some the conductor, and the motorman, said, immediately after the accident, that the motorman thought he had room to go by and ran into the back of the team.

[1,2] From the evidence the jury must have found either that the plaintiff's version was the true one, or that the motorman was guilty of negligence in attempting to pass the plaintiff's team when it was so dangerously near the railroad track that a slight turn of the horses would have thrown the plaintiff's cart against the car. Under either finding the defendant is liable.

The defendant contends that the injury was caused solely through the neglect of the plaintiff, in this, that before coming in contact with the car he had every opportunity to look both ways of the track, that he did not, and that, had he done so, he could have avoided the accident. This doctrine would authorize a motorman, who had his car under perfect control, to run it against any one who might be upon the track, and by his neglect to stop his car when he could, to kill whoever might be upon the track. The rule contended for by the defendant is not sustained by the decisions, either ancient or modern.

The duty of the defendant to the plaintiff in the situation in which the evidence shows the parties to have been at the time of the accident was clearly stated in *Flewelling v. Horse Railroad*, 89 Me. 594, 36 Atl. 1058, as follows: "That street railroads are granted very great privileges out of the public right, and their treatment of the public must be reasonable in return; so that when a person or team, through accident or misjudgment or for any cause, be caught in a position of any

peril of coming in collision or close contact with the cars, it is the duty of those who are managing the cars, to use all possible effort, by slackening the speed of a car or stopping it altogether to avoid injury."

This decision is in accordance with decisions both ancient and modern. *Butterfield v. Forester*, 11 East. 61; *Davies v. Mann*, 10 M. & W. 545. "For a street railway to run into a wagon from behind without special circumstances to justify it is evidence of negligence or willful wrong on the part of the street railway company." *Vincent v. Norton & Taunton St. Ry. Co.*, 180 Mass. 104, 61 N. E. 822.

"If the motorman did see or could have seen that the wheels were dangerously near the track and run into the wagon, then the company would be liable." *Higgins v. Wilmington City Railway Co.*, 1 Marv. (Del.) 360, 41 Atl. 87. A driver of a team is not bound to keep a lookout behind his team for a car. *Vincent v. Norton & Taunton St. Ry. Co.*, supra; *Devine v. Brooklyn H. R. Co.*, 34 App. Div. 248, 54 N. Y. Supp. 626; *Tunison v. Weadock*, 130 Mich. 141, 89 N. W. 703.

The motorman could have avoided the accident by the exercise of ordinary care and skill. Having failed to do so, the defendant is liable for injuries caused by that neglect. *Excelsior Co. v. Railroad Co.*, 93 Me. 70, 44 Atl. 138, 47 L. R. A. 82.

Motion overruled.

In re DELAWARE CANDY CO.

(Court of Chancery of Delaware. Feb. 28, 1913.)

1. FIXTURES (§ 31*)—TRADE FIXTURES—REMOVAL—RIGHT OF LESSEE.

A lessee as against his lessor is entitled to remove trade fixtures erected by the lessee, in the absence of a stipulation in the lease to the contrary, though there then be rent in arrear, subject to the landlord's right to distrain the same for the unpaid rent.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. § 62; Dec. Dig. § 31.*]

2. FIXTURES (§ 33*)—TRADE FIXTURES—REMOVAL BY RECEIVER—RIGHT OF LANDLORD.

A provision in a lease that the tenant might remove fixtures provided he could do so without damage to the building, and provided that there was no rent in arrear, displaced the tenant's common-law right of removal, and, the fixtures having been removed by the tenant's receiver in insolvency and sold, the landlord, having made proper excuse for laches in his application, was entitled to a lien on the proceeds of the sale of the fixtures for the rent in arrear.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 64, 65; Dec. Dig. § 33.*]

In the matter of the insolvency proceedings against the Delaware Candy Company. On claim of Thomas N. Stayton for the proceeds of certain trade fixtures removed and sold by the receiver, on which Stayton claimed a lien for rent in arrear. Allowed.

Petition for payment of rent out of funds in the hands of a receiver. In July, 1909, the Delaware Candy Company leased a portion of a building belonging to Thomas N. Stayton, at a yearly rental of nine hundred dollars, payable monthly, and placed therein a boiler and machinery for the manufacture of candy. On February 3, 1912, the lessor, under an option contained in the lease, terminated said lease for nonpayment of rent, and on February 6, 1912, a receiver for the company was appointed on the ground of insolvency. The lease also contained the following provision:

"It is further hereby expressly understood and agreed that on the termination of this lease, the said Delaware Candy Company is to have the privilege of removing any fixtures belonging to it, or put up by it, in said building, provided said fixtures may be removed without damage to said building; and provided further that there is no rent in arrear."

On October 18, 1912, the lessor filed a petition setting forth that at the time of the appointment of the receiver there was due \$1,080 for rent in arrear; that all the fixtures had been sold by the receiver, by order of court, and removed from the building, except a boiler in the basement of the building; and that under the terms of the lease all rent in arrear should have been paid in full before the removal of the fixtures. The petitioner also stated that he had mislaid, or lost, his copy of the lease and did not recall the above-quoted provision thereof until October 14, 1912, when the receiver produced a copy thereof at a hearing before the chancellor concerning the right of removal of said fixtures.

The petition prayed that the receiver be instructed to pay the lessor the amount of rent due at the time of the appointment of the receiver. The receiver did not file an answer, but at the hearing admitted the facts alleged in the petition.

Saulsbury & Morris, of Wilmington, for petitioner. Marvel, Marvel & Wolcott, of Wilmington, for receiver.

The CHANCELLOR: [1,2] As between the lessor and lessee, the right of the lessee to remove trade fixtures erected by it was subject to the condition that there was no rent in arrear at the termination of the lease. In the absence of any agreement on the subject the tenant would have had a right to remove the trade fixtures, though the rent be then in arrear, subject to the right of the landlord to distrain the same for the unpaid rent. Here, however, there was a specific agreement giving a right to remove fixtures under a certain condition, viz. payment of rent in arrear, and the condition displaces the common-law right to the extent of requiring a fulfillment of the condition before

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the right of removal can be exercised. *Tiffany on Landlord & Tenant*, p. 1598, § 243; *Mathinet v. Giddings*, 10 Ohio, 364; *Clemens v. Murphy*, 40 Mo. 121; *Allen v. Gates*, 73 Vt. 222, 50 Atl. 1092; *Cubbins v. Ayers*, 4 Lea (Tenn.) 329; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146.

Here, before the receiver was appointed, the lease was terminated, not by lapse of time, but by the lessor under a power in the lease for nonpayment of rent then in arrear. Subsequently the receiver, by order of the court, sold all of the trade fixtures put in by the tenant. This was without objection on the part of the lessor. He has explained, however, that he did not act earlier because he had mislaid his copy of the lease and did not recall the terms thereof giving him the right he now asserts respecting the proceeds of sale of the tenant's fixtures. This explanation seems satisfactory. It would be inequitable to deprive the lessor of any rights under the lease because of the receivership, or his apparent laches in asserting his rights earlier. Assuming that the lessor was entitled to an order preventing the sale and removal of the fixtures by the receiver, which seems likely, then as he has explained his apparent laches in asserting his rights, the only relief which he now asks seems reasonable and equitable, viz. to give him a lien on the proceeds of sale by the receiver of the tenant's fixtures for the rent due the lessor. This will be done in the due course of administering the estate of the insolvent corporation.

Let an order be entered accordingly.

In re COCHRAN'S ESTATE.

(Court of Chancery of Delaware. Feb. 28, 1913.)

1. PARTITION (§ 49*)—PARTIES—RIGHT TO INTERVENE.

In a proceeding by devisees to partition real estate, an intervention by heirs of the deceased, claiming an interest therein, and raising a purely legal question on undisputed facts, may be allowed, and their claims therein adjudicated.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 130-135; Dec. Dig. § 49.*]

2. WILLS (§ 470*)—CONSTRUCTION—INTENTION OF TESTATOR.

The intention of testator, to be gathered from the whole will, is to control.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 988; Dec. Dig. § 470.*]

3. WILLS (§ 554*)—ESTATES CREATED—DEVISE TO PARENT AND CHILD.

Under a devise to a widow for life, and then over to such of testator's children "as may survive" him and "the issue of such as have died" in his lifetime, such issue to take the share the parent would have taken if living, the issue of a child dying before the will would take a substantive and original gift, and not a substitutional gift granted on the prior gift to the parent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1198; Dec. Dig. § 554.*]

4. WILLS (§ 557*)—SURVIVORSHIP AND SUBSTITUTION—ISSUE OF CHILD DYING BEFORE THE WILL.

Testator devised a certain lot of land, on which he had intended to build a house, to his wife, and, at her death, to such of his children as might survive him and the issue of such as might have died in his lifetime, such issue taking by representation, and after the purchase of a lot having a house thereon he executed a codicil in lieu of such provision, devising the lot to the wife for life and over to such of his children as might survive him, the issue of any children who should be dead taking the share the parent would have taken if living. At the date of the will and of the codicil, a son of testator was dead, leaving children. Held, that while gifts of substitution are permitted to children of legatees who are dead at the date of the will, distinctly on the ground that such legatees took by name and not as a class, that a reference to a class cannot be held to include in it persons deceased, and that as the deceased son never came within the class interveners could not take by substitution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1203; Dec. Dig. § 557.*]

5. WILLS (§ 456*)—CONSTRUCTION—CONFLICTING RULES.

As between a rule which supports the natural meaning of the words and one which imports an artificial meaning, the former should be chosen.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 974; Dec. Dig. § 456.*]

6. PARTITION (§ 17*)—RIGHT OF ACTION—STAY TO DETERMINE DISPUTED TITLE.

An intervention proceeding for the partition of real estate of their ancestor raising a question of law upon undisputed facts will not be stayed until the dispute as to the title is adjudicated elsewhere, since a competent tribunal is not ignoring or trespassing on the powers of other courts in deciding the question.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 53-59; Dec. Dig. § 17.*]

In the matter of the partition of the real estate of John P. Cochran, deceased. Petition for partition by the devisees under the will of deceased in which the heirs of John Cochran, deceased, petitioned for intervention. Petition for intervention denied, and commission appointed to make partition among the original petitioners.

Petition for intervention in a cause in partition. A petition for partition of land late of John P. Cochran, deceased, had been filed by all the parties in interest, devisees under the will of John P. Cochran, and a commission appointed to make the partition. John P. Cochran being seised of a lot of land in Middletown, by the codicil to his will, made the following devise:

"I give, devise and bequeath to my said wife, Mary T. Cochran, the said house and lot of land so purchased from John W. Patton, to have and to hold for and during the term of her natural life, and at and upon her death, I give, devise and bequeath the same unto such of my children as may survive me, and if any of my said children shall be dead, leaving a child or children, then to such child or children, he, she, or they taking the share their parent would have taken if living, and

It is my will and I do direct that the interests of any of the persons to be benefited by this devise shall be held by the same trustees and subject to the same trusts as are set forth and provided in my said will in regard to other devises made for their benefit respectively."

At the death of the testator, John P. Cochran, on December 27, 1898, there were living his wife (who died June 26, 1912) and five of his children. Two of these five children died during the life of the widow and their devisees or heirs were parties to the petition, the three children of the testator who survived the widow being the other parties.

At the date of the will of John P. Cochran, a sixth child of his, viz., John Cochran, was dead, leaving four children, and one of the four afterwards died. The remaining three children of John Cochran filed a petition claiming that they, together, took one-sixth of the land, as issue of their father, and prayed to be allowed to intervene in and be made parties to the partition cause and be adjudged to be entitled to an interest in the land; or that partition be refused until the title of the petitioners be established at law.

Argument was had not only as to the right to intervene, but also as to the merits of the claim of the interveners to shares in the land.

By the third item of the will of John P. Cochran, he gave to his wife a certain lot of land for life and then, as to that land, provided in the same item, as follows:

"And at her death unto such of my children as may survive me, and the issue of such as may have died in my lifetime, such issue taking the share their parent would have taken if living."

It also appeared in the will that the testator intended to erect on the land last mentioned a dwelling house. By the first codicil (the material part whereof is quoted above), the testator stated in effect that since making his will he had bought from Patton another lot of land having thereon a dwelling house, and revoked the provision in the third item, and in his first codicil made in lieu thereof the provision for his wife first above quoted, under which the original petitioners for partition claimed. It distinctly appeared in the will that the testator knew that his son, John Cochran, was dead at the date of the will and codicil, and had left children who survived him and were alive at those dates, and the testator made some definite and separate provision in his will for such children of John Cochran. It also appeared that in making gifts to and for the benefit of some others of the children of the testator, living at the date of the will, he provided that in case certain defaults should happen respecting certain gifts of particular property, such property should go "unto my own right heirs forever," which last mentioned language would include the interveners, who were right heirs of the testator.

The original petitioners have filed an answer to the petition for intervention, denying the title of the interveners, but interpose no objection to their being made parties on the record if the chancellor should be of the opinion that they are entitled to the shares in the real estate which they claim.

William S. Hilles, of Wilmington, for intervening petitioners. John H. Rodney, of Wilmington, for original petitioners.

The CHANCELLOR. [1] The first question raised is whether the intervention will be allowed and the claims of the interveners be adjudicated in this way. There is no statute bearing on the subject. If the interveners have an interest in the land to be partitioned and are not made parties, they are not affected by the partition. But it is manifestly proper that the question as to their rights be settled promptly in the way adopted, for the question raised is purely a legal one and the facts are undisputed, and all parties, interveners as well as the original petitioners, would be bound by the decision of the question, subject, of course, to a review by an appeal. Indeed, there are several cases of record where such petitions for intervention were considered and allowed.

In the proceeding in *Re Ebenezer Rothwell*, in 1819, a purchaser of the shares of two of the tenants in common was allowed to intervene. In 1856, in the case of *Charles Warner v. Hunn Jenkins*, the petition was amended by adding certain cestui que trust as parties. Later, in 1871, in the *Matter of Real Estate of John McGranra*, one John McGranra, who was not an original party in the partition proceeding, made a petition in the case after the sale, claiming an interest and asking to be made a party and be given a share of the proceeds. Thereupon a rule issued to the other parties, testimony was heard by the chancellor and an order made declaring the petitioner to be a party entitled to a share of the proceeds of sale.

[2, 3] The main question, however, is whether the interveners have any interest in the land. At the time the will and codicil were executed, the testator had five children living. One child, John Cochran, was then dead leaving children then living. Provision had been made for these children of John, and it appears affirmatively and definitely in the will that he then knew of the death of John and that John had left children. The intention of the testator, to be gathered from the whole will, is to control. Regard must be had then to the third item of the will in connection with the first codicil, the one under which the interveners claim. The evident purpose of each of these provisions is to provide a home for his widow for her life. But the language of the gift of the remainder is quite different in the two clauses. It was urged by the solicitor for the children of John Cochran that under the

third item of the will they would probably be excluded from participation. But the law is otherwise. If there be a gift to the children of A. living at a given period and the issue of such children of A. as shall have died before that period, and A. had a child who was dead at the date of the will, the issue of that child would be entitled. There is a substantive and original gift to the issue and not a substitutional gift grafted on the prior gift to the parent. *Hawkins on Wills*, *249. So the gift "to such of any children as may survive me and the issue of such as have died in my lifetime" is an independent gift to the issue and the children of a son of the testator, dead at the date of the will, would have taken directly and independent of the parent and not by way of substitution for the parent, who never could take. The matter is thus stated in *Hawkins on Wills*, *249:

"Thus under a bequest to the children of A. at a given period, and the issue of such children of A. as shall have died before that period, the issue of a child of A. who may have died in the testator's lifetime, or who may have been dead at the date of the will, are entitled; the gift to issue involving no condition as to the time of death of the parent or ancestor."

In support of this the learned author cites *Coulthrust v. Carter*, 15 Beav. 421; *Rust v. Baker*, 8 Sim. 443; *Loring v. Thomas*, 1 Dr. & Sm. 497. See, also, *Atwood v. Alford*, L. R. 2 Eq. 479; *Wheeler v. Allen*, 54 Me. 233.

Under the third item, then, the five children of the testator, living at his death, would each have taken a vested remainder in one-sixth of the land and the children of John Cochran would have taken together a vested remainder in one-sixth of the land. The class of devisees in remainder consisted both of children and grandchildren, the latter taking an original and independent gift and not in substitution for their parents.

[4] After revoking that provision in the third item the testator by codicil made another gift of other property bought for the same purpose and used in the codicil entirely different language. Beyond doubt the natural and literal meaning of the codicil is such as to exclude the interveners. The word "said" has a direct reference to a class of persons which the testator had created by the words immediately preceding, viz.: "Such of my children as may survive me." They constitute the original class, and the share of any of that class who died in the life of the life tenant was given to the children of the one so dying, the members of this substituted class to take among them the share or shares which their parent or parents would have taken if they survived the testator. This view is further strengthened by the words "shall be dead." The natural significance of these words is not

dead at the date of the codicil, but dead at some future time. Again, they may mean dead at a time other than the date of the codicil, for the testator then knew that his son, John, was dead. Again, by the use of the word "if," the testator referred not to his son, John, but to some one else, viz.: such of his children as were alive when the codicil was made and who might die thereafter in the testator's lifetime. If he had intended to surely include the children of his deceased son, John, he would have again used the language used in the third paragraph of the original will respecting the other land.

There are cases, however, which hold that words such as "shall die," or "shall happen to die," used in such like cases do not necessarily point to a future death so as to exclude the issue of a child who may have died before the date of the will, "though according to strict construction, importing futurity, those words might have been understood as speaking of the event at whatever time it may happen." *Hawkins on Wills*, *249; *Loring v. Thomas*, 1 Dr. & Sm. 497; *Christopher v. Naylor*, 1 Mer. 320. It may be, therefore, that these words, "shall be dead," do not control the devise.

In support of the natural and literal meaning above referred to, of the words of the codicil, there are decisions of weight, and they uphold the proposition that one cannot take by way of substitution when the person for whom he claims to be substituted never could by any possibility have been an original legatee. The case of *Christopher v. Naylor*, 1 Mer. 320, is one of the cases most cited to support this. There, there was a bequest "to each and every child or children of my brothers and sisters, A., B., C. and D., which shall be living at my decease, but if any child or children of my said brothers and sisters shall happen to die in my lifetime and leave any issue then the legacy or legacies hereby intended for such child or children so dying shall be upon trust for and I give and bequeath the same to his, her, or their issue." It was held that the children of those nephews and nieces who were dead at the making of the will were not included in the gift.

"The nephews and nieces are, here, the primary legatees. Nothing whatever is given to their issue, except in the way of substitution. In order to claim, therefore, under the will, these substituted legatees must point out the original legatees in whose place they demand to stand. But of the nephews and nieces of the testator none could have taken besides those who were living at the date of the will. The issue of those who were dead at that time can, consequently, show no object of substitution and to give them the original legacies would be, in effect, to make a new will for the testator."

Where a testator refers to a class he cannot be held to have intended to include in it dead persons. *Growling v. Thompson*, L. R. 11 Eq. Cas. 366, note; *Grover v. Musther*, L. R. 43 Ch. Div. 509 (1889). Gifts by substitution are permitted to children of legatees who were dead at the date of the will, but distinctly on the ground that such legatees took by name and not as a class. It is otherwise if the original gift is to a class which is not determinable until the death of the testator, such as a gift to such of his children as shall survive the testator. In the case of a substitutionary gift to children or issue of persons indicated by a general description, the rule is that only the children or issue of the persons answering to the description at the date of the will can take the benefit.

[5] Applying these principles to the will under consideration here, the children of John Cochran can only take by substitution for him, and as he could by no possibility have taken under the will, because he never came within the class, being dead at the date of the will, his children could not be substituted for him. As Lindley, J., said in *Grove v. Musther*, *supra*, little assistance is to be gained from the cases in construing a will, for they rather confuse than assist. But while there are cases which hold otherwise, the case of *Christopher v. Naylor*, and the principle there established, stands firmly established in England. That case has been criticised, favored, disapproved, and followed in the many cases where cited. It is unnecessary to review all the cases cited by counsel, for they cannot be reconciled. There are, however, some cases cited on behalf of the children of John Cochran which strongly support their claim. These cases find in words substantially similar to those in the codicil here an intention to provide for grandchildren by a child deceased at the date of the will, as well as for grandchildren by a child then living but which may thereafter die, and according to those cases the testator is presumed to have as much affection and consideration for the one class of grandchildren as the other. But as between a rule which supports the natural meaning of the words, and one which imports an artificial meaning, one should choose the former.

In conclusion, then, it is clear that the testator having by his will made a gift by form of words which would surely have included the children of John Cochran, afterwards by a codicil revoked that gift and made in place thereof another gift in another form of words; that the literal and natural effect of the codicil was to exclude such children of John; and that at least by the weight of authority of other courts in like cases, this interpretation is based on a logical rule. Standing alone, the words of the

codicil might be subject to two meanings; but taken in connection with the provision of the will revoked thereby, it is clear that there can be no other reason for a change of words than a change of purpose, and the literal and natural meaning of the words will be adopted when there is a conflict of opinion among courts which have sought to interpret words of similar import.

[8] Inasmuch as the children of John Cochran have no right or interest in the property to be partitioned, they will not be allowed to intervene. The suggestion that the proceeding for partition be stayed until the dispute as to the title be adjudicated elsewhere does not meet with approval. A legal question based on undisputed facts has been properly raised in a tribunal competent to decide it, and it is not ignoring or trespassing on the functions and powers of other courts for this court to decide the question. The petition for intervention will be denied and a commission will be appointed to make partition among the original petitioners.

Let an order be entered accordingly.

FORD v. WILSON et al.

(Court of Chancery of Delaware. Feb. 14, 1913.)

1. WILLS (§ 865*) — SUBSTITUTION — IMPLIED GIFTS — PARTIAL INTESTACY.

A testatrix devised property in trust to pay the income to a daughter for life and the principal upon her death to her children and grandchildren. She left no children or grandchildren. Other clauses, containing provisions for the benefit of other children, provided for remainders over upon their death to the children then living of the testatrix. *Held*, that a similar remainder in the property, given in trust for the benefit of the daughter mentioned upon her death, could not be implied, but that the property should be disposed of as in case of intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2188-2199; Dec. Dig. § 865.*]

2. WILLS (§ 865*) — PARTIAL INTESTACY.

Where a testatrix, having five children, gave property in trust for one of them during her life, with remainder to her children or grandchildren, she then having neither children nor grandchildren, the children of the testatrix, as her distributees, took equitable, vested interests in remainder in such property, subject to be divested upon the cestui que trust leaving a child or grandchildren; and hence, where she died without children or grandchildren, her administrator and the executor or administrator of another child, who had previously deceased, each took a one-fifth interest in the property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2188-2199; Dec. Dig. § 865.*]

3. EXECUTORS AND ADMINISTRATORS (§ 293*) — DISTRIBUTION OF ESTATE.

Where a surviving husband was his wife's administrator, it was immaterial in which capacity he settled for a distributable part of a personal estate to which his wife was entitled.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1164-1168; Dec. Dig. § 296.*]

4. EXECUTORS AND ADMINISTRATORS (§ 41*)—ASSETS—RIGHT TO INCOME.

Where a testatrix gave property to trustees to invest the same, collect the rents, interest, dividends, and income as they should accrue and become payable, and pay them over to a daughter as often as they should be received during her life, the daughter's administrator was entitled to the interest and income calculated to the date of her death.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 283; Dec. Dig. § 41.*]

5. EXECUTORS AND ADMINISTRATORS (§ 297*)—DISTRIBUTION OF ESTATES—EVIDENCE OF PAYMENT—RELEASE.

An executor was entitled to require a release from a testamentary trustee in making final settlement before paying over the amount to which the trustee was entitled, especially as in this state there is no adjudication of estates carrying with it a decree or order for distribution, and the executor or administrator distributes at his peril.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1199-1204; Dec. Dig. § 297.*]

6. TRUSTS (§ 219*)—INVESTMENTS—INTEREST CHARGEABLE AGAINST TRUSTEE.

Where a testamentary trustee, by direction of the cestui que trust, who was sui juris, refused to give the executor a release upon the final distribution, and the executor thereupon deposited the amount to which the trustee was entitled with a trust company at a low rate of interest, the trustee, in settling with the cestui que trust, was not chargeable with interest in excess of that paid by the trust company.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 314-317; Dec. Dig. § 219.*]

7. EXECUTORS AND ADMINISTRATORS (§ 288*)—DISTRIBUTION UPON TERMINATION OF TRUST.

A testatrix gave property in trust for a daughter, with remainder to her children. She left no children, and the property was to be distributed as in case of intestacy. Part of the trust fund had been paid to the trustee, and part was still in the possession of the executor. Income from the fund was still unpaid and had to be separated from the principal. *Held*, that the whole fund should be placed in the hands of the trustee and distributed by him instead of being distributed by the executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1138-1148; Dec. Dig. § 288.*]

Bill in equity for instructions by Peter J. Ford, trustee under the last will and testament of Martha J. Wilson, deceased, against Annie M. Wilson, otherwise known as Sister M. Antonette, and others. Heard on the bill and answers on motion of complainant. Instructions given.

Martha J. Wilson died January 10, 1898, and by her will made certain bequests and then divided all the rest, residue and remainder of her estate into five equal parts; gave one share absolutely to each of two brothers and one sister; gave one other share in trust for a sister, Annie, for life and at her death to pay over the share to the testatrix's children then living and the issue of deceased children, the testatrix's daughter being a member of a religious order and presumably bound to die childless;

and gave the remaining one-fifth in trust as follows:

"And the remaining equal fifth part of said residue of my estate unto the said William F. Wilson and William H. Horn and the survivor of them and the heirs, executors, administrators and assigns of such survivor in trust nevertheless to invest and keep the same invested during the continuance of this trust in such real estate and securities, real or personal, or either, as they or he shall think proper, and to receive and collect the rents, interest, dividends and income thereof as the same shall accrue and become payable, and after deducting all expenses including a commission of five per centum upon all moneys received as income to pay over all said rents, interest, dividends and income when and so often as the same shall be received, unto my daughter Ellen C. Cornog, wife of William Cornog, now residing in Delaware County in the State of Pennsylvania, so long as she shall live, and for her sole, separate and absolute use, and upon her sole and separate receipt, and free from the debts, interference or control of her said husband or any future husband she may have; and in further Trust: at and immediately upon the death of the said Ellen C. Cornog to pay over, transfer and assign absolutely and free from all trusts the principal fund and the property then held under this trust to any child or children of the said Ellen C. Cornog who shall be living at the time of her death, in equal shares if more than one, the issue then living of any of her children then deceased to take the same share or shares by right of representation which his, her or their parent or parents respectively would have taken if then living."

William H. Horn became the executor of the will and he and William F. Wilson, the testamentary trustees, having renounced Henry A. du Pont was appointed trustee by the Chancellor. Upon his resignation later, Peter J. Ford was appointed trustee April 18, 1904. Ford, trustee, received from his predecessor \$3,464.62 and later received from Horn, executor, \$6,400, which moneys were kept invested by the trustee and accounted for by him. The income was paid to the life beneficiary, Ellen C. Cornog, until her death, July 22, 1911. She died intestate and without leaving any child or children living at her death, or any issue of any child then deceased. Her husband, William B. Cornog, survived her and is the administrator of her estate.

Martha J. Wilson, the testatrix, left to survive her as her heirs at law five children: Annie M. Wilson, Ellen C. Cornog, Florence A. Horn, William F. Wilson and David B. Wilson, of whom Ellen and David are dead, and William F. Wilson is a lunatic and is represented by a trustee. David B. Wilson left a widow and four children.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

Prior to the death of Ellen C. Cornog, William H. Horn, executor of Martha J. Wilson, filed a further and final account showing a further sum of \$3,997.97 due and payable to the trustee for Ellen C. Cornog as of November 1, 1907. This sum was about that time tendered to Ford, trustee, by Horn, executor, the latter requiring as a condition of said payment that the former give to the latter a full release as executor; but Ellen C. Cornog, the life beneficiary, having forbade Ford to accept it, he declined to receive it under such terms. On October 28, 1908, the money was deposited in the Security Trust and Safe Deposit Company, presumably under the control of Horn, executor, and remains there still bearing only two per cent. or three per cent. interest. Later, in November, 1908, Horn, executor, filed a petition to the Chancellor to compel Ford to receive the money and make the release, and after argument the Chancellor decided that he was without power to order the trustee to execute the release. No portion of the interest on the money so deposited has been withdrawn by any one.

After the death of Ellen C. Cornog, the complainant, Ford, as trustee, demanded of Horn, executor, payment of the principal sum so deposited and all accrued interest, and tendered a release, but Horn claimed the right to retain and administer the money as part of the estate of Martha J. Wilson. William B. Cornog, husband and administrator of Ellen C. Cornog, claimed that as Ellen C. Cornog died without children or issue of deceased children, and there was no further gift of that share of the residue, Martha J. Wilson died intestate as to that one-fifth share and that it vested in those who at the death of Martha J. Wilson were her heirs at law, including Ellen C. Cornog, so that it should be divided into five parts, of which the husband and administrator of Ellen C. Cornog was entitled to one part, and further, that both under the laws of Pennsylvania (where Ellen C. Cornog resided at her death) and of Delaware, the husband was entitled to all the estate of his wife, when, as here, she died without child or issue of children. This claim of William B. Cornog is disputed by the other heirs.

The estate is now all personality, being personality or proceeds of real estate sold by the executor. Being unable to properly distribute with these conflicting claims, Ford, trustee, brought this bill against all the parties, and prayed instructions.

By the answers, the allegations of fact in the bill are admitted to be true.

The interest accrued on the money deposited (to the date of filing the bill, March 11, 1912, was \$631.27, and the amount of such interest accrued) to July 22, 1911, the date of the death of Ellen C. Cornog, was \$540.19.

The cause was heard on bill and answers on motion of the complainant's solicitor for a decree under Rule 29a.

Herbert H. Ward, of Wilmington, for complainant. V. Gilpin Robinson, of Philadelphia, Pa., for defendants William B. Cornog and others. John Biggs and Armond D. Chaytor, Jr., both of Wilmington, for other defendants.

The CHANCELLOR. [1] Several questions were raised by the bill and they will be considered separately. First. Did the testatrix, Martha J. Wilson die intestate as to the share given in trust for Ellen C. Cornog for life, being one-fifth of the residuary estate, Ellen C. Cornog having died without leaving children or issue of a deceased child? The gift was for the benefit of Ellen for life only and there was no further or other gift of that share, or of any interest in it, except the child or grandchildren of Ellen. Looking only at this part of the will, it is clearly an intestacy, though intestacy is abhorred by courts in construing a will, which presumably disposes of all the estate of the testator. But it was urged that if the whole will is looked at, it will appear that there was a clear intention of the testatrix to make a gift by implication to the children of the testatrix living at the death of the life tenant and the issue of any such children as should then be dead, thereby excluding William B. Cornog, either as husband or administrator of Ellen C. Cornog. It was urged that because in making the trust provision for the benefit of her daughter, Annie, and her son, William F., the testatrix gave a remainder after the life estate to the children then living of the testatrix and the issue of any such as should then be dead, and in default of such children or issue, to the children then living of the testatrix, therefore the same intention would be implied in the gift in trust for Ellen C. Cornog, and only the children of the testatrix living at the death of Ellen would together take her share. But the danger of implying gifts is clearly pointed out in *Gray v. Corbit*, 4 Del. Ch. 135, 173, and there is here no reasonable ground for such implication. To deny intestacy here would be to conjecture what the testatrix would have done if she had thought of such an event as did in fact happen. Disposition of the trust estate in case Ellen C. Cornog died without child, or grandchild, was a *casus omissus* and a contingency wholly unthought of by the testatrix, for aught that appears in the will. There is no doubt, then, as to intestacy. Where there is a gift of a life estate in the residue, with a gift in remainder to a class unascertainable until the death of the life tenant, and at the death of the life tenant there were none of the class, there is intestacy, if there be no gift over, or other disposition of the residue, in case of such default.

[2] Second. Does the trust result to the heirs at law of Martha J. Wilson, the testatrix, passing to them as at her decease an interest transmissible upon the death of any

of them during the life of Ellen C. Cornog, or does the fund belong only to those heirs of the testatrix who at the death of Ellen C. Cornog could entitle themselves as such heirs?

In this case the question is material because one, at least, of the heirs at law of the testatrix died in the life of the life tenant and left a widow and children surviving him. This question is settled, not only by the well defined rules of law, but also by a case in point in this State, *Gray v. Corbit*, 4 Del. Ch. 135; s. c., 4 Del. Ch. 357. There land was devised to trustees in trust to apply the rents to the support of Richard, a son of the testator, for life, and at the death of Richard to convey to his children; if none be then living (as there were not) then to Richard's sister, Mary Ann, if then living (which she was not); and if the sister was not then living, then to convey to "the lawful heirs" of Mary Ann. The rents from the land were more than sufficient for the support of Richard, who was an imbecile, and at his death there was a large accumulation of such surplus rent. The questions there considered were: (1) Did this surplus pass to the lawful heirs of Mary Ann with the land? or (2) Did it result to the heirs at law of the testator? It was held that the surplus rents belonged to the heirs at law of the testator as in the case of intestacy, there being no disposition thereof by the will. The Chancellor noted that a different rule prevailed as to personality and that income accruing from personal estate prior to a limitation over followed the fund as an accretion to it. It was meant that, if the subject matter of the trust had been personal property, and it had been given in trust for the support of Richard for life, and then to be transferred to Mary Ann, the unused accumulation of income would have gone with the fund to Mary Ann, as an accretion to it. But this does not apply to the will of Martha J. Wilson, for there was no gift over. At a later hearing it was held by Chancellor Bates, in *Gray v. Corbit*, supra, that the surplus rents were distributable among all the heirs at law of the testator as ascertained upon his death, and not upon the death of his son, Richard, the life beneficiary; and further, that if any of such heirs died in Richard's life the executor or administrator of the heir so dying was entitled to it as personality, including the administrator of Richard.

Therefore, in ascertaining who is entitled to the one-fifth share given in trust for Ellen C. Cornog, it is clear of course, that those children of the testatrix alive at the death of Ellen, viz., Annie, Florence and William J., were entitled. So also was the representative of Ellen C. Cornog, who left to survive her husband, and the share of Ellen as an heir at law of her mother's estate in intestacy was transmissible to the representatives of Ellen, though Ellen herself could not have taken, because the contingency on which the

intestacy arose could not have happened until at and upon Ellen's death. When, however, it did happen and intestacy arose, then the Court must go back to the death of the testatrix, Martha J. Wilson. However uncertain the fact of intestacy occurring might have been in the life of Ellen, yet the right to an interest in Ellen's share in case intestacy happened by the death of Ellen without children, or grandchildren, would even in Ellen's life be a present subsisting interest, provided there were then a person ascertained and capable of taking, and, of course, there is always some person entitled to take by the laws of descent and distribution in the absence of testamentary disposal. Again, because under our statutes of descent and distribution all estates and interests are inheritable, so each child of the testatrix living at her death took an interest transmissible forward from him or her.

The case of *Gray v. Corbit*, supra, related to rents of real estate, but there does not seem to be any difference in principle in cases where the subject matter is personal property.

In this case, as in other cases of a resulting trust, the fund goes to the heir of the testator (meaning, in case of personal property, the person entitled to the distributive estate of the testator) as though there had been no disposition of the fund by the testator. However contingent or uncertain the intestacy may be, yet when it happened by the death of Ellen C. Cornog without leaving a child or grandchild, then the course of succession of the fund is ascertained by going back to the death of the testatrix and considering the case as if there had then occurred a descent directly from her of the fund. It follows that all the consequences of descent should be present, viz.: transmissibility by descent, bequest or assignment. It is not material to consider whether the interest of the heirs of Martha J. Wilson in this fund was transmissible by will, because none of her children who have died left a will.

At the death of the testatrix it was apparent that there would be a resulting trust in favor of the heirs of the testatrix, because there was then no child or grandchild of Ellen C. Cornog capable of taking under the will the one-fifth share given to Ellen for life and with remainder to her children or grandchildren. So also the persons then entitled to take were then ascertained, viz. the distributees of the testatrix. Therefore the heirs or distributees of the estate of the testatrix took equitable vested interests in remainder after the death of Ellen C. Cornog, subject to be divested upon her leaving a child or grandchild. The share of an heir of the testatrix, who died in the life of the life beneficiary, Ellen C. Cornog, passed to the executor or administrator of the one so dying. *Conwell's Adm'r v. Heavilo*, 5 Har. 296; *Rubencane v. McKee*, 6 Del. Ch. 40, 6 Atl. 639; *In re Nelson's Estate*, 74 Atl. 851

This was also held in *Gray v. Corbit*, supra, and in two cases there cited by Chancellor Bates, *Wright v. Wright*, 16 Ves., Jr. 188, and *Jeasop v. Watson*, 1 Myl. & K. 665.

[3] From the above it follows that William B. Cornog is entitled to the one-fifth share of the trust estate as administrator of his wife, Ellen C. Cornog. As her surviving husband, he is, under the laws of distribution of personal estates of decedents, entitled to the residue of her estate (see chap. 89 of Revised Code, § 32, as amended by chap. 207, vol. 20, Laws of Delaware, passed May 8, 1895). So that for the purposes of distributing the trust estate, it is not important in which capacity he settles with the one by whom the fund is distributed.

So also the representative of David B. Wilson, who survived the testatrix and died in the life of Ellen C. Cornog, leaving a widow and children, is his executor or administrator, and not his widow and children, and payment should be made to such executor or administrator and not to his widow and children.

A few more questions were raised and must be considered and determined. To whom does the income, accrued to the death of Ellen C. Cornog, on the fund deposited with the trust company belong? To her administrator or husband, or as part of the principal of the trust property?

[4] By the language of the will, it would seem clear that the income not only on the fund in the hands of Ford, trustee, but also the interest on the fund on deposit in the trust company, both calculated to the death of Ellen C. Cornog, should not go as part of the trust principal, but to the administrator of Ellen. The income was by the will payable to her as it should accrue, and became payable when and as received. Whatever belonged to her in her lifetime belongs to her personal representative, her administrator. This, of course, applies to the income on the funds in the hands of Ford, trustee, as well as that on deposit in the trust company.

[5, 6] Should Ford, trustee, or Horn, executor, be charged with interest on the amount on deposit with the trust company at a rate greater than the two per cent., or three per cent., allowed thereon by that company? This depends in part on who is responsible for the failure of Horn to pay over, and of Ford, trustee, to receive, the money so deposited. The reason why the money was not paid was because Ford refused to make a full release to Horn. This reason was a sufficient one, for Horn had a right as executor to require a release from Ford in making the final settlement. An executor is entitled to demand a release in making a final distribution of an estate. 2 Perry on Trusts,

§ 922; *King v. Mullins*, 1 Drew, 311. This is particularly true in this State, where there is not, as elsewhere, such an adjudication of estates of decedents as carries with it a decree or order for distribution. Here the executor or administrator distributes at his peril. But even if it was the duty of Ford to have acted either by accepting the settlement and giving the release, or by refusing the settlement and excepting to the account, his failure to do either may be excused by the action of the life tenant in notifying him not to accept the settlement and give the release. Ellen C. Cornog was sui juris and was entitled to the income on the fund to the time of her death, and she forbade her trustee to accept part of the principal of the trust property. It would be unfair to require the trustee, who had so complied with her objection, to pay to any one who should claim under her any penalty for so complying. If she had not been sui juris, the case might have been different. When a life beneficiary, who is sui juris, forbids the trustee to accept a settlement under which money is payable to the trustee, neither the life beneficiary, or any one who claims under her, will be awarded, as against the trustee, any sum as a penalty for not having accepted the settlement when tendered and invested the money, and if the trustee receives the money in settlement and interest thereon is allowed, he will not be chargeable with a greater rate of interest. Here there is no danger of loss of the sum so deposited, or of interest thereon allowed by the depository.

[7] By whom should the principal of the trust estate be distributed, i. e., by Ford, trustee, or by Horn, executor? It should be noted that the trust property is in two parts, one part \$9,866.62, now in the hands of Ford, and \$6,997.97, on deposit in the trust company under the control of Horn, with interest. Should Ford pay the former sum to Horn, or Horn pay the latter sum to Ford?

The trust has terminated and nothing remains to be done except to distribute the fund under the orders of this Court. If Ellen C. Cornog had left a child or grandchild, the trust fund would have gone through the trustee to her. The trustee must separate principal from income. By the will the money deposited with the trust company was payable to the trustee. Part of the trust fund is in the hands of the trustee. For these reasons, and in the absence of authority, or any controlling principle of law to the contrary, it seems most reasonable to have the whole fund put into the hands of Ford, trustee, and distribution made by him.

Let a decree be entered accordingly.

WRIGHT v. CELLA.

(Court of Chancery of Delaware. April 15, 1911.)†

(Syllabus by the Court.)

WILLS (§ 792*)—RIGHTS OF LEGATEES—ELECTION—DOWER.

A testator owning land made a general devise of all his property to his wife, A. She survived him for twelve years, and without making a formal statutory election, or being cited to do so, possessed the land for the rest of her life and by will gave all her property generally to her daughter. *Held*, that there was a sufficient manifestation of the intention of A. to accept the provisions of the will made for her in lieu of dower, the former being more advantageous to her than the latter.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2049-2052, 2061-2063; Dec. Dig. § 792.*]

Bill for specific performance by Sarah E. D. Wright against Luigi Cella. Decree for complainant.

Bill for Specific Performance. The bill is for specific performance of an agreement for the sale and purchase of land, the purchaser having declined to fulfill his agreement because the title of the seller to the land was not good. The important points about the title are these: Duffas Wright, owning the premises in fee simple at the time of his death in 1896, gave to his wife, Sarah Jane Wright, absolutely all his estate to which in any manner he was entitled at his death, without mentioning any specific property, or making any declaration as to the dower rights of his widow. His widow, the sole devisee, Sarah Jane Wright, had possession and treated as her property, the premises in question, being the only property owned by her husband. In 1908, twelve years later, Sarah Jane Wright died and by general residuary devise and bequest gave all her property to her daughter absolutely, without mentioning any particular property. The widow of Duffas Wright did not appear in the Orphans' Court and elect to take the provision in her husband's will in lieu of dower, and was not cited to do so. When her daughter, the devisee under her will, came to sell the land so devised, the defendant, the vendee, objected that there had been no such formal election.

There is no dispute as to the facts, and the cause was heard on bill and answer.

William S. Prickett, of Wilmington, for complainant.

The failure to renounce the provision of the will within a reasonable time is evidence of an acceptance of it. *Cooper v. Cooper's Ex'r*, 77 Va. 198. The election may be made otherwise than by the mode prescribed. *Smithers v. Smithers*, 72 Ky. (9 Bush) 230; *Pratt v. Felton*, 4 Cush. (Mass.) 174; *Johnson v. Connecticut Bank*, 21 Conn. 148; *Merrill v. Emery*, 10 Pick. (Mass.) 507.

Where the beneficiary named in the will

as in the case of a widow, has no right to the possession and occupation of the real estate devised to her, except by virtue of the provisions of the testator's will, her conduct in entering into possession of such property and using it as her own or for her own uses, will be held to be sufficient indication of her purpose to take under the will to constitute an election to take the provision of the will in lieu and bar of dower. *Barkley v. Mahon*, 95 Ind. 101; *Reed v. Dickerman*, 29 Mass. (12 Pick.) 146; *Hovey v. Hovey*, 61 N. H. 599; *Thompson's Lessee v. Hoop*, 6 Ohio St. 480; *Stockton v. Wooley*, 20 Ohio St. 184; *Delay v. Vinal*, 1 Metc. (Mass.) 57. 65; *Stark v. Hunton*, 1 N. J. Eq. 216, 217; *Craig v. Walthall*, 55 Va. 518, 525; *Clay v. Hart*, 7 Dana (Ky.) 1, 6; *Haynie v. Dickens*, 68 Ill. 267; *Cory v. Cory*, 37 N. J. Eq. 196, 201; *Rutherford v. Mayo*, 76 Va. 117, 123; *Exchange Bank v. Stone*, 80 Ky. 109; *Clark v. Middlesworth*, 82 Ind. 240; *Wilson v. Wilson*, 145 Ind. 659, 44 S. E. 665.

Frank L. Speakman, of Wilmington, for defendant.

THE CHANCELLOR. The sole objection to the title raised by the purchaser is that the widow of Duffas Wright had not, in her life time, formally elected to take the provision made for her under her husband's will in lieu of dower. Succinctly stated, the question is this: In case a widow, who is the general devisee of all her husband's property, including real estate, possesses and uses as owner such real estate for twelve years after his death, and for the rest of her life, without having made any formal election in the Orphans' Court, is there a presumption that she has made an election, where no circumstance appears to show that such presumption would be unfavorable to her interests?

At common law a devise of land was not considered to be in lieu or bar of dower, but it is otherwise here by the statute passed in 1816, which is as follows:

"If a testator shall devise to his wife any portion of his real estate, such devise shall be deemed and taken to be in lieu and bar of her dower out of the estate of her deceased husband, unless such testator shall, by his last will and testament, declare otherwise; but the widow shall have her election either to dower or the estate so devised." Section 5, chapter 87, Revised Code.

By subsequent sections provision is made for the making by her of her election in the Orphans' Court, by her appearance there either voluntarily or by citation. But no time is fixed within which the election may, or must, be made, nor are the consequences of a failure to elect, or to refuse an election, within a fixed time stated in the Act, unless she be cited. Under this statute a widow is presumed to have accepted in place of dower

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Received for publication March 10, 1911.

a devise of land made to her, unless the will declares otherwise, or she elects otherwise, no time being fixed within which she must so elect. A widow may elect between the provisions of the will and her dower, otherwise than under the statute, and her intention to so elect may be shown in various ways. The decisions on this statute are very few. *Chandler v. Woodward*, 3 Har. 428, and *Kinsey v. Woodward*, 3 Har. 459, do not apply here. Chancellor Wolcott, in *Spruance v. Darlington*, 7 Del. Ch. 111, 30 Atl. 663, throws some light on the question here raised. By his will a testator left all his residuary estate, including real estate, to his wife absolutely and by a later will, discovered many years afterwards and after the death of the widow, he made a different provision distinctly in lieu of dower. The Chancellor held that as the widow had no chance to elect whether to take under the second will, which was not discovered until after her death, the Court would make that election for her which will be most advantageous to her estate. If advantage to the widow is the test whether to presume an election, then it must not be assumed in all cases that a general gift by a husband of all his property is necessarily more advantageous to the widow than her dower rights would be, for her husband's debts may have been more than the value of his estate, and there be nothing for her as devisee, while there would be as widow, in case she had not by her own act or conduct barred her right thereto.

In this case the personal estate of Duffas Wright being sufficient to pay all his debts, so far as appears, it was absolutely more advantageous to his widow to take as devisee of all his estate than as widow to take only a life estate in part of his real estate. This fact is of weight in raising a presumption of acceptance. Still, it is for this Court to say whether, under the circumstances, her failure to make an election against the will raises a presumption of an acceptance of the provision of the will made for her and as a waiver of her right of dower. Clearly this is to be answered affirmatively, and the authorities cited support such a view. The time within which an election must be made, if no time be fixed by law, varies with each case and in all must be reasonable. Otherwise, the rights of others may be jeopardized by an unreasonable delay in making an election. Certainly a delay of twelve years to renounce the provision in the will would be unreasonable.

An election to take under the will may be manifested by the act of the person entitled to elect in accepting the property given to him by the will. So where a beneficiary under a will uses, occupies or enjoys the property given to him or her by the will for a considerable period of time, this may manifest an election to accept the provisions of

the will. But an election is not manifested by the occupancy of property which the person is entitled to occupy whether he or she takes under the will or against it. These principles seem settled by authority and reasonable.

In *Warren v. Morris*, 4 Del. Ch. 289, s. c., on appeal, 4 Houst. 414, it was decided that if a widow joins in a deed made by the executor of her husband's will, conveying real estate of her husband, under power of sale given in the will to the executor, without any stipulated consideration for her right of dower, it must be taken as her election to take under the will.

Therefore, because it was advantageous to her, and because of the twelve years use and enjoyment of all of the property of the testator, there is clearly in this case a sufficient manifestation of intention to accept the provisions in the will made for her. So that at her death, Sarah J. Wright had all the title her husband had and by her will devised it to her daughter, the complainant. The objections raised by the vendee to the title are untenable and insufficient, and a decree for specific performance will be decreed.

CURLETT et al. v. EMMONS.

(Court of Chancery of Delaware. April 5, 1910.)

(Syllabus by the Court.)

1. EQUITY (§ 373*)—PLEADING—ANSWER—EFFECT.

When the complainant elects to go to hearing on bill and answer, all the well-pleaded averments of the answer are taken to be true.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 711-713; Dec. Dig. § 373.*]

2. TRUSTS (§ 225*)—ACCOUNTING BY TRUSTEE—CREDITS.

Real estate was conveyed by tenants in common in trust for sale, the proceeds to be applied to the payment of liens of record, and the share of each grantor was chargeable with the amount necessary to discharge the liens against them respectively. When the deed was made, there was a judgment against T. R. C., one of the grantors, the lien of which expired before the sale was made and before it was paid by the trustee from the proceeds of sale. Before the lien expired, the trustee, in order to carry out the trust, made an agreement with the judgment creditor, whereby the creditor forebore to collect the judgment until the trustee should make a sale of the trust property. *Held*, that the trustee should be allowed as a credit the amount so paid by him to discharge the lien of the judgment, though the lien of it had then expired.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 322; Dec. Dig. § 225.*]

3. TENANCY IN COMMON (§ 34*)—MUTUAL RIGHTS AND LIABILITIES—ASSIGNMENT OF CLAIM.

The trustee refused to pay over the share of another beneficiary because of a claim made by another of the grantors, D. B. C., not a party to the suit, to be the equitable assignee of the share of J. C., because of the payment by D. B. C. of judgments against J. C., with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

moneys furnished by D. B. C., under an agreement with J. C. to reimburse him from proceeds of the land. It appeared that the agreement was made and the judgments paid and satisfied of record before the trust deed was made. *Held*, that by the trust deed, which authorized the trustee to pay only liens of record, D. B. C. had waived and relinquished any right as equitable assignee of the share of J. C.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 26; Dec. Dig. § 34.*]

Bill by Thomas R. Curlett and another against Harry Emmons, trustee, for an accounting. Decree entered.

For opinion on appeal, see 81 Atl. 508.

The bill was filed by beneficiaries under a deed of trust against the trustee to compel settlement, and was in the nature of a bill for an account. By a deed dated September 26, 1895, Thomas R. Curlett, one of the complainants, David B. Curlett and James Curlett and others conveyed a tract of land in Wilmington to Harry Emmons, the defendant, in trust, to sell the land as soon as he conveniently could and convey it to the purchasers and apply the proceeds: (1) To the payment and discharge of all liens of record against the property; (2) to pay three designated mortgages made by a prior owner (as to which there is no dispute); and (3) to divide the balance among the tenants in common, the grantors, "according to their several rights and interest in the above-described real estate at the time of the execution of this indenture, the share of any of said parties against whom there are liens of record covering their interest in said real estate being chargeable with the amount needed to satisfy and discharge said liens." The complainants were Thomas R. Curlett and Cora Agnes Curlett, the administratrix of James Curlett, deceased. It is alleged by the bill that in 1905 the land was sold by the trustee, and that the defendant refused to settle with Thomas R. Curlett for his share until the trustee had been allowed for the amount paid by the trustee on account of a judgment against Thomas R. Curlett and that the defendant refused to settle with the administratrix of James Curlett until allowance had been made for the amount paid by the defendant on account of a judgment against James Curlett, and also averred that the defendant as attorney for David B. Curlett had made a claim against the share of James Curlett. By his answer the defendant admitted these allegations. The two judgments, one against Thomas R. Curlett and the other against James Curlett, were liens against their shares in the trust property when the deed was made, but by a law then in force, limiting the lien of judgments, the lien thereof had expired before the sale of the land. It was explained in the answer that the real estate was not sold until 1905 because of lack of a market for it until that time. Also that the judgment creditors had forbore to enforce collection

of the judgments pursuant to an agreement made with them by the trustee; that this was necessary to carry out the trust; and that James Curlett knew of the arrangement. The defendant claimed to be allowed amounts so paid. As to the share of James Curlett, it was also alleged that certain judgments against James Curlett had been paid by David B. Curlett, at the request of James Curlett, and that David B. Curlett had claimed an equitable lien or assignment of the share of James Curlett, to reimburse him. These judgments against James Curlett were satisfied of record prior to the making of the trust deed, and, therefore, were not then liens of record against the property. David B. Curlett was not a party to the suit, though a party to the deed of trust.

The cause was heard on bill and answer.

Thomas F. Bayard, of Wilmington, for complainants. Anthony Higgins, of Wilmington, for defendant.

The CHANCELLOR. [¶] The complainants having elected to go to hearing on bill and answer, they thereby admit every well pleaded averment of the answer to be true. 2 Daniel's Chancery Pleading and Practice, 982; Langdell's Summary of Equity Pleading, § 83. There are two separate cases united in one, that of Thomas R. Curlett and that of the administratrix of James Curlett, and the cases are alike in some respects and different in others. With respect to the amounts paid by the trustee to settle the two judgments, one against Thomas R. Curlett and the other against James Curlett, the cases may be considered together; but with respect to the claim of David B. Curlett the case of James Curlett must be considered separately.

[2] Respecting the two judgments, it appears that they were both liens of record against the interest of the debtors in the trust land when the trust deed was made, but the lien thereof had expired when the land was sold and when the judgments were paid by the trustee. It may be quite reasonably held that if they were liens of record when the deed was made, the trustee was justified in paying the judgments even after the lien thereof had expired by operation of the statute limiting the lien of judgments, and even though the property was not sold until the lien had expired. Such would be the result of a literal interpretation of the deed and be within the purpose of the deed, evident from the terms thereof. But the decision will not be based on such narrow ground, for the answer furnishes an additional ground for so holding.

It is urged by the respondent in his brief that by the trust deed the creditors of Thomas R. Curlett and James Curlett, who then had liens of record, acquired interests as

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cestui que trust, and that the act limiting the lien of judgments did not apply so as to bar their rights to have their debts paid and discharged from the shares of their debtors, although the trust property was not sold until after the statutory period expired. That this rule applies respecting devises and charges by will for the payment of debts out of real estate seems to be settled, as to debts of the decedent not barred at the time of the death of the testator. Hill on Trustees, 341; 2 Perry on Trusts, § 601; Alexander v. McMurray, 8 Watts (Pa.) 504; Seitzinger's Estate, 170 Pa. 531, 32 Atl. 1101. And it is urged that the same principle applies to trusts under deeds for the payment of debts; but no authorities are cited except the opinion of Hill. This case, however, is not decided upon this principle, but upon an interpretation of the deed of trust, and a consideration of the allegations of the answer.

The trustee in this case should be allowed as credits as against Thomas R. Curlett and the administratrix of James Curlett, the amounts paid by him to settle the judgments against Thomas R. Curlett and James Curlett, respectively, because of the agreement made by the trustee with the judgment creditors. The lien of both judgments expired soon after the deed of trust was made, the judgment against Thomas R. Curlett on January 1, 1896, less than four months thereafter, and that against James Curlett in 1898, while the trustee was unable to sell the real estate until 1905. The trustee not being able to sell the property made an agreement with the creditors whereby they forbore proceeding to collect their judgments and gave time for payment until the sale could be made. It is expressly averred in the answer that this agreement "was necessary for more effectually carrying out the purpose of said trust by said defendant." If made before the liens expired, such an agreement under such circumstances was clearly within the powers of the trustee and so clearly advantageous to the judgment debtors that the trustee should be protected in what was done pursuant to that agreement. It does not appear in the answer by absolutely clear averment when the agreement to forbear was made, or when the judgments were paid; but it is a fair conclusion from the language of the answer that the agreement was made before the lien of the judgments expired, and that the judgments were paid after the trust property was sold and from the proceeds thereof. In paragraph 10 of the answer the trustee stated that at the time the trust deed was made in 1895 there was no market for the land, and finding it necessary to pay the whole amount of the judgment "at once," made the agreement for forbearance. Taking the averments of the answer most strongly against the defendant, it can only mean that the agreement was made before the lien expired and to carry out the trust.

Under such circumstances the amounts so paid by the trustee to discharge these judgments should be allowed. In addition, it appears affirmatively that the conduct of the trustee in dealing with the judgment creditors was known to James Curlett and was with his consent, which must be conclusive as to the amount paid on his account. Nor does it seem matter of consequence that settlement with his judgment creditor was made and the judgment satisfied of record before the trust property was sold, or that the judgment was at one time marked to the use of the trustee individually.

[3] The case of the administratrix of James Curlett presents a further and different matter for consideration, viz.: the claim of David B. Curlett against the share of James Curlett of the proceeds of sale. By the bill it is alleged that the trustee declined to pay to the administratrix of James Curlett his full share of the trust estate for the further reason that the trustee as attorney for David B. Curlett claimed that James Curlett owed David B. Curlett a debt, the character of the transactions not being set out in the bill. In his answer the trustee admits the allegation of the bill and states the further details of the claim of David B. Curlett thus: Prior to the making of the deed of trust, in 1895, there were eight judgments against James Curlett which were then liens of record against his interest in the trust property, and David B. Curlett undertook to make settlement thereof so as to free the land from the lien of the judgments. Seven of the judgments were settled by David B. Curlett with moneys furnished by David B. Curlett at the request of James Curlett "under an express but verbal agreement on the part of James Curlett that the moneys should be repaid to the said David B. Curlett out of the interest of said James Curlett in the proceeds of sale of the aforesaid lands and premises when the same should be subsequently sold," as alleged in the answer. These seven judgments had all been satisfied of record at the time the trust deed was made in 1895. The remaining judgment unpaid and unsatisfied of record was that of Philip R. Clark. By the answer it is further alleged that David B. Curlett had demanded from the defendant the amount so paid by him to settle the seven judgments with interest, as an equitable lien upon the distributive share of James Curlett and that the amount so paid with interest exceeds the share of James Curlett in the proceeds of sale of the trust property.

It may be that David B. Curlett, prior to the making of the deed of trust in 1895, had an equitable lien against the share of James Curlett by reason of the payments by him of the seven judgments against James Curlett, or might have claimed to be in equity the assignee thereof to the extent of the amount so paid, and the authorities cited by the de-

fendant seem to establish the principle. 3 Pom. Eq. Jr. § 1211; *Rachel v. Smith*, 101 Fed. 159, 42 C. C. A. 297; *Cumberland, etc., Ass'n v. Sparks*, 111 Fed. 647, 49 O. C. A. 510. But by the execution of the deed of trust David B. Curlett waived and relinquished such rights; for by that deed, to which both he and James Curlett were parties, an entirely different arrangement was made binding on both, and this deed provided that the share of James Curlett of the proceeds of sale of the property was applicable to the payment of such debts or claims only as were liens of record at the time the deed was made, and that this excluded all other claims against it, including that of David B. Curlett.

The defendant urges that the rights of David B. Curlett should not be adjudicated in this cause, to which he is not a party. But it must be noted that the claim of David B. Curlett is made by the trustee as attorney for David B. Curlett, and, therefore, the trustee has brought his claim into the case. Furthermore, Chancellor Nicholson in an opinion given in this cause in disposing of exceptions to the answer, held, nearly a year before the case was heard on bill and answer, that the claim of David B. Curlett was a matter for a cross-bill. Under such circumstances it is clearly inequitable to allow the trustee to set up the existence of the claim of David B. Curlett as a defense to the demand of the administratrix of James Curlett for a full settlement. Therefore, the trustee must settle with the administratrix of James Curlett notwithstanding the existence of the claim of David B. Curlett.

The bill prays for an accounting by the trustee and any decree must be in accordance with the prayers of the bill and the conclusion of the court. It is held, therefore, that in the settlement of the defendant with Thomas R. Curlett, the defendant is to be allowed as a credit the amount paid by him to discharge the judgment formerly held by the National Bank of Wilmington and Brandywine against Thomas R. Curlett, which amount, by paragraph 14 of the answer, is \$271.76. Inasmuch as the defendant prevailed as against Thomas R. Curlett, the latter should pay his share of the costs of the cause, being one-half thereof.

In the settlement of the defendant with the administratrix of James Curlett, the defendant is to be allowed as a credit the amount paid by him to discharge the judgment formerly held by Philip R. Clark against James Curlett, the amount so paid, according to the answer, being \$212; and the defendant is to settle with the administratrix for the balance of the share of James Curlett, without any deduction on account of the amount claimed by David B. Curlett. Inasmuch as neither the complainant, Cora Agnes Curlett, administratrix of James Curlett, or

the defendant prevailed entirely, but each prevailed in part as to the other, the remaining one-half of the costs of the cause should be divided between the administratrix of James Curlett and the defendant.

The death of James Curlett and the appointment of Cora Agnes Curlett as his administratrix, alleged in the bill and not admitted by the answer, or otherwise proved was admitted to be true at the argument by the solicitor for the defendant.

Let a decree be entered accordingly.

TRUSTEES FOR BAPTIST CHURCH OF BOROUGH OF WILMINGTON et al. v. LAIRD.

(Court of Chancery of Delaware. Feb. 6, 1913.)

1. RELIGIOUS SOCIETIES (§ 20*)—PROPERTY—CONDITIONAL DEEDS.

A conveyance to several persons in trust to be used for the sole purpose of a Baptist meeting house, with a provision for perpetuating the trust by authorizing the survivors to convey to new trustees, was not a conveyance upon condition, which was breached by a sale of the land, but was a conveyance in trust without any implied restriction against the sale.

[Ed. Note.—For other cases, see *Religious Societies*, Cent. Dig. §§ 130-143; Dec. Dig. § 20.*]

2. RELIGIOUS SOCIETIES (§ 20*)—CONVEYANCE OF PROPERTY—AUTHORITY—DIRECTION OF CHANCERY COURT.

The Chancery Court has power to direct a conveyance of an estate held under a charitable trust, and the same power may be exercised by the Legislature, as was done by 26 Del. Laws, c. 252, authorizing the named trustees of the First Baptist Church of Wilmington to convey lands held under a charitable trust, the proceeds to be used for the same purpose as the original trust.

[Ed. Note.—For other cases, see *Religious Societies*, Cent. Dig. §§ 130-143; Dec. Dig. § 20.*]

3. TRUSTS (§ 193½*)—SALE OF TRUST PROPERTY—AUTHORITY.

Under Rev. Code 1852, amended to 1893, p. 721 (20 Del. Laws, c. 115, § 4) § 2, empowering the Chancellor to authorize a trustee to sell the trust property free from the trust, if the sale be not expressly prohibited by the instrument creating the trust, provided the proceeds of the sale be applied to the same purpose, the Chancellor may direct a sale of trust property to apply the proceeds to the same purpose, though the creating instrument directs that the trust property be used only for a certain purpose, there being no express prohibition of sale.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 246, 248; Dec. Dig. § 193½.*]

4. RELIGIOUS SOCIETIES (§ 17*)—ACQUISITION OF PROPERTY—NAME OF GRANTEE—VARIANCE.

A conveyance of land to named persons as "Trustees for the Baptist Meeting in the Borough of Wilmington, State of Delaware," when the corporate name adopted was "Trustees for the Baptist Church in the Borough of Wilmington, State of Delaware," was valid, notwithstanding the use of the word "Meeting" in

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stead of "Church"; the same corporation being intended.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 32; Dec. Dig. § 17.*]

5. RELIGIOUS SOCIETIES (§ 18*)—PROPERTY—TITLE ACQUIRED—"DRY TRUSTS."

Where a deed conveyed land to trustees of a charitable corporation, who had no active duties to perform as to such land, both the legal and equitable title vested in the corporation; the trust being a dry trust.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 33; Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 3, p. 2212.]

Suit by the Trustees for the Baptist Church of the Borough of Wilmington, State of Delaware, and others, against William W. Laird. Decree for complainants.

Joseph Stidham and wife, in 1784, conveyed to John Boggs et al. a lot of land upon trust that it be used for the sole purpose of a Baptist meeting house, to be erected, and for a burying place, with provision for self-perpetuation of the trustees, the survivors to convey to the new coming trustees as joint owners in trust. Afterwards the church was erected. In 1810 the members of the church became incorporated under the general provisions of the laws of Delaware then in force, as to religious bodies, and took the name of "Trustees for the Baptist Church in the Borough of Wilmington, State of Delaware."

In 1811 Ashton Richardson conveyed another lot to James Robinson and six other persons, "Trustees for the Trustees for the Baptist Meeting in the Borough of Wilmington, State of Delaware," which, according to the bill, was the same corporation as that incorporated in 1810 as above. This latter conveyance was to the grantees, their successors and assigns, in trust for the entire benefit of and to be enjoyed by the members of said Baptist Meeting.

An act was passed in 1911, reciting the two conveyances, and that John R. Rittenhouse and five other named persons were then the Trustees of the First Baptist Church of the Borough of Wilmington and trustees under the two conveyances, and authorizing those six persons as such trustees to sell both tracts and convey them in fee simple free of trust and without liability on the part of the purchaser as to the application of the purchase money, the proceeds to be used for the same purposes as the original trust. Chapter 252, vol. 26, Laws of Delaware, approved April 6, 1911.

The trustees made a written agreement with the defendant, Laird, to sell him both parcels of land, but Laird refused to take title or pay because he said the title was not marketable. A decree for specific performance was sought.

By his answer, the defendant admitted all the allegations of the bill, except that he says that the legal title to the land is in the

heirs at law of the original grantors and not in the complainants, and, while ready to perform the contract, cannot do so because the title of the complainants is not marketable. There was no allegation or evidence that the land had been used as a burial place.

The cause was heard on bill and answer, at the election of the complainants.

Charles B. Evans and T. Bayard Heisel, both of Wilmington, for complainants. William F. Kurtz, of Wilmington, for defendant.

The CHANCELLOR. [1] The main objection to the title under the Stidham deed is that that deed was a conveyance upon condition that it be used only for the purposes of the church and that a sale was a breach of the condition which gave the heirs of Stidham a right to enter, though there was not in the deed such right of re-entry given. But such view is an incorrect one. No such right of re-entry will be presumed. On the contrary it was not a conveyance upon condition, but was one upon trust, and there is no express or implied restriction against the sale and conveyance of the land. Perry on Trusts, §§ 692-694; Stanley v. Colt, 5 Wall. 119, 18 L. Ed. 502; Brown v. Meeting Street Baptist Society, 9 R. I. 177; Sohier v. Trinity Church, 109 Mass. 1; Wells v. Heath, 10 Gray (Mass.) 17; Clark et al. v. Evangelical Society in Quincy, 78 Mass. (12 Gray) 17; Mills v. Davison et al., 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. Rep. 594.

[2] The Stidham deed created a charitable trust, viz., for the use thereof for a Baptist meeting house and for a burying place for members of the Baptist Church. There is no prohibition of sale and no express or implied condition subsequent which will terminate the trust in case of a sale and give the heirs at law of the grantor a right to re-enter for condition broken by reason of the sale. Being then a charitable trust, and not a conveyance on condition, the power of the Court of Chancery to sanction or direct an alienation of the trust estate is generally recognized. This power has, in this case, been directly exercised by the Legislature by the special act of 1911 and no reasonable objection can be raised to the right of the Legislature to exercise this power directly, instead of leaving it to be done by the Court of Chancery. The cases cited above support fully these views.

[3] If, as is shown, it be a trust and there is no express prohibition of sale, the direction that the trust property be used only for a certain purpose does not inhibit a conversion thereof in order to apply the proceeds of sale to the same purpose. This may be done by authority of general statutes relating to all trust property. Section 4, c. 115, vol. 20, Laws of Delaware, published as amend-

ed March 20, 1895. See also Revised Code, p. 721.

In this case there is the special act which gives the same power of conversion as is given to other trustees by an order of the Court of Chancery, and a deed made pursuant to it is equally effective to vest in the purchaser the legal title, as would a deed made by any other trustee made under the order of the Court of Chancery.

The case of *Tharp v. Fleming*, 1 Houst. 580, arising under the Potter will, is not an authority against the conversion, because in that case a conversion was expressly prohibited by the will creating the trust. There can be no question but that the persons named in the special act of 1911, and complainants in this bill, are the trustees by succession from the original trustees named in the Stidham deed. By that deed a succession of trustees was provided for by election by the original trustees of others to fill vacancies and so on, from time to time, the board being self-perpetuating. By the bill it appears that the individual complainants are the present board of trustees, and presumably by due election and succession. This is admitted by the answer. Therefore, they are the trustees in succession from the original trustees named in the deed. No objection to the title can, therefore, arise on that score.

[4] Assuming, however, that there was no proper succession and that it is not known which of the several original trustees named in the deed was the survivor, or who are the heirs at law of the survivor, who is presumably dead after a lapse of 129 years, then under the general statute the Court of Chancery had power to order a conveyance to the person entitled to receive it. Chapter 90, vol. 11, Laws of Delaware.

The General Assembly, by the special act of 1911, has exercised the same power and authorized a conversion of the trust property by a conveyance to be made, not by a person designated under the general statute by the Court of Chancery, but by certain persons named in the special act. If it be important, no difficulty would arise as to the absence of an allegation or proof of a conveyance to the several succeeding trustees of the legal title to the land. By the deed of Stidham it was the duty of the survivor or survivors of the original trustees to convey to each succeeding trustee, and so on from time to time, so as to vest in them the legal title to the land. As hereinbefore mentioned, if there be doubt whether such conveyances have been made, the court, under the general statute, would have power to appoint a person to transfer the legal title to the present trustees, who by succession are entitled to have it. By the special act of 1911 a similar power is exercised directly by the General Assembly, and there is no valid objection to be made to the power of the Legislature to enact such law, or to its effectiveness, to ac-

complish the purpose intended by it. Which ever view of the matter is taken the right of those named trustees to sell and convey the Stidham land is clear, and a good marketable title would pass to the person to whom the deed therefor would be made by such trustees.

[5] The objection to the title to the Richardson land is based on the difference in the name of the corporation, incorporated in 1810, from that named in the deed by Richardson in 1811. After the incorporation of the members of the Baptist Church in 1810, Richardson conveyed other land to certain named persons, as "Trustees for the Trustees for the Baptist Meeting in the Borough of Wilmington, State of Delaware," and the only trust or limitation in this deed was this: "In trust for the entire benefit and behoof of and to be held, enjoyed, occupied and possessed by the members of the said Baptist Meeting." The name quoted above is substantially that adopted by the members of the same religious body when they became incorporated in 1810, they having then adopted the name "Trustees for the Baptist Church in the Borough of Wilmington, State of Delaware." The only difference between the two titles is that in the deed the word "Meeting" was used in place of the word "Church" in the name chosen at the time of the incorporation. As it is alleged in the bill, and admitted by the answer, that the corporation named in the deed is the same as that in the certificate of incorporation, the difference in the name is clearly unimportant.

[6] By this deed of Richardson, then, the title to the land is conveyed to certain individuals as trustees for an existing corporation, with no active duties to perform, or anything to show that it was not a dry trust. In such cases clearly the legal, as well as the equitable, title vested directly in the corporation, and it can make a good title to this land now without the authority of the special act of 1911. That act, however, would be an additional safeguard to the purchaser.

The objection to the Richardson title is not tenable, and, from anything that appears of record in this cause, no reasonable ground exists for claiming that it was not a marketable title, such as the purchaser was obliged to accept under his contract.

A decree for specific performance will be entered according to the prayer of the bill.

KERR v. KISKIMINETAS TP.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

HIGHWAYS (§ 213*)—DEFECTS—GUARD RAIL.

In an action for injuries to one driving on a highway, where the evidence authorized finding that the road was too narrow, it was properly left to the jury to say whether prudent men would have guarded such place with barriers, and whether the supervisors could have foreseen that, in the absence of such barriers, at the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

meeting of two vehicles, one of them might be thrown down a declivity.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 535-537; Dec. Dig. § 213.*]

Appeal from Court of Common Pleas, Armstrong County.

Action by Rose Kerr against Kiskiminetas Township. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

J. W. King and J. H. Painter, both of Kitting, for appellant. Clarence O. Morris, of Freeport, and H. A. Hellman, for appellee.

MOSCHZISKER, J. This was an action of trespass to recover damages for personal injuries alleged to have been suffered by the plaintiff as a result of the negligence of the defendant township. On August 20, 1910, at about 5 o'clock p. m., the plaintiff, Mrs. Rose B. Kerr, was driving a one-seated buggy along a public highway, accompanied by her mother-in-law and her two sons; the latter partly standing and partly resting upon the knees of the two women. The older boy, who was about 11 years of age, drove about three-quarters of a mile, when another team was seen approaching from the opposite direction. The plaintiff then took the reins and guided the horse to the right side of the road, where she brought it to a stop. The other team came along until the two horses were side by side. At this point the road is bounded on one side by an embankment and on the other side by a depression or declivity, about 50 feet in length, which was described by a number of witnesses as "very steep." There is a conflict in the testimony as to the width of the road at the place where the accident occurred; some of the witnesses giving it as but 9 feet, and others stating it to be as much as 14 feet. Mrs. Kerr and her witnesses testified that after the two teams came opposite each other the horse which the plaintiff was driving began to back down across the road over the declivity; that she endeavored to stop it, but before she was able to do so both she and her mother-in-law were thrown out of the side of the buggy; and that she was caught between the vehicle and a tree and seriously injured. It was contended that the accident happened as a result of the failure of the township supervisors to maintain guard rails or barriers along the lower side of the road next to the declivity; and that their neglect in this regard rendered the highway unsafe for travel. The jury brought in a verdict in favor of the plaintiff, and judgment was entered thereon. The defendant has appealed.

The appellant states the first question involved to be: "Is the backing of a horse an ordinary habit, or is it a vice?" We are not convinced that this is strictly a question of

law, but incline to the belief that it falls rather within the realm of facts; and as such it was properly submitted to the jury by the learned trial judge.

From the evidence the jury could have found that at the point of the declivity the road was too narrow for two vehicles safely to pass one another; and it was left for them to say whether or not ordinarily prudent men would have erected barriers to guard such a place, and whether or not the supervisors should have foreseen that one of the natural consequences of the absence of such barriers was that, upon the meeting of two vehicles at that point, a horse might become restless and back over the declivity (particularly a horse obliged to stop while approaching its home and going uphill, as was this one). These issues were properly for the jury and their verdict thereon cannot justifiably be pronounced either unwarranted or unreasonable.

The question of the plaintiff's contributory negligence was fairly submitted; the jury being told more than once that the plaintiff could not recover if they determined that she had been guilty of any negligence that contributed to the accident.

On the whole we are not convinced of any reversible error; the assignments are all overruled, and the judgment is affirmed.

In re McKEOWN.

(Supreme Court of Pennsylvania. Nov. 7, 1912.)

1. STATUTES (§ 120*)—SUBJECTS AND TITLES — CLASSIFICATION OF TOWNSHIPS.

Act May 24, 1901 (P. L. 294), entitled "An act to amend an act entitled 'To provide for the classification of the townships of the commonwealth with respect to their population into two classes, and to prescribe the government for townships of each class,' amending the seventh section thereof, and authorizing the township commissioners of townships of the first class to enter into a contract with any one or more taxpayers of the township, for making, amending, and repairing the public highways and bridges in said township," is not violative of Const. art. 3, § 3, providing that no bill shall be passed containing more than one subject, which shall be clearly expressed in the title, for failure to give notice that the provisions of Act June 12, 1893 (P. L. 451), are extended to townships of the first class.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 168-172; Dec. Dig. § 120.*]

2. STATUTES (§ 120*)—SUBJECTS AND TITLES — CLASSIFICATION OF TOWNSHIPS — "AUTHORIZE."

The title to Act May 24, 1901 (P. L. 294), gives sufficient notice that the court of quarter sessions may, by its order, compel the township commissioners to execute a contract, such as is required by Act June 12, 1893 (P. L. 451), to "authorize" the township commissioners to do a thing, being to invest them with power to that effect.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 168-172; Dec. Dig. § 120.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 646-648.]

3. STATUTES (§ 137*)—SUBJECTS AND TITLES—AMENDING ACT.

The title to Act May 24, 1901 (P. L. 294), is not insufficient because of failure to give notice of the date when Act April 28, 1899 (P. L. 104), amended thereby, was approved.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 204; Dec. Dig. § 137.*]

4. STATUTES (§ 137*)—SUBJECTS AND TITLES—AMENDING ACT.

The title to Act May 24, 1901 (P. L. 294), amending Act April 28, 1899 (P. L. 104), is not insufficient because of failure to give notice that only the first subdivision of section 7 of the amended act is to be amended.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 204; Dec. Dig. § 137.*]

5. STATUTES (§ 138*)—AMENDMENT—CONSTITUTIONAL PROVISION.

Act May 24, 1901 (P. L. 294), providing for the classification of townships with respect to population, and authorizing the township commissioners to enter into contracts for making and repairing the public highways and bridges, is not a revival, amendment, or extension of the act therein referred to, within Const. art. 3, § 6, prohibiting the revival, amendment, or extension of the provisions of an act by reference to its title only.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 205, 206; Dec. Dig. § 138.*]

6. MUNICIPAL CORPORATIONS (§ 62*)—LEGISLATIVE CONTROL — CONSTITUTIONAL PROVISION.

Act May 24, 1901 (P. L. 294), is not violative of Const. art. 3, § 20, prohibiting the General Assembly from delegating to any special commission, private corporation, or association any power to interfere with any municipal function.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 153, 154; Dec. Dig. § 62.*]

Appeal from Superior Court.

Appeal by P. W. McKeown from an order of the court of quarter sessions directing county commissioners to enter into a road contract. From a judgment of the superior court affirming the order, the petitioner appeals. Affirmed.

Henderson, J., filed the following opinion in the superior court:

"Under the act of June 12, 1893 (P. L. 451), any one or more of the taxpayers of any township or road district could acquire the right to make, at his or their own expense, the roads of the township or district, with the approval of the court of quarter sessions, and in accordance with the procedure in the act prescribed. The validity of this statute is not attacked, and since the decision in *Lehigh Valley Coal Co.'s Appeal*, 164 Pa. 44, 30 Atl. 210, its constitutionality cannot be considered doubtful. At the time this act was passed the townships of the state had not been classified and the act therefore applied to all of them. The act of April 28, 1899 (P. L. 104), divided townships into two classes; and it was held, in *Philadelphia & Reading Coal & Iron Co.'s Petition*, 200 Pa. 352, 49 Atl. 797, that the latter act repealed the act of 1893 as to townships

of the first class. The Legislature then adopted the act of May 24, 1901 (P. L. 294), applying the provisions of the act of 1893 to townships of the first class. The proceeding before us is based on the act of 1901. The appellant contends that this statute is unconstitutional; and that there is therefore no authority in law for the order appealed from. This is the only question to be considered; it being conceded by the appellant that if the act of 1901 is constitutional that is the end of the case. Three objections are made to its constitutionality: (1) It violates section 8 of article 3 of the Constitution, which declares that no bill shall be passed containing more than one subject, which shall be clearly expressed in the title; (2) It is forbidden by section 6 of article 3, which provides that no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, etc.; (3) It is contrary to section 20 of article 3, which prohibits the General Assembly from delegating to any special commission, private corporation, or association any power to make, supervise, or interfere with any municipal improvement, money, property, or effects whether held in trust or otherwise, or to levy taxes, or perform any municipal function whatever. The proceeding was on the petition of P. W. McKeown, a property owner and taxpayer in the township of Hanover, in Luzerne county, and the order appealed from was made in strict conformity to the provisions of the statute. The act in question is an amendment of the act of April 28, 1899, and the two statutes are to be considered together. The particular respects in which it is alleged the title is defective and insufficient are: (a) That it does not give notice that the provisions of the act of June 12, 1893, are extended to townships of the first class, nor does it give notice of the subject of the proviso; (b) It gives no notice by the word 'authorizing,' or by any other word in the title, that the court of quarter sessions may, by its order, compel and require the township commissioners to execute a contract such as is required by the act of June 12, 1893; (c) It gives no notice when the amended act of assembly was approved; (d) It gives no notice that only the first subdivision of section 7 of the amended act is thereby to be amended.

[1] "With reference to the first of these propositions, it may be said that it was not necessary to incorporate in the title a reference to the act of 1893. All that is contemplated in the statute is sufficiently indicated in the title. The method by which the result is to be worked out is fully set forth in the body of the act; but it has never been held that the details of the statute must appear in the title. The distinguishing subject is the authorization of the township commissioners to enter into contracts with taxpayers for the making, amend-

ing, and repairing of public highways and bridges of the township; and, as it appears in the title to be an amendment, the reader is put on notice of the act to which the amendment applies. The title shows that the subject to be legislated about is the same as that provided for by the act of 1893. It would be difficult to more clearly comply with the mandate of the Constitution in this respect without unduly amplifying the title.

[2] "A critical construction of the word 'authorized' is resorted to to support the objection that the title gives no notice that the court of quarter sessions may require the township commissioners to enter into a contract; but this, we think, is not sufficient to warrant the conclusion that the title is defectively expressed. When notice is given in the title that the commissioners may be authorized to enter into such contract, inquiry is at once suggested as to the conditions and circumstances under which this authority may be granted, and the method by which it is to be exercised. The thing legislated about is contracts for the care of the roads at the expense of a voluntary caretaker, and the title points directly to this subject and fairly covers the scope of the statute. To 'authorize' the commissioners to do a thing is to invest them with power to that effect. Whence this power is derived, and under what circumstances it is to be exercised, is to be learned by reading the body of the act.

[3] "The objection that the title gives no notice when the act to be amended was approved is answered by *State Line & Juniata R. R. Co.'s Appeal*, 77 Pa. 429. In that case a supplement was entitled 'A supplement to an act entitled "An act to incorporate the State Line & Juniata Railroad."' The date of the original act was not given; but it was held to be a sufficient title, as all the legislation contained in the supplement related to the railroad. There can be no doubt as to the identity of the statute to which the amendment refers. No other is shown to have the same title; and, as it relates to municipal divisions existing in every county in the state, except one, there is no reason for supposing that any confusion or misapprehension could exist with reference to the statute referred to in the act under consideration. The case of *Provident Life & Trust Co. v. Hammond*, 230 Pa. 407, 79 Atl. 628, involved a wholly misleading title. It purported to be an amendment of section 21 of an act approved June 27, 1879 (P. L. 112); but no act was approved on that day. It appeared that what was intended to be accomplished was an amendment of section 1 of the act of June 8, 1893 (P. L. 353), which was entitled a supplement to the act of June 27, 1879. The opinion of the court shows that it was impossible to ascertain from the title what statute was amended. It is not so in the case under consideration. No other

similar title is to be found, and when reference is made to the body of the act its title and date are fully set forth.

[4] "The criticism that no notice is given that only a part of section 7 of the amended act is thereby amended is not pressed in the argument, and need not be considered at length. It would doubtless be conceded by the learned counsel for the appellant that the whole of the section might have been amended, and, if so, a less extensive alteration could be made.

[5] "There are numerous cases which hold that, where a mode of procedure has been established by statute or exists at common law, an act applying such mode to a new class of cases by general reference to it is a valid enactment, although it may have the effect to extend in some degree a previous statute. *Smith Woolen Machinery Co. v. Browne*, 206 Pa. 543, 56 Atl. 43, is a comparatively recent case on this subject. To the same effect is *Greenfield Ave.*, 191 Pa. 290, 43 Atl. 225. *Cornman v. Hagginbotham*, 227 Pa. 549, 76 Atl. 721, is another case. Such a statute is not a revival, amendment, or extension of another act bringing it within the prohibition of section 6 of article 3 of the Constitution. It is the mere application of an established mode of procedure or course of official conduct to a new thing or person. The soundness of this doctrine is well illustrated in the case before us. A method of road construction was provided for by a general act of assembly, applicable to all the townships in the state. The division of the townships into classes was brought about by an enactment which, by implication, repealed this act as to townships of the first class. It was then deemed expedient by the Legislature to apply to the latter class of townships a method of road construction and repair by contract, which had formerly existed as to all the townships. The act of 1901 brought over to the townships of the first class the mode of procedure established by the act of 1893.

[6] "As to the third general objection, we think it sufficient to say that the act does not delegate to any special commissioner, private corporation, or association any power to interfere with any municipal function. No commission is created; nor is any private corporation intrusted with the power to make, supervise, or interfere with, any municipal improvement, or to perform any municipal function. The contract in question was made with a private individual—a taxpayer. True it is alleged he is acting at the instance of one or more corporations, which have indemnified him against loss in the execution of the contract; but, as between the township and the contractor, the undertaking is that of an individual. The constitutionality of the act of 1893 was sustained in *Lehigh Valley Coal Co.'s Appeal*, 164 Pa. 44, 30 Atl. 210, as has been already noticed, and

that decision necessarily applies to this feature of the present case.

"The order is affirmed."

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZIS-KER, JJ.

T. F. McLaughlin and C. B. Lenahan, of Wilkes-Barre, for appellant. John D. Farnham and Andrew H. McClintock, both of Wilkes-Barre, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the learned judge of the superior court.

COMMONWEALTH ex rel. HUNTER v. SMALL.

(Supreme Court of Pennsylvania. Jan. 8, 1913.)

QUO WARRANTO (§ 3*)—OUSTING JUSTICE OF THE PEACE—INJUNCTION.

Where a justice of the peace opens an office for business outside of the borough in which he was elected, he may be restrained by injunction, but quo warranto does not lie to oust him from office.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 4; Dec. Dig. § 8.*]

Appeal from Court of Common Pleas, Westmoreland County.

Quo warranto by the Commonwealth, on the relation of W. Irwin Hunter, against James B. Small. Judgment for defendant, and relator appeals. Affirmed.

Doty, P. J., of the court below filed the following opinion:

"A clear understanding of the facts will do much to simplify and perhaps solve this case. The relator was duly elected a justice of the peace in the borough of Greensburg, was commissioned by the Governor, and has an office in the Second ward of said borough. The defendant was duly elected a justice of the peace in the adjoining borough of Southwest Greensburg. The evidence on the part of plaintiff shows that the defendant has an office on Main street in the borough of Greensburg; that he transacts official business there, and accepts fees for such service. This defendant has no legal right to have an office or to act as a justice of the peace in the borough of Greensburg. The law requires that during his continuance in office a justice of the peace shall keep his office in the ward, borough, or township for which he shall have been elected. As such violation of law is a direct injury to the relator, he has good ground of complaint, and the law must afford some remedy. A bill to enjoin the defendant will lie, as it is the province of equity to restrain any act contrary to law and prejudicial to the rights of individuals in every case where the law fails to furnish an adequate remedy.

"It is contended that equity will not lie because the law furnishes a complete remedy

by information in the nature of quo warranto. Such contention cannot be sustained by reason or authority. Quo warranto is the specific remedy to try the title to an office, and it is exclusive of all remedies for that purpose. The manifest purpose of this proceeding, however, is not to oust the defendant from his office of justice of the peace, but to restrain him from keeping an office and doing the acts of a justice in the borough of Greensburg contrary to law. The suggestion avers that the defendant was duly elected and commissioned a justice of the peace, but that he unlawfully exercises the functions of such office to the damage of the relator.

"The Act of June 14, 1836 (P. L. 621) at first reading seems to be comprehensive enough to embrace this case. But the uniform construction of the act shows that it has no application to the facts before the court. In Hagner v. Heyberger, 7 Watts & S. 104, 42 Am. Dec. 220, an injunction was refused because the sole question involved was 'whether the defendant can now legally hold and exercise the office of school director.' And Sergeant, J., in the opinion points out the distinction in the two remedies as follows: 'An injunction would seem to be a writ adapted to control and regulate officers in the discharge of their functions, when they are confessedly such, rather than to try their right to hold and exercise their offices.' So in Graeff v. Felix, 200 Pa. 137, 49 Atl. 758, a bill was dismissed because the gravamen was that the commissioners who authorized an alleged illegal expenditure of public money were no longer legally in office. The above cases are relied on by plaintiff, but the principle declared really justifies the action which the court has taken in this case.

"The case of Cleaver v. Com., 34 Pa. 283, gives a clear construction of the act of 1836 and points out when it is the appropriate remedy. The act provides that quo warranto may issue in certain cases. (1) In case any person shall usurp, intrude into, or unlawfully hold or exercise any county or township office within the respective county. (2) In case any person, duly elected or appointed to any such office, shall have done, suffered, or omitted to do any act, matter, or thing whereby a forfeiture of his office shall by law be created. Cleaver v. Com., 34 Pa. 283, holds that: 'The first clause provides for the case of a person, not de jure an officer, usurping; or intruding into, or unlawfully holding or exercising such office. The second clause provides for the case of a de jure officer who has done, suffered, or omitted to do anything by which a forfeiture of his office has by law been created. * * * The words in the first clause apply only to a person who is not an officer.' The defendant is de jure a justice of the peace, and he is not therefore within the first clause just cited, and it is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

not alleged that he has done anything which requires the forfeiture of his office. The only allegation is that defendant, being a de jure justice of the peace, crossed the imaginary line which separates the two boroughs, and opened an office contrary to law. It is very clear that under the facts in this case there could be no judgment of ouster or forfeiture. And the only judgment authorized by such act in the event of a defendant being adjudged guilty is that 'the court shall give judgment that such defendant be ousted and altogether excluded from such office.'

"In a careful opinion by Dana, J., in *Morrison v. Stuart*, 6 Luz. Leg. Reg. 89, with facts very similar to the case in hand it is held that an injunction will lie because the question is not as to the right to hold an office, but the manner and place of the exercise of his office by the defendant. And in *People v. Whitcomb*, 55 Ill. 172, the same doctrine is held, wherein it is declared that 'the writ of quo warranto is generally employed to try the right of a person who claims to an office, not whether his official acts should be confined to a particular locality.'

"It seems plain that the plaintiff has mistaken his remedy; that proper relief cannot be afforded in this proceeding, and that the verdict for defendant is justified.

"And now, May 6, 1912, after due consideration, motion for judgment non obstante verdicto is denied, and judgment on the verdict."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

H. H. Fisher and Jay R. Spengel, both of Greensburg, Pa., for appellant. Denna C. Ogden and John B. Keenan, both of Greensburg, Pa., for appellee.

PER CURIAM. The opinion of the learned judge of the Common Pleas fully sustains the conclusion reached, and on it the judgment is affirmed.

BRYAN et al. v. JONES & LAUGHLIN STEEL CO. et al.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

EXECUTION (§ 258*)—REQUISITES AND VALIDITY—TIME OF ISSUANCE.

Where an execution issued on a judgment more than five years after its entry was levied on land acquired by defendant after the date of the judgment, the land became subject to a lien, not of the judgment, but of the levy, and the lapse of more than five years from the entry of the judgment before the issuance of the execution does not render it void; and where defendant makes no objection that a scire facias was not issued, and permits the land to be sold, he cannot afterwards, in a collateral proceeding, object to the validity of the sale.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 736-739; Dec. Dig. § 258.*]

Appeal from Court of Common Pleas, Beaver County.

Action of ejectment by Henry A. Bryan and another, widow and heir of Aaron Boone Bryan, and devisees and heirs at law under the last will of Ann Bryan, against the Jones & Laughlin Steel Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

The court found the facts to be as follows:

"(1) On the 23d day of August, 1893, at No. 287, September term, 1893, judgment was entered on an amicable revival sur judgment No. 291, September term, 1888, in favor of Margaret J. Holt, as plaintiff, and against Henry A. Bryan and Aaron Boone Bryan, as defendants.

"(2) That on or about the 2d day of June, 1895, Ann Bryan died, having first made her last will and testament in writing, wherein and whereby the plaintiff in this suit, Henry A. Bryan, became seised, inter alia, of the undivided one-third of the lands in dispute in this action.

"(3) That on the 17th day of August, 1898, at No. 240, September term, 1898, a writ of scire facias to revive and continue the lien of the said judgment at No. 287, September term, 1893, was issued, which said writ of scire facias was served upon Henry A. Bryan, the plaintiff, and the same was not served on his codefendant, the said Aaron Boone Bryan.

"(4) That after the return day of the said writ of scire facias at No. 240, September term, 1898, no appearance or defense having been made by the said Henry A. Bryan, the plaintiff entered judgment on the 9th day of September, 1898, for want of an appearance and for want of an affidavit of defense; the præcipe for the said judgment directing the prothonotary to enter judgment against the said Henry A. Bryan, one of the defendants in said judgment.

"(5) That the prothonotary, instead of following the command of the said præcipe, entered judgment against the defendants named in the writ of scire facias, to wit, Henry A. Bryan and Aaron Boone Bryan.

"(6) That on the 4th day of November, 1898, at No. 63, December term, 1898, the plaintiff issued a writ of fieri facias (being an alias writ) on the said judgment at No. 287, September term, 1893; and the sheriff by virtue of the last-mentioned writ levied upon, inter alia, the title of the said Henry A. Bryan in and to the lands involved in this suit, and on December 3, 1898, sold the same to Oliver A. Douds, one of the defendants in this action of ejectment.

"(7) That the title acquired by the said Oliver A. Douds in and to the said property became by virtue of sundry conveyances vested in the defendant Jones & Laughlin Steel Company."

Argued before FELL, C. J., and BROWN, POTTER, STEWART, and MOSCHZISKER, JJ.

Frank C. Whitesell and William A. McConnell, both of Beaver, for appellants. J. F. Reed, Agnew Hice, M. J. Patterson, and D. K. Cooper, all of Beaver, for appellees.

STEWART, J. [1] The validity of the execution process under which the real estate of Henry A. Bryan was sold to defendant's predecessor does not depend in the slightest degree upon the regularity of the judgment obtained in the revival proceedings. The execution issued on the original judgment. True, this judgment, except as revived, was not a lien upon the land sold, inasmuch as the land had been acquired subsequent to its rendition; but it was notwithstanding sufficient to support execution process, and, when under such process the land was levied on, it thereby became subject to the lien, not of the judgment, but of the levy. The fact that more than five years had elapsed from the rendering of the judgment and the issuing of the execution did not render the process void. Certainly the defendant was entitled to be warned by scire facias before the seizure of his land in satisfaction of the debt; but, because this provision in the law, as said in *Hinds v. Scott*, 11 Pa. 19, 51 Am. Dec. 506, is for the debtor's personal protection, he may refuse or neglect to take advantage of it, and, where such refusal or neglect to assert his privilege continues until his property has been seized and sold in satisfaction of his debt, he is definitely concluded from thereafter asserting his privilege.

[2] In *Hinds v. Scott*, supra, this very question was before the court, and it was there settled, once for all, that, where one suffers his land to be sold upon an execution, the judgment upon which it issued being more than five years old and not revived by scire facias, neither he nor those claiming under him can afterward, in a collateral proceeding, be permitted to call in question the validity of the sale. That case governs this, and it is therefore unnecessary to inquire into the regularity of the revival proceeding, since without revival the execution process under which the land was sold was entirely adequate to support the sale that followed.

The assignments of error are overruled, and the judgment is affirmed.

CRAWFORD et al. v. SULLIVAN et al.
(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. APPEAL AND ERROR (§ 787*)—DISMISSAL—
GROUNDS—WANT OF PROSECUTION.

An appeal by plaintiff from an order dissolving a temporary injunction, of which he has

delayed the argument for over a year, though he had an opportunity to be heard at three successive terms, will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3129, 3130; Dec. Dig. § 787.*]

2. INJUNCTION (§ 135*)—PRELIMINARY INJUNCTION—DISCRETION OF COURT.

The refusal to grant or continue a preliminary injunction is error only when the right threatened with invasion is an unquestionable one, and the only protection from irreparable injury is to be found in a court of equity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. § 135.*]

Appeal from Court of Common Pleas, Lawrence County.

Bill in equity by Hugh A. Crawford and others against D. E. Sullivan and another for an injunction. From a decree dissolving a preliminary injunction, plaintiffs appeal. Dismissed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

J. Norman Martin, of New Castle, for appellants. James A. Gardner, City Sol., of New Castle, for appellees.

PER CURIAM. [1] Appellants' bill of complaint was filed in the court below on September 6, 1911, and on the same day the preliminary injunction prayed for was issued. Ten days later it was dissolved, and nine days thereafter—on September 25, 1911—this appeal was taken from the refusal of the court to continue it. Appellants' laches is in itself a sufficient reason for our declining to interfere with the action of the court below. By the act of June 12, 1879 (P. L. 177), the right was given to the appellants to ask us to hear their appeal at the October term, 1911, or within a month from the time it was taken. Passing that term, it would have been heard at the January term, 1912, when we were in session for nearly five months, if counsel for appellants had asked us to hear it; and the opportunity to be heard was again given when we met at the May term, in the Middle district.

[2] It is quite evident that the appellants have not felt very much aggrieved by the refusal to continue the preliminary injunction. The refusal to grant or continue such an injunction is error only when the right threatened with invasion is an unquestionable one, and the only protection from irreparable injury to it is to be found in a court of equity. Such is not the present situation. On appeal from a final decree, which, if not yet made, might have been made long ago but for this appeal, the appellants will have an opportunity to be heard, if any established right has been unlawfully interfered with and they are entitled to equitable relief.

Appeal dismissed with costs.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

PURVIS et al. v. DEMPSEY.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. LANDLORD AND TENANT (§ 208*)—BREACH OF COVENANT—REMEDIES.

A written lease forbade underletting without the written consent of the lessors under penalty of instant forfeiture of the unexpired part of the term, and provided that, in case of default in payment of rent or any other breach of covenant by the lessee, the whole of the rent should, at the option of the lessors, become due, or their attorney might confess judgment against the lessee for the whole amount of the rent, and that a determining of the term, or receipt of rent after default or after judgment or execution, should not deprive the lessors of other remedies provided by law. *Held*, that the remedy by forfeiture for underletting was not exclusive, and the lessors had the right to enter judgment for the whole of the rent, where the premises were sublet without consent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 821-831; Dec. Dig. § 208.*]

2. JUDGMENT (§ 50*)—RENT—CONFESSION OF JUDGMENT—EVIDENCE.

Where a lease authorized the lessors, on breach of any covenant by the lessee, to confess judgment for the whole of the rent for the unexpired term, an affidavit by the lessors, filed with the lease, averring a breach of condition as to subletting, is sufficient to support judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 75-78; Dec. Dig. § 50.*]

Appeal from Court of Common Pleas, Butler County.

Action by Mary E. Purvis and others against W. W. Dempsey. From an order discharging a rule to strike off judgment for plaintiff, defendant appeals. Affirmed.

From the record it appeared that on February 7, 1910, the plaintiffs executed a lease to the defendant of real estate in the borough of Butler for the term of 10 years for a total rent of \$20,000, payable \$2,000 per year in quarterly installments.

The material portions of the lease were as follows: "The lessee further covenants and agrees to use and occupy said described premises as a planing mill only, and to not assign or transfer this lease, or to underlease or let said premises or any part thereof without the written consent of the lessors under penalty of instant forfeiture of the unexpired part of the term for which this lease is given. The lessee further agrees to surrender the premises at the end of the term; notice to quit being hereby expressly waived. In case default be made any time in the payment of any one of said installments of rent when due, and forthwith on any other breach of covenant upon the part of lessee, the whole of the rent shall, at the option of the lessors, become due and payable, and the lessors or their attorney may enter or confess judgment against the lessee for the whole amount of said rent, with the costs of suit, attorney's commission of 5 per cent. for collection, release of all errors, and without stay of execution, hereby waiving in-

quisition and condemnation, and sale on *fi fa*. agreed to, and the benefit of exemption claimed under and by virtue of any exemption law now in force, or which may be hereafter passed, is hereby expressly waived, and the term shall at the election of the lessors determine, and the lessors may without notice re-enter and expel said lessee and all persons from the premises, or, at the lessors' option, enter judgment in ejectment against said lessee and all persons holding under said lessee for possession of the premises, and, for entering said judgment or judgments, this lease or a copy thereof shall be a sufficient warrant to any person. A determining of the term or receipt of rent after default, or after judgment or after execution, shall not deprive the lessors of other actions against the lessee for possession or for rent or damages; but the lessors may use the remedies herein given or those provided by law. In the event of the determining of the term of this lease by reason of a default or breach of any of the terms or conditions hereof, the lessee shall have, upon the payment in full of all rent due, two months from the date of service of written notice from the lessors or their agent of their election, to determine or end the term of this lease within which to remove any buildings, property, etc., he may have or bring upon said premises, and failure of the lessee to remove said property within said time shall be considered an abandonment of the same, and title thereto shall thereupon vest in the lessors."

Other facts appear by the opinion of Galbreath, P. J., which was as follows:

"By written agreement bearing date February 7, 1910, the plaintiffs leased to the defendant, for a period of 10 years, certain real estate situate in the borough of Butler, Pa., used and occupied for the purpose of a planing mill, for the annual rental of \$2,000. This agreement provides, *inter alia*, as follows: 'The lessee further covenants and agrees to use and occupy said described premises as a planing mill only, and to not assign or transfer this lease, or to underlease or let said premises or any part thereof without the written consent of the lessors, under penalty of instant forfeiture of the unexpired part of the term for which this lease is given.' The lease further provides that: 'In case default be made any time in the payment of any one of said installments of rent when due, and forthwith on any other breach of covenant upon the part of the lessee, the whole of the rent shall, at the option of the lessors, become due and payable, and the lessors or their attorney may enter or confess judgment against the lessee for the whole amount of said rent, with the costs of suit, attorney's commission of 5 per cent. for collection, release of all errors, and without stay of execution, hereby waiving inquisition

and condemnation, and sale on fl. fa. agreed to, and the benefit of exemption claimed under and by virtue of any exemption law now in force, or which may be hereafter passed, is hereby expressly waived, and the term shall at the election of the lessors determine, and the lessors may without notice re-enter and expel said lessee and all persons from the premises, or, at the lessor's option, enter judgment in ejectment against said lessee and all persons holding under said lessee for possession of the premises, and, for entering said judgment or judgments, this lease or a copy thereof shall be a sufficient warrant to any person.'

"On January 26, 1912, the plaintiffs entered judgment by virtue of the warrant of attorney contained in said lease against the said defendant. The entry of said judgment was accompanied by an affidavit made by S. H. Purvis, one of the plaintiffs, setting forth, *inter alia*: 'That W. W. Dempsey, the above-named defendant and lessee in said lease, did assign and transfer said lease, and did underlease and underlet said premises, or a part thereof, without the written consent of the plaintiffs or lessors in said lease, to the Butler Planing Mill Company, Incorporated, who went into possession of said premises, or a part thereof, and operated said planing mill, or a portion thereof, under a transfer and sublease from said W. W. Dempsey, in violation of the terms and conditions of said lease; that, on account of the breach of the covenant above set forth, the whole of the rent for the balance of the term of said lease has become due and payable under the terms and provisions of said lease; and that there is due, owing, and unpaid from defendant to the plaintiffs the sum of \$17,500, the rent from May 7, 1911, to February 7, 1920, at the rent of \$2,000 per year, being the amount for which judgment is confessed, with attorney's commission of 5 per cent.'

[1] "On part of the defendant it is contended, in support of the motion to strike off said judgment, that, under the provision of said lease, an exclusive remedy is provided in case the lessee should underlease the premises without the written consent of the lessors, namely, by instant forfeiture of the unexpired term for which the lease was given. On part of plaintiffs, however, it is contended that they are not confined to the remedy by forfeiture of the unexpired term, but that, under the further provisions of said contract or lease, they are entitled to a judgment for the rent for the unexpired term. The provision of the lease, on which this contention rests, is that: 'In case default be made any time in the payment of any one of said installments of rent when due, and forthwith on any other breach of covenant upon the part of the lessee, the whole of the rent shall, at the option of the lessors, become due and payable, and the lessors or their attorney may enter or confess judgment against the

lessee for the whole amount of said rent,' etc.

"We are not convinced that the remedy by instant forfeiture, in case of an unauthorized assignment of the lease, is the exclusive one of which the plaintiffs may avail themselves. Such an interpretation of the written agreement does not, we think, harmonize with what seems to have been the evident intention of the parties. The remedy by forfeiture is under the general rule for the benefit of the lessor, and he is not obliged to invoke it against his will. But, even assuming that the lessors had seen fit to assert their right of forfeiture, this would not still, under the provisions of the lease, have relieved the defendant from the payment of rent thereafter falling due. This would seem to be the meaning of that provision of the lease that: 'In case default be made at any time in the payment of any one of said installments of rent when due, and forthwith on any other breach of covenant upon the part of the lessee, the whole of the rent shall, at the option of the lessors, become due and payable, and the lessors or their attorney may enter or confess judgment against the lessee for the whole amount of said rent.' This provision is supplemental to the prior provision whereby the lessors may forfeit by reason of any unauthorized assignment of the lease. Such forfeiture would not end the contractual relations of the parties, but would still leave the defendant liable for all future rent, under the provision which we have just quoted. That such was the intention of the parties, and that such is the meaning of their contract, is further evidenced, we think, by the following provision: 'A determining of the term or receipt of rent after default, or after judgment or after execution, shall not deprive the lessors of other actions against the lessee for possession or for rent or damages, but the lessors may use the remedies herein given or those provided by law.'

"We conclude, therefore, that, whilst the provision of the contract whereby the lessors may declare a forfeiture of the lease is one of the remedies at their disposal, yet it is not an exclusive one; and, if at their option it had been exercised, their right would still remain of entering judgment against the lessee for the whole amount of the rent, and the defendant, we think, cannot be heard to complain that, instead of declaring a forfeiture and supplementing such declaration of forfeiture with the judgment confessed for rent, the plaintiffs have entered judgment for the rent without declaring a forfeiture.

[2] "It is further contended, on part of the defendant, that the judgment entered in the case is without authority in law or under the terms of the lease, as in said lease no provision is contained authorizing the decision of the question of default by the lessors, and the entry of judgment against the lessee

upon the ex parte affidavit of the plaintiffs or their representative.

"We must assume that the provision in the contract authorizing the plaintiffs, by their attorney, in certain events to confess judgment was intended to have a meaning, and in certain contingencies to become operative. It is true that the contract of lease makes no provision whereby the fact of the alleged breach shall first be determined before judgment is entered. It is equally true that no provision is made whereby the defendant can be heard before entry of judgment against him. In the absence of any such provision, we think that the averment of the plaintiffs, under oath of a breach of condition, is sufficient in the first instance to support the judgment. Then, too, the contract itself provides that, 'for entering said judgment or judgments, this lease or a copy thereof shall be a sufficient warrant to any person.' If the breach of condition be denied, such denial may be made the basis of a proceeding to open the judgment, as may also any denial on the part of the defendant that the rent represented, being the amount of the judgment, is properly due. For these reasons, we conclude that the rule to strike off the judgment cannot be sustained, and the same is therefore discharged."

Argued before FELL, C. J., and BROWN, POTTER, STEWART, and MOSCHZISKER, JJ.

Robert W. Smith, of Hollidaysburg, Benjamin R. Williams, of Butler, and James S. Moorhead, of Greensburg, for appellant. Charles F. Hosford and Aaron E. Reiber, both of Butler, for appellees.

PER CURIAM. The order appealed from is affirmed on the opinion of the learned judge of the common pleas discharging the rule to strike off the judgment.

PENN GAS COAL CO. v. GREENSBORO GAS CO.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. SPECIFIC PERFORMANCE (§ 8*)—DISCRETION OF COURT.

A bill for the literal performance of a contract appeals to the sound discretion of the court.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18; Dec. Dig. § 8.*]

2. SPECIFIC PERFORMANCE (§ 16*)—SUBSTANTIAL PERFORMANCE.

Where, in a suit for specific performance, defendant has substantially performed, enforcement of an immaterial matter will not be decreed which would inflict undue hardship on defendant without advantage to plaintiff.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 35, 36; Dec. Dig. § 16.*]

3. INJUNCTION (§ 23*)—BREACH OF CONTRACT.

A contract between a coal company and a gas company provided that the latter in drilling a gas well through the former's coal seam should fill in a space between the outer and inner casings with liquid cement. *Held* that, where the enforcement of such provision would not benefit the coal company and would cause great loss to the gas company, equity will not enjoin completion of the well until the space is filled with cement.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 22; Dec. Dig. § 23.*]

Appeal from Court of Common Pleas, Westmoreland County.

Bill by the Penn Gas Coal Company against the Greensboro Gas Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Doty, P. J., filed the following opinion in the court below:

"Findings of Fact.

"(1) The plaintiff corporation is engaged in the mining of coal, and is the owner of coal lands in the county of Westmoreland, state of Pennsylvania.

"(2) The defendant corporation is engaged in drilling for natural gas in the county of Westmoreland and elsewhere.

"(3) The plaintiff company owns the Pittsburgh seam of coal under the 'Benjamin Guffey' tract, and the defendant company has secured from the owner of the surface the right to the oil and gas in and under said tract of land.

"(4) The two corporations, parties to this bill, on 20th April, 1908, entered into an agreement which, *inter alia*, provides as follows: 'Now this agreement witnesseth: That the said Greensboro Gas Company, the said party of the first part, for itself, its successors and assigns, does hereby agree to and with the Penn Gas Coal Company, its successors and assigns, as follows: First. That it will case the well which it is now engaged in drilling to a depth of one hundred and fifty-four (154) feet, measured from the surface, with a casing of wrought iron, with screw joint, not less than ten inches in diameter; that it will place within the casing thus provided an inner casing of not more than eight and one fourth (8¼) inches in diameter, of like material and kind, to extend to a depth of at least seven hundred and twenty (720) feet beneath the surface. That this inner casing shall be so placed with the outer casing that the space remaining between the two casings shall be of equal width at all points as near as possible, and that the space beneath the outer and inner casings shall be filled with liquid cement, and for that purpose nothing but pure cement is to be used, to be mixed and used at such texture that it will freely flow and fill up the space thus remaining between the casings provided, to a depth of not less than seven hundred and twenty (720) feet, as

measured from the overlying surface. The said party of the first part shall also fill the space between the ten-inch casing and the surrounding earth or strata of whatever diameter it may be found to be, to a depth of not less than one hundred fifty-four (154) feet, as measured from the surface, with grouting made of two parts cement and one part sharp sand, to be used at such texture that it will flow freely and fill up all crevices and open places between the line of 10-inch casing and the surrounding earth or strata. * * * Fourth. The placing of the casings, and the cementing and grouting required by the terms of this agreement are to be done and completed to the satisfaction of the said Penn Gas Coal Company before the well now under course of drilling, or any wells hereafter to be drilled, are drilled to a depth of more than one thousand (1,000) feet as measured from the surface of the overlying strata, and that the said party of the second part, by its agents, servants or employees shall have the right to enter upon the premises on which the drilling operations are conducted for the purpose of examination and inspection of the methods and materials used by the said party of the first part in the performance by it of the covenants of this agreement.'

"(5) The defendant began drilling a well on the 'Guffey' tract about the middle of October, 1911, and in the drilling observed the requirements of the agreement except in two particulars: (1) The placing of the casings and the cementing and grouting were not completed to the satisfaction of the plaintiff company before the said well had been drilled more than 1,000 feet. (2) The entire space between the outer and inner casings was not filled with liquid cement to the depth of 720 feet as measured from the surface.

"(6) That the defendant did pour liquid cement, of the texture provided in the agreement, into the space between the outer and inner casings so long as said cement would flow therein, and until said space was filled as far as it was possible to fill the same.

"(7) The bill filed by plaintiff avers failure of defendant to perform the contract, and prays that defendant be restrained from conducting any further drilling operations in connection with said well until it has fully complied with the terms of its said agreement with your orator by filling the space between the 10-inch casing and the surrounding earth or strata, of whatever diameter it may be found to be from the surface of said well, to a depth of not less than thirty (30) feet below the floor of the Pittsburgh seam of coal, with grouting made of two parts cement and one part sharp sand, to be used at such texture that it will flow freely and fill up all crevices and all the places between the 10-inch casing and the surrounding earth or strata, and also until the defendant shall fill the space between

the said 8¼-inch casing and the 10-inch casing with pure liquid cement, mixed and used at such texture as to flow freely and fill up the space remaining between the said 8¼-inch and 10-inch casings from the surface of said well to a depth of not less than 1,000 feet measured from the surface.'

"Conclusions of Law.

[1] "(1) As the bill prays the literal enforcement of a contract it is, therefore, an appeal to the sound discretion of a chancellor.

[2] "(2) As the defendant substantially performed the contract and in good faith attempted to fulfill it in every particular, specific performance of an immaterial matter will not be decreed where such decree without advantage to the plaintiff would inflict undue hardship on the defendant.

[3] "(3) The agreement between the parties provides, *inter alia*, that in the drilling of a gas well the space between the outer and inner casings shall be filled with liquid cement. The defendant will not be enjoined from drilling the well simply because this feature of the contract has not been performed as the evidence shows that it is not necessary to so fill such space in order to protect the plaintiff's mines, which was the avowed object in the making of the agreement.

"(4) That the bill in the case be dismissed.

"Discussion.

"Although the defendant in good faith tried to do as the contract requires, it failed to fill the space between the outer and inner casings with liquid cement. Of this the plaintiff complains, and alleges that great injury is likely to follow 'by reason of gas which probably will escape into the mine from the well now in course of drilling in the event gas should be encountered.' The defendant avers that it has taken every reasonable precaution to safeguard the property of plaintiff, and that there is no probability whatever, if gas be discovered, that it will escape into the plaintiff's coal mines.

"At the threshold of the case it is highly important to determine whether the precautions already taken are sufficient to prevent the probable escape of gas. To permit the gas to escape into the mine would cause great damage to plaintiff, and it might entirely destroy the property. The defendant has a right to bore through the stratum of coal in order to reach its gas, but every reasonable precaution must be taken to avoid injury to plaintiff's property. There can be no absolute certainty about the matter. Neither side affirms positively what will follow in the event that gas should be found. The plaintiff avers that the gas probably will escape into the mine. The defendant alleges that there is no probability that the gas will find its way into the mine.

"The question then is whether reasonable precautions have been provided to prevent the escape of gas. The gas, if found, will pass from the gas sand through a 4-inch tube, encased in a 6 $\frac{1}{2}$ -inch casing, which is placed in an 8 $\frac{1}{4}$ -inch casing, and this latter casing inclosed in a 10-inch casing, and the whole tube surrounded by cement from the surface to the bottom of the Pittsburgh seam of coal. In order to prevent the escape of gas, there are provided the four lines of pipe and the cement filling outside of the 10-inch casing. The coal mine contains sulphur water. The acid of this water corrodes iron. The witnesses differ as to the time it would take to destroy an iron pipe or to weaken it so that it would not hold the gas. There is much testimony on the part of plaintiff that the precautions provided in the contract are necessary to prevent leakage of gas. Mine inspectors and mining engineers, who have had experience in and about coal mines, testify that the grouting required is a reasonable precaution. On the other side witnesses who have had a large experience in the drilling of oil and gas wells through coal seams are of opinion that the filling with liquid cement of the space between the inner and outer casings is not necessary. It appears that many thousand gas wells have been drilled through coal veins and the witnesses, who are men of practical experience, testify that they never knew an instance where the gas escaped through the pipes into the coal mines. In some way, which is not clearly explained, it seems that the pipes thus used are not seriously affected by the sulphur water.

"There is one other consideration which seems to give force to defendant's contention that there is no human probability that gas will escape into the mine. The 4-inch tube in which the gas is conveyed is encircled by a 6 $\frac{1}{2}$ -inch casing. Between this casing and tube is an open space, and between the 6 $\frac{1}{2}$ and 8 $\frac{1}{4}$ casing is another open space free of obstructions to a distance of at least 1,100 feet from the surface. If gas should escape from the tube, it would naturally pass through such spaces into the open air, and it would have no tendency to pass through the remaining lines into the workings of the mine. It seems to be fairly established, therefore, that there is no probability, if gas be struck, that any of it will find its way into plaintiff's mine, and that every reasonable precaution has been adopted to avoid such danger. Further than this the court should not go, unless the duty is to enforce strictly the terms of the agreement of 20th April, 1908. The defendant in one particular has failed to carry out the agreement. It made a reasonable effort in good faith to do what the contract requires. Twenty-two sacks of cement were poured into the space between the two casings. It is demonstrated by a mathematical calculation, the only way it could be shown, that the quantity of cement was not sufficient to fill entirely the space

between the two casings. The liquid cement was poured in until the space seemed to be filled as no more could be put therein. The testimony does not show the cause of the trouble. No fault is alleged on the part of the defendant. The space is not filled with liquid cement. Nor is there a suggestion of any way to fill it at this time. The contract has not been performed, and cannot now be performed in this particular.

"If defendant be enjoined from completing the well until the space between the two casings is filled with liquid cement, the well will never be drilled. This would occasion great loss to the defendant, and, as we have seen, it would result in no material benefit to the plaintiff. Under existing conditions and in the light of the testimony, there is no probability of gas from the well escaping into the mine. That the space between the casings be filled with cement is not apparently a necessary precaution against accident. Under such conditions is the plaintiff entitled to an enforcement of the letter of this contract? The agreement is a little out of the ordinary. It is not based on a valuable consideration. Each party recognizes the rights of property belonging to the other. The evident purpose of the agreement was to save the delay and expense of litigation, and such purpose has utterly failed. So far as possible, however, the agreement should be performed. The defendant alleges substantial performance and the impossibility without any fault on its part of following the agreement to the letter. It has faithfully endeavored to perform the contract in every substantial particular, and therefore has a right to invoke in its relief the equitable doctrine of substantial performance as declared in *Gillespie Tool Co. v. Wilson*, 123 Pa. 19, 16 Atl. 36, *Morgan v. Gamble*, 230 Pa. 165, 79 Atl. 410, and other cases along the same line. The defendant does not seek affirmative relief, but in reply to plaintiff's demand that the contract be strictly enforced alleges performance of every material part. It would seem, therefore, under the circumstances of this case, that the defendant should not be prevented from completing the well. To stop the work we would cause great loss to the defendant, and it is altogether improbable that plaintiff will be injured by permitting the work to go on, as every reasonable and necessary precaution has been provided to prevent the escape of gas into plaintiff's mine.

"This bill is for the specific enforcement of a contract, and as such is an appeal to the conscience of a chancellor. And a contract which has been substantially performed is not to be enforced in equity if its literal fulfillment has been prevented by uncontrollable circumstances when such enforcement would inflict undue hardship and especially where its nonenforcement does no injury to complainant. *Oil Creek R. R. Co. v. Atlantic & Great Western R. R. Co.*, 57 Pa. 65. The

agreement, however, was voluntarily entered into. The defendant company undertook to do what turned out to be impossible. The evidence undoubtedly shows that, under the conditions, it is not necessary to fill entirely the space between the inner and outer casings with liquid cement. Both parties had a disposition to avoid litigation, and yet both are responsible that litigation has followed, and for this reason it is fair that the costs be divided. And now, May 6, 1912, this case came on to be considered on bill, answer, and proofs, and was argued by counsel, and upon due consideration it is ordered, adjudged, and decreed that the injunction heretofore granted herein be dissolved; that the bill be dismissed; that neither side file bill for witness fees, and that the docket costs be equally divided between the parties; that the prothonotary file of record the above findings of law and fact with this decree; and that he give notice thereof to the parties of their counsel, to the end that exceptions may be filed in accordance with the equity rules, and, if no exceptions be filed in due time, that decree absolute be entered as of course without further order."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Charles E. Whitten and Paul H. Gaither, both of Greensburg, for appellant. Robert W. Smith, of Hollidaysburg, A. Leo Well, of Pittsburg, and James S. Moorhead, of Greensburg, for appellee.

PER CURIAM. The decree is affirmed at the cost of the appellant on the findings and opinion of the learned judge of the common pleas.

MCCORMICK et al. v. SYPHER et al.
(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. TRUSTS (§ 136*) — CREATION — PASSIVE TRUST.

A deed of trust by a husband and wife of realty belonging to the husband to a trustee for the wife and children, under which the trustee has no active duties, creates a dry and passive trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 179; Dec. Dig. § 136.*]

2. TRUSTS (§ 140*) — CREATION — EXPRESS TRUST—CONSTRUCTION—"CHILDREN."

In a deed of trust by a husband and wife to a trustee for the wife and children of the wife begotten by her husband, the word "children" is a word of purchase, and not of limitation, and the children, including those born after the date of the deed of trust, take a fee simple after the death of the wife.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 183-187; Dec. Dig. § 140.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1115-1141; vol. 8, p. 7601.]

Appeal from Court of Common Pleas, Butler County.

Action by Charles H. McCormick and others against David Sypher and others. From a judgment for plaintiffs, on issue framed to determine title to land, defendants appeal. **Affirmed.**

Argued before FELL, C. J., and BROWN, POTTER, STEWART, and MOSCHZISKER, JJ.

W. D. Brandon and J. Campbell, both of Butler, for appellants. Stephen Cummings, W. Z. Murrin, and John Murrin, all of Butler, for appellees.

BROWN, J. This appeal comes from a judgment in an issue framed in the court below upon the petition of the appellants, for the purpose of determining the title to land. On December 30, 1873, W. A. McCormick, who was the owner of it, executed a deed for it, in which his wife, Susan A. McCormick, joined, to Lewis Z. Mitchell: "In trust for the said Susan A. McCormick and the children of the said Susan A. McCormick on her body begotten and to be begotten by her husband, the said Wm. A. McCormick, their heirs and assigns forever." At the time this deed was executed, the McCormicks had two children. Subsequently seven others were born to them, and the nine are the plaintiffs in this issue. On February 19, 1876, McCormick and his wife executed a deed for this property to Sarah Croup, who immediately entered into possession and continued in possession of it until she sold and conveyed it to David Sypher, one of the defendants below. He subsequently conveyed a portion of the property to Mrs. Elizabeth McKee, who died intestate in the year 1906, leaving three children to survive her, and they, with Sypher, were made the defendants in the issue. The case was submitted to the jury under instructions that, if they found Mrs. Croup and those claiming under her had been in possession of the property adversely for the statutory period, the verdict should be for the defendants; and such a finding was returned. The court below subsequently sustained the motion of plaintiffs for judgment non obstante veredicto upon the whole record, and directed the entry of judgment in favor of the appellees for the land in dispute, subject to the defendant's right of possession during the lifetime of Susan A. McCormick, who is still living.

[1] The first contention of the appellants is that an active trust was created by the deed from McCormick and wife to Mitchell; and the statute of limitations, therefore, ran against the trustee, who held title not only for the mother, but for the children as well. In the court below they contended otherwise by expressly averring in their pleadings that the trust created by the deed to Mitchell was not an active one; and they based their right to a verdict on the ground that as es-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tate tail had been created which, under the statute, became a fee simple in Mrs. McCormick. With this state of the record, we ought hardly to be asked to convict the court below of error in holding that the trust was a mere passive one (*Morton v. Funk*, 6 Pa. 483; *Henry v. Zurflieh*, 203 Pa. 440, 53 Atl. 243; *In re Payne's Estate*, 204 Pa. 535, 54 Atl. 387; *Lauer Brewing Company v. Chimielski*, 206 Pa. 90, 55 Atl. 841; *Bousquet's Estate*, 206 Pa. 534, 56 Atl. 60); but aside from the admission of the appellants in their pleadings in the court below, if the question of the character of the trust had been there raised, the court would have been bound to hold that it was dry and passive. It is not to be saved as an active one on the ground of any necessity to protect a married woman or a spendthrift child, or to support contingent remainders, or to serve any other useful and lawful purpose. In *Carson v. Fuhs*, 131 Pa. 256, 18 Atl. 1017, in construing a similar deed, we said what we now repeat. "The trustee in this case had no active duties to perform. It is a passive, dry trust, with no interest to guard, no rights to protect." The conveyance to Mitchell is therefore, as the court below correctly held in its opinion directing judgment for the plaintiffs non obstante veredicto, to be regarded as though it had been "made directly to Susan A. McCormick and the children of the said Susan A. McCormick on her body begotten and to be begotten by her husband, the said William A. McCormick, their heirs and assigns." The question, then, is, What estate did Mrs. McCormick take under the deed? If she took but a life estate, with remainder to her children, born and to be born to her said husband, William A. McCormick, the judgment of the court below must be affirmed, for the statute of limitations will not begin to run against the appellees until their right of possession accrues upon the death of their mother.

[2] If the words "and the children of the said Susan A. McCormick" are words of limitation, the estate granted to her was an absolute one under the rule in *Shelley's Case*, and the deed from herself and husband to Sarah Croup passed the fee; but these words are primarily of purchase, and not of limitation. To refer to the exhaustive learning in the innumerable cases in which this rule has been announced would be to assume that there are some in the profession who are still ignorant of it. It is sufficient to repeat what was said in *Oyster v. Oyster*, 100 Pa. 538, 45 Am. Rep. 388: "The authorities are uniform that 'children' is as certainly a word of purchase as 'heirs of the body' are words of limitation. *Guthrie's Appeal*, 37 Pa. 9; *Taylor v. Taylor*, 63 Pa. 481, 3 Am. Rep. 565. This is the general rule; and the exceptions which from time to time have been recognized do not impair the rule itself. There are many instances in our state where

'children' has been held to be a word of limitation; but in all of them such construction was clearly in accord with the intent of the testators, as gathered from the four corners of the will, as when 'children' has been used with 'heirs of the body' or 'issue' as its synonyms." There is nothing in the deed in the present case which in any degree modifies, or tends to modify, the primary and presumptive meaning of the word "children," or to indicate that the appellees were to take by descent from their mother, as her heirs at law, and not as purchasers from their father. This being so, the judgment of the court below rests upon an unbroken line of cases with which the profession are so familiar that a citation of any one of them is hardly called for.

The grant in *Coursey v. Davis*, 46 Pa. 25, 84 Am. Dec. 519, was to a married woman, "Mildred Ann Davis, and her children exclusively, and their heirs and assigns, to have and to hold the premises to the said Mildred Ann Davis and to her children exclusively, and their heirs and assigns." In an elaborate and exhaustive opinion by Mr. Justice Read, in which he collated the authorities both in England and in this state, in order to ascertain the legal, as well as the natural, meaning of the words used to describe the relation of the mother and of the children, it was held that the words vested in her a life estate only, with remainder in fee to her children as a class, so that those in being at the date of the deed, as well as those subsequently born, would be entitled to take on the termination of the life estate at her death. In *Wolford v. Morgenthal*, 91 Pa. 30, decided some years later, and not to be distinguished in principle from the present case, the grantee in the deed was Margaret Morgenthal, a married woman, and the conveyance was "in trust for the use and benefit of Margaret Morgenthal and her heirs forever—that is, the children, if any, begotten by Frederick Morgenthal—and her daughter, Elizabeth Wire, is to be made equal, to be for them and their heirs forever after the decease of Frederick Morgenthal, her present husband." The habendum was "for the use and benefit of the said Margaret Morgenthal and her daughter, Elizabeth Wire, and the children begotten by the said Frederick Morgenthal, if any, upon the body of the said Margaret Morgenthal, his wife." The question before the court was as to the estate taken by Margaret Morgenthal and the children, respectively; and it was held that the mother took a life estate, with the remainder in fee to the children as a class, and opened to let in those after born. The deed in *Hague v. Hague*, 161 Pa. 643, 29 Atl. 261, 41 Am. St. Rep. 900, was to "Sarah Jane Hague and her children," and it was held that the grant was of a life estate to the mother, with remainder in fee to the children as a class, which included those born after the delivery

of the deed. In *Crawford v. Forest Oil Co.*, 208 Pa. 5, 57 Atl. 47, the devise was to a son "and to his children," and the same ruling was made. Vide, also, *Elliott v. Diamond Coal & Coke Co.*, 230 Pa. 423, 79 Atl. 708; *Vaughan's Estate*, 230 Pa. 554, 79 Atl. 750.

As the questions raised by the appellants have long been settled against them, the judgment is affirmed.

FIRST NAT. BANK OF NEW CASTLE v. CITY OF NEW CASTLE.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

MUNICIPAL CORPORATIONS (§ 902*)—CERTIFICATES OF INDEBTEDNESS—TRANSFER—REPRESENTATION BY OFFICERS.

Where a city treasurer, without authority, executes in the city's name a promissory note to a bank, reciting that he has deposited certificates of indebtedness of the city as collateral security, the bank cannot recover against the city on the certificates of indebtedness independently of the note, where they had been indorsed in blank by the original holders, and there was nothing to show that they were the individual property of the treasurer; the presumption in such case being that the bank knew that the certificates were the property of the city, which the treasurer had no authority to pledge.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1887; Dec. Dig. § 902.*]

Appeal from Court of Common Pleas, Lawrence County.

Action of assumpsit by the First National Bank of New Castle against the City of New Castle on certificates of indebtedness. From a judgment for defendant, plaintiff appeals. Affirmed.

On a motion for a new trial and for judgment for plaintiff non obstante veredicto, Galbreath, P. J., filed the following opinion in the court of common pleas:

"The matters for consideration arising on the pending motions, as well as out of the exceptions taken on part of plaintiff during the progress of the trial, may be reduced to three classes, namely: First. The instructions of the court as to the inferences to be drawn by the jury from the nature of the transaction upon which the plaintiff came into possession of the certificates of indebtedness sued upon. Second. The admission of the testimony of the payees mentioned in said certificates as to the circumstances of their payment and by whom paid. Third. The admission of evidence tending to show that after and about the time of the transaction in question the city treasurer was paying out of the city treasury large numbers of certificates of indebtedness, direct to the holders thereof, and not upon warrants first obtained therefor from the city controller.

"The pending suit arose out of a transaction between the plaintiff bank and John

Blevins, then treasurer of the city of New Castle, on September 19, 1898, which was in writing, and is as follows: 'New Castle, Pa. Sept. 19, 1898. \$5,431.49. Four months after date, for value received, I hereby promise to pay to the First National Bank of New Castle, Penn'a, or order, at said bank fifty four hundred thirty-one & 49/100 dollars with interest at the rate of 6 per cent per annum after due, having deposited with said bank as collateral security for the payment of this note, and also as collateral security for all other present or future demands of any and all kinds of the said bank against the undersigned due or not due, or that may be hereafter contracted, including any indorsement made or that in future may be made by me, the following property, viz: Surdies cert's of indebtedness of city of New Castle, Pa., for \$5,431.49 and interest.' The obligation was signed, 'City of New Castle—John Blevins, Treasurer.'

"The contract thus made was without authority from the city of New Castle. The amount of this note was placed to the credit of Blevins, as city treasurer, in said bank. On January 7, 1899, and before the said note fell due, Blevins died. The city of New Castle refused to pay the note, and thereupon the bank brought suit, not on the note, but on the implied obligation of the city to pay for money advanced to the city and which went into its treasury. On appeal to the Supreme Court it was held that there could be no recovery, under the circumstances of that case, Blevins being a defaulter, as city treasurer, at the time he effected the loan, in consequence of which no consideration passed to the city; and, further, that as a ministerial officer of the city he could not in any event impose liability on the city in the manner by which he had sought to do so. See 224 Pa. 285, 73 Atl. 331, 132 Am. St. Rep. 779. Thereupon the present suit was instituted, not upon the implied obligation of the city to pay, nor yet upon the note which was the basis of the transaction, but on the certificates of indebtedness which were pledged as security for the note. These certificates were indorsed in blank by the holders thereof, and in that form were delivered by Blevins, as city treasurer, to the bank. The promise to pay and the pledge of the collateral were part and parcel of the same contract. There is nothing in the form of the contract to indicate that, while the note was made by John Blevins, treasurer, the pledge of the collateral contained in the same writing was by John Blevins individually. Had the indorsement on the certificates been to him in his individual right, the reasonable inference following their delivery as collateral, would have been that he was pledging his own property. In the absence, however, of any such indorsement, the only index of the character in which he held them

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Index

is found in the capacity in which he pledged them to the bank, which he did over the signature, 'City of New Castle, John Blevins, Treasurer.' There is nothing whatever, either in the form of the contract entered into with the bank, or in the form of the indorsement, to indicate individual ownership of the certificates. Under the circumstances there was no means of knowing how he held them, except the manner in which he disposed of them.

"If it be said, however, that the certificates were negotiable and passed by delivery, yet this does not relieve the difficulty. That they therefore came into possession of Blevins as his own property is a non sequitur, and the assumption that they did so is met by the fact that he pledged them expressly in his capacity as city treasurer. Besides this, the certificates did not pass to the bank by delivery alone, but by delivery under the written agreement contained in the note. The delivery followed and took on the character of the agreement.

"Nor can it be said, we think, that the bank was an innocent purchaser, without notice that the certificates did not belong to Blevins in his own right. The bank was not dealing with John Blevins, the individual, but with him as city treasurer, assuming to act for the city and in its name. In that way, and in no other, he sought, not only to impose the liability, but also to pledge the security. The officers of the bank made no inquiry as to the ownership of the security, or as to the authority of the treasurer to pledge it, although the very form and nature of the transaction were sufficient to put them on their inquiry. Having failed to do so, we think they cannot be heard to say that they believed themselves to have been dealing with him in any other character than that which he was expressly holding out at the time.

"In view of these considerations we deemed it the duty of the court to say to the jury that they not only could, but should, infer that Blevins held the certificates and turned them over to the bank in his capacity as city treasurer, unless there was evidence that, notwithstanding the form of the transaction, they were his own property, paid for with his own money, and the jury were instructed to this effect. The suggested inference seemed a necessary one from the nature of the transaction, and we think there was no evidence in the case sufficient to negative or turn it aside. The only thing, seemingly, relied upon by the plaintiffs with this end in view was the possession of the certificates by Blevins. But, as already said, in the absence of any indorsement to him, the character in which he held them was evidenced alone by the character in which he disposed of them.

"At the trial the court was asked by plaintiff's counsel to strike out the testimony of the defendant's witnesses, who were the

original holders of the certificates, as to their payment. These witnesses testified that they went to the city treasurer's office and received payment directly at the hand of Blevins, the city treasurer, and without any warrant. They also testified that he went to a vault or safe, brought out a small box, and took from it the money with which payment was made. There was also testimony on the part of other witnesses tending to show that this was the place in which he kept the city funds. This testimony tended to corroborate and strengthen the presumption growing out of the transaction itself that the certificates had been in fact paid out of city funds. And whilst it is true that the bank, so far as the evidence goes, did not have actual knowledge of these things, yet the fact that they were dealing with the city treasurer was sufficient to have put them on their inquiry as to whether he owned the securities in his own right, and, if not, then whether all the precedent steps necessary to support his authority as city treasurer in negotiating them had been taken. We are not convinced that there was error in receiving or refusing to strike out the testimony of these witnesses.

"The same thing may be said, we think, of the evidence tending to show that at and for a considerable time before the transaction in question Blevins, as city treasurer, was paying out of the city treasury large numbers of certificates of indebtedness direct to the holders, without first requiring a warrant from the city controller. That these were paid out of city funds is evidenced from the fact that it was his custom, after having made payment, to obtain warrants, payable to himself as city treasurer, for the certificates so paid by him. These seemed so numerous that it might almost be said to have been the custom of his office at that time.

The extent to which and the time during which this was carried on tended to corroborate the defendant's contention, based on the nature of the transaction itself and on the fact of direct payment made to the holders of the certificates in suit, that these had been in fact paid for out of the city funds. The fact that no warrants appear to have been turned in for these particular certificates makes it evident that after payment by the treasurer they were retained by him until delivered to the bank. The objection that the bank had no knowledge of the manner of doing business in the treasurer's office is answered by the fact that in dealing with the city treasurer, who was assuming to act for the city, the duty of inquiry, not only as to his authority, but as to all the material matters entering into the transaction, became imperative; and notice must be assumed of all those things which inquiry would have discovered, including the manner in which he came into possession of the certificates, and whose they were.

"It is unnecessary to cite any authority,

other than the decision of the Supreme Court in the former suit between the same parties, to sustain the position that, if the certificates in question were the city property, Blevins had no authority, as city treasurer, to pledge them in any event, much less as security for an illegal contract.

"Under the undisputed evidence in the case, we think no other verdict could be sustained than that which was rendered by the jury. In fact, if the note which contained the contract of the parties, and which showed the nature of the transaction, had been placed in evidence by the plaintiff, without further evidence than was produced upon the trial on part of plaintiff, but embracing it all, we think it would have been the duty of the court to enter a compulsory nonsuit. But as the note did not appear in evidence until offered by the defendant, it was necessary to dispose of the case by verdict. If, however, the note itself was such as to necessarily defeat the plaintiff's claim, the question of the admission of other evidence complained about becomes unimportant, and, even if erroneous, as we think it was not, it was nevertheless harmless.

"For these reasons, the motion for new trial is overruled, as is also the motion for judgment non obstante veredicto."

Argued before FELL, C. J., and BROWN, POTTER, STEWART, and MOSCHZISKER, JJ.

C. H. Akens, of Akens, and Wilkison, Lockhart & Chambers and B. A. Winternitz, all of New Castle, for appellant. James A. Gardner, City Sol., and Robert K. Aiken, both of New Castle, for appellee.

BROWN, J. On September 19, 1898, John Blevins, now deceased, was treasurer of the city of New Castle. On that day he negotiated a loan, in the name of the city, from the First National Bank of New Castle, where he kept his account as city treasurer. The amount of the loan was \$5,431.49, and he executed and delivered to the bank a note, of which the following is the material part: "New Castle, Pa., Sept. 19, 1898. \$5,431.49. Four months after date, for value received, I hereby promise to pay to the First National Bank of New Castle, Penn'a, or order, at said bank fifty-four hundred thirty-one & 49/100 dollars, with interest at the rate of 6 per cent. per annum after due, having deposited with said bank as collateral security for the payment of this note, and also as collateral security for all other present or future demands of any and all kinds of the said bank against the undersigned due or not due, or that may be hereafter contracted, including any indorsement made or that in future may be made by me, the following

property, viz.: Sundries cert's of indebtedness of city of New Castle, Pa., for \$5,431.49, and interest." The obligation was signed, "City of New Castle, John Blevins, Treasurer." This contract or loan was made without the knowledge of the city, and without any authority from it; but the bank, after the death of Blevins, who was a defaulter, brought suit against it for money advanced to it, and there was a recovery in the court below. On appeal by the city the judgment against it was reversed, for reasons to be found in the opinion of this court in *First National Bank v. New Castle*, 224 Pa. 287, 73 Atl. 331, 132 Am. St. Rep. 779. Subsequently this action was instituted by the bank on the certificates of indebtedness which had been pledged by Blevins as collateral security for the note.

These certificates had been issued by the city for municipal improvements, and were indorsed in blank by the original holders. In this form they were delivered by Blevins, as city treasurer, to the bank. Nothing on the face of the note made by him as city treasurer indicated that the collateral which he thus pledged was his individual property, and the bank, in taking the certificates from him in pursuance of the writing, is presumed to have known, as the learned trial judge correctly held, that they were the property of the city; for he undertook to pledge them as its treasurer, but without any authority whatever from it to do so. On the trial these certificates were offered in evidence by the plaintiff without the accompanying note, which showed how they had been pledged. If the whole transaction had appeared in the presentation of plaintiff's case by the production of the note, the defendant's motion for a nonsuit could not have been denied; for nothing was developed by the plaintiff to rebut the presumption of ownership appearing from the note itself.

The contention of the appellant as to the negotiability of the certificates is immaterial, in view of the notice of ownership in them appearing from the note, which the city, in its defense, offered in evidence. At the close of the testimony binding instructions for the return of a verdict in favor of the defendant would have been proper; for nothing shown by the plaintiff in rebuttal repelled the presumption of its knowledge of the ownership of the certificates.

The reasons why all of the assignments of error should be overruled are so forcibly stated in the well-considered opinion of the learned trial judge, refusing a new trial and judgment for the plaintiff non obstante veredicto, that we cannot profitably add anything to it.

On that opinion let the judgment be affirmed. It is so ordered.

COMMONWEALTH ex rel. PALMER v. SAMUEL.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. MUNICIPAL CORPORATIONS (§ 149*)—OFFICERS—TERM OF OFFICE—ASSESSORS.

In a city of the third class, the term of office of an assessor, chosen at the February election in 1910, ends on the first Monday in December, 1911, under the schedule of constitutional amendments adopted in 1909; and a vacancy is created to be filled at the municipal election in November, 1911.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 327-332; Dec. Dig. § 149.*]

2. MUNICIPAL CORPORATIONS (§ 49*)—OFFICERS—"ASSESSORS."

The word "assessors," in the constitutional amendment of 1909 (P. L. 954), relating to the term of office of certain officers, is not confined to election assessors, but includes city or property assessors.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 134-137; Dec. Dig. § 49.*]

For other definitions, see *Words and Phrases*, vol. 1, p. 556.]

Appeal from Court of Common Pleas, Lawrence County.

Quo warranto by the Commonwealth on the relation of Harvey L. Palmer against David Samuel to try title to office. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, POTTER, STEWART, and MOSCHZISKER, JJ.

C. H. Akens, of New Castle, for appellant. Robert K. Aiken and George T. Weingartner, both of New Castle, for appellee.

MOSCHZISKER, J. The appellant correctly states the question involved: "Does the term of office of an assessor in a city of the third class, chosen at the February election in 1910, end on the first Monday of December, 1911, under the schedule for the amendments to the Constitution adopted in 1909, so as to create a vacancy in the office to be filled at the municipal election in November, 1911, or does his term run to the first Monday of December, 1913?" The relator was elected property assessor in the city of New Castle on the third Tuesday of February, 1910, and claims that his term does not expire until 1913. The respondent was elected to the same office at the municipal election in November, 1911.

The schedule to the constitutional amendments of 1909 (P. L. 954) provides, *inter alia*, "In the case of officers elected by the people, all terms of office fixed by acts of assembly at an odd number of years shall each be lengthened one year," and, "In the year one thousand nine hundred and ten the municipal election shall be held on the third Tuesday of February, as heretofore; but all officers chosen at that election to an office the

regular term of which is two years, and also all election officers and assessors chosen at that election, shall serve until the first Monday of December in the year one thousand nine hundred and eleven. All officers chosen at that election to offices the term of which is now four years, or is made four years by the operation of these amendments or this schedule, shall serve until the first Monday of December in the year one thousand nine hundred and thirteen."

The relator contends that the word "assessors" contained in the schedule must be limited and construed to mean "election or assistant assessors"; further that his term was "fixed by act of assembly at an odd number of years"; that it was "lengthened one year" by the schedule; that he was an officer "chosen at the February election in 1910 to an office the term of which was made four years by the operation of the amendments of this schedule"; and that he is therefore entitled to "serve until the first Monday of December, 1913"; while the respondent contends that the word "assessors" included not only "election or assistant assessors," but also "city or property assessors," and that the term of the relator was thereby limited to expire on the first Monday of December, 1911.

[1, 2] In disposing of these contentions, the learned court below states: "We are of opinion the people meant just what they plainly said regarding assessors elected in February, 1910; that 'assessors chosen at that election shall serve until the first Monday of December in the year 1911.' They did not attempt to limit the word so as to mean a particular kind of assessor, but said all assessors elected in February, 1910, shall serve until the first Monday of December, 1911. And in the language of *Etter v. McAfee*, 229 Pa. 315, 78 Atl. 275, we may say: 'It is not for the courts to say that the people did not mean what is so plainly said in the amendment to the Constitution, which by their votes was adopted in 1909.' In order to sustain the claims of the relator, it is necessary to read into the schedule for the amendments to the Constitution some limiting or qualifying word so as to make the word 'assessor' mean some particular kind of assessor; and this we decline to do. We are of opinion that the relator's term of office expired on the first Monday of December, 1911, and the respondent rightfully holds the office of city assessor." The conclusion reached by the court below is in accord with the trend of our decisions. No other parts of the constitutional amendments or the schedule thereto throw any light upon the use of the word "assessors," in the part of the schedule under consideration, which would justify a court in qualifying it by the word "election," and thus limit its meaning. "In construing * * * the Constitution we are not at liberty * * * to supply words

omitted, in order to work out a thought which the people themselves had the opportunity to give expression to, had they so desired." *Commonwealth v. McAfee*, 232 Pa. 36, 49, 81 Atl. 85, 89. While it is true that the schedule provides that all officers chosen to offices at the February election of 1910, the term of which "is made four years by the operation of this amendment or this schedule," shall serve until 1913, yet this provision follows immediately after the prior one, especially concerning "assessors." Under these circumstances, both reason and the applicable rules of construction dictate that the specific provisions as to assessors must control such offices, and the general provision shall apply to other offices not otherwise specifically provided for.

We are not convinced that error was committed by the learned court below in determining this case. The assignment is overruled, and the judgment is affirmed at the cost of the appellant.

MCCUNE v. PITTSBURGH & BALTIMORE COAL CO.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. WATERS AND WATER COURSES (§ 67*)—POLLUTION OF STREAM—LIABILITY IN DAMAGES.

Where mine water is diverted from its natural course by one operating a coal mine on his own land, and is discharged into a stream of pure water, which, by reason of its higher elevation, does not form the natural drainage of the mine, the landowner is liable in damages.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 58; Dec. Dig. § 67.*]

2. WATERS AND WATER COURSES (§ 75*) — POLLUTION OF STREAM—INJUNCTION.

In an action for diverting mine water from its natural outlet and discharging it into a stream of pure water not forming the natural drainage of the mine, unless it is clearly shown that it is impracticable to discharge the water in any other way, or that the expense would substantially deprive the mineowner of the use of his property, further pollution of the stream will be enjoined.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 66; Dec. Dig. § 75.*]

Appeal from Court of Common Pleas, Westmoreland County.

Bill by James McCune against the Pittsburgh & Baltimore Coal Company. Decree for plaintiff, and defendant appeals. Affirmed.

Doty, P. J., filed the following opinion in the court of common pleas:

"Findings of Fact.

"(1) The plaintiff is the owner of a tract of land in Hempfield township, containing about 150 acres, which has been used for farming purposes, and which has thereon

erected farm buildings. The coal underlying said tract of land, at a depth of 15 feet, is now owned by the Keystone Coal Company, some of which coal has been mined and carried away.

"(2) Prior to June, 1908, there flowed a stream of pure water through the said tract of land, which stream was used for ordinary agricultural purposes, and which furnished the only supply of water to the farm, except what was obtained from a well at the barn and a spring at the house.

"(3) That the defendant corporation is the owner of a large tract of coal underlying lands in the same township of Hempfield and for some years has been mining and removing said coal from two mines, known as Edna No. 1 and Edna No. 2, which two mines are not connected in any way through the seam of coal. The entry to No. 1 is by means of a drift, and the operation to No. 2 is by means of a shaft. The main entry of Edna No. 1 extends in the direction of Edna No. 2, and at the time the testimony was taken had reached a point about 1,500 feet from the mining operations in No. 2.

"(4) The mine water of Edna No. 1 is not discharged at the opening of said mine, but naturally follows the entry, and, if not arrested, would flow by force of gravity to the terminus of the entry, even if projected into the workings of Edna No. 2. Prior to 1908 the water from Edna No. 1 was pumped to the surface of the Croushore farm from a point in the entry about 1,600 feet from its opening, and the water thus brought to the surface went into a stream which does not flow through plaintiff's land. In June, 1908, after said entry had been further projected the defendant made a bore hole about 300 feet deep on the Gongaware farm, and at the bottom of the bore hole dug a 'sump' into which was collected by gravity, and from the advanced workings by pumps, all the mine water of Edna No. 1, which water since that time has been pumped to the surface and discharged into a tributary of the stream which flows through plaintiff's land.

"(5) That before the water of the mine was assembled and discharged as already found, the water of the stream running through plaintiff's land was ordinarily pure and fit for farm use, and contained nothing injurious to plant life. The water of the stream, after mixing with said mine water, is unfit for domestic or farm use and destructive of vegetation.

"(6) That the defendant has secured the right to sink the bore hole and to discharge the mine water on the Gongaware surface, and when the water is thus discharged it flows naturally into the stream running through plaintiff's land.

"(7) That the bore hole on the Gongaware farm is not the natural outlet for the mine water of Edna No. 1; that the sump is not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

at the lowest point in defendant's tract of coal; that the water is lifted 300 feet from the sump to the surface; that the stream into which the water is forced is over 200 feet higher than the coal under the bore hole; and that it is practicable to carry on the operations in defendant's mines without diverting the natural flow of the mine water to the substantial injury to the plaintiff.

"Conclusions of Law.

[1] "(1) One operating a coal mine on his own land is liable in damages, where it appears that the mine water is diverted from its natural outlet and by artificial means raised to the surface and discharged into a stream of pure water, which, by reason of its higher elevation, does not form the natural drainage of the mine.

[2] "(2) That under such circumstances, unless it be clearly shown that the natural conditions make it impracticable to discharge the water in any other way, or that the expense of so doing would be so great as to substantially deprive the owner of the mine of the use of his property, an action can be maintained, and an injunction will lie to prevent the further pollution of such stream.

"(3) That as the evidence fails to show that it is impracticable otherwise to discharge the mine water, or that the expense of so doing would deprive the defendant of the use of its own property, the plaintiff is entitled to the injunction prayed for.

"Discussion.

"There has been no undue haste in this matter. The bill of complaint was filed July 23, 1908; the testimony was taken in March, 1909; the matter was argued one year later in March, 1910; and the papers, with briefs of counsel, were not presented to the court until October, 1911. The long delay was partly due to an impression that the parties themselves might be able to adjust the matters involved, without requiring an adjudication by the court. But no agreement has been reached, and the court is asked to determine the matter.

"The testimony is voluminous, but when carefully examined there will be found few material facts in dispute. The facts deemed essential appear in the findings of fact, supra, and in addition answers have been given to numerous requests for findings of fact on behalf of both parties. The situation is about this: The parties own adjoining properties; the defendant a large tract of coal; the plaintiff the surface of a farm of about 150 acres. The defendant for six or seven years has been mining and removing coal by means of two operations which have no physical connection, and which are known as Edna No. 1, a drift mine, and Edna No. 2, a shaft mine. The mine water from Edna No. 1, although a drift mine, is not discharged at the mouth of the entry. Prior

to 1908 the mine water was collected in a sump and pumped to the surface of the Gongaware farm, and thus discharged into a different watershed from that in which the plaintiff's farm is situate. That after 1908 the mine water from Edna No. 1 was assembled by gravity and by means of pumps from the advanced workings in a sump at the bottom of a bore hole and pumped to the surface of the Gongaware farm, and the water thus discharged flows naturally into a tributary of a stream which runs through plaintiff's farm. That the water at the Gongaware bore hole is lifted 300 feet from the sump to the surface, and thus finds its way into the stream through plaintiff's farm, which stream is about 200 feet higher than the coal at the bottom of the bore hole, and by reason of such discharge of mine water the said stream is rendered about useless for domestic or farm purposes.

"Thus far there is substantial agreement. But at this point the trouble begins, because the parties radically differ as to two important propositions of fact. The plaintiff insists and asks us to find, in the fourteenth request, that 'there is an entirely feasible and practicable method of treating the so-called mine water, whereby the hurtful ingredients thereof may be neutralized.'

"On the other hand, the defendant, in the seventh request, asks the court to find 'that there is no evidence in this case that a practical and reliable system for that purpose could be devised or made available for the removal of the deleterious ingredients in the water of this mine.' Such contention gives rise to one of the difficult problems in the case. Each side is satisfied with calling a single witness on this proposition. The two differ in their statements of fact and in the deductions which they make. It does not appear that the cost of erecting a treatment plant is unreasonable. The witnesses do not differ widely as to the cost of the plant. But there is a wide difference in their estimates of the cost of operation. Taking the testimony of Alex Potter, the cost of maintaining the plant would not impose an undue burden on the defendant. On the other hand, H. F. Newman estimates that it would cost over \$200 per day to operate a treatment plant which would remove the hurtful ingredients from the water. Both witnesses are well qualified, but, like doctors and other experts, radically differ in their opinions. It is true that the burden is fairly on the defendant, not to show that it is impracticable to free the mine water from injurious properties, but to demonstrate with reasonable satisfaction that it is not practicable to mine its coal so as to avoid the injury of which plaintiff complains. A careful examination of the testimony shows that the witness for plaintiff does not take into consideration all the items of expense; and it would appear, therefore, that he has underestimated the cost. It would seem also, on the other hand,

that the cost of operation is somewhat exaggerated.

"The evidence is not clear and satisfactory as to whether a treatment plant would be practicable. It is shown, however, that no such plant is in actual operation at any coal mine. If required here, it would be the first and only one of its kind. To impose such a burden in view of the evidence submitted would seem to be unreasonable. The sulphur and other injurious ingredients can readily be removed from the mine water. There is an exact formula for the purpose. Treatment plants are very common in the western part of the state. On the Yough river and elsewhere such plants are erected by municipalities, manufacturing establishments, and railroad companies, in order to render river water fit for use in boilers and for domestic purposes. It does seem strange that such operations are feasible in the public works and impracticable at the mines. And it also seems to be a strange condition that allows the mine owners to pollute the streams and imposes the burden of purifying the water upon those who from necessity must use it for industrial and domestic purposes. Such condition is not likely to continue, unless it be demonstrated that the necessity of protecting a great industry absolutely requires it. It is possible that by legislation or by complaint on the part of the commonwealth, as in *Commonwealth v. Russell*, 172 Pa. 506, 33 Atl. 709, the rule will be declared that for the public welfare the streams of the state must be saved from pollution.

"But on account of the unsatisfactory evidence, as already pointed out, this court does not feel justified in requiring the defendant to install a treatment plant, and thereby impose on it a burden which is not borne by any other coal company. An effort was made by way of cross-examination to show the profit to defendant in its operation at Edna Nos. 1 and 2. Such inquiry, after objection, was not permitted. Nor would it be helpful to know the profit on a ton of coal. The cost of production and the selling price constantly vary. It is in evidence that the margin of profit is small, and that the coal produced is in competition with coal from other mines in the region. Even taking the lowest estimate of the cost of treatment, the defendant company would be placed at an immense disadvantage with competitors who are not required to install a treatment plant.

[2] "The parties also differ as to whether it is practicable to drain the mine in a way to avoid injury to plaintiff's land. The evidence does show that it was necessary to make some change about 1908 in the pumping system; that the method in use was inadequate to relieve the mine from water; that the mine inspector directed the removal of the pipes from the entries; that a change

was necessary and urgent, in order to keep the mine in operation and give the men steady employment; that at the time of the location of the sump and pumps at the bore hole on the Gongaware farm that point was found suitable for the purpose; and that since such change the mining operations have not been interrupted by the accumulation of water.

"But as to the proposition whether it is practicable to otherwise drain the mine, the evidence is neither clear nor convincing. As the burden is on the defendant, it should show with reasonable clearness that its mine cannot be properly operated without injury to the plaintiff's land. All agree that the mine must be relieved of water if the coal operation is to be continued. Unless there be some sufficient reason, the water should be taken out at the natural outlet. There is no satisfactory evidence to show that it would be more dangerous or more expensive to the discharge the water of this mine. On the question as to whether it would be practicable to pump the water at some point which would do no injury to plaintiff, we have the testimony of two witnesses only. These witnesses testify that it would be impracticable to so drain the mine, but the reasons assigned do not clearly justify the opinion they express. It is alleged that the connection of the two operations would drown out Edna No. 2; that No. 2 has all the water it can handle; that No. 2 would have to handle the water just the same as No. 1; that it would take a large pumping establishment; and that it is a question whether any right to go through there, as far as the safety of the property goes, as well as the safety of the employes. When the defendant undertakes to divert the natural flow of water and to cast it upon higher ground, to the injury of another, it should make it clear that the physical conditions in the mine make it dangerous or impracticable to do otherwise. The testimony does not establish either proposition.

"The questions of fact which have been under discussion seem important, and yet perhaps, as the law stands, it may not be essential to determine whether it is practicable to otherwise drain the mine, or not; whether it is feasible to free the water of injurious ingredients. The facts have been determined, however, as the evidence seems to justify. The other facts involved are not in dispute. The water is assembled in the mine at a point which is much lower than the surface of plaintiff's land. Some of the water is thus collected by means of pumps, and if not interfered with, its natural flow would not in any way injure the plaintiff's property.

[1] "Under the facts in this case and under the authorities as we understand them, our duty seems to be a plain one. Unless

this case be clearly an exception, the maxim, 'Sic utere tuo ut alienum non lædas,' aptly called the 'Golden Rule,' applied to business transactions, must apply and control. And this principle, as all the authorities declare, always applies whenever, in the use of one's own property, any substantial and avoidable injury is done to the property of another. It does not apply, of course, where, in the natural and reasonable use of one's own property, some trifling inconvenience or annoyance results to another. The principle there is: 'Qui jure suo utitur neminem lædit.' Examples of the application of the latter principle are found in *Harvey v. Coal Co.*, 201 Pa. 63, 50 Atl. 770, 88 Am. St. Rep. 800, and other cases along that line.

"The injury here is substantial. It is idle to talk about it as a trifling annoyance or mere inconvenience. The stream through plaintiff's farm is rendered useless for farm purposes, and it is shown in the testimony that the discharge of the mine water is destructive of vegetation. The pollution of the only stream of pure water running through the farm is a serious and substantial injury.

"It is earnestly contended, however, that such injury is *damnum absque injuria*, and such contention is based on *Penna. Coal Co. v. Sanderson*, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445. This case has been much discussed and at times apparently misunderstood. The essential facts are that the coal company in mining its coal caused the mine water to flow into a brook, and thereby worked injury to a lower riparian owner; that the brook was the natural outlet for the water of the mine; that the water for several years had been discharged by gravity; that afterwards a shaft was sunk, and the water was pumped to the surface and discharged into the same stream, which had already been polluted. It was emphasized in the opinion of the court that there could be no responsibility in damages for the water which, by mere force of gravity, ran out of the drifts and found its way into Meadow brook. And as to the water which was pumped it was said: "The pollution of a clear stream might inflict an injury for which damages would be reasonable, but we cannot see how damage could be estimated for the pollution of a stream which had already become foul from other causes for which the law gave no remedy." All that the case decides, therefore, is that an owner of coal lands can mine his coal in the usual and ordinary way, and in such operation allow the water as it comes from the mine to flow naturally into a stream of pure water, without liability to a lower riparian owner for the pollution of the stream; and that such operator can in a shaft operation pump mine water to the surface and allow it to seek its natural outlet, without liability for damage, if the water of the stream be al-

ready polluted. That this is the extent to which the exception to the general rule has been carried in the *Sanderson* Case is repeatedly declared by the Supreme Court in subsequent cases. Thus, in *Robertson v. Coal Co.*, 172 Pa. 566, 572, 33 Atl. 706, it is said: "The question presented in that case was whether, as between owners of land lying along a stream, the owner of the upper tract may open mines upon his land, when the drainage therefrom must necessarily pollute the stream and render it unfit for use by the lower owner. * * * If, notwithstanding the exercise of reasonable care and precaution, injury was unavoidable, such injury would not sustain an action for damages. Within the lines thus stated *Coal Co. v. Sanderson* is an authority. * * * This court is, however, not disposed at present to modify the rule of the *Sanderson* Case as it is stated above." Then in *Hindson v. Markle*, 171 Pa. 138, 144, 33 Atl. 74, 75, this language is found: "That was the mere flowage of natural water which was discharged by natural and irresistible forces, necessarily developed in the act of mining prosecuted in a perfectly lawful manner." And in the opinion of the court in the case of *Sullivan v. Steel Co.*, 208 Pa. 540, 549, 57 Atl. 1065, 1068 (66 L. R. A. 712), it is said: "The changed conditions brought about by the appellee have not resulted from the development and natural use and enjoyment of its own property, as was the situation in *Penna. Coal Co. v. Sanderson*, 113 Pa. 126 [6 Atl. 453, 57 Am. Rep. 445], the doctrine of which case has never been and never ought to be extended beyond the limitations put upon it by its own facts."

"The whole question then is whether the *Sanderson* Case controls here. As that case introduces an 'extreme exception to the general rule' (Porter, J., in *Commonwealth v. Emmers*, 33 Pa. Super. Ct. 151, 158), it should have no application, unless the case in hand presents the same conditions, and especially so when we are admonished that the doctrine of that case never ought to be extended beyond the limitations put upon it by its own facts. The cases are alike in one particular. Here the mine water is pumped to the surface. In the *Sanderson* Case, at the time of complaint, the water was likewise lifted by pumps. But in other essential particulars the cases are unlike. In one case the stream was already polluted without fault of the coal company, and that fact was deemed important, as in the opinion we find: 'If the stream was already corrupted by the water which flowed from the tunnels, or if that water was sufficient of itself to corrupt it, so as to render it useless for domestic purposes, the water which was pumped, as an independent cause of action, would occasion an injury without damage.' The real, substantial injury there was occasioned

by the natural flow of the water from the mine. And the court said that: 'It is clear that for the consequences of this flow, which, by the mere force of gravity, naturally, and without any fault of the defendants, carried the water into the brook and thence to the plaintiff's pond, there could be no responsibility in damages on the part of the defendants.' It is plain, therefore, that the two cases are radically different. The stream through plaintiff's farm was undefiled prior to 1908. The mine water, which has rendered it unfit for domestic use, does not flow naturally and by mere force of gravity from the mine; but said water is assembled partly by means of pumps not at the lowest point in defendant's seam of coal, and then elevated 300 feet to a point on the surface, from which it finds its way to the stream on plaintiff's land 150 feet higher than the seam of coal.

"If the doctrine of the Sanderson Case is not to be extended, as we are admonished by the Supreme Court, it is clear that we have no right to give it application here. The cases are unlike in nearly every essential particular. If the remedy sought is to be denied, this court must go far beyond the Sanderson Case and hold that a mine owner can divert the natural flow of the water in the mine, raise it artificially to the surface, and thereby destroy a pure stream of water on higher ground. The principle involved is of far-reaching consequence. The exception introduced in the Sanderson Case has resulted in the pollution of nearly every stream in the western end of the state, and it has become a serious problem how to obtain pure water sufficient to supply the inhabitants. In *Robertson v. Coal Co.*, 172 Pa. 566, 572, 33 Atl. 706, there was almost a suggestion that at some future time the rule of the Sanderson Case would be modified as it was emphasized that at that time the court was not disposed to modify the rule. It is intimated, however, in *Commonwealth v. Emmers*, 227 U. S. —, 33 Sup. Ct. 151, 57 L. Ed. —, and declared in *Commonwealth v. Russell*, 172 Pa. 506, 33 Atl. 709, that the Sanderson Case does not control where public rights are involved.

"The case in hand concerns only individual rights, and if clearly within the Sanderson Case the plain duty would be to dismiss the bill. But, as already shown, the conditions are not identical, and the exception to the general rule is not to be extended. A prima facie case would have been made out for plaintiff by showing that a stream of pure water flowing through his land was polluted by the action of defendant in pumping mine water from a lower level. Under such circumstances an action would lie under the maxim *sic utere*. The burden then undoubtedly would be on defendant to show that the natural use of his property made such

injury unavoidable. The case did not proceed exactly along such lines; but no matter how it proceeded, the burden remains on the defendant to show that the injury was not to be avoided by reasonable care and expenditure. And fortunately we are not without a rule in the matter, as in *Pfeiffer v. Brown*, 165 Pa. 267, 30 Atl. 844, 44 Am. S. Rep. 660, it is declared that if damage can be prevented short of expense which would be a substantial deprivation of the use of one's own property it is an *injuria* which will sustain an action. The injury complained of here could be prevented in one of three ways: First, by an opening at a lower level, which would furnish a natural drainage for the mine. There was no attempt to show that this was impracticable, or that it would impose an unreasonable expenditure. All that we have on this proposition is the suggestion of counsel 'that the place of the development of a coal property is controlled by the conditions upon the surface, the convenient location of a railroad, the ownership of surface lands by the companies or individuals engaged in developing the coal, and other causes may also contribute; and it is no doubt true that in opening this mine the defendant considered all of the conditions apparent at that time, and adopted the location for the opening for the removal of the coal which was best adapted for that purpose. Even if it were established by testimony that the location adopted for the opening was best adapted for that purpose, it would seem to fall short of the rule declared in *Pfeiffer v. Brown*, supra, and would fail to lift the burden which rests on the defendant.

"The remaining methods of preventing injury would be by adopting a different drainage for the mine water, or by purification after the water is brought to the surface at the Gongaware bore hole. As to the latter methods and the contentions thereon, sufficient has been said already.

"The defendant has failed to establish that the injury was unavoidable, or to prevent it would necessitate such expense as would deprive it of the use of its property. There was no attempt to show that an opening which would afford natural drainage for the mine water was impracticable, and the evidence fails to show that the water of Edna No. 1 cannot be discharged otherwise than to the injury of plaintiff. 'The extreme exception to the general rule,' which was introduced in the Sanderson Case, does not control, because, as already pointed out, the conditions as presented in the two cases are unlike. The undoubted tendency of later cases is to limit rather than extend the principle of that case. It follows, therefore, that the general rule must apply, and that the defendant must use its own property so as to avoid injury to the plaintiff.

"The real difficulty in the case is presented

at this point. The prayer of the bill is that the defendant 'be enjoined from pumping and discharging the waters from its mines into the said stream.' If such injunction were to take effect presently, the result would be disastrous. The loss to the defendant would be out of all proportion to the injury of which the plaintiff complains. The plaintiff's injury is substantial, as we have seen. But if the pumping is to cease at once the mine will be flooded, and it would be hard to estimate the damage which would be inflicted on defendant. In equity, a decree is of grace, not of right, and it is not granted when greater injury is inflicted than by leaving the party to seek redress in a court of law. But here it is clear that defendant, without legal excuse, is, in the use of its own property, doing substantial and continuous injury to the property of plaintiff. A single action of trespass would not redress the injury. Repeated actions would likewise become oppressive and bring about the same result as a decree in this court. The case, however, as stated at the outset, has proceeded leisurely. The parties, for some reason, have not been impatient for a determination of the matter. There seems, therefore, to be no occasion for a decree, such as is prayed for, to take effect immediately, and having regard for the rights of both parties such decree should not be made. It seems clear, however, that defendant, under the circumstances, has no right to pollute the stream which flows through plaintiff's farm; and, without right in the matter, it must cease within a reasonable time to discharge the water of its mine into the said stream. It is not easy to determine what is a reasonable time, as no evidence has been introduced on this subject; but, unless further advised, it would seem that six months would be a sufficient time to enable defendant to arrange for some other disposition of the mine water. And, so far as the plaintiff is concerned, it must be immaterial whether the hurtful ingredients be taken from the water, so as to cause no injury to vegetation, or whether the water be discharged in either one of the two ways suggested."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

James S. Moorehead and Robert W. Smith, both of Hollidaysburg, for appellant. Charles E. Whitten, Paul H. Gaither, A. C. Snively, and W. S. Byers, all of Greensburg, for appellee.

PER CURIAM. We concur in the conclusion reached by the learned judge of the common pleas, and affirm the decree entered. The period of six months allowed the defendant by the decree, within which it is required to cease to pollute the stream, will commence on the filing of this opinion.

THOMPSON v. CRAFT.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. CONTRACTS (§ 152*)—CONSTRUCTION—GENERAL RULES.

In construing a contract, a word will not be given a different meaning from what it fairly and ordinarily imports, unless there is something to show that the word was used in an unusual sense.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 732, 733, 738; Dec. Dig. § 152.*]

2. CONTRACTS (§ 153*)—CONSTRUCTION—GENERAL RULES.

A word not plainly inserted by mistake or accident in a contract is never to be thrown out entirely, while there is a plain and natural construction that can be given to it, not manifestly destructive of the general intent of the sentence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. § 153.*]

3. MINES AND MINERALS (§ 55*)—CONTRACTS — SALE OF MINERALS IN LAND — "ABSOLUTE."

Where an option to purchase coal underlying land provides that it shall be void if the vendor's wife refuses to sign the deed, and an assignee of the option indorses his acceptance thereon, whereupon the vendor makes an indorsement accepting notice of the acceptance of the option and stating that the contract of sale is made absolute, and the receipt of \$10 from the assignee on account of the purchase money is acknowledged, the term "absolute" indicates a contract in direct contradistinction to that created by the option, and free from the condition there imposed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

For other definitions, see Words and Phrases, vol. 1, p. 83; vol. 8, p. 7560.]

4. CONTRACTS (§ 245*)—DISCHARGE—SUBSEQUENT AGREEMENT.

Where the terms of a contract are inconsistent with those of a former contract between the same parties, relating to the same subject-matter, so that they cannot subsist together, the later contract discharges the former.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1129, 1130; Dec. Dig. § 245.*]

Appeal from Court of Common Pleas, Greene County.

Bill in equity by Josiah V. Thompson against John S. Craft, administrator of B. L. Craft, for specific performance. From a decree dismissing the bill, plaintiff appeals. Reversed, with directions.

Holt, P. J., specially presiding, found the facts to be as follows:

"Findings of Fact.

"First. That on the 22d day of March, 1904, and for several years prior thereto, B. L. Craft was the owner and in possession of a certain tract of land situate in Jefferson township, Greene county, Pa., bounded by the lands of Jacob Haver and others, containing 155 acres and 61 perches.

"Second. That on the 22d day of March, 1904, the defendant entered into a contract in writing with one W. F. Flenniken for the

sale and conveyance unto the said Flenniken, his heirs and assigns, of all the nine-foot or river vein of coal in and under the said tract of land, with the right to mine and remove all and every part of the same, together with certain other mining privileges specifically mentioned in the said contract, at and for the price or sum of \$100 per acre, payable as follows: One-third of the purchase money at the time of making and delivery of the deed for said land, and the balance in two equal annual payments from the date of the said deed, with interest at the rate of 5 per cent. per annum on the deferred payments, to be secured by a mortgage upon the premises; the said article of agreement containing a covenant that, 'in case Mrs. Craft (who was the wife of the said B. L. Craft) refuses to sign deed, this option shall be null and void'; also a covenant as follows: 'It is expressly understood and agreed that, if the first payment aforesaid is not made on the 2d day of April, A. D. 1904, or within five days thereafter, this agreement shall be considered as rescinded, and neither party shall be bound thereby.'

"Third. That, while the said instrument of writing is in form a contract for the sale of the aforesaid coal and mining rights, the parties to the instrument and J. V. Thompson, the assignee of the interest of the said Flenniken in said contract, treated the same as an option for the purchase of the said coal, mining privileges, etc.

"Fourth. That on the 17th day of December, 1904, the said B. L. Craft extended the aforesaid agreement or option to purchase said coal and mining rights, in writing, on the back of said contract or option, as follows:

"I hereby renew and extend the foregoing option to January 15, 1905. Witness my hand and seal this 17th day of Dec. 1904. [Signed] B. L. Craft."

"Fifth. That prior to January 15, 1905, and during the time the said agreement of March 22, 1904, was a valid and subsisting contract between W. F. Flenniken and the said B. L. Craft, the said Flenniken called upon the plaintiff and offered to sell the coal, mining rights, etc., described in said agreement to the said Thompson; but no agreement of purchase and sale was then consummated.

"Sixth. That the said B. L. Craft, on or about February 4, 1905, after the first extension of said option or contract had expired, being still the owner in fee and in possession of the said lands, addressed a letter to the plaintiff and delivered the same to the said Flenniken, who, in turn, delivered the same, together with an abstract of title of the said lands of the defendant, to the plaintiff; the following being a copy of the said letter:

"J. V. Tomson—Sir: Sende you the abstract for you to examon if it all rite you can have the cole at the prise and turns that Mr. Flanigan shoed to you if your not sades-

fide with it you can returne it to me in 10 days also if you except it I want it to be a copy from. B. L. Craft.

"P. S.—the note of the Barnes survey comes so neere the other survases you will have to take it as the abstract cauls for. It only makes a few rods difernes. B. L. Craft."

"Sixth. That prior to January 15, 1904, while the said contract of March 22, 1904, was a valid and subsisting contract between W. F. Flenniken and B. L. Craft, the said B. L. Craft and W. F. Flenniken called upon the plaintiff and offered to sell the coal, mining rights, and surface privileges described in the said agreement of March 22, 1904, to the plaintiff, but no agreement of purchase and sale was then consummated.

"Seventh. That the abstract aforesaid, exhibited by the said Flenniken, together with the defendant's letter written on or about February 4, 1905, was an abstract of the coal and mining rights contained in said agreement of March 22, 1904; and the rights or interest proposed to be sold by the defendant and said Flenniken to the plaintiff were the identical rights and interests described in the said contract of March 22, 1904—other words, the plaintiff was seeking to purchase, and Flenniken and the defendant were offering to sell to the plaintiff, the rights of the said Flenniken, as evidenced by the said contract of March 22, 1904.

"Eighth. That on February 6, 1905, the said W. F. Flenniken, in writing, on the back of the said agreement or option assigned the same to the plaintiff; the said assignment being in the following form:

"February 6, 1905, B. L. Craft having by letter extended the within option to J. V. Thompson until February 14, 1905, for value received I hereby assign the same to said J. V. Thompson, and acknowledge receipt of ten dollars thereon. W. F. Flenniken [Seal.]

"Ninth. That on the same day the plaintiff gave notice to the defendant, in writing, on the back of said contract or option of his acceptance of the said contract or option of March 22, 1904, as extended by the said letter of the defendant, which notice of acceptance is as follows:

"B. L. Craft: I hereby give you notice of my acceptance of within option as per terms therein, in accordance with your letter of February 4, 1905, reviving and extending said option ten days. February 6, 1905. J. V. Thompson. [Seal.]

"Tenth. That the defendant on the 6th day of February, 1905, accepted notice of the said acceptance, in writing, also indorsed upon the back of said option or agreement of March 22, 1904, which notice is in the following form:

"February 6, 1905. I hereby accept notice of the acceptance of within option & contract of sale is made absolute & I ac-

knowledge receipt of ten dollars from J. V. Thompson on account of purchase money. L. L. Craft. [Seal.]

"Eleventh. That the only agreement that was made between the plaintiff and the defendant, concerning any interest in the said coal and mining rights, was that extending to the plaintiff the said option or agreement between Flenniken and the defendant.

"Twelfth. That Mrs. Craft, the wife of the defendant, has, at all times since the date of the said contract or option of March 22, 1904, refused to sign or execute a deed for the said coal, mining rights, and privileges mentioned in said instrument of writing.

"Thirteenth. That the defendant in good faith endeavored to have his wife sign the deed for the said coal, mining rights, etc., for the purpose of conveying the same unto the plaintiff, and that she refused to sign the same.

"Fourteenth. That the plaintiff, through his agent or attorney, also endeavored to have the wife of the defendant sign a deed to the plaintiff for the said coal, mining privileges, etc., but she refused to execute the same.

"Fifteenth. That the plaintiff made a demand upon the defendant for a deed for the said coal, mining privileges, etc., in accordance with the terms of the said agreement or option of March 22, 1904, and the defendant refused to execute and deliver a deed therefor to the plaintiff; but said refusal so to convey, on the part of the defendant, was because of the refusal of the wife of the defendant to join in the deed therefor.

"Sixteenth. That the defendant was at all times willing to execute and deliver a deed for the coal, mining privileges, etc., to the plaintiff, provided the defendant's wife would sign a deed therefor.

"Seventeenth. That on the 5th day of March, 1906, the plaintiff, through his agent, tendered to the defendant, in lawful and legal tender money, one-third of the purchase money for the said coal, mining privileges, etc., at the price of \$100 per acre, with interest upon the whole amount at 6 per cent. from February 6, 1905, and a mortgage for the other two-thirds payable in two equal annual payments with interest from March 1, 1906, at the rate of 5 per cent. per annum, as provided by the aforesaid contract, and at the same time presented to the defendant a deed for the conveyance of the said coal and mining rights by the defendant to the plaintiff, and requested and demanded its execution and delivery by the defendant to the plaintiff; but the defendant declined to accept the said money and mortgage, and refused to execute and deliver a deed as requested, and still refuses either to accept the purchase money tendered or to execute and deliver a deed for the property; but such refusals, as aforesaid, were because of

the refusal of the wife of the defendant to sign the deed for the aforesaid coal, etc.

"Eighteenth. That the plaintiff has always been ready and willing to perform his part of the said contract of March 22, 1904, in accordance with the terms of said contract.

"Nineteenth. That the defendant, before the bill in this case was filed, tendered to the plaintiff \$10 in legal money, together with interest thereon, being the amount of purchase money received by the defendant from the plaintiff on account of the purchase money for the said coal, mining privileges, etc., but the plaintiff refused to accept the same.

"The court held that the contract of sale was conditional upon the consent of Mrs. Craft to sign the deed; and, as she had refused to sign it, the contract could not be enforced. A decree was accordingly entered dismissing the bill."

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

A. F. Silveus and W. J. Kyle, both of Waynesburg, for appellant. F. W. Downey, R. F. Downey, Joseph Patton, and C. W. Waychoff, all of Waynesburg, for appellee.

STEWART, J. B. L. Craft, against whom the bill in this case was filed, and whose legal representative, since the former's death, has been made defendant, on the 22d of March, 1904, by sufficient instrument in writing, granted to one Flenniken an option on certain terms for the purchase of coal underlying a tract of land, of which he was the owner, containing 155 acres and 61 perches, fully described in the grant, together with mining rights in connection therewith. The option was limited to 15 days, and was conditioned as follows: "In case Mrs. Craft refuses to sign deed, this option shall be null and void." On the 17th of December, 1904, Craft renewed and extended the option to the 15th of January, 1905, and again further extended it to the 14th of February, 1905. Within the period covered by the last extension, on the 6th of February, 1905, Flenniken assigned his interest in the option to Thompson, the plaintiff, by indorsement thereon as follows: "Feby. 6th, 1905. B. L. Craft having by letter extended the within option to J. V. Thompson until Feby. 14th, 1905, for value received I hereby assign the same to said J. V. Thompson & acknowledge receipt of ten dollars thereon." The letter here referred to from Craft to Thompson was without date; but it is admitted that it was written on the 4th of February, and its contents show conclusively that Craft then knew of pending negotiations between Flenniken and Thompson for a transfer of the option. In the letter Craft advises Thompson that he has sent him an abstract of the title to the land to examine, and tells him that, if satisfied with it, he can have the coal "at the price and terms" that Mr. Flenniken had

shown him, and asking him, in case of acceptance, that the abstract be returned to him within 10 days for the purpose of copying. Next in order of time is the following indorsement on the original contract signed under seal by Thompson: "B. L. Craft: I hereby give you notice of my acceptance of the within option as per terms therein in accordance with your letter of Feby. 4, 1905, reviving and extending the said option ten days." Then follows the indorsement signed under seal by Craft: "Feby. 6, 1905. I hereby accept notice of the acceptance of the within option and contract of sale is made absolute & I acknowledge receipt of ten dollars from J. V. Thompson on account of the purchase money." Thompson, having thereafter tendered to Craft the purchase money in accordance with the stipulated terms, demanded the conveyance of the coal. The conveyance being refused, the present bill was filed to compel specific performance of the contract.

The facts, as we have stated them, all appear in the bill. The answer denies no single material averment, but seeks to justify the refusal to convey on the ground that positive and persistent refusal on the part of the respondent's wife to join in the conveyance had rendered the contract null and void under its terms. The fact here asserted in regard to the wife's refusal was not questioned, nor was complicity therein on the part of the husband charged. Since the wife was not a party to the contract, she was strictly within her rights in refusing to join in the conveyance. The most, therefore, that could be required of Craft by way of performance would be a conveyance of the property subject to the wife's right of dower therein. Such conveyance the plaintiff is willing to accept in discharge of the contract, and asks that it be decreed him. This much he is clearly entitled to, unless the condition in the original contract stands in his way. This states the only question in the case. In determining it, recourse must first be had to the contract as written. If that be intelligible and unambiguous, inquiry ends there, for the sole purpose of inquiry is to ascertain the intention of the parties; the law presuming that they meant just what they said. The contract we are here dealing with includes several instruments or writings written at different times, but all parts of a whole, and hence are to be taken and construed together. The first was the original option to Flenniken. In express terms it was made conditional, depending on the grantor's wife joining in the conveyance; the condition failing, the contract was to be at an end, and both parties released from obligation thereunder. The other writings in the series that concern us are those which evidence the final transaction, the indorsement by Thompson of his acceptance, and the indorsement by Craft immediately fol-

lowing and made upon the same day. The first was an agreement on Thompson's part which bound him to take the property upon the terms expressed in the option; but it still left the contract conditional, for he was bound only to take on the condition that the wife joined in the conveyance. The other was not merely a recognition by Craft of the legal effect of the former; but it went further, and in express terms declared the sale "absolute." More than this, it acknowledged a payment on account of purchase money in connection therewith. This was the final expression of Craft's understanding of what the contract meant. The learned chancellor was of the opinion, in view of the earlier provision of the contract, that the word "absolute," as here used, was of doubtful meaning, and could be correctly understood only as the court was enlightened by extrinsic evidence. Considerable testimony was accordingly taken, resulting in the following finding of the chancellor: "The weight of the evidence is in favor of the theory of the defendant, and we could find, and do find from the evidence, that the optional contract as extended by the letter of February 4, 1905, was not modified or changed so as to eliminate therefrom the condition that the contract or optional agreement should be null if the wife of the defendant should refuse to sign the deed." A dismissal of the plaintiff's bill followed.

[1] In the view we take of this case, a discussion of the evidence, which influenced the mind of the court, is unnecessary. We pass with the single remark that we find nothing in it that makes for one more than the other. Indeed, we find nothing in it that would be helpful, were outside help required. The contract, as written, is its own best interpreter; and it is sufficient in itself, we think to disclose the real understanding of the parties. It is only by giving to the word "absolute," as used by Craft in his last sealed expression, a different meaning from what the word fairly and ordinarily imports, or by ignoring it entirely, that other conclusions can be reached than that its purpose was to make unconditional that which had been conditional. The former is never allowed except as there is something to show that the word was used in an unusual sense. Here there is nothing to indicate it.

[2] We are equally restrained from doing the latter, since it is a settled rule that a word, not plainly inserted by accident or mistake, is never to be thrown out entirely while there is a plain and natural construction that can be given to it, not manifestly destructive of the general intent of the sentence. *Philadelphia v. River Front R. R. Co.*, 133 Pa. 134, 19 Atl. 356.

[3] The term "absolute," as here used, itself indicates a contract in direct contradistinction to that created by the option to Flenniken. We have no reason to suppose

that it was introduced through accident or mistake. Then why not give to it its plain and natural meaning? It occurs in the last of the series of writings constituting the contract, written nearly a year after the original conditional option had been given.

[4] It is another accepted rule of construction that in agreements between the same parties concerning the same matter, where the terms of the latter are inconsistent with those of the former, so that they cannot subsist together, the latter will be construed to discharge the former. The present is a case in which this rule could very properly be applied; but the case stands in no need of it. The language of the contract is sufficient in itself to express a clear purpose to change the contract from a conditional one to one absolute. A consideration of such facts as are properly before us confirms us in the view that the construction we have given the contract gives effect to the intention of the parties. The respondent in his answer admits that, for a year prior to the agreement with the plaintiff, his wife had positively and persistently refused to join in the conveyance. He does not even suggest that he had any reason to suppose, when he made the contract absolute, that her purpose had changed or would change. To the ordinary mind, the contract with Thompson would have seemed a vain and useless thing, under such circumstances, if it meant no more than an extension of the conditional option until the time fixed for the first payment of the purchase price, which was then rapidly approaching. Quite as irreconcilable with the claim now made that the contract meant no more than an extension of the optional contract would be the fact that part of the purchase price was accepted. The written contract and the situation and dealing of the parties, with reference to its subject-matter, reveal a purpose to purchase and sell, whether the wife consented or refused.

The decree dismissing the plaintiff's bill is made the subject of the thirty-fourth assignment of error. In view of our construction of the contract, this assignment must be sustained.

The decree is reversed, the bill reinstated, and it is ordered that a decree be entered in accordance with the view herein expressed; the costs of the proceeding to be paid by the appellee.

CLYMER OPERA CO. v. FLOOD CITY MUT. FIRE INS. CO.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

INSURANCE (§ 378*)—ESTOPPEL TO CLAIM FORFEITURE—KNOWLEDGE OF AGENT.

Where a fire policy is issued without a written application, and the insurance agent knows that the covenant as to unconditional and sole ownership in insured is untrue, and

the insured has been guilty of no fraud, the company is estopped from setting up the breach of the covenant in a suit on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.*]

Appeal from Court of Common Pleas, Indiana County.

Action by the Clymer Opera Company, for itself and the use of the Savings & Trust Company of Indiana, against the Flood City Mutual Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The trial judge charged in part as follows: "If you find that Mr. C. C. McLain was an agent of the defendant companies, and as agent got this insurance and had it written, knowing that the property insured was located on leased ground, and not upon ground on which the Clymer Opera Company had the fee-simple title, then the plaintiff should recover a verdict against the defendants for the amount of the indemnity secured by policies, with interest from date of the fire."

Defendant presented these points:

"(1) By agreement dated December 26, 1908, W. F. Neely leased to Lloyd Hill et al., trading as the Clymer Opera Company, a lot of ground in the borough of Clymer, known as lot No. 68, on Franklin street, upon which lot the plaintiff erected an opera house, which was destroyed by fire, and to recover the insurance upon which this suit is brought. The agreement of December 26, 1908, is a lease, and the interest of the assured in the real estate is not the unconditional and sole ownership contemplated by the policy of insurance upon which suit is brought. The plaintiff, therefore, cannot recover against the defendants. Answer: Declined.

"(2) The Indiana Insurance Agency, Timberlake & McLain, the agent for the Safety Mutual Fire Insurance Company of Lebanon, Pa., the India Mutual Insurance Company of Boston, Mass., and the Birmingham Fire Insurance Company of Pittsburg, Pa., and the Flood City Mutual Fire Insurance Company of Johnstown, had no authority to waive the provision in the policy in regard to buildings standing upon leasehold, except by indorsement in writing upon the policy, or by writing thereto attached, and this stipulation in the policy was a complete notice to the insured of the agent's limited authority; and the assured had no right to assume that the company or companies defendant in this case had or would waive this provision, unless he found such waiver written upon or attached to the policy. The plaintiff therefore cannot recover. Answer: Declined."

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

D. B. Taylor and Wm. E. Schaack, both of Indiana, Pa., for appellant. Samuel Cunningham and Ernest Stewart, both of Indiana, Pa., for appellee.

MOSCHZISKER, J. This is an appeal by the defendant insurance company from a judgment entered against it upon a verdict rendered in favor of the plaintiff in an action of assumpsit brought on two policies of fire insurance. The appellant does not deny that it issued the policies sued upon, or that the plaintiff suffered the losses alleged by it, but contends that, since the plaintiff's interest in the insured property was not "unconditional and sole ownership," the policies were void under the following clauses, contained in each of them: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple." And: "No officer, agent or other representative of this company shall have the power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such conditions and provisions no * * * agent * * * shall have such power or be deemed or held to have waived such provisions and conditions unless such waiver, if any, shall be written upon or attached hereto. * * *" It was admitted by the plaintiff that the land upon which the insured building stood was leased by it, and that there was no indorsement on the policies relating to the character of its title; the only indorsement thereon being to the effect that the loss, if any, should be payable to the Indiana Savings & Trust Company, as mortgagee. But the plaintiff introduced evidence to show that the defendant company's agent had notice of the nature of its interest in the insured property prior to the placing of insurance thereon, and the jury, under instructions from the trial judge submitting this question of fact to them, found in favor of the plaintiff. It is also to be noted that there was no written application for the insurance, and that it is not contended that the plaintiff was guilty of any fraud or misrepresentations in procuring the same.

In *Clymer Opera Co. v. Birmingham Fire Insurance Co.*, 50 Pa. Super. Ct. 639, involving the same facts here presented, Judge Porter of the superior court correctly states the law as follows: "The question * * * is not whether the company had waived this particular covenant of the policy, but is whether, under the facts established by the evidence, it was estopped to assert that covenant. Covenants of this character have frequently been passed upon by the courts, held to be valid, and given full effect, unless the assured produced evidence establishing facts which estopped the company to assert the covenant, or constituted a waiver of its provisions. *Schiavoni v. Dubuque Fire & Ma-*

rine Ins. Co., 48 Pa. Super. Ct. 252, and cases there cited. The decisions firmly establish the following principle with regard to the covenant with which we are dealing: When the policy is issued without a written application, and the agent authorized by the company to write the policy knows that one of its conditions is inconsistent with the facts, and the insured has been guilty of no fraud or misrepresentation, the company is estopped from setting up the breach of said condition. *Caldwell v. Fire Ins. Association*, 17 Pa. 492 [35 Atl. 612]; *Damms v. Humboldt Fire Ins. Co.*, 226 Pa. 358 [75 Atl. 607, 13 Ann. Cas. 685]; *Porter v. Insurance Co.*, 20 Pa. Super. Ct. 75." Also see *Phila. Tool Co. v. British-American Assur. Co.*, 132 Pa. 238, 19 Atl. 77, 19 Am. St. Rep. 596. In the case at bar, while the insured did not own the ground, it did own the building and contents covered by the policies, and as such owner it had an insurable interest, which was made known to the agent of the defendant insurance company prior to the latter's acceptance of the risk and the issuance of the policies sued on. "Whatever mistake, or worse than mistake, was made in writing the policy, * * * it is clearly chargeable, not to the insured, but to the company's agent, and should be imputed to the company itself." *Caldwell v. Fire Ins. Ass'n*, supra, 177 Pa. 502, 35 Atl. 613.

The assignments of error are overruled, and the judgment is affirmed.

BUTLER ENGINE & FOUNDRY CO. v. BUTLER BOROUGH.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. MUNICIPAL CORPORATIONS (§ 511*)—PUBLIC IMPROVEMENTS—ASSESSMENT OF DAMAGES—APPEAL.

The requirement of Act June 13, 1874 (P. L. 283), conferring the right of appeal from an award of viewers in proceedings to improve a street, that the appeal shall be accompanied by an affidavit of appellant that it is not taken for delay, but because affiant firmly believes that injustice has been done, is a condition essential to the jurisdiction of the court to hear the appeal; and, where the affidavit filed avers nothing beyond the fact that the statement set out in the paper filed is correct and true, the appeal is properly quashed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1183, 1184; Dec. Dig. § 511.*]

2. MUNICIPAL CORPORATIONS (§ 511*)—PUBLIC IMPROVEMENTS—ASSESSMENT OF DAMAGES—APPEAL.

Appearance through counsel, under an issue framed by the court on appeal from an award of viewers in proceedings to improve a street, does not waive the right of the appellee to take advantage of the appellant's failure to file the affidavit required by the act of June 13, 1874 (P. L. 283).

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1183, 1184; Dec. Dig. § 511.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Court of Common Pleas, Butler County.

Appeal by the Borough of Butler from an award of damages to the Butler Engine & Foundry Company in proceedings for the improvement of a street. From an order quashing the appeal, the Borough appeals. Affirmed.

The borough of Butler, by virtue of an ordinance duly enacted, graded, paved, and curbed Lookout avenue, a public street of said borough, upon which street the property of the Butler Engine & Foundry Company abuts. After the completion of the improvement, the court of common pleas of Butler county appointed three viewers to assess the cost and expense of the improvement and the damages and benefits upon the borough and abutting property owners, which board of viewers on November 15, 1911, filed their report awarding the Butler Engine & Foundry Company special damages in the sum of \$2,500, to be paid by Butler borough, and assessed the Butler Engine & Foundry Company with special benefits in the sum of \$556.29. On December 13, 1911, the borough of Butler appealed from the award of \$2,500 special damages to the Butler Engine & Foundry Company. The affidavit attached to the appeal was as follows: "John H. Wilson, being duly sworn according to law, deposes and says that the statements set out in the above and foregoing are true and correct." The court awarded an issue in which the Butler Engine & Foundry Company was plaintiff and the borough of Butler defendant. On January 19, 1912, Marshall and Watson and John R. Henninger, attorneys for the Butler Engine & Foundry Company, filed their general appearance for the plaintiff in that issue. On February 10, 1912, the plaintiff, on motion of the same attorneys, moved the court to strike off the appeal for want of an affidavit. On March 6th the borough of Butler filed its answer to the rule, and the same was argued before the court March 18, 1912. The court made the rule absolute and quashed the appeal, from which judgment the borough of Butler appealed.

Argued before FELL, C. J., and BROWN, POTTER, STEWART, and MOSCHZIS-KER, JJ.

John H. Wilson, of Butler, for appellant. John R. Henninger, and Marshall & Watson, both of Butler, for appellee.

STEWART, J. Within the time prescribed by law, the borough of Butler filed its appeal from the award of viewers appointed to assess the cost and expense of certain street improvements, and the damages and benefits upon the borough and the owners of abutting properties. The particular award appealed from in this case was that which gave to the Butler Engine & Foundry Company the sum of \$2,500 special damages

The affidavit filed in support of the appeal averred nothing beyond the fact that the statement set out in the paper filed was correct and true, whereas the act of June 13, 1874 (P. L. 283), which confers the right of appeal in such cases, by section 2 provides as follows: "Any appeal taken pursuant to this act shall be signed by the party or parties taking the same, or by his or their agent or attorney, and shall be accompanied by an affidavit of the party appellant, or his or their agent or attorney, that the same is not taken for the purpose of delay, but because affiant firmly believes that injustice has been done." Because of the failure to file such affidavit with the appeal, the court below held the appeal radically defective; and, on motion of the appellee, it was stricken off. Appellant contends that so much of the act as indicates what the affidavit shall contain is merely directory, and the failure to observe it is nothing more serious than an irregularity which may be corrected; and, second, that, even though the provision in the act be regarded as mandatory, failure to comply is a matter which may be waived by the opposing party.

[1] That it is more than an irregularity, and is a condition essential to the jurisdiction of the court to hear the appeal, is not only a plain inference from the language employed in the act, but is the construction which this court has given to the same language occurring in similar statutes, notably in that which provides for an appeal from the award of arbitrators (Act of 20th of March, 1810 [5 Smith's Laws, p. 135] § 11). This latter act requires that the appellant shall swear or affirm "that it is not for the purpose of delay such appeal is entered, but because he firmly believes injustice has been done." In the case of Thompson v. White, 4 Serg. & R. 135, the only particular in which the affidavit fell short of the statutory requirement was the omission therefrom of the word "firmly"; the omission having a qualifying effect with respect to affiant's belief, whether so intended or not. Because of the omission, the appeal fell. This may be said to be an extreme case of strict construction; but the necessity for such strict construction becomes apparent and entirely logical when we consider the underlying reason. The appeal there, as here, was a purely statutory remedy, allowed only when statutory requirements had been complied with, among others, the filing of an affidavit in a prescribed form. Except as this particular requirement had been complied with, the court was without jurisdiction to hear the appeal. It was recognized that the court could take jurisdiction to itself by disregarding or relaxing the condition imposed by the Legislature, only as it usurped legislative power. Of course it was strict construction, one that gave effect to every word in the provision of the act, but only because it manifestly ac-

corded with legislative intent, and because any more liberal construction would leave the question of jurisdiction so elastic that it could never be determined by fixed standard. Our attention has not been called to a single case in which the rule here laid down has been departed from or relaxed. It was properly applied here. The distinction sought to be made by appellant's counsel goes no further than to the nature of the proceeding out of which the question arose. To this extent the distinction holds; but it suggests no difference in principle whatever. That such defect, failure to accompany the appeal with an affidavit in the prescribed form, may not be cured by amendment after the time allowed for the appeal was clearly decided in *Proper v. Luce*, 3 Pen. & W. 65.

[2] It is further argued that, by appearing through counsel in the issue framed by the court, the appellee waived the right to take advantage of appellant's failure to file the required affidavit. This would be true if the requirement were simply directory; but, since it is mandatory and compliance essential to jurisdiction, waiver is impossible. Underlying this statute are considerations of public policy. The policy that finds expression here, as in *McConnel v. Morton*, 11 Pa. 398, is the prevention of frivolous appeals entered in caprice or under the existence of passion. The maxim, "*Privatorum conventio juri publice non derogat*," here applies. Private compacts are not permitted to render sufficient, between themselves, that which the law declares essentially insufficient.

The assignments of error are overruled, and the judgment is affirmed.

THORSON v. CARNEGIE STEEL CO.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. MASTER AND SERVANT (§§ 286, 289*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

In an action against a steel company for injuries to an employé through being struck by a moving crane, evidence held to present a question for the jury as to negligence and contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050, 1089-1132; Dec. Dig. §§ 286, 289.*]

2. APPEAL AND ERROR (§ 233*)—OBJECTIONS IN LOWER COURT—RECEPTION OF EVIDENCE—MOTION TO STRIKE OUT TESTIMONY.

In an action for injuries to an employé, where a motion to strike out the testimony of a witness was overruled, and he subsequently came into court and asked to correct his testimony, and was permitted to do so, and there was no renewal of the motion to strike out, nor any request to direct the jury to disregard it, there was no reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 233.*]

Appeal from Court of Common Pleas, Lawrence County.

Action of trespass by John B. Thorson

against the Carnegie Steel Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

The accident occurred on March 8, 1906. The court charged, in part, as follows: "The act of 1905 (P. L. 352) provides that, whenever practicable, the machinery shall be safeguarded with safety devices. Prior to the passage of this act, when a person went in a dangerous place to work, he was held to assume the risk of his employment in that place. But, if the company has not provided safety devices for his protection, then he cannot be charged with assuming the risk of his employment."

Plaintiff offered the following point: "3. If the jury believe that it was practicable for the defendant company to have provided and equipped its traveling crane and appliances in the bar mill with clamps, safety guards, gongs, or warning bells, then its failure to do so would be in violation of the provisions of section 11 of the act of Assembly May 2, 1905 (P. L. 352), and would constitute negligence on the part of the defendant against which said negligence the defendant cannot set up the assumption of the risk by the plaintiff. Answer: Affirmed."

Verdict and judgment for plaintiff for \$3,681.54. Defendant appealed.

Argued before FELL, C. J., and BROWN, POTTER, STEWART, and MOSCHISKEE, JJ.

J. Norman Martin, of New Castle, for appellant. A. W. Gardner and Chas. E. Mehard, both of New Castle, for appellee.

BROWN, J. [1] The appellee, an employé of the Carnegie Steel Company, while walking on a crane track near the roof of the building in which he was working, was struck by a moving crane and sustained the injuries for which compensation is claimed in this action. While the jury might fairly have returned a verdict in favor of the defendant neither the question of its negligence, nor that of the contributory negligence of the plaintiff, could, under all the evidence, have been taken from them. Testimony was properly admitted to show that, in performing the duty assigned to him, it was necessary for the appellee to be on the crane girder or track at the time he was injured. Shortly before, he had taken off a top sheet of an iron partition near the roof of the building, and was carrying it along the crane track to leave it in some safe place where it would not fall on any one below. He testified that, before he started, he looked down the track and saw that the crane was not in motion, and that no one was in the cage, and that, after he had walked 10 or 12 feet on the track, the crane, moving in the direction in which he was going, ran into and injured him. The general noise of the mill prevented his hearing the noise made by it as it approached

him from the rear. From all the testimony, the jury were justified in finding that employes of the defendant company at times walked over the crane track; that it was the duty of the foreman, under whom the appellee worked, to have given notice to the craneman that he would in all probability be on the crane girder or track, and that there should be a lookout for him; that the foreman failed to give such notice; and that the appellee had not been instructed as to the crane call whistles and the other signals used in the mill. Though there were safety devices in use on cranes identical in construction with the one which ran over the appellee, there were none upon it; and this went to the question of the appellant's negligence, as the learned trial judge correctly held in instructing the jury in those portions of his charge which are quoted in the eighth and ninth assignments of error. In submitting the question of the defendant's negligence, and that of the plaintiff's contributory negligence, no error is to be found in the charge or in the answers to the points, and the assignments, from the fourth to the sixteenth, inclusive, are overruled.

[2] No reversible error is set forth in the first assignment. The motion to strike out the testimony of Waldron was overruled; the court directing that it should stand for the time being. He subsequently came into court and asked to correct his testimony, and, having been permitted to do so, stated that he was mistaken in having testified as to the length of time the safety appliances had been on the cranes in the Shenango mill. There was no renewal of the motion to strike out his former testimony, nor was a request made that the jury be directed to disregard it. Sanquist's testimony—the admission of which is complained of by the second assignment—was confined to appliances in use in 1909; and what he said as to the Ohio plant was stricken out, on motion of counsel for appellant, as soon as it was discovered that he had spoken without knowledge. The question put to Davenport—the disallowance of which is complained of by the third assignment—was not relevant at the time it was asked, and the trial judge committed no error in ruling it out as not proper cross-examination.

The 16 assignments are overruled, and the judgment is affirmed.

SCHWARTZFAGER v. PITTSBURGH, H., B. & N. C. RY. CO.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. ACCORD AND SATISFACTION (§ 21*)—RESCISSIO—GROUNDS.

One who gives a railway company a general release on its agreement to pay a sum of money, together with all hospital and doctor bills and wages until the person executing the

release is able to work again, is entitled, on the company's refusal to pay the wages, though it has paid the sum of money and the doctor and hospital bill, to rescind the release and sue the company on the original cause of action.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 143; Dec. Dig. § 21.*]

2. ACCORD AND SATISFACTION (§ 17*)—ELEMENTS—PERFORMANCE OF AGREEMENT.

A mere accord, not followed by execution and satisfaction, is generally no bar to an action on the original obligation; but this rule supposes that the agreement of the creditor is to accept the performance of the debtor's promise, and not the promise itself.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 123; Dec. Dig. § 17.*]

3. ACCORD AND SATISFACTION (§ 17*)—ELEMENTS—PERFORMANCE OF AGREEMENT.

An unexecuted agreement to pay a sum certain in satisfaction of a pending suit, and an agreement to receive the sum and release the defendant, is insufficient in law to defeat a recovery.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 123; Dec. Dig. § 17.*]

Appeal from Court of Common Pleas, Lawrence County.

Action of trespass by Ralph Schwartzfager against the Pittsburgh, Harmony, Butler & New Castle Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

The court charged, in part, as follows: ["The contract then being legal and being in writing, after he had ratified it by making his demand, it becomes a question then as to whether or not there was a repudiation of the contract on the part of the defendant company—whether or not there was such conduct on the part of the defendant company as would justify the plaintiff, even after he had made the contract and binding then by his affirmation or ratification of it, in repudiating his contract. And upon that point, gentlemen, we say to you that, if you find in the case that the defendant company neglected and refused to pay the wages according to the terms of the contract, then the plaintiff would be justified in repudiating the contract. And, if he repudiated the contract and gave notice to the defendant company of his repudiation of it, because of their neglect, failure, or refusal to comply with the terms of it, he would be justified in so doing—he would have a legal right then to proceed as if the contract had not been made, providing he proposed, offered, and tendered to the defendant company such moneys as already had been paid to him, and further proposed and offered to tender money for all expenses the company had already expended under that contract by his affirmation of it."]

Defendant presented this point: "Under all the evidence, the verdict must be for the defendant. Answer: Refused."

Plaintiff presented these points: "(7) If

the jury believe that, when the plaintiff on the morning after his injury, to wit, February 21, 1910, at the hospital, either from the effect of medicine administered to him or pain and suffering from his injuries, did not know and understand the nature and contents of the agreement, or release signed by him, he would not be bound thereby, and would have the right, within a reasonable time after learning of its existence and what it contained, to disavow and repudiate it. Answer: Affirmed." "(10) The defendant not having paid to plaintiff wages, nor offered to pay the same, but on the contrary neglected to pay the plaintiff in compliance with the agreement of February 21, 1910, plaintiff had a right to treat the contract as ended and to repudiate it, and to disaffirm the same by tendering back to the defendant the money received by virtue of its execution, together with the offer of the plaintiff to pay to the defendant any money expended on his account when the amount thereof was made known to him. Answer: Affirmed."

Verdict and judgment for plaintiff for \$5,000. Defendant appealed.

Argued before FELL, C. J., and BROWN, POTTER, STEWART, and MOSCHZISKER, JJ.

J. Norman Martin, of New Castle, for appellant. Chas. E. Mehard and A. W. Gardner, both of New Castle, for appellee.

POTTER, J. The plaintiff brought this suit to recover damages for injuries alleged to have resulted from the negligence of the defendant company in the operation of its cars. Liability was not denied; but the defendant set up, as a defense, a settlement with the plaintiff and a release of all damages. It appears from the evidence that on February 21, 1910, the day after the accident, the plaintiff, while in the New Castle Hospital, was visited by W. A. Goehring, vice president of the defendant company, at whose solicitation he signed a release which reads as follows: "New Castle, Pa., February 21, 1910. Received from Pittsburgh, Harmony, Butler & New Castle Railway Company forty dollars in full payment of all claims, demands, and rights of action against said company, all of which are hereby waived, satisfied, and released including, not by way of limitation but specifically, all of such sustained by me or growing out of an accident which occurred on the 20th day of February, 1910, at New Castle, Pa. Also, pay all hospital and doctors bills and wages until he recovers able to work—to do day's work at his trade. R. Schwartzfager. [Seal.]"

When the release was signed, Mr. Goehring paid plaintiff the sum of \$90. Subsequently the company paid his hospital expenses and doctors bills. At the trial plaintiff took the ground that the release was not binding, alleging in the first place that he

was not mentally capable of making a contract when it was executed; and in the second place that the company had failed to perform its promise to pay him wages, until he recovered sufficiently to be able to work, and for that reason he had rescinded the contract. The trial judge held the first reason to be unavailable, because, by his own admission, plaintiff ratified the contract by insisting that the company should comply with it. Upon the second ground, the evidence was held to be sufficient to take the case to the jury; and it was submitted to them to determine as a fact whether the defendant had neglected and refused to pay the wages in accordance with the agreement. The jury were instructed that, if such was the case, the plaintiff was justified in repudiating the contract. The uncontradicted testimony of the plaintiff was that on three separate occasions, twice in the month of May, 1910, and once in June, he saw Mr. Goehring, the representative of the company, and demanded payment of the wages. None were paid.

On November 22, 1910, before suit was brought, plaintiff gave written notice to Mr. Goehring that he had rescinded the contract and tendered to him the \$90 which was paid when it was executed, and requested a statement of the amount of the bills paid to the hospital and to the doctors on his account by the company. The jury returned a verdict in favor of the plaintiff for the sum of \$5,000. A motion for judgment in favor of the defendant non obstante veredicto was refused, and judgment was entered on the verdict. Defendant has appealed.

[1] The only question raised by the assignments of error is whether defendant was entitled to binding instructions in its favor. The liability of the defendant company for a breach of the contract is not seriously questioned; the real point for determination being whether there was such a failure of the consideration for the release as to justify the plaintiff in disregarding it and bringing his suit upon the original cause of action. As we understand the contention of counsel for appellant, it is that the plaintiff is entitled to bring suit only for the amount of the unpaid wages due under the contract. A case closely analogous in principle to that which is here presented was that of *Saeger v. Runk*, 148 Pa. 77, 23 Atl. 1006. There, as in the present instance, there was a release founded upon a consideration paid partly in cash and consisting, as to the remainder, in a promise to pay, which was not performed. In that case the owners of the principal of a dower interest charged on real estate released it to the owner of the land, who was a married woman, and who paid part of the consideration cash and gave her notes for the balance. She afterwards attempted to repudiate her liability on the notes on the ground of coverture. The release contained

the following clause: "After which [the signing of the release] it shall be as effectual for the discharge of such arrears of interest due at the death of said Eliza Saeger as for any other purpose." Upon the trial the defendant submitted a point to the effect that, as there was no fraud, accident, or mistake, the release was a bar to the action. The point was refused, and the jury found a verdict for the amount of the notes, being the amount of the dower interest, which was in arrears. It will be noted that the consideration failed not wholly but in part. The judgment was affirmed by this court on the ground that, the consideration of the release having failed, plaintiff could recover on the original application. In the case now before us, a small amount of the consideration was paid in cash; but there was an entire lack of performance of the principal part of the consideration for the agreement, which was the payment of wages during the period of disability.

[2] The governing principle here involved is thus broadly stated in 1 Cyc. 315: "Accord and part performance do not constitute a satisfaction. It is merely executory so long as by its terms something remains to be done in the future." And again on page 336: "A mere accord, which is not followed by execution and satisfaction, is, as a general rule, no bar to an action on the original obligation. This rule, however, presupposes that the agreement of the creditor is to accept the performance of the debtor's promise or agreement, and not the promise or agreement itself." The circumstances of this case indicate, we think, that the plaintiff looked chiefly to the performance of the agreement to pay him wages; that it was this which he agreed to accept in satisfaction of the pre-existing obligation. The agreement, fairly construed, must be regarded as requiring performance of the promise.

[3] In *Reed v. Martin*, 29 Pa. 179, it was held, as stated in the syllabus, that: "An unexecuted agreement to pay to plaintiff a sum certain in satisfaction of a pending suit and an agreement by plaintiff to receive the same and release the defendant, is not sufficient in law to defeat a recovery." In *Hearn v. Klehl*, 38 Pa. 147, at page 149 (80 Am. Dec. 472), Mr. Justice Woodward said: "It is not enough that there be a clear agreement or accord, and a sufficient consideration; but the accord must be executed." This language was quoted with approval by Mr. Justice Sterrett in *Hosler v. Hursh*, 151 Pa. 415, at page 422, 25 Atl. 52, at page 53. In further discussing the question, he says: "There is an obvious distinction between an engagement to accept a promise in satisfaction and an agreement requiring performance of the promise. If the promise itself, and not its performance, is accepted in satisfaction, this is a good accord and satisfaction, without

performance. The agreement relied on in this case will not bear that construction. * * * The agreement was not to accept defendants' promise in lieu of the notes, but the specified sums in cash and approved securities. It contemplated the performance of the promise, and was therefore executory." In like manner the agreement in the present case cannot be fairly construed to be an acceptance of the defendant's promise to pay wages in lieu of the then existing obligation of the company to make good the damages caused by its negligence; but it must, we think, be regarded as contemplating the payment of wages for the specified time—that is, until plaintiff should recover his ability to work at his trade. The agreement, thus construed, was executory.

In reaching this conclusion we have not overlooked the decision in *Laughhead v. Coke Co.*, 209 Pa. 368, 58 Atl. 685, 103 Am. St. Rep. 1014. In that case it appeared that the plaintiff agreed to settle his claim for a definite sum of money and the promise of employment, to commence when a vacancy in a certain position should occur. It did not appear that the contingency upon which the vacancy was to arise had occurred at the time of the suit, and there was therefore no breach of the contract in that respect. It was held, upon the facts there shown, that the accord and satisfaction were complete. Plaintiff was not allowed to recover upon his original contract. Under the strict letter of the terms of the agreement, there was no default; and it was held that the receipts for the settlement of the unliquidated damages could not be avoided, except on the ground of fraud, accident, or mistake. The facts of that case differ materially from those now before us. In our view, the part performance of the agreement in this case did not constitute a satisfaction. The agreement was executory, because, under it, something remained to be done in the future—the payment of wages—and in this particular the agreement was never carried out. Part performance did not constitute satisfaction, and the pre-existing obligation was not discharged.

The assignments of error are overruled, and the judgment is affirmed.

KAHN et ux. v. KITTANNING ELECTRIC LIGHT CO.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

ELECTRICITY (§ 19*)—ELECTRIC LIGHT COMPANY—BROKEN LIVE WIRE—ACTION—EVIDENCE.

Where a boy left his home in the morning and a few minutes later was found lying on a street with a severe burn in his hand, caused by contact with a broken live wire belonging to defendant, an electric light company, from which burn he died, and there was no evidence to show the case of the break nor how long it

lay upon the ground, no action will lie against the light company.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

Appeal from Court of Common Pleas, Armstrong County.

Action by Henry M. Kahn and wife against the Kittanning Electric Light Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Trespass to recover damages for the death of plaintiffs' son. The facts are stated in the opinion of the Supreme Court.

The trial judge charged as follows:

"In this case the court regrets very much to have to take the case from the jury, and to decide it for itself. The Supreme Court has laid down the rule that such responsibility must often be assumed by the court, and we do not desire to evade or shirk our responsibility, however much we would prefer to submit the case to the decision of the jury.

"We have been asked on the part of the defendant to instruct you that, under all the evidence in this case, your verdict must be in favor of the defendant. We feel constrained under the testimony, after we have read a number of cases and decisions of the Supreme Court, to grant that request, and say that you should return a verdict in favor of the defendant.

"In this case there is no question that this young man met his death in a very unfortunate manner. But, before a verdict should go against the defendant, it is incumbent on the plaintiffs to show some specific act of negligence on the part of the defendant. There is testimony in the case that these poles were erected 184 feet apart, and, while in some places the ordinary rule is to erect their poles from 100 to 120 feet apart, there is not sufficient evidence that it was the distance between these poles that caused the injury to this boy.

"If there had been testimony that by reason of those poles being erected such a distance apart, or if there had been testimony that on account of no guy wires being fixed to the poles, and that that was the immediate and proximate cause of the accident, then the plaintiffs in this case could have recovered. The nearest we have to that is the testimony of Mr. Bell, who testifies that he saw these wires and poles before the accident, and that he saw them afterward, and he infers and says it is his opinion that these wires, being so close together and sagging as he describes them, may have come together that night, and that that may have been the cause of this wire falling down. Mr. Bell did not know where this wire came apart, whether it was in the middle between the two poles, or close to either one of them. He says that ordinarily there would be a mark on the other wire showing where the wires came together, but there is no evidence

as to that. So, at most, it is but a conjecture or guess, and the law seems to us to be plain that the plaintiffs have not complied with the requirements of the law; that is, that they have not produced such certain evidence or such evidence upon which the jury could decide the case. As we look at it, under the law, it is our duty in this case to direct a verdict in favor of the defendant."

Verdict and judgment for defendant. Plaintiffs appeal.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

C. E. Harrington and J. H. Painter, both of Kittanning, for appellants. R. L. Ralston, of Kittanning, and H. A. Heilman, for appellee.

POTTER, J. This was an action of trespass by Henry M. Kahn and his wife against the Kittanning Electric Light Company to recover damages for the death of their son, alleged to have been caused by the negligence of the defendant company. On the morning of October 22, 1910, shortly before 7 o'clock, the boy, who was 13 years old, left the home of his parents to go to work. A few moments later he was found lying upon the street, suffering from a severe burn in the hand caused by coming in contact with a broken live wire belonging to defendant company. He was taken to the hospital, where tetanus subsequently developed from the injury, causing his death two weeks later. Upon the trial the court below directed a verdict for the defendant, on the ground that the evidence upon the part of plaintiffs was not sufficient to sustain a finding by the jury that the injury to the boy resulted from negligence on the part of the defendant. It was not shown what caused the break in the wire, nor did it appear how long the wire lay upon the ground after it was broken. The witness Pollock testified that the accident happened near his house; that about a quarter to 7 he heard some one cry, and he went out and found the boy lying injured upon the pavement. As soon as he had taken the boy to the hospital near by, he notified the defendant company by telephone that the wire was down, and they at once sent a man to fix it. He said there had been a rain and wind storm during the night, and some electrical trouble. Our examination of the evidence leads us to the conclusion that the facts of this case do not bring it within the principle of the decision in *Herron v. Pittsburg*, 204 Pa. 509, 54 Atl. 311, 93 Am. St. Rep. 798, where a broken police call wire lay for several hours upon the street. In that case it was shown that the break was known to the police officials by 9 o'clock in the morning, and the accident did not occur until late in the afternoon. It was held that the break

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

n the wire was notice that it might become dangerous, and imposed upon the city the duty of prompt examination and care. So in *Devlin v. Light Co.*, 192 Pa. 188, 43 Atl. 962, the live wire upon which plaintiff stepped had been negligently left upon the sidewalk by defendant's employes while they were engaged in readjusting the wires. But in the present case the evidence does not show how the wire was broken before the accident. Much less does it show that the defendant was negligent in not sooner discovering the break, or in failing to give the matter prompt attention after it did learn of its existence, and of the presence of the broken wire upon the street. In fact, counsel for plaintiffs placed but little emphasis upon this phase of the case, but sought rather to show that the method of construction of the line was faulty. His expert witness Bell suggested that the wires were too slack, and that this slackness may have become dangerous because, by swaying, the wire may become crystallized at the point where it is fastened, and may finally break at that point. But there was no evidence to show that as a matter of fact the wire did become crystallized, or that it did break at the point where it was fastened. Nor does the evidence show that the insulation was poor at the place where the break occurred. As the trial judge said, the cause of the break in the wire was not shown by the testimony, and it was left as a mere matter of conjecture. It was not shown that the break occurred in the center of the span, or at such a distance from the pole that it must have been caused by the alleged defect of having too long a span.

In his opinion, refusing the motion for a new trial in this case, the trial judge carefully analyzes the evidence, and points out clearly that the plaintiffs failed to show any specific act of negligence on the part of the defendant that can fairly be considered as the proximate cause of the injury. As he aptly says, the statements in the declaration and in the testimony of the witnesses were merely conclusions, and did not set forth facts which could properly be held to constitute negligence. We agree with his conclusion that the case is within the principle of the decision in *Smith v. East End Electric Light Co.*, 198 Pa. 19, 47 Atl. 1123, *Aument v. Telephone Co.*, 28 Pa. Super. Ct. 610, and *Lanning v. Pittsburgh Railways Co.*, 229 Pa. 575, 79 Atl. 186, 32 L. R. A. (N. S.) 1043. It was there held that it was not enough to prove the mere fact of the breaking of a wire, which caused the injury. The question for the jury was: "Did the negligence of the defendant company cause it to break? If this did not appear, there was no liability upon the defendant." In the case at bar as the evidence did not show the cause of the break in the wire, or that the company failed to remedy the trouble with due and reason-

able alacrity, the trial judge was justified in withdrawing the case from the jury.

The assignments of error are overruled, and the judgment is affirmed.

In re McCLARREN'S ESTATE.

Appeal of HEILMAN.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. CONVERSION (§ 15*)—DIRECTIONS IN WILL—EFFECT.

Where a will devises the testator's homestead to his wife for life and directs it to be then sold by the administrator and the proceeds equally divided between testator's sons, and also directs that the residue of moneys from the sale of testator's real estate other than that allotted to the widow's occupation and use shall be divided in equal shares between testator's sons, and that the administrator sell and convey the real estate in accordance with the foregoing, all the testator's realty is converted into personality.

[Ed. Note.—For other cases, see *Conversion*, Cent. Dig. §§ 28-37, 52; Dec. Dig. § 15.*]

2. CONVERSION (§ 22*)—RECONVERSION—RELEASE TO EXECUTOR.

Where a will by power of sale works an absolute conversion of realty and directs distribution of the proceeds to testator's sons, and the executor sells personal property and files an account of the proceeds, a release by the sons to the executor will not work a conversion of the realty, where it merely waives the appointment of an auditor and acknowledges receipt of the fund and is intended merely to save the expense of distribution through the orphans' court.

[Ed. Note.—For other cases, see *Conversion*, Cent. Dig. §§ 66-72; Dec. Dig. § 22.*]

3. CONVERSION (§ 22*)—RECONVERSION—DEEDS BY LEGATEES.

The joinder by testator's sons in a deed by the executor of lands sold pursuant to the power in the will, to save the trouble and expense of court proceedings, does not work a reconversion of the real estate, but deeds executed by the sons themselves without any connection with the executors, in accordance with a plan of lots, do work a reconversion.

[Ed. Note.—For other cases, see *Conversion*, Cent. Dig. §§ 66-72; Dec. Dig. § 22.*]

4. CONVERSION (§ 22*)—RECONVERSION—POSSESSION AND USE OF REALTY.

Where a power of sale in a will works an equitable conversion of realty, and the proceeds of sale are to be divided between testator's sons, the sons work a reconversion by taking possession of the land and dealing with it as real estate.

[Ed. Note.—For other cases, see *Conversion*, Cent. Dig. §§ 66-72; Dec. Dig. § 22.*]

Appeal from Orphans' Court, Armstrong County.

In the matter of the estate of P. F. McClarren, deceased. From a decree dismissing exceptions to an auditor's report, Alexander Heilman appeals. Affirmed.

The following opinion was filed in the court below by Reed, P. J., specially presiding:

"This is a contest on distribution between the creditors of George K. McClarren, who is one of the legatees under the will of P. F. McClarren, deceased. His distributive share

of the proceeds of the real estate sold is claimed by his judgment creditors, and the dispute between them is as to the priority of lien of their respective judgments. It is contended that the decedent by his will converted the real estate into personalty, and also that, if it were reconverted by the parties in interest prior to its sale, the judgments to which the auditor has awarded the fund were entered in the interim, and therefore were not liens upon it at the time it was sold. Hence the questions for determination are: Did the testator by his will convert this real estate into personalty; and, if so, did the parties in interest reconvert it into real estate, and at what date?

"P. F. McClarren died, testate, December 21, 1900, leaving to survive him a widow and one daughter and two sons. The provisions of his will which give rise to this contest are as follows:

"I also hereby set aside for my wife's individual use so long as she may live all that portion of my real estate bounded on the south by the public road leading from the Allegheny river by Shoops, on the east by the center of the Allegheny Valley Railway, on the north by a 35-foot street in the plan of lots recently laid out by R. S. Slaymaker, artist, for P. F. McClarren, thence on the west by the Allegheny river; on which there is now erected two dwelling houses, frame barn, wareroom, office and other buildings; to include so much of the orchard as lies south of the street above referred to; supposed to contain three acres be the same more or less. * * *

"I will and bequeath to my son Warren Terry McClarren the sum of two thousand dollars to be paid to him out of the proceeds of my estate to make him equal with his sister and brother.

"As to the residue of moneys from the sale of my real estate, other than that allotted to my wife's occupation and use, I direct it to be divided in equal shares between my two sons, George K. and Warren T. or in case of their decease, then to their children.

"As to that portion of my real estate reserved and allotted to her individual use (meaning my wife), I direct that the same be sold by my administrator, at private or public sale, and that the proceeds arising therefrom be equally divided between my two sons share and share alike after her death.

"I hereby empower my said administrator to sell and convey by deed or deeds my real estate in accordance with the foregoing.

"I hereby declare that my wife shall not be disturbed or annoyed in the peaceable possession of that portion of my real and personal estate herein set apart for her individual use and comfort so long as she shall live."

"Subsequently, by codicil, the testator appointed Hon. W. D. Patton executor of the will, who, February 2, 1902, filed his final

account of the personal estate, showing a balance for distribution between the widow and two sons of \$8,595.48, which balance April 2, 1902, was awarded by agreement of the parties as follows: To the widow, \$2,865.16; to W. T. McClarren, \$3,865.16, which included the \$2,000 bequeathed to him 'to make him equal with his brother and sister'; and \$1,865.16 to George K. McClarren.

"The real estate involved in this controversy originally consisted of a single messuage, part of which the testator devised to his wife for life. The proceeds of the remaining part, which had been laid out in lots prior to his death, he devised to his two sons, share and share alike. The widow died December 12, 1907, and after her death the executor, December 3, 1910, pursuant to an agreement entered into by all the parties in interest that the real estate should be sold by him and the proceeds thereof substituted for the land and distributed to those entitled thereto without regard to how the sale had been effected, sold the part devised to the widow for life for the sum of \$8,050, and the part that had been laid out in lots (except some of the lots which had been previously sold and conveyed and to which reference is hereafter made) for the sum of \$4,600.

"It is to be observed that the testator by his will distinguished his real estate into two parts, and this distinction was recognized and maintained by all the parties in interest in their subsequent dealings with it and in the sales made thereof after the widow's death. In my opinion it must be so considered and treated in the determination of the questions whether one or both of the pieces were converted into personalty by the will of the testator, and, if so, whether one or both were subsequently reconverted by the beneficiaries and when. The exceptants contend that it was the intention of the testator to convert both tracts into personalty, and the auditor has so found. *Severns' Est.*, 211 Pa. 65, 60 Atl. 492; *Jones v. Caldwell*, 97 Pa. 42. The controverted questions, therefore, are whether the beneficiaries subsequently by their unequivocal acts or declarations elected to take one or both of these pieces of real estate unconverted, and, if so, when and how they manifested such election.

"As to that part of the real estate laid out in lots and which the executor was privileged and empowered to sell immediately after the death of the testator, the beneficiaries clearly evinced a purpose to take the land in lieu of the proceeds. This election was unequivocally manifested when they accepted it as unconverted and proceeded to sell and convey the lots into which it had been divided. In October, 1901, they sold and conveyed one of these lots to Dennis A. Duff and also one to R. C. McElfresh. The executor and widow of the testator joined in the execution of these deeds; but there is no evidence showing that they received any part of

he proceeds of the sale, and the fair inference is that the same were received by Warren T. McClarren and George K. McClarren, the beneficiaries under the will who executed the deeds. The executor in his final account in 1902 charged himself with \$224.45 received from Dennis A. Duff and \$65.64 received from R. C. McElfresh; but there is nothing to show that these sums were any part of the proceeds of the sales of these lots. If they had been, it could have been readily proven, and the burden to so prove was on those who now allege it. There is nothing to show that the executor had anything to do with negotiating the sales of these lots, or that he received any part of the proceeds. The only reasonable inference from the facts and circumstances in evidence is that the sales were made by the beneficiaries, Warren T. McClarren and George K. McClarren, and that the proceeds of the same were received by them. The joining of the executor and widow in the execution of the deeds was perfunctory, and no doubt was done at the instance of the purchasers to remove any question in their minds about the title they were acquiring. It appears that one of the lots in this plan of lots had been sold to James W. Lockhart in the testator's lifetime, and after his death the widow, executor, and Warren T. McClarren and George K. McClarren, August 7, 1901, joined in executing and delivering a deed to Lockhart for the same. From this it is argued that the deeds executed by the same parties to Dennis A. Duff and R. C. McElfresh were for lots sold by the testator in his lifetime. This contention, however, is answered by the rule of non sequitur. If such were the fact, it could have and should have been proven. It is significant that in the deed to Lockhart it is recited that the lot therein described is the same lot sold by P. F. McClarren (the testator) to the said James W. Lockhart by article of agreement dated 23d day of September, A. D. 1899.' The deeds to Duff and McElfresh were made about the same time as the deed to Lockhart, but contain no such recital.

"As already stated, the executor filed his final account of the personal estate February 1, 1902, showing a balance in his hands for distribution of \$8,595.48, which was amicably distributed between the widow and Warren T. McClarren and George K. McClarren, who, April 2, 1902, receipted for their distributive shares and executed a release and discharge of the executor 'with the same force and effect as if the said balance had been distributed by the orphans' court of Armstrong county.' This practically severed the executor's connection with the estate. He never exercised or offered to exercise any power or authority conferred upon him by the will in reference to the testator's real estate. About three years after the widow's death, under and pursuant to the agreement

hereinbefore referred to, he sold the real estate devised to her for life for \$8,050, and the remaining lots of that part of the real estate that had been laid out in lots for \$4,600. After the executor had filed his account of the personal estate, the beneficiaries of the real estate continued to deal with the tract comprising the plan of lots as unconverted, thereby confirming their prior election to accept it as real estate instead of the proceeds thereof. They sold a number of lots and executed and delivered deeds to purchasers, and in various other ways set out by auditor in his report indicated their prior election to take this real estate as land instead of money. Assuming that the will converted this part of the testator's real estate into personalty, the beneficiaries reconverted it into real estate as early as October, 1901, when they sold a part of the same and executed and delivered deeds to the purchasers therefor. *Smith v. Starr*, 3 Whart. 62, 31 Am. Dec. 498; *McGarry v. McGarry*, 9 Pa. Super. Ct. 71; *Howell v. Mellon*, 189 Pa. 169, 42 Atl. 6; *Brandon v. McKinney*, 233 Pa. 481, 82 Atl. 764. From the time of the sale of the first lot in October, 1901, down to the final sale of the remaining lots in 1910, all the joint and several acts of the beneficiaries clearly and unequivocally indicated their election to hold this real estate as such. It is disputed that the testator by his will converted this part of the real estate into personalty, but inasmuch as the beneficiaries reconverted it into realty as of the date of October —, 1901, the distribution of the proceeds of sale is not affected if it be granted that the will did convert it into personalty.

"As to that part of the real estate devised to the widow for life, there is no evidence whatsoever of any act or declaration by the beneficiaries, prior to her death, to indicate an election on their part to hold the same as real estate. A few days after her death they did so elect by taking possession of it and leasing it, collecting the rents and dividing the same equally between them after paying thereout the taxes assessed on both tracts and the insurance on buildings on this particular tract. After her death December 15, 1907, they assumed absolute control and dominion over this part of the real estate and treated and dealt with it as such until it was sold pursuant to the agreement herein referred to. The testator positively and explicitly directs this part of his real estate to be sold after the death of his widow and the proceeds arising from such sale to be equally divided between his two sons. This worked a conversion of it into personalty. *Parkinson's App.*, 82 Pa. 455; *McClure's App.*, 72 Pa. 414; *Jones v. Caldwell*, 97 Pa. 42. It remained personalty until reconverted into realty by the beneficiaries after the death of the widow, which reconversion took place December 15, 1907.

"The auditor in his disposition of the case reached the conclusion that the testator intended to convert all his real estate into personality and to bequeath the proceeds as money, but that the beneficiaries elected to take such real estate as such in lieu of the proceeds, and that this election was made as to all of the real estate at a date preceding the entry of the judgments of Alex. Hilleman and Mary Montgomery et al., which were entered on the same day, namely, October 18, 1902. He found George K. McClarren's net share of the proceeds of sale to be \$5,696.92, and awarded to Alex. Hilleman and Mary Montgomery et al. \$3,447.60 in full payment of the debt, interest, costs, and attorney's commission of their respective judgments; and the balance of said distributive share, \$2,249.32, he awarded to judgments of W. D. Patton. There have been a large number of exceptions filed to the auditor's findings of fact and conclusions of law; but the only substantial error discovered by the court is in his failure to distinguish between the two parcels of real estate regarding the respective dates when the beneficiaries elected to take and hold the same as real estate in lieu of the proceeds thereof bequeathed to them.

"From the testimony and records submitted I am unable to make the distribution and can only indicate my opinion as to how it should be made and refer the case back to the auditor to make the same in accordance therewith. For his information I may say that one-half of the proceeds of the sale of that part of the real estate comprising the plan of lots, less one-half of the expenses of the sale and the costs of the audit, leaving the net balance, as near as I can determine from the data at hand, \$1,985.97, should be distributed pro rata to the judgments of Alex. Hilleman and Mary Montgomery et al., which were entered on the same day, October 18, 1902. These judgments never became liens on that part of the real estate devised to the widow for life. When they were entered this real estate in contemplation of law was personality, and, while writs of scire facias thereon were issued, judgments on these writs were not taken and entered until after the real estate had been sold. Inasmuch as the real estate devised to the widow for life remained personality until after her death, the one-half of the proceeds of its sale, less one-half of the expenses of the sale and the costs of the audit, leaving the net balance, as near as I can determine, \$3,710.96, should be awarded to those judgments that became liens after its reconversion, to wit, December 15, 1907, according to priority, subject, however, to the assignment by George K. McClarren to Hon. W. D. Patton of his interest in the estate to secure the payment of his indebtedness to him; and the balance remaining, if any, to the attaching creditors as their respective rights thereto may appear.

"It is earnestly maintained, however, that a reconversion of the real estate divided into lots did not take place in October, 1901, when the two beneficiaries joined with the executor and widow in executing and delivering deeds to Dennis A. Duff and R. C. McElfresh for lots Nos. 37 and 38, for the reason that these conveyances were for the purpose of executing contracts made for the sale of these lots by the testator in his lifetime. If this were an established fact, this contention would seem to be correct. *Foster v. Harria*, 10 Pa. 457; *Longwell v. Berkeley*, 23 Pa. 99; *Leiper's App.*, 35 Pa. 49; 78 Am. Dec. 347; *Bender v. Luckenbach*, 16 Pa. 18, 29 Atl. 295, 296. In that event the reconversion was effected June 26, 1905 when the beneficiaries sold and conveyed to C. C. Fiscus lot No. 3, instead of October, 1901, as hereinbefore stated. This change in the date when the reconversion was effected would materially affect the distribution of the proceeds of sale of this real estate. Instead of the judgments of Alex. Hilleman and Mary Montgomery et al. being entitled thereto, the same would have to be awarded to the judgments of Hon. W. D. Patton as the first liens upon the real estate after the beneficiaries elected to take it as such instead of the proceeds thereof. *Boland v. Miller*, 100 Pa. 47; *Brolasky v. Gally*, 51 Pa. 509; *Ross' App.*, 106 Pa. 82; *Burr v. Sim*, 1 Whart. 252, 29 Am. Dec. 48; *Simpson v. Kelso*, 8 Watts, 247; *Melly v. Wood*, 71 Pa. 488, 10 Am. Rep. 719; *Brandon v. McKinney*, 233 Pa. 481, 82 Atl. 764. Since it has become necessary to refer the case back to the auditor to make distribution in accordance with the views of the court herein expressed, and inasmuch as it is possible that the deeds to Dennis A. Duff and R. C. McElfresh were made and delivered for the purpose of consummating sales made by the testator, the auditor is authorized and directed, if the parties in interest so desire, to grant a further hearing in relation thereto for the purpose of determining the real character of those transactions.

"And now, April 24th, 1912, so far as the exceptions filed to the auditor's report conflict with the views of the court they are dismissed, and so far as they harmonize therewith, they are sustained; and the report is referred back to the auditor to make distribution of George K. McClarren's distributive share of the proceeds of sales of the real estate of P. F. McClarren, deceased in accordance with this opinion."

On exceptions to the auditor's supplemental opinion, Reed, P. J., filed the following opinion:

"This case is now before the court on exceptions to the supplemental report filed by the auditor. The original report was referred back to him to make distribution in accordance with the opinion of the court on the exceptions filed thereto and also for fur:

ther consideration by him of the question raised as to the nature and effect of the deeds made by the executor and the widow and legatees of the testator and delivered to Dennis A. Duff and R. C. McElfresh for lots Nos. 37 and 38. These deeds were made and delivered in 1901 and were held by the court to manifest a clear and unequivocal intention on the part of the legatees to take the real estate of which they were a part in its unconverted state. It was contended, however, by judgment creditors of George K. McClarren, one of the legatees, that these deeds were made in pursuance of sales by the testator in his lifetime on articles of agreement, and therefore could not be given the effect of working a reconversion of this part of the testator's real estate which by his will he had converted into personality. The court indicated in the opinion filed that if the auditor should find that these deeds were executed and delivered in consummation of sales made by the testator, and from the testimony offered on the reference of this question to him he has so found, the reconversion of the real estate of which these lots were a part was not effected until June, 1905, when the legatees in their own right sold and conveyed certain of these lots and thereby clearly and unequivocally expressed their intention to take this real estate in its unconverted state. This change in the date when the reconversion was effected materially affects the distribution of the proceeds of the sale of this real estate. If the reconversion took place in 1901, then the judgments of Alex. Heilman and Mary Montgomery et al. became the first liens thereon and would be entitled to the proceeds of the sale; but, if it did not take place until 1905, the judgments of other creditors became the first liens thereon and would take the proceeds.

"The testator devised a part of his real estate to his widow for life, with direction to sell the same after her death and to divide the proceeds between his two sons, Warren T. McClarren and George K. McClarren, share and share alike, and bequeathed the residue of moneys accruing from the sale of his real estate other than that devised to his wife for life to his said sons in equal shares, and authorized and empowered his executor to sell and convey the real estate in executing and carrying out the provisions of his will.

"The auditor has found that the testator by his will converted all his real estate into personality and bequeathed the proceeds to his two sons share and share alike; and in this finding the court concurs. None of the parties in interest, in their arguments before the court has questioned the correctness of this conclusion. The parties are likewise unanimous in their approval of the auditor's finding that a reconversion was subsequently effected by the legatees. The sole controversy between them is: When was this recon-

version effected? The auditor was of the opinion that it took place shortly after the testator's death, or at least prior to the time of the entry of the Heilman and Montgomery judgments, October 18, 1902, and made no distinction between that part of the real estate laid out into lots which the executor was empowered to sell forthwith and to divide the proceeds in equal shares between his two sons, and that part devised to his widow for life with direction to sell after her death and to divide the proceeds thereof between said sons share and share alike. In the opinion of the court this conclusion of the auditor was not sustained by the evidence or the law applicable thereto. In his supplemental report the auditor still adheres to his original opinion on this question, but, constrained by the views of the court, he finds that the reconversion of that part of the real estate laid out into lots took place in June, 1905, and of that part devised to the widow for life in December, 1907; and in these findings the court concurs. The auditor in support of his views cites *Yerkes v. Yerkes*, 200 Pa. 419, 50 Atl. 186, and *Painter v. Painter*, 220 Pa. 82, 69 Atl. 323, 20 L. R. A. (N. S.) 117; but he apparently overlooks the fact that the question is not when does a conversion take place, but how is a reconversion effected. The executor could not, by anything he might do or say, work a reconversion. Neither could the legatees by their several and independent acts or declarations effect this result. The declarations or acts which would work a reconversion must be joined in by all the parties in interest, and they must be unequivocal acts or declarations clearly manifesting an intention of all the legatees of the proceeds to take the land in lieu thereof. It is impossible to deduce such intention from the administration account of the personal estate filed by the executor, or from the amicable distribution of the balance thereby shown to be in his hands, or from the receipt of the widow and legatees of their respective distributive shares and the release and discharge of the executor in pursuance thereof with the same force and effect as if this balance had been distributed by the orphans' court, or from all these acts and declarations combined. There is absolutely nothing in these acts and declarations, considered singly or together, to indicate an election on the part of the legatees to take the land in lieu of the proceeds bequeathed to them.

"Prior to June, 1905, there is not a syllable of testimony that these legatees took possession of this real estate or that they rented it or paid taxes on it or in any other way exercised acts of ownership over it to indicate an intention on their part to take the same as land. From a careful reading of the testimony, the first indication by either of the legatees of an intention to take the land in its unconverted condition was when

George K. McClarren, October 18, 1904, executed and delivered to Alexander Hellman a power of attorney to make sales of these lots. The intention of George K. McClarren thus manifested was not acquiesced in by the other legatee, Warren T. McClarren, until June 20, 1905, when he joined with Alexander Hellman, attorney in fact for George K. McClarren, in executing and delivering a deed for lot No. 13 in this plan of lots, and a few days later they jointly executed and delivered to C. C. Fiscus a deed for lot No. 3, thereby clearly and unequivocally declaring their intention to take the land in lieu of its proceeds. Regarding that part of the real estate devised to the widow for life, the proceeds of which after her death were bequeathed to these two sons, they had no right to its possession and did not in any manner whatsoever during the lifetime of the widow express an intention to take it in its unconverted state. After her death December 12, 1907, they did December 15, 1907, take possession of it by their agent, Alexander Hellman, rented the same, received the rent, paid the taxes, paid insurance on the buildings located thereon, and in other ways manifested a clear and unequivocal intention to take the land in lieu of its proceeds. The auditor, constrained by the views of the court expressed in the opinion on the exceptions filed to his original report, has now found as a fact that the reconversion of that part of the real estate laid out in lots was effected June, 1905, and that the reconversion of that part of the real estate devised to the widow for life was effected in December, 1907; and this finding the court approves. There is absolutely no evidence upon which to base a finding of a reconversion of either of these pieces of real estate at a date earlier than stated in this finding.

"In the distribution of the proceeds of sale of these two pieces of real estate it is unnecessary to distinguish the fund into two parts, inasmuch as the same judgments would take the proceeds by virtue of being the first liens thereon if distributed separately. After awarding so much of the fund as is required to pay the debt, interest, and costs of the several judgments secured thereon, there remains a balance of \$1,210, which the auditor has awarded pro rata to the judgments of Alex. Hellman and Mary Montgomery et al. These judgments were not a lien on the real estate at the time of its sale or otherwise secured on the proceeds of sale. They were entered before the legatees elected to take the land unconverted. Subsequently writs of scire facias were issued upon them, but judgments were not entered on these writs until after the land was sold. The auditor, being of the opinion that the proceeds of sale by agreement of the parties was substituted for the real estate, finds that these judgments, although entered after the sale, became liens upon the proceeds. I

am unable to agree with this conclusion of the auditor. The lien of a judgment attaches only to the land, and not to the proceeds of its sale. *Hahn v. Smith*, 1 Pen. & W. 484; *Homer's Est.*, 7 Pa. Dist. R. 63; *Snively's Est.*, 9 Pa. Co. Ct. R. 422. See *Hardenburg v. Beecher*, 104 Pa. 20. As between creditors the proceeds of this sale were personal property and would go to the distributee under the will unless he voluntarily parted with his right thereto or the same was seized by execution process against him. *R. C. Lamberton and Margaret Lamberton, executors*, for use of the Franklin Trust Company, obtained a judgment against George K. McClarren, distributee, after the sale of the real estate, and thereupon issued an attachment execution, which was served upon the custodian of the proceeds of the sale of said real estate. The trust company, by virtue of this execution process, claims this balance of \$1,210, which the auditor awarded to the judgments of Alex. Hellman and Mary Montgomery et al., and in the opinion of the court it is entitled to the same, and its exceptions to the auditor's supplemental report awarding this balance pro rata to the judgments of Alex. Hellman and Mary Montgomery et al. are sustained. The Franklin Trust Company has also excepted to the auditor's charges for services in taking testimony and preparing his supplemental report. No testimony has been offered to show, and the court is not in any way advised, how much time was spent by the auditor in taking testimony and preparing his report, and in absence of any information on the subject the court assumes that the auditor's charges do not exceed the compensation allowed him by law, and therefore this exception is dismissed. The exceptions filed on behalf of Alex. Hellman and Mary Montgomery et al. to the auditor's failure to allow full payment of debt, interest, and costs of their respective judgments against George K. McClarren, for the reasons stated in this opinion, are severally dismissed, and the balance of \$1,210, divided pro rata between these judgments by the auditor is now awarded to the Franklin Trust Company."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

H. A. Hellman and J. H. Painter, of Kittanning, for appellant. H. L. Golden, of Kittanning, Homer R. Blair, of Franklin, and Eugene Mackey, of Pittsburg, for appellee Franklin Trust Co.

MESTREZAT, J. [1] In *Severns' Estate*, 211 Pa. 65, 68, 60 Atl. 492, 493, it is said: "We therefore have in the will an authority given to the executrix to sell and a direction to divide the proceeds of the sale in equal shares among the three legatees. In order to carry out the provisions of the will and

make that distribution of the proceeds of the property, a sale of the real estate becomes imperative and is an absolute necessity. This, as appears from the authorities cited above, meets the requirements of our cases and operates as an equitable conversion." Applying this doctrine, sustained by all the cases, to the case in hand, it is clear that the will of P. F. McClarren worked a conversion of all his real estate. It is manifest that it was the testator's intention that his two sons should receive the proceeds of the sale of both pieces of real estate, and not the land itself. He devised the homestead to his wife for life, and then directs "that the same be sold by my administrator, at private or public sale, and that the proceeds rising therefrom be equally divided between my two sons share and share alike after her death." Here are two of the essential requisites of an equitable conversion: A positive direction to sell, and an absolute necessity to sell in order to execute the will. As to the other part of his real estate, known as the "McClarren Plan of Lots," the will provides as follows: "As to the residue of moneys from the sale of my real estate, other than that allotted by my wife's occupation and use, I direct it to be divided in equal shares between my two sons, George K. and Warren T. or in case of their decease, then to their children." This is a positive direction to divide the proceeds of and not the real estate itself between the two sons, and, while there is no express direction to sell, there is an absolute necessity to sell to accomplish the purpose of the testator; and that works a conversion. *Fahnestock v. Fahnestock*, 152 Pa. 56, 25 Atl. 313, 34 Am. St. Rep. 623. But there is another clause in the will which not only discloses an intention on the part of the testator that his real estate shall be sold for the purposes of distribution, but also empowers his personal representative to make the sale. It is subsequent to the provisions directing the proceeds of the land to be divided between his sons and is as follows: "I hereby empower my said administrator to sell and convey by deed or deeds my real estate in accordance with the foregoing." The power of sale contained in this provision applies to both pieces of real estate, and read in connection with the item of the will directing the division of the proceeds of the plan of lots operates as a conversion of that part of the testator's land. *Roland v. Miller*, 100 Pa. 47.

The appellant concedes that if there was a conversion of the real estate under the terms of the will, and we so hold, there was a reconversion, but he and the appellee disagreed as to the date of the reconversion. The appellant contends that it occurred on April 2, 1902, the date of the execution of the release and discharge of the executor, or when the legatees joined in the execution of certain deeds, and that as his judgment was en-

tered on October 18, 1902, it was the first lien and should be paid out of the proceeds of the sale of the real estate. The appellee claims, and the court below found, that reconversion took place as to the plan of lots in June, 1905, and as to the real estate held by the widow for life it took place after her death in December, 1907. It was accordingly held by the learned trial court that, the appellant's judgment having been entered prior to the reconversion, it was not a lien on the real estate and was postponed to the lien of the judgments entered subsequent to the reconversion.

[2] We think it clear that the release executed and delivered to the executor by the parties entitled under the will was not an act by them disclosing an intention to reconvert the real estate. The appellant misconceives the purpose as well as the effect of the release. The executor had filed his account of the administration of the personal estate showing a balance in his hands for distribution. The release waived the appointment of an auditor, agreed to distribution, acknowledged the receipt of the amount due from the personal estate, and released and discharged the executor, "with the same force and effect as if the said balance had been distributed by the orphans' court of Armstrong county." The purpose of the release, as is apparent, was simply to save the time and expense of a distribution of the personalty by the orphans' court. It did not relate to or affect the real estate, nor did it release the executor from his duty to sell the real estate or show an intention on the part of the legatees to accept the land in place of the proceeds of the sale.

[3] The execution of the deeds to Lockhart, Duff, and McElfresh by the legatees was not an act of reconversion. They were sales by the decedent and the deeds were executed by the executor to carry out the testator's contracts. The widow and legatees joined in executing the deeds, as found by the auditor and the court, to save the trouble and expense of a proceeding in court for specific performance. The lots having been sold by the testator, his legatees through the executor were entitled to the purchase money and not to the real estate.

[4] The learned court below properly found that the first indication by the legatees to take the plan of lots as land was the execution and delivery of a deed to a purchaser of one of the lots in June, 1905. A few days later they executed and delivered a deed for another lot. These were acts on the part of the legatees clearly disclosing an intention to reconvert and fixing the date of reconversion. As to the part of the real estate devised to the wife for life, there was nothing to indicate an intention to reconvert until after her death when the legatees took possession and dealt with it as real estate. The action of the court below on this branch of the case

is sustained by the recent decision in *Brandon v. McKinney*, 233 Pa. 481, 82 Atl. 764.

The elaborate opinions of the learned court below make unnecessary any further discussion of the points involved in the case.

The decree is affirmed.

FIRST NAT. BANK OF LEECHBURG v. TITLE GUARANTY & SURETY CO.
(Supreme Court of Pennsylvania. Jan. 6, 1913.)

APPEAL AND ERROR (§ 966*)—REVIEW—DENIAL OF CONTINUANCE.

An order denying a continuance will not be reversed, in the absence of an abuse of power by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.*]

Appeal from Court of Common Pleas, Armstrong County.

Action by the First National Bank of Leechburg against the Title Guaranty & Surety Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the opinion of Patton, P. J., in the court below:

"The statement of claim was filed on April 24, 1911. On Saturday, June 1, 1912, two days before the case was to be called for trial, the defendant presented a petition to the court in which it averred that it was the surety on the bond in suit which had been given to protect the plaintiff from loss by reason of fraud or dishonesty of one A. B. Windt, employed by the plaintiff as its foreign exchange bank clerk; that the suit had been brought to recover losses alleged to have been sustained by reason of the defalcations of Windt. The petitioner averred that it expected to prove at the trial that Windt had made a full and complete settlement with the plaintiff. The petition continued as follows: 'Defendant further says that it is informed, and believes and expects to be able to prove upon trial of this cause, that not only was there a full settlement between the said Windt and the said plaintiff, but that the plaintiff recommended the said Windt to the good will of the public, both by newspaper publications and otherwise. Defendant further says that it is informed by John H. Jordan, Esq., United States District Attorney for the Western District of Pennsylvania, and believes and expects to be able to prove upon trial of this cause, that the said A. B. Windt, for whose alleged defalcations this action is brought, is now serving a term of imprisonment at Manila, in the Philippine Islands, and that his term will probably expire during the present month. This defendant is informed that the said United States District Attorney, John H. Jordan, has made requisition for the said Windt, so that he may be tried upon the identical charges upon which this action is

based, and that the said Windt is to be transported, immediately upon his release from imprisonment, to this country and placed in charge of the United States authorities for the Western District of Pennsylvania, to stand trial upon these charges. This defendant further says that it believes that the said Windt, in view of the alleged settlement of these charges as above set forth, and in view of his knowledge of all of these transactions, would be a valuable witness for this defendant, and in fact is the only witness having full and complete knowledge of his said alleged fraudulent transactions. . . .

Your petitioner further says that there has not been sufficient time since the filing of the supplemental declaration by the plaintiff in this cause to take the deposition of the said Windt, by reason of his imprisonment at such a great distance. Your petitioner further says that it is impossible to procure other witnesses, and in fact there are no other witnesses who, it is reasonable to suppose, can testify to the same facts. Your petitioner further says that the said witness is perfectly competent, and that his testimony will be competent, relevant, and material to the issue. The petition prayed for the continuance of the case until the fall term."

"When the case was called for trial, the court overruled the motion for continuance based upon the petition previously presented."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHIZISKER, JJ.

George J. Shaffer and Lyon & Hunter, all of Pittsburgh, and Heiner & Golden, of Kittanning, for appellant. J. H. Painter, Floy C. Jones, and H. L. Golden, all of Kittanning, for appellee.

PER CURIAM. This action was upon a bond given to indemnify the plaintiff from loss which might result from the embezzlement or larceny by an employé. The only assignment of error to be considered relates to the refusal of the court to continue the case because of the absence of a material witness, who at the time was imprisoned in the Philippine Islands. A motion for the continuance of a case is addressed to the sound discretion of the court, and its order will not be overruled in the absence of clear proof of an abuse of power. That does not appear in this case.

The judgment is affirmed.

CALL v. HALLAM CONST. CO.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

1. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR—MEASURE OF DAMAGES.

On plaintiff's appeal from a judgment in a personal injury case, where the jury has found that he is not entitled to any damages what-

ever, an assignment of error, as to the measure of damages, does not present ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

2. NEGLIGENCE (§ 136*)—INJURIES TO THIRD PERSONS—ACTIONS—QUESTION FOR JURY.

In an action by a woman against a contracting company for injuries sustained from falling into an unguarded excavation made by defendant in a private alley, evidence held to present a question for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

3. MASTER AND SERVANT (§ 330*)—INJURIES TO SERVANT—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action against a contracting company for injuries sustained from falling into an unguarded excavation in a private alley, the ordinance under which defendant's contract to improve a street was made, the contract itself, and evidence in relation to the borough's duty to the alley, if any, were admissible to show the situation of the parties in respect to the work done in the alley.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.*]

4. NEGLIGENCE (§ 138*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In an action for personal injuries, the court charged that plaintiff must show negligence by a preponderance of evidence, and that "in addition it must also appear" that plaintiff was herself free from contributory negligence, and that, if it appears from the evidence that plaintiff was guilty of contributory negligence, there could be no recovery. Held not erroneous as leading the jury to believe that plaintiff must show freedom from contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 354-370; Dec. Dig. § 138.*]

5. TRIAL (§ 296*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

A judgment will not be reversed for an inaccurate instruction, where the court subsequently gave ample and proper instructions, so that the jury could not have been misled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

6. NEW TRIAL (§ 44*)—GROUNDS—INTOXICATION OF JUROR.

It is not an abuse of discretion to refuse a new trial asked for on the ground of intoxication of a juror, where the court finds, from depositions offered in support of the motion, that the juror was not incapacitated for an intelligent consideration and disposition of the case.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 80-85, 105; Dec. Dig. § 44.*]

Appeal from Court of Common Pleas, Greene County.

Action of trespass by John Call, as administrator of Elizabeth Call, and individually, against the Hallam Construction Company for personal injuries. From a judgment for defendant, plaintiff appeals. Affirmed.

At the trial it appeared that on September 27, 1908, in the evening, Elizabeth Call fell into an excavation made in an alley by the defendant company. The company at the

time was engaged in work, under a contract with the borough of Waynesburg, of improving streets.

Defendant made the following offer:

"By Mr. Irwin: We propose to introduce in evidence the ordinance of the borough of Waynesburg providing for the grading of Lincoln street past the Call property and past the place where the excavation was made in which this injury occurred, to follow that by the contract entered into between the borough of Waynesburg and the Hallam Construction Company for the grading and paving of Lincoln street, for the purpose of showing that the contract entered into by the Hallam Construction Company, under which that paving and grading was done in pursuance of the borough ordinance, did not embrace the grading or paving of this private alley, where it intersected Lincoln street at the point where this injury occurred. This is to be followed by evidence showing that that excavation was made under an arrangement between W. W. Call, the husband of the owner of the property, and Mr. Freeland, who had charge of the men of the Hallam Construction Company, who were doing the grading of Lincoln street, and to show, further, that he had no authority to make any contract for the Hallam Construction Company; that he had no authority, on behalf of the Hallam Construction Company, to enter into an agreement to do the excavation; and that the Hallam Construction Company had no knowledge that any such an arrangement was entered into until the excavation had been completed, and also there was no ratification of the arrangement. Objection: By Purman: Plaintiffs object to the evidence offered: (1) Because the evidence offered is not an offer to show that the defendant company did not do the work of digging the ditch across the pavement, and therefore the contract between the defendant company and the borough, concerning their grading, would be incompetent, irrelevant, and immaterial. (2) Further that the defendant cannot excuse itself of negligence by offering to show that it had no contract with the municipality for the excavation made, out of which the negligence arose. (3) That it is generally incompetent, irrelevant, and immaterial. By the Court: We will overrule the objection, admit the evidence, grant an exception, and seal a bill. By Mr. Irwin: I desire to offer in evidence, at this point, the ordinance which has been identified by the secretary of the counsel, and ask to read the same to the jury. Objection: By Mr. Purman: Plaintiffs object to the offer of the ordinance for the reason that it is incompetent, irrelevant, and immaterial. It does not prove, nor tend to prove, the defendant company did not commit the trespass complained of in the declaration. Neither does it show, nor tend to show, justifi-

fication of the excavation complained of. By the Court: Objection is overruled, offer admitted, exception granted, and bill sealed. Same read by Mr. Irwin."

The court charged, in part, as follows:

"The jurors, however, are the judges of the kind and character of the warning to be given—that is, the jury examine the facts and circumstances and ascertain whether or not the warning given of the existence of the excavation is such that a reasonably prudent person would have given in the circumstances—or, if no warning has been given, whether or not the circumstances are such that a reasonably careful person would have put up a warning, and what the character of the warning required.

"Now, gentlemen, we say to you that, if the employes of the defendant company made an error in opening that sidewalk, then, for anything that resulted because of that excavation having been made, the defendant company would be liable, unless from subsequent facts and circumstances it was relieved.

"Now, gentlemen, you will determine, first, Was this excavation made without any authority of the property owners? Now, we say to you, if it was, the property owners did not recognize it—did not acquiesce in it, did not approve it—then, gentlemen of the jury, the defendant would be required to guard this excavation and put up barricades, lights, or other warning reasonably necessary in the circumstances to warn travelers upon the sidewalk of the excavation.

"Again, gentlemen, there is another question that you will also have to take up, if you find that this excavation was not made by the defendant's employes by accident or by mistake alone, and that is whether or not the excavation was made under an arrangement or agreement with the property owners. Now, if you find that it was, then there is another question for you to determine, and that is whether it was made under the direction and control of W. W. Call. If it was, if it was merely a contract in the first instance or arrangement for the grading, and that was made under the direction and control of W. W. Call, the employes of the Hallam Construction Company merely doing the work under Call's supervision and direction, then it would be the duty of Call to protect that excavation. And, if you find such to be a fact, there could be no recovery in this case. On the other hand, if you find the excavation was made under the control of the employes of the defendant company—that is, if they took entire charge of it, and it was under their control and supervision while it was being excavated, but, after it was excavated, the property owners agreed to become responsible for it (in other words, took it off their hands), if it was then a completed job, so far as the Hallam people were concerned—then it would be the duty of Call (W. W. Call) to guard that excavation;

and, in such event, there could not be a recovery here.

"Again, gentlemen, if you find that such was not the case, you will then inquire whether or not there was an arrangement between the foreman for the defendant company and the property owners for the doing of the work, including the subgrade and putting in of the paving. If you find there was such an arrangement, and that the work was done under the direction and supervision of W. W. Call, then there could be no recovery in this case, for in such circumstances it would have been the duty of W. W. Call to have guarded the excavation.

"Gentlemen, if you find here that there was such an arrangement as was contended for here by the plaintiffs with the agent of the defendant, and that agent's act was ratified, and you find that the defendant was guilty of negligence that contributed to bringing about this injury, then you will pass to another question. If you should find the defendant was guilty of negligence, through its agents and employes, that did contribute to bring about this accident, still the defendant would not be liable if Elizabeth Call contributed in any way to the bringing of that injury upon herself. Now, in determining whether or not she was guilty of contributory negligence in approaching that place, you will take into consideration her age, the kind of an evening it was as to darkness, the condition of the streets in the neighborhood of this sidewalk, and all of the other facts and circumstances present at that place. Did she know that there was already a depression in this sidewalk, if there was such? And did she not, gentlemen of the jury, do that which a reasonably prudent person would have done in approaching it? Or did she fail to do something in approaching that depression, if one existed, that a reasonably prudent person would not have failed to do? If she failed in either of these respects, she would be guilty of contributory negligence, and she could not recover, no matter how negligent the employes of the defendant company may have been."

Plaintiffs presented these points:

"Points.

"(1) That this action is a joint action, brought in the lifetime of Elizabeth Call by the plaintiffs against the defendant for injuries alleged to be wrongfully inflicted upon the person of the wife; and, if the jury find in favor of both of the plaintiffs, it is their duty to render two verdicts, one verdict in favor of John Call, administrator of Elizabeth Call, deceased, for such sum or amount as her earning power may have been diminished by reason of her injury from the time of her injury to the time of her death, and for such additional time as she would probably have lived if the injury had not occurred, together with such sum or amount

is would reasonably compensate her for the pain and suffering sustained by her by reason of the injury; the other verdict in favor of John Call for such sum as the jury may find he has been obliged to expend on account of the injury from the time the injury was sustained up to the time of her death, including the loss of the fellowship, society, and comfort sustained by him by reason of the injury from the time of the injury up to the time of his wife's death. Answer: Refused and not read.

"(2) It was the duty of the defendant to keep the footway or pavement on Lincoln street, while making the improvement, in reasonably safe condition for travel; and it was also its duty, when digging and excavating across the footway or pavement, to place a light or other warning at or near said excavation at night to prevent injury to travelers; and if the jury believe from the evidence that the defendant in this action made, or caused to be made, the excavation on or across the pavement of Lincoln street (into which Elizabeth Call fell and was injured), and that defendant left it open and wholly unguarded, and without a light, and that, because of this negligence, Elizabeth Call, in the nighttime, fell into the excavation and was injured, without fault on her part, then the jury may find for the plaintiffs. Answer: Refused and not read.

"(3) Plaintiffs' right to recover in this action is not controlled by whatsoever authority or for whom Hallam Construction Company actually made the excavation across the footway or pavement (into which Elizabeth Call fell and was injured); but the question for determination by the jury is, Did the defendant company make the excavation, and, if so, how and in what manner did they make it, and also, was it dangerous, and did they negligently leave it by night unguarded, without light or other warning, and was it because of this negligence that Elizabeth Call was injured? and if the jury believe from the evidence that Hallam Construction Company made the excavation and negligently left it by night unguarded, without light or other warning, and that, because of its leaving it so unguarded, Elizabeth Call, without fault on her part, fell into the ditch and was injured, then the defendant, Hallam Construction Company, is liable to answer in damages for such neglect and consequent injury, no matter for whom they were actually doing the work. Answer: Refused and not read.

"(4) Even if the jury should believe from the evidence that the defendant, Hallam Construction Company, made the excavation in the footway or pavement for or at the instance of the abutting property owners, and without authority from the borough, yet, if they do believe from the evidence that said Hallam Construction Company negligently left said ditch or excavation open and wholly

unguarded by night, without light or other warning, and that the same was dangerous, and that, because of this negligence, Elizabeth Call fell into said ditch or excavation and was injured, then plaintiffs are entitled to recover in this action, provided the jury further find that Elizabeth Call did not contribute to the cause of said injury. Answer: Refused and not read."

Defendant presented these points:

"(1) If the jury find from the evidence that the contract, under which the Hallam Construction Company was paving Lincoln street past the point where the accident occurred, did not embrace the grading and paving of the private alleyway where the plaintiff was injured, but that the grading of that alleyway was done by the employes of the Hallam Construction Company under an arrangement between the owners of the property where the accident occurred and the man in charge of the men who were doing the grading, before the defendant company can be held liable for negligence in not properly guarding that excavation or placing lights there at night to warn the traveling public, it must be shown that either the man in charge of the employes, with whom the owner of the property had the arrangement for having the alleyway graded, had authority to enter into a contract on behalf of the Hallam Construction Company to do that work, or that the Hallam Construction Company had knowledge that he had undertaken to grade that alley on behalf of the company, and ratified and approved his agreement, and permitted the work to be done in pursuance to his arrangement with the owner of the property. Answer: Affirmed.

"(2) If the jury find from the evidence that the contract, under which the Hallam Construction Company was grading and paving Lincoln street past where the accident occurred, did not embrace the grading and paving of the private alleyway where the accident occurred, but that the grading of that alleyway was done by an arrangement between the owner of the property and the man in charge of the employes of the Hallam Construction Company, who were grading the street, that that arrangement was simply for the grading of the alleyway, and that the owner of the property, before the accident occurred, was informed or knew that the grading was completed, then it was his duty to take the necessary steps to protect the traveling public from falling into that excavation or from injury by reason of the excavation, and his failure so to do would not render the Hallam Construction Company liable for the accident for which this suit is brought. Answer: Affirmed.

"(3) If the jury believes from the evidence that immediately prior to the time when the alleyway where the accident occurred was excavated, and for some considerable time prior thereto, there had been an offset of

some 15 or 18 inches on the eastern side of the alleyway, the alleyway being that much lower than the footway immediately east of the alley, and that Elizabeth Call had frequently passed over that footway and alley going to and from her son's residence, and knew of the existence of that offset in the pavement, then she was bound to exercise care, when walking along the street on the night of the accident, to avoid falling over that depression. If the jury finds from the evidence that she, while walking from Washington street to her son's on the south side of Lincoln street at the time of the accident, was not paying attention to the condition of the sidewalk nor looking out for that depression in the pavement, but that she simply walked on in the darkness, heedless of the fact that there was a depression there, until she walked over it and fell, then she was guilty of contributory negligence, and the plaintiff in this case cannot recover, even though it be true that the alleyway had been excavated deeper, and that there was no barrier or lights to warn the traveling public. Answer: Affirmed."

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKEE, JJ.

James J. Purman and David R. Huss, both of Waynesburg, for appellants. R. W. Irwin, of Washington, J. W. Ray, of Waynesburg, and J. A. Wiley, of Washington, for appellee.

ELKIN, J. [1] This is an action brought by the husband individually and as administrator to recover damages for personal injuries sustained by his wife. The case was submitted to the jury, and a verdict was returned in favor of the defendant. The 18 assignments of error relate mainly to the charge of the trial judge and the answers to the points. Most of the assignments are technical and lacking in substantial merit, when viewed in the light of the whole record. The assignment relating to the instruction as to the measure of damages certainly would not warrant a reversal, when the jury found, as a fact, that appellants were not entitled to recover any damages whatever.

[2] Complaint is made by appellants that the case was not fairly submitted to the jury from their point of view, and that the charge was inadequate. It is urged that the contentions of the defendant were unduly emphasized, while those of the plaintiffs were minimized or disregarded. In order to properly determine the various questions thus raised for our consideration, it has been necessary to carefully examine the entire record, including the charge of the court, the answers to points, the theories upon which the case was tried by the contending parties, and the reasons given for refusing a new trial. After having done so, we have reached the conclusion that all of the disputed questions of fact were fairly submitted to the jury, and that there was no substantial and reversible

error in the instructions as to the law applicable to the case. The negligence charged was that the defendant had negligently and wrongfully allowed the excavation in the pavement or footway to remain open, unguarded, and without barrier or signal light as a protection to travelers upon the street or pavement. The contention of the appellants was that it was the duty of the appellee to give notice of the dangerous situation, caused by the excavation in question, by signal lights or otherwise, and to erect proper guards, and that failure to perform these duties was the proximate cause of the accident. The appellants tried their case upon this theory, and this view was fairly submitted to the jury. Appellee, on the other hand, contended that the excavation of what is known in the case as the private alley, where the accident occurred, was no part of the work which it undertook to perform for the borough of Waynesburg, and that its employé, who did the work under an arrangement with the abutting property owners to pay for the same, acted without authority. It was further contended that, after the excavation of the alley had been made and the work completed, W. W. Call, a son of Elizabeth Call, the injured person, accepted the work and assumed the burden of properly guarding the excavation. Indeed, W. W. Call, who occupied the abutting property, took the initiative in getting the owners to agree to have the excavation made while the borough was grading and improving the public streets. It was to his advantage and for his benefit that the work was done in the alley. It was a fair question, under the evidence, whose duty it was to put signal lights at the place of the accident and to guard, if necessary, the excavation thus made. All of the questions incidental to this inquiry were submitted to the jury. If the employé of the Hailam Construction Company acted without authority and did what he had no right to do, no liability would attach to his principal. On the other hand, if he acted within the general scope of his authority, or even if he acted without authority in the first instance, but subsequently his principal ratified his acts, liability for negligence and wrongful acts in the prosecution of the work would attach. Again, even if there was no question as to the employé acting within the scope of his authority, and if it be conceded that the principal is liable for negligent acts committed in making the excavation, it was still for the jury to say whether the work, after completion, was turned over to the abutting property owner, and, if so, whether the duty of guarding had been assumed by him. All these questions were in the case, and they were submitted to the jury. Most of the assignments of error relate to the charge of the court and the rulings of the trial judge, during the course of the trial upon questions necessarily involved in the respective contentions of the parties.

[3] The contract between the construction company and the borough, and the ordinance upon which it was based, were properly admitted in evidence as items tending to show what the situation of the parties was in respect to the work done. These matters were in no sense controlling; but they were pertinent to the case. The same is true as to the testimony relating to the alley, whether the borough had any duty to perform in connection with its maintenance and repair, and whether this was intended to be included in its contract with the construction company. These were questions of fact necessarily involved in the determination of the rights and duties of the parties.

[4] By the eleventh assignment, complaint is made that the trial judge placed too heavy a burden upon the plaintiffs in making out their case in chief. The jury was instructed that the plaintiffs, in order to recover, must prove, by the preponderance of the evidence, that the defendant, through its officers, agents, or employes, was guilty of the negligence from which the injuries resulted, and that, "In addition, it must also appear that Elizabeth Call was herself free from contributory negligence." It is argued that this instruction required the plaintiffs to affirmatively show that Elizabeth Call was not guilty of contributory negligence, which, of course, is not the law. The plaintiffs must affirmatively establish the negligence of the defendant, and must disclose a case free from contributory negligence. In the very next sentence, following the instruction complained of, the learned trial judge said: "That is, gentlemen, if it should appear from the evidence that Elizabeth Call was guilty of contributory negligence, there could be no recovery in this action by the plaintiffs." When the charge on this point is considered as a whole, the jury must have understood that the law only required the plaintiffs to prove the negligence of the defendant, and to disclose a case free from contributory negligence on the part of the plaintiffs.

[5] A judgment will not be reversed for an inaccurate instruction in one part of the charge, where it appears that the court subsequently gave ample and proper instructions, so that the jury could not have been misled. *Fitzpatrick v. Traction Co.*, 206 Pa. 335, 55 Atl. 1050. The present case comes within the spirit of this rule. The general effect of the charge, rather than a particular sentence or expression contained in it, is the test by which to determine whether it was a misleading instruction.

[6] The eighteenth assignment relates to the refusal by the court to grant a new trial on the ground of the alleged intoxication of one of the jurors. The trial courts are clothed with very great discretion in the granting or refusing of new trials. As a rule, this discretion will not be disturbed by

appellate courts on appeal. The learned court below, in disposing of the question raised by this assignment, said: "Depositions have been taken for the purpose of supporting this reason. We have examined these depositions, and they do not sustain either the allegation that the juror was asleep during the delivery of a part of the charge or that he was, at any time during the progress of the trial, incapacitated by reason of liquor or otherwise for an intelligent consideration and disposition of the case." In view of this finding, based upon depositions taken after the trial had been concluded, we cannot say that the learned court below abused its discretion, or that error was committed in disposing of this reason for a new trial. Within anything like the proper limits of an opinion, it is impossible to discuss in detail all of the questions raised by the 18 assignments of error. We have examined and considered them all, without being convinced that any reversible error was committed in submitting the case to the jury. It was a case for the jury on all the disputed questions of fact; and the right to recover depended upon the findings of fact in dispute. This was clearly within the province of the jury. The learned trial judge instructed the jury at length upon all these questions, and fairly submitted the contentions and theories upon which the parties relied to sustain or defeat a recovery. The case was carefully submitted, and we see no sufficient reason for reversing the judgment.

All of the assignments of error are overruled, and the judgment affirmed.

IGOE et al. v. HANSEN.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

FIXTURES (§ 21*)—SALE OF REAL PROPERTY—MACHINERY.

Where trustees for corporate creditors sell machinery of the company, and it is detached from the real estate and part of it removed, a subsequent purchaser of the realty, with notice of the sale of the machinery, cannot claim the portion of the machinery allowed to remain on the premises.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 47-56; Dec. Dig. § 21.*]

Appeal from Court of Common Pleas, Lawrence County.

Trespass by Peter Igoe and others, partners under the firm name of Igoe Bros., against John M. Hansen for conversion of machinery. From a judgment for plaintiffs, defendant appeals. Affirmed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKE, JJ.

J. Norman Martin, of New Castle, E. E. Jones, of Pittsburg, and A. Martin Graham, of New Castle, for appellant. Robert K. Aiken, of New Castle, for appellees.

PER CURIAM. The Cuyahoga Wire & Fence Company was engaged in the manufacture of wire and nails in the city of New Castle until the year 1908, when its plant was closed and its property conveyed to a trustee for creditors. There was testimony to show that in the fall of 1905 the appellees purchased certain machinery, belting, tools, etc., which had been used by the company in connection with its business; that the machinery so purchased by them was detached by taking out the bolts fastening it to the floor of the building; and that a part of it so detached was taken away by them, and the remaining part left on the premises, having been there when the real estate was sold to the appellant in the spring of 1906. The material question in the case was as to his notice of appellees' purchase of the machinery at the time he bought the real estate. The right to recover turned largely upon this, and the jury were instructed that, if no notice had been given to him at or before the time he closed his contract that a portion of the machinery in the plant had been sold to the appellees, his deed was sufficiently broad to include that which is in dispute in this action. There was ample evidence to lead the jury to the conclusion that he purchased with notice of the title of the appellees to the personal property which he converted to his own use.

No complaint is made of the charge of the learned trial judge in submitting the case to the jury, and we have discovered nothing in the 22 assignments of error complaining of rulings on offers of evidence and answers to points that calls for a reversal of the judgment. All are overruled, and the judgment is affirmed.

EASLEY v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 6, 1913.)

RAILROADS (§ 333*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where a person approaching a grade crossing with an unobstructed view, in daylight, sees a train a very short distance away and goes on the crossing and is struck by the train, he cannot allege as an excuse that he thought the train was standing still, where he could have seen that it was in motion.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1080-1063; Dec. Dig. § 333.*]

Appeal from Court of Common Pleas, Armstrong County.

Action by William C. Easley against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, BLKIN, STEWART, and MOSCHZISKER, JJ.

Orr Buffington and O. W. Gilpin, both of Kittanning, for appellant. C. E. Harrington, Austin Clark, and R. L. Ralston, all of Kittanning, for appellee.

BROWN, J. The motion for judgment of nonsuit should have prevailed in this case, and the learned trial judge erred in refusing the prayer that a verdict be directed for the defendant. Grant avenue, in the borough of Kittanning, runs north and south, and the tracks of the defendant company are laid longitudinally upon it. Campbell street crosses it at right angles. On the morning of October 28, 1910, in broad daylight, the appellee was driving westward on Campbell street, and as he was crossing the first, or north-bound, track of the appellant, on Grant avenue, the rear of the tender of an engine, which was pulling a train of freight cars, collided with his team, the collision resulting in the injuries for which damages are claimed in this action. The novel excuse of the appellee, to relieve himself of the charge of contributory negligence, clearly disclosed by his own testimony, was not that he had stopped, looked, and listened and had not seen the approaching train. His plea is that, when he stopped and looked, he saw the cars a very short distance south of him, but thought they were standing still, though he had a clear and unobstructed view of them. He stopped his horse within two or three feet of the north-bound track, and admits he saw the train; but, having heard neither whistle nor bell, he assumed that it was not in motion, and proceeded to cross over the track. This is unavailing. The train admittedly was in motion when he first saw it, and while there is nothing in his testimony, or that of any witness called by him, as to its rate of speed, the uncontradicted testimony of the engineman, the fireman, and the conductor was that it was moving at about six miles an hour. Even if the ringing of the bell may have been a question for the jury, the appellee gave no valid excuse for not seeing the coming of the train. That he did not see its approach when in dangerous proximity to him, as he started to cross the track, was due entirely to his own carelessness. This conclusively appears from the following taken from his testimony: "Q. From the time you saw it until it struck you, you didn't know that it was moving? A. No, sir: at first I didn't know that it was moving. It didn't ring any bell nor blow any whistle, nor make any noise. * * * Q. After you saw the train down there, you thought that it was not coming toward you? A. Yes, sir. Q. And for that reason you drove on the track? A. Yes, sir. Q. And paid no attention to it because you felt that you were safe? A. I did. Q. You were very much surprised when you found that it was upon you? A. That is so. Q. You thought that the train was standing there, and I wouldn't

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & : 2497 Index

move, and then you drove right on the track? A. Yes, sir; I thought it was not in motion, and I could cross the track safely without it coming on me. Q. You didn't pay any further attention to it? A. No; I didn't until it was quite close to me, when I couldn't avoid it."

When the appellee first saw the train, he could not have been looking in its direction with any degree of care, or he would surely have seen that it was coming towards him, for it was but a slight distance from him. Instead of a careful look, he must have given but a careless glance. The law requires the former, and will not excuse the latter. He admits that he saw the train, and, because he thought it was standing still, paid no further attention to it until it was so close to him that he could not avoid it. These are his own words, frankly confessing a degree of carelessness in crossing a railroad track, which imperatively calls for a reversal of the judgment. What the appellee must have seen, if he had exercised ordinary care in looking, he is conclusively presumed to have seen, and the excuse which he gives is no better than if he had admitted he had not looked at all. The case is within the rule announced in *Paul v. Philadelphia & Reading Railway Co.*, 231 Pa. 333, 80 Atl. 365, Ann. Cas. 1912B, 1132.

The first and fourth assignments of error are sustained and the judgment is reversed.

HURLEY v. WESTERN ALLEGHENY R. CO.

(Supreme Court of Pennsylvania. Jan. 6, 1918.)

MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Where a railroad employé was working on a railway trestle, on a scaffold with the foreman, who directed a fellow workman to get certain blocks ready, and in so doing the workman jerked a rope so that it struck a plank on which plaintiff was standing, causing his fall, he cannot recover under Act June 10, 1907 (P. L. 253), providing that the negligence of a fellow servant shall not be a defense where there is negligence of the foreman in giving an order, the execution of which would naturally cause injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

Appeal from Court of Common Pleas, Armstrong County.

Action by Daniel J. Hurley against the Western Allegheny Railroad Company. From

an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

O. E. Harrington, of Kittanning, for appellant. J. H. Painter, of Kittanning, for appellee.

PER CURIAM. The plaintiff was one of a number of men engaged in building a railroad trestle, and at the time he was injured was working with the foreman on a scaffold. The foreman directed a fellow workman to get the blocks ready to raise materials for the work. In carrying out this order the workman jerked a rope in such a manner that it struck a plank on which the plaintiff was standing and caused his fall. At the trial a nonsuit was entered.

The plaintiff had as safe a place in which to work as the nature of the work on which he was engaged would permit and no negligence on the part of the defendant was shown. On behalf of the plaintiff it is contended that the defendant is liable under the act of June 10, 1907 (P. L. 523), because a foreman had directed a workman to get the blocks ready while the plaintiff was on the scaffold and had failed to supervise his work in so doing. The act provides that the negligence of a fellow servant shall not be a defense where his act is "done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of the act," and it makes any person in charge of the work, or any part thereof, the agent of the employer. It applies where there is negligence in giving an order, the execution of which would naturally and reasonably cause injury, but it has no application where the only negligence shown is in the manner in which a proper order is executed. The order given by the foreman to get the blocks ready involved in its execution no probable danger to any one, and he was under no duty to stand by and superintend its execution. An employer is not required to be always present, personally or by a representative, to guard against an unexpected or a transient peril. *Schneider v. Philadelphia Quartz Co.*, 220 Pa. 548, 69 Atl. 1035; *King v. McClure Co.*, 222 Pa. 625, 72 Atl. 228.

The judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

MEMORANDUM DECISIONS

CURTIS et al. v. CORNISH et al. (Supreme Judicial Court of Maine. Dec. 18, 1912.) Exceptions from Supreme Judicial Court, Cumberland County, at Law. Petition by Oakley C. Curtis and others against Leslie C. Cornish and others. On exceptions from the judgment. Exceptions sustained. E. W. Freeman, of Portland, for petitioners. Fred V. Matthews, of Portland, for all respondents, except the Justices.

PER CURIAM. Upon the authority of *Curtis v. Cornish*, 109 Me. 384, 84 Atl. 799, the entry must be exceptions sustained.

MACKEY v. GRAND TRUNK RY. CO. (Supreme Court of New Hampshire. Coos. Dec. 3, 1912.) Exceptions from Superior Court, Coos County; Mitchell, Judge. Action by Edward D. Mackey, administrator of the estate of Margaret Duggan, deceased, against the Grand Trunk Railway Company. Judgment for defendant, and plaintiff excepts. Exceptions sustained. Matthew J. Ryan and Herbert I. Goss, both of Berlin, for plaintiff. Drew, Shurtleff & Morris, of Lancaster, and Rich & Marble, of Berlin, for defendant.

PARSONS, C. J. Upon the only ground of liability asserted—the defendants' fault in not avoiding the injury after discovery of the danger—the case cannot be distinguished from *Cavanaugh v. Railroad*, 78 N. H. 68, 79 Atl. 694. In view of the suggestion of additional evidence upon the question of damages, there is now no occasion to consider the plaintiff's exception to the ruling thereon, which was not argued. The plaintiff was entitled to go to the jury. Exception sustained. All concurred.

BENZ v. CENTRAL R. CO. OF NEW JERSEY. (Court of Errors and Appeals of New Jersey. Nov. 18, 1912.) Error to Supreme Court. Action by Mary Benz, as administratrix, etc., against the Central Railroad Company of New Jersey. A judgment for plaintiff was affirmed by the Supreme Court (82 Atl. 431), and defendant brings error. Affirmed. Samuel Kalisch, Jr., of Newark, for plaintiff in error. George Holmes, of Jersey City, for defendant in error.

PER CURIAM. The judgment under review herein should be affirmed for the reasons expressed in the opinion delivered by Garrison, J., in the Supreme Court.

FITZGERALD, SPEER CO. v. KELLY. (Court of Errors and Appeals of New Jersey. Nov. 18, 1912.) Error to Supreme Court. Action by the Fitzgerald, Speer Company against Peter J. Kelly. From a judgment for plaintiff, defendant brought error to the Supreme Court, and from a judgment of affirmance therein (81 N. J. Law, 6, 83 Atl. 491) brings error to the Court of Errors and Appeals. Affirmed. Martin P. Devlin, of Trenton, for plaintiff in error. John O. Vanatta, of Phillipsburg, and George J. Pierce, of Newark, for defendant in error.

PER CURIAM. The judgment of the Supreme Court is affirmed for the reasons stated in the opinion filed in that court by the Chief Justice.

FRITZ v. FRITZ. (Court of Errors and Appeals of New Jersey. Nov. 18, 1912.) Appeal from Court of Chancery. Bill by Charles Fritz Jr., against Margaretha Fritz. From a chancellor's decree in favor of complainant (83 Atl. 181), defendant appeals. Affirmed. J. Ed. Walscheld, of Town of Union, for appellant. Tennant & Haight, of Jersey City, for respondent.

PER CURIAM. The decree appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Garrison.

GRANTWOOD LUMBER & SUPPLY CO. v. ABBOTT et al. (Court of Errors and Appeals of New Jersey. Nov. 20, 1912.) Error to Supreme Court. Action by the Grantwood Lumber & Supply Company against John L. Abbott and another. A judgment for defendants was affirmed by the Supreme Court (84 N. J. Law, 564, 78 Atl. 1046), and plaintiff brings error. Affirmed. Mackay & Mackay, of Hackensack, for plaintiff in error. Weller & Lichtenstein, of Hoboken, for defendants in error.

PER CURIAM. The judgment under review herein should be affirmed for the reasons expressed in the opinion delivered by Trenchard, J., in the Supreme Court.

LEYDEN v. LAWRENCE et ux. (Court of Errors and Appeals of New Jersey. Nov. 18, 1912.) Appeal from Court of Chancery. Action by James J. Leyden against Elijah W. Lawrence and wife. From a decree for complainant (79 N. J. Eq. 113, 81 Atl. 121), defendant appeals. Affirmed. French & Richards, of Camden, for respondent. Austin H. Swickhamer, of Woodbury, and John Cadwalader, Jr., for appellants.

PER CURIAM. The decree appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Leaming.

MORRIS v. DORSEY et al. (Court of Errors and Appeals of New Jersey. Nov. 18, 1912.) Appeal from Court of Chancery. Suit by Isabella Morris, by her next friend, Eliza Grinnage, against Benjamin F. Dorsey and others. From an order of the Court of Chancery (77 N. J. Eq. 460, 77 Atl. 44) complainant appeals. Affirmed. John J. Crandall, of Camden, for appellant. Ralph W. E. Douglas, of Camden, for respondents.

PER CURIAM. The order appealed from is affirmed for the reasons stated in the opinion of Vice Chancellor Leaming filed in the court below.

STATE v. CARROLL. (Court of Errors and Appeals of New Jersey. Nov. 18, 1912.) Error to Supreme Court. John H. Carroll was convicted of procuring a person to vote knowing him to be not qualified. His conviction was affirmed by the Supreme Court (82 Atl. 304), and he brings error. Affirmed. Robert H. McCarter, of Newark, Stackhouse & Kramer, Albert S. Woodruff, and Floyd H. Bradley, all of Camden, for plaintiff in error.

William T. Boyle, of Camden, Prosecutor of the Pleas, for the State.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Swayze, J., in the Supreme Court.

STATE v. CODINGTON. (Court of Errors and Appeals of New Jersey. June 26, 1911.) Error to Supreme Court. Horace Codington was convicted of crime. From a judgment of the Supreme Court (80 N. J. Law, 496, 78 Atl. 743) affirming the conviction, he brings error. Affirmed. William V. Steele, of Somerville, for plaintiff in error. Frederick A. Pope, of Somerville, Prosecutor of the Pleas, for the State.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by the Chief Justice in the Supreme Court.

STATE v. DI BENEDETTO. (Court of Errors and Appeals of New Jersey. Nov. 18, 1912.) Error to Supreme Court. Joseph Di Benedetto, having been convicted of receiving stolen goods, and such conviction having been affirmed by the Supreme Court (82 Atl. 521), he brings error. Affirmed. Fort & Fort, of Newark, and Philip J. Schotland, of Newark, for plaintiff in error. Wilbur A. Mott, of Newark, Prosecutor of the Pleas, for the State.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Gummere, C. J., in the Supreme Court.

STATE v. JANKOWSKI. (Court of Errors and Appeals of New Jersey. Nov. 18, 1912.) Error to Supreme Court. Wladyslaw Jankowski, alias Frank Smith, was convicted of illegal transportation of a girl within the state. His conviction was affirmed by the Supreme Court (82 Atl. 309), and he brings error. Affirmed. Abner Kalisch, of Newark, for plaintiff in error. Wilbur A. Mott, of Newark, for the State.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Swayze, J., in the Supreme Court.

STATE v. VAN NESS. (Court of Errors and Appeals of New Jersey. Nov. 18, 1912.) Error to Supreme Court. Marcus Van Ness was convicted of violating the primary election law, and the judgment of conviction was affirmed by the Supreme Court (83 Atl. 195), and he brings error. Affirmed. James R. Nugent, of Newark, for plaintiff in error. Frederick R. Lehlbach, of Newark, Asst. Prosecutor of the Pleas, for the State.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion (83 Atl. 195), delivered by Chief Justice Gummere in the Supreme Court.

TISCHMAN v. ERIE R. CO. (Court of Errors and Appeals of New Jersey. Nov. 18, 1912.) Error to Supreme Court. Action by Otto Tischman against the Erie Railroad Company. Judgment in the Supreme Court affirming a judgment for plaintiff (81 N. J. Law, 268, 81 Atl. 114), and defendant brings error.

Affirmed. Weller & Lichtenstein, of Hoboken, for plaintiff in error. Collins & Corbin, of Jersey City, for defendant in error.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion (81 N. J. Law, 268, 81 Atl. 114), delivered by Trenchard, J., in the Supreme Court.

HOLT v. METROPOLITAN MERCANTILE & REALTY CO. et al. TONEY v. SAME. (Court of Chancery of New Jersey. Dec. 9, 1912.) Bill by John Holt against the Metropolitan Mercantile & Realty Company and Charles E. Toney, and by Charles E. Toney against the Metropolitan Mercantile & Realty Company and John Holt. Decree for the Metropolitan Mercantile & Realty Company for \$409.49, on payment of which by Holt he is to receive a deed for the land in controversy, with a satisfaction of a mortgage to Toney. T. A. Spraggins, of Jersey City, for the application.

GARRISON, V. C. Prior to the time that the Metropolitan Mercantile & Realty Company made its so-called mortgage to Toney Holt had defaulted in his payments under his contract, and therefore, under the terms of the contract, the Metropolitan Company was entitled to call upon him to pay immediately all the said to be paid installments. So now figured up, this amounts to more than the \$409.49, which Toney then figured that the Metropolitan Company (and since the assignment or transfer) to him, he himself was entitled to. That sum will be taken, because Toney is willing to stand for that sum, and it is to his detriment, because he is really entitled to more by a few dollars. He, of course, is therefore entitled to interest on that sum from that date in September, 1910, when it became payable to him. Under these circumstances, equity will be done in this suit, if a decree is made of this character; that the amount that was due the Metropolitan Mercantile & Realty Company (and since the transfer to Toney) under the contract between the Metropolitan Company and Holt is fixed at \$409.49 on the 16th of September, 1910, and that the amount now due is that sum with interest from that date, and that upon Holt's paying that sum he shall receive a deed from the Metropolitan Company for the amount in question, together with a satisfaction of the Toney mortgage, and it may possibly be some other relief in the decree; that is, that the decree shall operate a certain day in case the dissolution of the company makes any difference. Let Mr. Spraggins draw a decree along that line, and submit it to Mr. Mackay, with a notice that he is going to have the decree signed on a certain day, and I will then hear the parties.

In re Nomination of SPILLINGER et al. (Supreme Court of Pennsylvania. Oct. 29, 1912.) Appeal from Court of Common Pleas, Dauphin County. In the Matter of the Nomination Papers of Spillinger and Young. Objections to nomination papers sustained, and nominees appeal. Dismissed. Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ. John R. Geyer and John E. Fox, both of Harrisburg, for appellants. Utley E. Crane, of Philadelphia, for appellee.

PER CURIAM. So far as is disclosed by the record, this appeal is without merit, and, it being a certiorari, we must accept the record as it is presented. Appeal dismissed.

§ 21 (Pa.) One who gives a railway company a general release on its promise to pay a sum of money, hospital and doctor bills, and wages is entitled on refusal to pay the wages, to rescind the release and sue on the original cause of action.—*Schwartzfager v. Pittsburgh, H., B. & N. C. Ry. Co.*, 85 A. 1115.

§ 27 (N.J.) Whether a tender is accompanied by such acts and declarations as are necessary, on its acceptance, to constitute an accord and satisfaction, if the evidence is conflicting, is for the jury.—*Rose v. American Paper Co.*, 85 A. 354.

ACCOUNT.

See Appeal and Error, §§ 77, 589; Associations; Bankruptcy, § 209; Discovery; Executors and Administrators, §§ 310, 469-513; Guardian and Ward, § 153; Injunction, §§ 194, 199.

II. PROCEEDINGS AND RELIEF.

§ 12 (N.J.) Equity will not entertain a suit by a township for an accounting by a tax collector; the remedy at law being adequate.—*Franklin Tp. v. Crane*, 85 A. 408; Same v. Trammell, Id. 411.

ACKNOWLEDGMENT.

See Equity, § 393; Notaries, § 2.

II. TAKING AND CERTIFICATE.

§ 16 (Pa.) A prothonotary of the court of common pleas cannot take proof of the execution of an instrument within the recording acts, or the probate of an unacknowledged assignment of an oil and gas lease for the purpose of having it placed on record.—*Midland Gas Co. v. Jefferson County Gas Co.*, 85 A. 853.

ACQUIESCENCE.

See Estoppel, § 90.

ACTION.

See Abatement and Revival; Corporations, § 202; Death, § 30; Eminent Domain, § 166.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

§ 41 (Vt.) A special count in assumpsit may be joined with the common counts.—*Boville v. Dalton Paper Mills*, 85 A. 623.

§ 47 (N.J.Sup.) Under Practice Act, § 11, causes of action against a landlord for wrongful distress and for breach of covenant may be joined.—*Murphy v. Patten*, 85 A. 56.

§ 50 (Conn.) An action in replevin against two persons for goods in possession of each, in which the other has no interest, presents a case of misjoinder of causes of action.—*Patchin v. Rowell*, 85 A. 511.

§ 50 (N.J.Sup.) Under the Practice Act, §§ 6, 11, and Schedule A, rule 13, causes of action against landlord for breach of covenant and against landlord and another for wrongful distress in the collection of rent under the same lease may be joined.—*Murphy v. Patten*, 85 A. 56.

§ 53 (Conn.) On defendant's breach of a contract to share with plaintiff the profits to be derived from a real estate venture, plaintiff held to have but a single cause of action to recover entire damages, past and prospective.—*Maguire v. Kiesel*, 85 A. 689.

ACTION ON THE CASE.

§ 1 (R.I.) Trespass on the case, in its more comprehensive significance, includes both assumpsit and case, and so will lie for unliquidated damages for failure to perform a contract.—*Bagaglio v. Paolino*, 85 A. 1048.

ADJOINING LANDOWNERS.

See Boundaries; Party Walls, § 10.

ADMINISTRATION.

See Executors and Administrators.

ADMISSIONS.

See Evidence, §§ 121, 207-262; Infants, § 51.

ADOPTION.

§ 20 (N.H.) Since the common law did not recognize the adoption of a child as creating any legal rights, as did the civil law, in determining the nature of such rights the civil law may properly be looked to.—*Clark v. Clark*, 85 A. 758.

§ 21 (N.H.) In view of Laws 1862, c. 280, Pub. St. 1901, c. 181, § 5, providing that an adopted child shall bear the same relation to the adopting parents as to inheritance as a natural child, except as to property limited to the line of the parent's body, an adopted child is an "heir in the descending line," within Pub. St. 1901, c. 186, § 12, giving such heirs of a legatee, deceased before testator, the same estate the legatee would have taken had he survived.—*Clark v. Clark*, 85 A. 758.

§ 24 (N.H.) The adoption of a child is not equivalent to the birth of issue in determining the rights of a surviving husband or wife.—*Clark v. Clark*, 85 A. 753.

ADULTERY.

See Criminal Law, §§ 358, 729; Divorce, §§ 54, 79, 99, 109, 115, 125, 135; Witnesses, §§ 188, 248.

§ 11 (Vt.) The state may show that the woman with whom accused was charged with having committed the act had a bad reputation for chastity.—*State v. Neiburg*, 85 A. 769.

§ 11 (Vt.) In an adultery case, evidence of the woman's bad reputation for chastity was admissible, though defendant did not know of such reputation.—*State v. Snyder*, 85 A. 9-4.

The rule that the state cannot attack a defendant's character, unless he offers his good character in his defense, will not, in the prosecution of a man for adultery prevent proof being made of the woman's bad reputation for chastity.—Id.

§ 12 (Vt.) The testimony of the wife, if she is a competent witness, is sufficient proof of the marriage of the husband.—*State v. Neiburg*, 85 A. 769.

§ 13 (Vt.) The state can properly show that the house, in a bedroom of which defendant, a female, was found late at night with a man was a place of assignation, resorted to by men and women for immoral purposes.—*State v. Cushing*, 85 A. 770.

In a prosecution of a female for adultery, evidence that the male was doped or drunk to such an extent as to be physically unable to copulate at the time of the alleged offense should have been admitted.—Id.

ADVERSE POSSESSION.

See Ejectment, §§ 6, 10; Equity, § 47; Railroads, § 82.

I. NATURE AND REQUISITES.

(A) Acquisition of Rights by Prescription in General.

§ 8 (N.J.) That defendants had been in possession of a part of a public highway to the exclusion of the public for any length of time did not destroy the public easement therein.—Board of Chosen Freeholders of Camden County v. Sharpless, 85 A. :222.

(E) Duration and Continuity of Possession.

§ 44 (Md.) A plaintiff in ejectment, failing to show continuous possession, *held* not to establish a title otherwise good within Code Pub. Gen. Laws 1904, art. 75, § 76, providing that in actions where title to land is in question, it shall not be necessary to prove that the land has been patented, but a patent will be presumed in favor of one showing a title otherwise good.—*Joseph v. Bonaparte*, 85 A. 962.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 114 (Me.) Evidence in trespass *quare clausum* *held* not to establish title to a particular boundary by adverse possession.—*Proctor v. Libby*, 85 A. 298.

AFFIDAVITS.

See Damages, § 197; Depositions; Equity, §§ 302, 393; Judgment, §§ 50, 144; Pleading, § 301.

AGENCY.

See Principal and Agent.

AGREEMENT.

See Contracts.

AGRICULTURE.

§ 4 (Md.) Evidence of the condition of a stay rod attached to the rail, when the witness examined it about a month after the accident, was admissible.—*Agricultural & Mechanical Ass'n of Washington County v. Gray*, 85 A. 291.

Plaintiff *held* not negligent in occupying the place provided by defendant for its patrons to witness races.—*Id.*

A request to charge, susceptible of the inference that, if the jury found that those who erected the guard rail in front of the grand stand on fair grounds were independent contractors, defendant was not liable for plaintiff's injuries from collapse of such rail, was properly refused.—*Id.*

Where a railing, supported by posts imbedded only 1½ inches in loose rock at the top of a stone wall 10 or 12 feet high in front of the grand stand on the fair grounds, gave way when the usual crowd pressed against it, the mere collapse of the railing was sufficient in itself to raise an inference of negligence.—*Id.*

ALIENATING AFFECTIONS.

See Husband and Wife, §§ 325-335.

ALIENS.**IV. NATURALIZATION.**

§ 71½ [New, vol. 7 Key-No. Series] (Pa.) The court's power to correct or purge its records may be exercised in the case of the naturalization of an alien as well as in any other case where the court has jurisdiction to act.—*In re Macoluso's Naturalization*, 85 A. 149.

From a petition to cancel a certificate of naturalization, a ten days' service on a son of the person named in the certificate by a justice of the peace in the county where the son resides is sufficient.—*Id.*

Act Cong. June 29, 1906, c. 3592, § 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 124), does not deprive a state court of authority to annul a forged certificate of citizenship upon a private petition joined in by the district attorney of the county.—*Id.*

ALLEYS.

See Easements, §§ 50, 58.

AMENDMENT.

See Constitutional Law, §§ 7, 8; Elections, § 278; Limitation of Actions, § 127; Pleading, §§ 236-251; Statutes, §§ 137-142.

AMUSEMENTS.

See Theaters and Shows.

ANIMALS.

See Appeal and Error, § 1053; Damages, § 94; Highways, § 184; Railroads, § 443; Trial, § 60.

ANSWER.

See Pleading, § 94.

APPEAL AND ERROR.

See Certiorari; Corporations, § 613; Courts, § 214; Criminal Law, §§ 1015-1186; Elections, § 154; Eminent Domain, § 262; Exceptions, Bill of; Executors and Administrators, § 510; Homicide, §§ 332, 340; Intoxicating Liquors, §§ 45, 104; Municipal Corporations, §§ 511, 642; Prohibition, §§ 3, 10; Taxation, §§ 452, 493; Trial, § 85; Wills, § 365; Work and Labor, § 30.

III. DECISIONS REVIEWABLE.**(D) Finality of Determination.**

§ 77 (Pa.) An appeal will not lie from a decree directing executors to file an account, it not being final.—*In re Parmer's Estate*, 85 A. 148.

§ 78 (Pa.) Where a denial of a petition to intervene would be a practical denial of relief to which petitioner for intervention is entitled and can obtain in no other way, refusal to permit intervention is a final order and appealable.—*In re Frey's Estate*, 85 A. 147.

§ 78 (R.I.) On demurrer to a whole bill for partition, where the court sustains the demurrer, but finds the bill good as a bill for an accounting, and strikes out the words of dismissal in the decree, there is no final decree from which an appeal may be taken.—*Hammond v. Hammond*, 85 A. 937.

(E) Nature, Scope, and Effect of Decision.

§ 105 (Pa.) An appeal does not lie from the entry of a compulsory nonsuit, but only upon refusal to take off the nonsuit.—*Bausbach v. Reiff*, 85 A. 762.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.**(A) Issues and Questions in Lower Court.**

§ 171 (Conn.) Plaintiff's contention below being that defendants by a payment on plaintiff's claim were estopped to assert that they then had a greater claim against it, it is too late for it to claim such payment should be considered on the question of bona fides of their claim.—*Holcomb Co. v. Clark*, 85 A. 376.

§ 171 (Conn.) The applicant company in condemnation proceedings could not be heard on review to make a claim at variance with its theory on which the hearing was had below.—*In re New Haven Water Co.*, 85 A. 636.

§ 173 (Md.) A defense not presented at trial will not be considered on appeal.—*American Surety Co. of New York v. Spice*, 85 A. 1031.

(B) Objections and Motions, and Rulings Thereon.

§ 204 (Pa.) Corroborative evidence admitted without objection *held* not reversible error.—*Seigfried v. Boyd*, 85 A. 72.

§ 219 (Conn.) Assignments of error not presented to the trial court by request for finding either directly or by reasonable implication as required by Gen. St. 1902, § 793, will not be reviewed.—*Maguire v. Kiesel*, 85 A. 689.

§ 230 (Pa.) In an action against a railroad for unlawful discrimination where the only question considered was the distribution of the railroad's own cars, the railroad cannot for the first time on exceptions to the findings of fact and conclusions of law claim error in failure to take into account the private cars.—*Puritan Coal Mining Co. v. Pennsylvania R. Co.*, 85 A. 426.

§ 231 (Vt.) An objection that an allegation is indefinite and uncertain and insufficient, without saying wherein, is too general for consideration.—*Thorworth v. Blanchard*, 85 A. 6.

§ 232 (Vt.) Dismissal of a demurrer as not seasonably filed cannot be held error on a ground not covered by the objection to the dismissal.—*Boville v. Dalton Paper Mills*, 85 A. 623.

§ 233 (Pa.) The refusal to strike out testimony was not reversible error where the witness subsequently went on the stand to correct his testimony, and there was no renewal of the motion to strike out nor request to direct the jury to disregard such testimony.—*Thorson v. Carnegie Steel Co.*, 85 A. 1114.

(C) Exceptions.

§ 261 (Pa.) An assignment of error to improper remarks of counsel must show a request for the withdrawal of a juror and continuance, a refusal of such request, and an exception granted by the trial judge; a mere objection to the remarks and exception noted being insufficient.—*Ickes v. Ickes*, 85 A. 885.

§ 268 (Vt.) Under P. S. 1982, a reference in the court's finding to the transcript and a recital that it was made a part thereof for any proper purpose in connection with the finding did not justify reference to the transcript, in the absence of an exception to the sufficiency of the evidence to sustain the findings or any claim that additional findings should have been made.—*Allen Lumber Co. v. Higuera*, 85 A. 979.

§ 270 (Del.) In the absence of an exception, the denial of a new trial cannot be reviewed.—*Philadelphia, B. & W. R. Co. v. Gatta*, 85 A. 721.

§ 274 (Vt.) An exception to the dismissal of a demurrer, stating that defendant claimed that a paper filed was not a specification within the rule as to time of demurrer, and therefore that the demurrer was not filed out of time, implies that no other objection was made to the dismissal.—*Boville v. Dalton Paper Mills*, 85 A. 623.

Complaint may not be made that there was no preliminary finding by the trial court of one's agency, where the only question presented by the exceptions is whether there was any evidence tending to show such an agency as justified the admission of the person's declarations.—*Id.*

§ 274 (Vt.) A general exception to the court's findings and judgment does not raise the question of the sufficiency of the evidence to sustain any particular finding.—*Allen Lumber Co. v. Higuera*, 85 A. 979.

§ 275 (Vt.) Where defendant took 76 exceptions but did not except to the whole charge, and did not call the court's attention to a probably inadvertent mistake in not limiting the damage which might be added to the actual damage in trespass for delay to "not exceeding the legal rate of interest," except by exception number 62, the court having corrected a large number of them in a supplemental charge, he cannot complain on appeal.—*Lee v. Follensby*, 85 A. 915.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

§ 370 (Vt.) That the "entry fee" required by P. S. 6208, to be paid to the clerk of court before entry of the case in the Supreme Court, was not paid until after adjournment of the term of that court held next after the motion for appeal was filed, was not ground for refusing to docket the appeal.—*Lafountain & Staples v. Wilder & Nichols*, 85 A. 5.

(D) Writ of Error, Citation, or Notice.

§ 422 (R.I.) In an action against husband and wife, defendant's notice of intention to prosecute exceptions, referring to the defendants in the singular number, held amendable, and cured by a bill of exceptions filed on behalf of both defendants.—*Kendall v. Rossi*, 85 A. 922.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

(B) Jurisdiction Acquired by Appellate Court.

§ 455 (Vt.) The filing of a motion for appeal by the clerk of the court of chancery instantly transferred the cause to the Supreme Court.—*Lafountain & Staples v. Wilder & Nichols*, 85 A. 5.

IX. RECORD AND PROCEEDINGS NOT IN RECORD.

(E) Abstracts of Record.

§ 589 (Pa.) On appeal from an allowance of a receiver's account, questions not referred to in the statement of questions involved in the appellant's paper book or raised by exceptions to the account will not be reviewed.—*Haddock v. Plymouth Coal Co.*, 85 A. 23.

§ 589 (Pa.) A paper book with an abstract setting forth extraneous matter is in violation of Supreme Court rule 26, providing for an abstract of proceedings showing the issue and how it was made.—*Wingrove v. Central Pennsylvania Traction Co.*, 85 A. 850.

A statement in four lengthy paragraphs, covering a page of closely printed matter, is in violation of Supreme Court rule 34, providing for a statement of the question involved.—*Id.*

(I) Defects, Objections, Amendment, and Correction.

§ 635 (R.I.) Where the record showed that plaintiff excepted to the decision of the judge who heard the cause, his bill of exceptions will not be dismissed because not clearly showing that exception; it appearing that was the only one relied upon on appeal.—*Sheer v. Hall & Lyon Co.*, 85 A. 935.

(K) Questions Presented for Review.

§ 694 (Conn.) The evidence not being in the record, it cannot be said the court erred in charging, as matter of law, as to the width and location of a railroad right of way as condemned.—*New York, N. H. & H. R. Co. v. Cella*, 85 A. 521.

(L) Matters Not Apparent of Record.

§ 712 (Vt.) A statement, in a bill of exceptions in an action for malpractice, that "defendant claimed" that plaintiff improved certain witnesses to testify to the local standard of treatment was not equivalent to a statement that the witnesses qualified as experts, or gave testimony on that question.—*Willard v. Norcross*, 85 A. 904.

XI. ASSIGNMENT OF ERRORS.

§ 724 (Pa.) It is improper to file assignments of error presenting the same question in different forms.—*Lincoln v. Wakefield*, 85 A. 133.

§ 727 (Pa.) A judgment will not be reversed, because the court refused to withdraw a juror and continue the case, and because of remarks of counsel, where the assignment of error fails to show what those remarks were.—*Brown v. Central Pennsylvania Traction Co.*, 85 A. 362.

§ 728 (Conn.) The record showing three exceptions relating to the testimony of C., an assignment that the court erred in ruling out and excluding the testimony of C., as stated in the stenographer's notes, is insufficient; a special or specific assignment of each claimed error being necessary.—*New York, N. H. & H. R. Co. v. Cella*, 85 A. 521.

§ 733 (Pa.) Assignments of error which failed to assign the final decree for error are defective.—*Bowers v. Myers*, 85 A. 860.

§ 733 (Pa.) An assignment of error in refusing a motion for judgment non obstante veredicto is defective, where neither the motion nor the order of court is given.—*Reichner v. Reichner*, 85 A. 877.

§ 734 (Pa.) Assignments of error to the dismissal of exceptions to an adjudication in equity are defective if neither the exceptions nor the order dismissing them are set forth in the assignments.—*Cornell v. Seddinger*, 85 A. 446.

§ 742 (Pa.) All questions covered by the assignments and desired to be reviewed must be comprehended by or referred to in appellant's statement of questions involved.—*Lincoln v. Wakefield*, 85 A. 133.

§ 743 (Conn.) Under Gen. St. 1902, § 798, which prescribes a form of appeal, and requires appellant to state distinctly the specific errors complained of, an assignment of error in the rulings and instructions as they appear in the record and bill of exceptions is insufficient.—*Stern v. Max Rippes Co.*, 85 A. 543.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 781 (Me.) Questions in the determination of which neither party has any interest are moot, and exceptions will be dismissed.—*Heald v. Payson*, 85 A. 576.

§ 787 (Pa.) An appeal by plaintiff from an order dissolving a temporary injunction, of which he has delayed the argument for over a year, though he had an opportunity to be heard at three successive terms, will be dismissed.—*Crawford v. Sullivan*, 85 A. 1090.

§ 801 (Vt.) Where a motion to dismiss an appeal was not argued, it could not be considered.—*Roberts v. W. H. Hughes Co.*, 85 A. 982.

XVI. REVIEW.

(A) Scope and Extent in General.

§ 843 (Me.) Where the declaration demanded damages to soil, grass, and crops to the amount of \$500, and the uncontradicted evidence sustained a claim of \$500, the question of the amount of additional damages was immaterial.—*Howe v. Ashland Lumber Co.*, 85 A. 160.

§ 855 (R.I.) On appeal from a decree reserving questions as to the amount of water complainant may take under an easement, and the purposes for which it may be taken, a question whether the easement is gross or appurtenant to a particular tract is not reviewable.—*Cram v. Chase*, 85 A. 642.

§ 856 (N.J.) An order directing a verdict will be affirmed, if sustainable on any of the grounds advanced to support it.—*Pierson v. New York, S. & W. R. Co.*, 85 A. 233.

(C) Parties Entitled to Allege Error.

§ 882 (Conn.) One may not complain that the charge used the term "acting within the scope of their authority," without defining it; it in

this respect following his request.—*Hope v. Valente*, 85 A. 541.

§ 882 (Vt.) The defendant cannot complain of an instruction that a license was authority which might be revoked at any time, but that there was no evidence of a revocation, so that, if authority was given, the license continued, on the ground that there was no such issue in the case, and that it was misleading, where he requested an instruction that the jury was not to consider the question of whether the license, if found, was revoked, in that it was immaterial under the pleadings.—*Lee v. Follensby*, 85 A. 915.

(E) Presumptions.

§ 926 (N.H.) Where evidence received was competent for one purpose, the presumption is that its use was limited to such purpose.—*Ferryall v. Youlden*, 85 A. 786.

§ 930 (Conn.) Exclusion by the jury from their consideration of an item in issue, not being apparent, cannot be presumed; the verdict having been for the ultimate sum due defendants, who had denied the propriety of certain of plaintiff's charges and counterclaimed for various items of damages.—*Holcomb Co. v. Clark*, 85 A. 376.

§ 930 (Me.) The court, in reviewing an exception to the admission of evidence, limited by the trial court to a specific issue, must assume that the jury followed the instructions.—*Whittaker v. Sandford*, 85 A. 399.

§ 931 (N.J.Sup.) Facts found by the district court will be presumed to rest on competent proof, when nothing appears to the contrary.—*Dordoni v. Hughes*, 85 A. 353.

§ 933 (Conn.) It cannot be presumed that the court on a motion to set aside a verdict predicated its conclusion on any unwarranted assumption or otherwise than on a review of the testimony to discover what the jury might or might not reasonably have found as to the issues.—*Holcomb Co. v. Clark*, 85 A. 376.

§ 934 (Conn.) It cannot be assumed that the judgment for defendants was otherwise than as warranted on their counterclaim.—*Holcomb Co. v. Clark*, 85 A. 376.

§ 934 (N.H.) Where trial court granted motion to default administrators of deceased defendant for their failure to appear, it would be presumed that it found that plaintiff's delay in returning the scire facias to revive the action was a technicality which justice did not require should defeat the action.—*Shea v. Starr*, 85 A. 783.

(F) Discretion of Lower Court.

§ 966 (Pa.) An order denying a continuance will not be reversed, in the absence of an abuse of power by the trial court.—*First Nat. Bank v. Title Guaranty & Surety Co.*, 85 A. 1126.

§ 970 (Me.) The trial court's admission of a writing as a standard of comparison will not be disturbed unless clearly erroneous.—*Williams v. Williams*, 85 A. 43.

§ 977 (Del.) A writ of error will not lie to the court's decision on a motion for a new trial, in the absence of an abuse of discretion.—*Philadelphia, B. & W. R. Co. v. Gatta*, 85 A. 721.

§ 978 (Pa.) Where a jury disregards instructions as to the measure of damages, the discretion of the trial court in directing a remittitur or new trial will not be reviewed where injury to defendant is not clearly shown.—*Cox v. Pennsylvania R. Co.*, 85 A. 863.

§ 984 (Vt.) A discretionary allowance of costs to orators, in an action to foreclose a mortgage, could not be disturbed on appeal.—*Roberts v. W. H. Hughes Co.*, 85 A. 982.

(G) Questions of Fact, Verdicts, and Findings.

§ 996 (N.J.Sup.) The Supreme Court will not reverse a judgment that is based on a conclusion of the district court on a mixed question of law and fact, if the conclusion is legally inferable from the facts proven.—*Dordoni v. Hughes*, 85 A. 353.

§ 1001 (Conn.) A verdict should not be set aside where there is some evidence upon which the jury might reasonably reach their conclusion, but, where its manifest injustice denotes mistake, prejudice, corruption, or partiality, it should be set aside.—*McLaughlin v. Thomas*, 85 A. 370.

§ 1001 (Me.) Where jury held defendant negligent, the court could not substitute its judgment for that of the jury, although defendant's negligence was not very clearly established.—*Dyer v. Collins*, 85 A. 1.

§ 1002 (Me.) A verdict on conflicting evidence will not be disturbed, in the absence of bias, misconduct, or prejudice of the jury.—*Kennard v. Hathaway*, 85 A. 1.

§ 1002 (Me.) A verdict on conflicting evidence and sustained by evidence not inherently improbable will not be disturbed.—*Oscar Holway Co. v. Bailey*, 85 A. 406.

§ 1002 (R.I.) A verdict on conflicting evidence will not be disturbed on review.—*Imperial Broom Co. v. Western Warehouse Co.*, 85 A. 673.

§ 1004 (Me.) Where the amount of the award for personal injuries was authorized by plaintiff's testimony, it could not be disturbed on appeal, though from the entire evidence it seemed improbable that plaintiff was injured to such an amount.—*Gage v. Maine Central R. Co.*, 85 A. 1065.

§ 1005 (R.I.) Though the evidence be conflicting, the verdict will not be disturbed after approval by trial court, where there is no substantial evidence against it.—*Benoit v. Payette*, 85 A. 641.

§ 1008 (Pa.) Where the credibility of witnesses is involved, a finding that a marriage did not exist will not be set aside unless manifest error is shown.—*In re Patterson's Estate*, 85 A. 75.

§ 1009 (Me.) The decision of a justice sitting in equity as to matters of fact, will not be reversed, unless clearly erroneous.—*Woodward v. Dain*, 85 A. 660.

§ 1009 (R.I.) On appeal from a decree, the trial judge's findings are entitled to great weight.—*Blomen v. N. Barstow Co.*, 85 A. 924.

§ 1010 (N.J.Sup.) On appeal from a judgment on trial without a jury, where opposite conclusions might have been drawn from the testimony, that conclusion essential to support the judgment will be taken as found.—*Upton v. Slater*, 85 A. 225.

A determination of a question of fact by the judge of the district court sitting without a jury is final when there is legal evidence to support it.—*Id.*

§ 1010 (Pa.) Findings of fact by the orphans' court based on sufficient evidence will not be reversed, where no error is shown.—*In re Goetz's Estate*, 85 A. 67.

§ 1011 (N.J.Sup.) Where the evidence is conflicting, the trial court is the proper judge of the weight thereof.—*MacBride v. Rogers*, 85 A. 202.

§ 1011 (Pa.) Where the testimony is conflicting, a finding that a marriage did not exist will not be set aside, unless manifest error is shown.—*In re Patterson's Estate*, 85 A. 75.

§ 1012 (N.J.Sup.) An objection that a judgment is against the weight of the evidence cannot be considered if there is any evidence to support it.—*Nelson v. Bock*, 85 A. 1009.

§ 1022 (Pa.) Where the finding of an auditor, confirmed by the orphans' court, that a testa-

tor did not stand in loco parentis to his grandsons, legatees under his will, is based on competent evidence, and there is no manifest error, it will not be reversed on appeal.—*In re Grothe's Estate*, 85 A. 141.

(H) Harmless Error.

§ 1048 (Pa.) A refusal to strike out an objectionable reply elicited by the appellant on cross-examination is not ground for reversal, where the answer did him no harm.—*Powell v. S. Morgan Smith Co.*, 85 A. 416.

§ 1050 (Conn.) In an action for services in prosecuting a divorce action, the admission of evidence by defendant's counsel in the divorce action that he told plaintiff herein that he thought defendant had a fighting chance on a certain question, and asked him whether he had looked up the law, held not prejudicial even if admitted for the improper purpose of proving plaintiff's services by his own declarations.—*Stoddard v. Sagal*, 85 A. 519.

§ 1050 (Conn.) In an action for the death of plaintiff's wife resulting from a defective stair railing, the admission of evidence that she had left two sons and three daughters was harmless as an attempt to arouse the sympathies of the jury, where all of the children save one were witnesses in the case.—*Koskoff v. Goldman*, 85 A. 588.

§ 1050 (Me.) In an action for deceit in the sale of a farm, error in admitting evidence held harmless.—*Pierce v. Cole*, 85 A. 567.

§ 1050 (Vt.) If there was no evidence in support of defendant's claim that a certain person was plaintiff's agent, admitting plaintiff's evidence that he was not such agent was harmless.—*Livingstone Mfg. Co. v. Rizzi Bros.*, 85 A. 912.

§ 1051 (Conn.) Where, in an action for dispossessing plaintiff of rooms, other evidence would support a finding that defendant owned the house, any error in admitting evidence by her husband that she owned the house was harmless.—*Mathews v. Livingston*, 85 A. 529.

§ 1051 (Vt.) Any error in admission of a declaration that papers were to be sent to a certain place was harmless; it appearing they were in fact sent there.—*Boville v. Dalton Paper Mills*, 85 A. 623.

§ 1052 (Conn.) The admission of a question asked plaintiff, whether he sold goods to defendant, if erroneous as calling for a conclusion, was harmless, where the witness subsequently related the entire transaction.—*Walter v. Sperry*, 85 A. 739.

§ 1052 (Pa.) Judgment will not be reversed because of the inadmissibility of an offer, where the testimony subsequently admitted thereunder was clearly competent.—*Powell v. S. Morgan Smith Co.*, 85 A. 416.

§ 1053 (Conn.) Any error in admitting testimony of communication to defendant's servant of information of the viciousness of his horse, because he was not shown to have general charge of it was harmless; the court having correctly charged when knowledge of the servant was imputable to defendant.—*Hope v. Valente*, 85 A. 541.

§ 1053 (R.I.) Defendant cannot complain because plaintiff was permitted to read portions of a deposition where the trial judge, in admitting the deposition, stated that he would, and afterwards did, instruct the jury to disregard such portions.—*Ralph v. Taylor*, 85 A. 941.

§ 1056 (Conn.) In an action for plaintiff's dispossession from rooms rented and for assault, error in excluding a complaint, an amendment thereof, and the substituted complaint, filed during a period of nearly two years, in which plaintiff did not charge any assault, was harmful to defendant, though part of the pleadings were left in the file, and went to the jury.—*Mathews v. Livingston*, 85 A. 529.

§ 1057 (Pa.) In an action for alienation of the affections of plaintiff's husband, where a witness swears that he knew plaintiff by sight, and identifies her, an assignment of error to the refusal to permit him to testify that plaintiff's husband had said to him that the woman with whom he was talking was his wife will not be sustained.—*Ickes v. Ickes*, 85 A. 885.

§ 1057 (Vt.) Exclusion of the question asked of defendant by his counsel as to what a certain payment was for was not error; plaintiff admitting that defendant, when paying it, said it was for the purpose claimed by defendant.—*Livingstone Mfg. Co. v. Rizzi Bros.*, 85 A. 912.

§ 1058 (Conn.) The exclusion of a memorandum made by defendant's intestate, relevant to the matters in issue, was not rendered harmless because defendant was permitted to testify to the intestate's oral statements regarding the same matter.—*Walter v. Sperry*, 85 A. 739.

§ 1058 (Me.) The exclusion of evidence held harmless where other evidence to the same general effect was admitted.—*Williams v. Williams*, 85 A. 43.

§ 1058 (R.I.) Any error in excluding evidence was harmless, where the same facts were fully shown by other evidence.—*Canham v. Rhode Island Co.*, 85 A. 1050.

§ 1058 (Vt.) Any error in exclusion of offered evidence was harmless; the same witness being subsequently allowed to give it.—*Livingstone Mfg. Co. v. Rizzi Bros.*, 85 A. 912.

Exclusion of the question of his counsel to defendant, as to what a certain payment, made by him, was for, was not error; his letter, inclosing his check for the payment, and stating what it was for, being admitted in evidence.—*Id.*

§ 1060 (N.H.) Defendant's counsel having asked concerning other accidents, defendant was not prejudiced by the statement of plaintiff's counsel that they would offer similar evidence if the question was allowed.—*Marcotte v. Maynard Shoe Co.*, 85 A. 284.

§ 1064 (Md.) Modification of a request to charge on plaintiff's contributory negligence by adding a clause requiring that the injury would not have been sustained except for plaintiff's want of care and caution, in order to prevent his recovery, held not prejudicial to defendant.—*Knecht v. Mooney*, 85 A. 775.

§ 1064 (Vt.) Where a deposition, taken at plaintiff's request, was not offered by him nor allowed to be introduced by the defendant, and the court instructed the jury as to how they should consider it and assertions made by counsel as to its contents, an illustration of the position in which the plaintiff might be placed with reference to some fact testified to, if the deposition were used, was not reversible error.—*Lee v. Follensby*, 85 A. 915.

§ 1068 (Conn.) In an action for damages for dispossession of rooms and the conversion of goods, an instruction that if either party regarded plaintiff as a tenant, and was justified by the evidence in so regarding him, the relation of tenant attached, was not reversible error, where the jury on undisputed facts were justified in finding that the relation of landlord and tenant existed, even if otherwise erroneous.—*Mathews v. Livingston*, 85 A. 529.

Failure to instruct that, in attempting to enforce a lodger's lien, a landlord had a right to use as much force as is necessary to keep the lodger's property in the house, was harmless, where the jury found that plaintiff was a tenant, and not a lodger.—*Id.*

§ 1068 (Pa.) On plaintiff's appeal from a judgment in a personal injury case, where the jury has found that he is not entitled to any damages whatever, an assignment of error, as to the measure of damages, does not present ground for reversal.—*Call v. Hallam Const. Co.*, 85 A. 1126.

§ 1071 (Conn.) Error in finding facts in a jury case as though the case had been tried to the court was not reversible where no prejudice could have resulted therefrom.—*Raughtigan v. Norwich Nickel & Brass Co.*, 85 A. 517.

(J) Decisions of Intermediate Courts.

§ 1082 (Md.) Since a justice of Baltimore county had jurisdiction of a landlord's suit for restitution, and the circuit court for that county had jurisdiction to review the justice's judgment, the Court of Appeals, on appeal from the judgment of the circuit court, can only consider whether that court had jurisdiction to render its decision, and not whether its decision was correct.—*Mathews v. Whiteford*, 85 A. 1040.

§ 1082 (N.J.) An objection not urged in the Supreme Court on review will not be considered in the court of errors and appeals on writ of error.—*Battschinger v. Robinson*, 85 A. 317.

(K) Subsequent Appeals.

§ 1099 (Vt.) On a second appeal in an action to foreclose a mortgage, the question whether a different mandate should have been sent down on the first appeal could not be considered.—*Roberts v. W. H. Hughes Co.*, 85 A. 982.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) Decision in General.

§ 1108 (N.J.) Where, between the filing of the answer in equity and the date of the decree, an alley in question had been dedicated as a street, a decree restraining defendant from using the alley to haul goods to and from his warehouse abutting the inferior end of the alley will be reversed.—*Jarman v. Freeman*, 85 A. 184.

§ 1109 (R.I.) Where realty of defendant was attached, and, pending suit, he was adjudged a lunatic, and his guardian was made a party thereto, and where, subsequent to argument on his appeal, he died, his administrator was not entitled to file answer in the Supreme Court as the decision must be on the case as presented below.—*Smart v. Burgess*, 85 A. 742.

(D) Reversal.

§ 1165 (Pa.) A decree will be reversed where the answers of the court to the request for findings of law or fact are confused and conflicting, leaving it uncertain as to what, in the judgment of the court below, were the facts or the law.—*Borough of Mt. Carmel v. Lehigh Valley Coal Co.*, 85 A. 137.

§ 1175 (Vt.) Where on a third appeal from jury trials, in each of which the verdict has been for plaintiff, the judgment is reversed and it appears that plaintiff has made as good a showing as possible, and could not recover under all the facts shown, judgment will be rendered for the defendant by the Supreme Court.—*Willard v. Norcross*, 85 A. 904.

(F) Mandate and Proceedings in Lower Court.

§ 1207 (Vt.) Under a mandate for foreclosure, the court of chancery held to have discretion to decree a strict foreclosure.—*Roberts v. W. H. Hughes Co.*, 85 A. 982.

APPEARANCE.

§ 26 (Conn.) A defendant was not precluded by the fact that its appearance was voluntary and after judgment against its codefendant had been set aside, from moving to strike out a substituted complaint improperly filed.—*Gallop v. Thomas B. Jeffery Co.*, 85 A. 374.

APPLICATION.

See Payment, §§ 36-43.

APPOINTMENT.

See Receivers, §§ 29, 35; Trusts, § 169.

APPROVAL.

See Statutes, § 28.

ARBITRATION AND AWARD.

See Municipal Corporations, § 453.

ARGUMENT OF COUNSEL.

See Appeal and Error, §§ 261, 727, 1060; Criminal Law, §§ 729, 730; Trial, §§ 114, 133.

ARREST.**I. IN CIVIL ACTIONS.**

§ 9 (T.I.) Parties and witnesses, while bona fide attending court in good faith, are privileged from arrest on civil process, whether they are residents or nonresidents, and whether they attend on summons or voluntarily.—In re Greene, 85 A. 552.

Enforcement of a witness' privilege from arrest while attending court in good faith devolves on the court on which the witness is attending.—Id.

Under Gen. Laws 1909, c. 307, § 9, a municipal court sitting as a court of probate has jurisdiction to protect a witness before it against arrest on civil process, and for that purpose to issue a writ of protection.—Id.

ARREST OF JUDGMENT.

See Judgment, § 266.

ASSAULT AND BATTERY.

See Appeal and Error, § 1056; Evidence, § 208.

I. CIVIL LIABILITY.

(A) Acts Constituting Assault or Battery and Liability Therefor.

§ 7 (Conn.) A landlord was not entitled to use more force than was reasonably necessary to prevent property on which he had a lien from being removed from the house.—Mathews v. Livingston, 85 A. 529.

ASSESSMENT.

See Municipal Corporations, §§ 406-586; Taxation, §§ 317-493.

Of damages, see Damages, §§ 197-216.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 219, 261, 724-743; Criminal Law, § 1129.

ASSIGNMENTS.

See Acknowledgment; Corporations, § 398; Courts, § 19; Covenants; Mines and Minerals, § 74; Mortgages, § 244; Municipal Corporations, § 1003; Subrogation; Tenancy in Common, § 34.

I. REQUISITES AND VALIDITY.

(B) Mode and Sufficiency of Assignment.

§ 58 (Pa.) A suit cannot be maintained on a partial assignment of a debt unless the debtor assented to the assignment.—Vetter v. City of Meadville, 85 A. 19.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Trusts for Creditors.

§ 11 (Pa.) An agreement, in writing, by a debtor to apply the funds due the creditor to

the indebtedness to a third party does not constitute an assignment by the debtor for the benefit of his creditor.—Reichner v. Reichner, 85 A. 877.

V. RIGHTS AND REMEDIES OF CREDITORS.

(C) Claims and Liens Prior or Superior to Assignment.

§ 336 (R.I.) In the absence of statute, a general assignment for the benefit of creditors would not defeat a previous attachment.—Smart v. Burgess, 85 A. 742.

ASSISTANCE, WRIT OF.

See Quieting Title, § 52.

ASSOCIATIONS.

See Insurance, §§ 719-815; Limitation of Actions, § 95; Master and Servant, § 78.

§ 15 (N.H.) Association to build a hall on land to be donated by defendant held not to forfeit the building by abandonment of the undertaking; and, after defendant took possession of the building, any member thereof could maintain an action against him for an accounting.—Rowell v. Sanborn, 85 A. 665.

ASSUMPSIT, ACTION OF.

See Action, § 41; Infants, § 98; Sales, § 181; Towns, § 39; Vendor and Purchaser, § 36; Work and Labor.

ASSUMPTION.

Of risk, see Master and Servant, §§ 219, 221, 265, 288.

ATTACHMENT.

See Assignments for Benefit of Creditors, § 339; Bankruptcy, §§ 334, 391; Corporations, § 670; Execution; Exemptions; Fraudulent Conveyances, § 139; Garnishment; Judgment, § 17; Mortgages, § 567; Payment, § 43.

I. NATURE AND GROUNDS.

(B) Grounds of Attachment.

§ 47 (N.J.Sup.) In an action of tort, where the special cause relied on for an attachment under Practice Act April 30, 1907 (P. L. p. 273) § 1, is that defendant is not a resident, and that summons cannot be served on him, the absence of evidence that the summons cannot be served vitiates the entire proceeding.—Hisor v. Vandiver, 85 A. 181.

IV. WRIT OR WARRANT.

§ 142 (N.J.Sup.) The jurisdiction by a commissioner to order a writ of attachment on the proofs must be as formal and precise, and must appear in the order, as is required in actions on contract where defendant is held to bail.—Hisor v. Vandiver, 85 A. 181.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

§ 164 (Me.) Heavy machinery which cannot be removed from the building in which it is installed without dismantling and unbolting from the floor is property not subject to removal, under the provisions of Rev. St. c. 81 § 27, providing that, when attached property cannot be removed, the attaching officer may serve a copy of his return on the town clerk.—Tolman v. Carleton, 85 A. 390.

§ 177 (R.I.) An attachment is a lien on the property attached, and becomes effective when judgment is rendered; the judgment relating back to the time when the attachment was made.—Smart v. Burgess, 85 A. 742.

§ 180 (N.J.) A transfer of corporate stock in satisfaction of a debt due from the stockholder has priority over a subsequent attaching cred-

itor of the stockholder.—*Flostroy v. Wm. B. Corby Coal Co.*, 85 A. 578.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

§ 272 (R.I.) The death of a defendant, and not the appointment of an executor or administrator, dissolves an attachment against his real estate.—*Smart v. Burgess*, 85 A. 742.

IX. RETURN.

§ 328 (Me.) While Rev. St. c. 83, § 27, providing that, where attached property is not removable owing to its size or bulk, the attaching officer may file his return with the town clerk, leaves the question of removability to the judgment of the officer, his determination is not conclusive.—*Tolman v. Carleton*, 85 A. 390.

X. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 349 (Conn.) Recovery cannot be had under the common counts for a breach of an attachment bond, where the only obligation assumed by the defendant was a conditional one.—*Galup v. Thomas B. Jeffery Co.*, 85 A. 374.

ATTESTATION.

See Wills, § 114.

ATTORNEY AND CLIENT.

See Appeal and Error, § 1050; Bankruptcy, § 436; Embezzlement, § 39; Evidence, § 555; Interest, § 19; Receivers, §§ 154, 198; Trial, § 232; Witnesses, §§ 199-202.

II. RETAINER AND AUTHORITY.

§ 98 (Pa.) The tender by a lessee of mortgaged property to the attorney of record in the scire facias on the mortgage, the mortgagee being a nonresident of the state, was sufficient to preserve the lessee's rights.—*Hopkins Mfg. Co. v. Ketterer*, 85 A. 421.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

§ 130 (N.J.) An attorney may have compensation for examining a title, having a survey made on, and ascertaining incumbrances on property located in a state in which he was not licensed to practice.—*Wescott v. Baker*, 85 A. 315.

§ 153 (Pa.) Anything savoring of lack of good faith of an attorney, such as receipt of money without notice to client within reasonable time, or neglect to pay over promptly on demand, forfeits compensation.—*In re Martin*, 85 A. 88.

Where attorneys compromised a suit and failed to notify their clients of the amounts expected or received in settlement, an allowance of \$2,450 attorney's fees out of a collection of \$8,125, of which only \$1,156 had been turned over, will not be sustained.—*Id.*

§ 160 (N.J.) An attorney held not required by Practice Act, § 9, to tax the costs of his services in examining papers not connected with pending litigation as a prerequisite to an action for compensation.—*Wescott v. Baker*, 85 A. 315.

§ 166 (Conn.) In an attorney's action for services resisted on the ground that the fee was excessive, evidence as to plaintiff's practice and professional standing was admissible.—*Stoddard v. Sagal*, 85 A. 519.

AUDITA QUERELA.

See Judgment, § 173.

AUDITORS.

See Executors and Administrators, § 315.

AUTHORITY.

See Corporations, § 398; Principal and Agent, § 119.

AUTOMOBILES.

See Evidence, § 533; Insurance, § 424; Municipal Corporations, §§ 705, 706; Pleading, § 67; Release, § 29; Street Railroads, § 90.

AVOIDANCE.

See Insurance, §§ 291-326, 668.

BALLOTS.

See Elections, §§ 192, 194.

BANKRUPTCY.

See Assignments for Benefit of Creditors; Evidence, § 353.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 139 (Me.) Where a bankrupt was in possession of a farm at the time of the adjudication, whatever interest he had, including growing crops, passed to and vested immediately in the trustee.—*Carney v. Averill*, 85 A. 494.

§ 144 (N.J.Ch.) After an adjudication in bankruptcy all liens and claims against the property of the bankrupt must be determined in the bankruptcy court; and on its appointment of a custodian and application therefor a receiver of the Chancery Court will be ordered to turn over all that he has received, less expenditures in caring for the property.—*Kennedy v. American Tanning Co.*, 85 A. 812.

§ 150 (Me.) While a trustee in bankruptcy is vested in a qualified sense with all the assets of the bankrupt, he may decline to take such property as he deems burdensome and worthless, and title thereto remains in the bankrupt.—*Dow v. Bradley*, 85 A. 896.

(D) Administration of Estate.

§ 257 (Me.) A sale of personal property by a trustee in bankruptcy, acting under an order of sale issued by the court, is a "judicial sale."—*Carney v. Averill*, 85 A. 494.

§ 268 (Me.) A trustee in bankruptcy has authority to sell only such rights and interests as the bankrupt had.—*Carney v. Averill*, 85 A. 494.

The rule of caveat emptor prevails in bankruptcy sales, unless special direction otherwise is made in the order of sale.—*Id.*

A warranty of title to personal property, signed by a trustee in bankruptcy as such, executed four days after the sale, without any further consideration and assuming no personal liability, imposed no such liability on the trustee.—*Id.*

Where a trustee in possession of a hay crop on the bankrupt's estate sold it by order of court, the fact that the purchaser failed to cut it by reason of a mortgagee's invalid claim, and in consequence lost by the purchase, created no personal liability on the part of the trustee.—*Id.*

(E) Actions by or Against Trustee.

§ 285 (Me.) A trustee in bankruptcy is an officer of the court, and cannot be subjected to suits by the purchaser of personal property belonging to the estate, without leave of the bankruptcy court.—*Carney v. Averill*, 85 A. 494.

§ 299 (Pa.) In a proceeding by petitioner's trustees in bankruptcy to compel her testamentary trustee to file an account, where petitioner might show that before her insolvency she had entered into an agreement with her trustee under which her trustees in bankruptcy have no right to an accounting, refusal to permit petitioner to intervene was error.—*In re Frey's Estate*, 85 A. 147.

(F) Claims Against and Distribution of Estate.

§ 334 (Conn.) A plaintiff in attachment who seeks a special judgment to secure the benefit of the attachment made, or of the substituted bond given prior to the adjudication in bankruptcy of defendant, may prove his claim in bankruptcy, and in the distribution of dividends the amount of the judgment may be deducted from the face of the claim allowed and the dividends paid on the balance.—*American Woolen Co. v. Maaget*, 85 A. 583.

§ 363 (Conn.) When an action was brought before defendant was adjudged a bankrupt, and he failed to obtain a discharge, dividends in the bankruptcy proceedings received by plaintiff merely reduced the cause of action pro tanto.—*American Woolen Co. v. Maaget*, 85 A. 583.

Filing proof of claim with notice that claimant did so without prejudice to his right to pursue the action *held* not a waiver of his right to prosecute the action.—*Id.*

§ 363 (Conn.) Evidence that the claim sued on had been allowed against the bankrupt estate of a third person *held* inadmissible, where it did not appear that plaintiff had anything to do with so listing it, or had attempted to profit thereby.—*Walter v. Sperry*, 85 A. 739.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 391 (Conn.) An action brought before defendant was adjudged a bankrupt survives where he fails to obtain a discharge.—*American Woolen Co. v. Maaget*, 85 A. 583.

Where a defendant in attachment obtained a discharge of the attachment by giving bond, and he was thereafter adjudged a bankrupt and obtained his discharge, plaintiff was entitled to a special judgment securing the benefit of the attachment, or the substituted bond.—*Id.*

The court has jurisdiction to render a special judgment against a defendant in an action aided by attachment who is subsequently adjudged a bankrupt, and who obtained his discharge to enable plaintiff to enforce the bond given for the release of the attachment.—*Id.*

§ 426 (Md.) Where the narr. declared on defendant's contract to indemnify plaintiff against expenses incurred under plaintiff's agreement guarantying defendant's honesty as an insurance agent, and alleged defendant's breach of his agreement with plaintiff to repay what it was required to pay on his account, *held* that the judgment for plaintiff was not one in an action for fraud, within Bankr. Act, § 17, so that defendant's discharge in bankruptcy was not a valid defense to a scire facias on the judgment.—*American Surety Co. of New York v. Spice*, 85 A. 1031.

Only such debts created by a bankrupt's fraud as were created while he was acting as an officer in a fiduciary capacity are excepted from the operation of a discharge.—*Id.*

The words "fiduciary capacity," as used in Bankr. Act, § 17, excepting from a discharge in bankruptcy debts created by the debtor's fraud while acting in any fiduciary capacity, refer to technical or express trusts, and do not include conversions or fraud by agents, etc.—*Id.*

§ 436 (N.J.Supp.) A mere assertion of counsel that the district court did not have jurisdiction, because defendant, at the time of the trial, was a bankrupt, in the absence of evidence to support it, was properly disregarded.—*Nelson v. Bock*, 85 A. 1009.

BANKS AND BANKING.

See Embezzlement, §§ 9, 38; Gifts, § 49; Husband and Wife, § 49½; Municipal Corporations, § 902; Receivers, § 101; Wills, § 108.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(E) Insolvency and Dissolution.

§ 73 (Pa.) "Insolvency," in its legal sense, as applied to banks and trust companies, exists whenever such an institution, from any cause, is unable to pay its debts in the ordinary course of business.—*Commonwealth v. Tradesmen's Trust Co. of Philadelphia*, 85 A. 363.

§ 77 (Pa.) In petition for receiver to wind up the affairs of a trust company, a traverse to the averment of insolvency is ineffectual which admits that the institution has closed its doors.—*Commonwealth v. Tradesmen's Trust Co. of Philadelphia*, 85 A. 363.

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

§ 119 (R.I.) The ordinary relation of banker and depositor on a general deposit is that of debtor and creditor.—*State v. Grills*, 85 A. 281.

§ 153 (R.I.) The ordinary relation of banker and depositor on a general deposit is that of debtor and creditor; but, without actual delivery to the depositor and a redeposit for a special purpose, a general deposit may by agreement be converted into a special deposit.—*State v. Grills*, 85 A. 281.

§ 154 (Me.) In an action to recover the amount of a deposit where the bank claimed with the depositor's authority to have purchased a bond out of the proceeds of such deposit, evidence *held* sufficient to support a finding that the depositor had not authorized the purchase.—*Trainer v. Marine Nat. Bank*, 85 A. 478.

In an action to recover an excess payment of interest on a loan, evidence *held* insufficient to support a finding for the depositor on the theory that the notes had been altered after execution by increasing the interest rate.—*Id.*

In an action to recover a deposit where it was claimed that the part of the deposit had, with the depositor's authority, been used to purchase a bond for him, evidence that the property upon which the bond was secured could have been sold for more than enough to pay the bond issue was inadmissible; the authority of the bank being the question in issue.—*Id.*

BASTARDS.

See Divorce, §§ 115, 125.

I. ILLEGITIMACY IN GENERAL.

§ 1 (Me.) As a general rule legitimacy is to be ascertained by the law of the domicile.—*Holmes v. Adams*, 85 A. 492.

§ 11 (Pa.) Act April 27, 1835 (P. L. 368), did not legitimate illegitimate children, but merely gave to the mother and illegitimate children the capacity to inherit from each other.—*Goughnour v. Zimmerman*, 85 A. 874.

IV. PROPERTY.

§ 100 (Pa.) Where an illegitimate child died before the passage of Act June 5, 1883 (P. L. 88), intestate, leaving neither mother nor issue, her surviving illegitimate brothers and sisters do not inherit her real estate, though derived from the mother by will.—*Goughnour v. Zimmerman*, 85 A. 874.

§ 102 (Me.) The clause "the same as if born in lawful wedlock" used in Comp. Laws Nev. 1900, § 3046, making an illegitimate child the heir of his mother, does not allow an illegitimate or his issue to inherit from its mother's lineal or collateral kindred.—*Holmes v. Adams*, 85 A. 492.

BENEFICIAL ASSOCIATIONS.

See Insurance, §§ 719-815.

BEST AND SECONDARY EVIDENCE.

See Criminal Law, § 400; Evidence, §§ 157-185.

BIDS.

See Costs, § 96; Municipal Corporations, § 294; Schools and School Districts, § 80.

BIGAMY.

§ 8 (N.J.) Evidence as to why the father of the woman last married kept the marriage certificate from his daughter, and why he had not delivered it to defendant, was inadmissible.—*State v. MacRae*, 85 A. 455.

§ 10 (N.J.) Evidence on the part of the defendant relating to the illicit relations between himself and the woman last married before such marriage, and that her family knew of his former marriage, *held* properly excluded, so far as excepted to.—*State v. MacRae*, 85 A. 455.

BILL OF DISCOVERY.

See Discovery.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF LADING.

See Carriers, §§ 49, 57, 94, 149½, 155.

BILL OF PARTICULARS.

See Pleading, § 144.

BILLS AND NOTES.

See Executors and Administrators, § 437; Indemnity; Insane Persons, §§ 77, 99; Partnership, § 146; Schools and School Districts, § 97; Trial, §§ 45, 89; Trusts, § 249.

I. REQUISITES AND VALIDITY.**(F) Validity.**

§ 103 (Me.) A note given by a party, after his settlement of several of his notes, on the payee's false statement that the law required him to pay the fees of the payee's attorney for collecting the other notes, was without legal consideration.—*Avery v. Avery*, 85 A. 54.

VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

§ 396 (Me.) One signing his name on the back of a note at its inception is a joint or joint and several maker, so far as concerns the necessity for demand and notice of nonpayment, though he is in fact an accommodation indorser or surety.—*Stuart v. Oliver*, 85 A. 747.

VIII. ACTIONS.

§ 489 (Md.) Where the signatures to the note sued on were not denied in the pleas, plaintiff was relieved under the express provisions of Code Pub. Civ. Laws, art. 75, § 24, subsec. 108, from any necessity of proving the signatures.—*Herrman v. Combs*, 85 A. 1044.

§ 503 (Md.) In an action between the original parties to a note, *held* error to exclude certain evidence as tending to show want of consideration for the note sued on, since under Code Pub. Civ. Laws, art. 13, §§ 47, 77, failure of consideration is a defense against any person not a holder in due course.—*Herrman v. Combs*, 85 A. 1044.

§ 511 (Md.) Where, in an action on a note given for a debt due a deceased person, the

defendant claimed that the deceased gave her a release reciting that the money constituting the debt was given her in consideration of services, evidence that defendant lived with deceased a number of years and did certain work for him was material.—*Herrman v. Combs*, 85 A. 1044.

§ 537 (Me.) Whether the payee of a note knew, at the time of extending the time for payment, that one who signed his name on the back of the note at its inception was a surety or accommodation maker only, *held*, under the evidence, for the jury.—*Stuart v. Oliver*, 85 A. 747.

§ 537 (Md.) In an action between the original parties on a promissory note, *held* error to exclude a release and evidence of its execution on the assumption that it was either a forgery or was obtained by improper means; these questions being for the jury and not for the court.—*Herrman v. Combs*, 85 A. 1044.

BOARDERS.

See Husband and Wife, § 208.

BOARDS.

See Constitutional Law, § 62; Corporations, § 298; Costs, § 96; Health, §§ 3, 18, 24; Officers, § 114; Schools and School Districts, § 97; Taxation, § 485.

BONA FIDE PURCHASERS.

See Mortgages, § 244; Sales, § 234.

BONDS.

See Attachment, § 349; Corporations, § 479; Courts, § 169; Evidence, § 441; Municipal Corporations, §§ 173, 864, 938; Pleading, § 246; Recognizances; Replevin, §§ 33, 50; Schools and School Districts, §§ 81, 97; Trusts, § 194; Vendor and Purchaser.

BOOKS.

See Corporations, § 311.

BOUNDARIES.

See Adverse Possession, § 114; Judgment, § 743.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 36 (Conn.) Where the exact location of the land claimed by plaintiff was uncertain, deeds of adjacent land were admissible to locate plaintiff's land as it formerly existed.—*Raughtigan v. Norwich Nickel & Brass Co.*, 85 A. 517.

§ 37 (Me.) Testimony to overcome a record boundary line should be full, clear, and convincing, and should be scanned with care and caution.—*Proctor v. Libby*, 85 A. 298.

Evidence in trespass *quare clausum* *held* sufficient to sustain a finding that there had been no agreement establishing a boundary line different from the record line.—*Id.*

Evidence in trespass *quare clausum* *held* sufficient to sustain a finding that a line different from the record line had not been established by estoppel.—*Id.*

§ 40 (Pa.) In ejectment to determine a disputed boundary line, the location of certain trees, whether they corresponded with the official survey, etc., *held* for the jury.—*Seigfried v. Boyd*, 85 A. 72.

§ 46 (Me.) When a boundary line is located and marked, and thereafter recognized and treated by the parties as a true line, it is conclusive upon them and their assigns, though it varies from the record line.—*Proctor v. Libby*, 85 A. 298.

§ 47 (Me.) Where the owner of land points out a certain line as a boundary, he may be

estopped from thereafter denying such boundary.—*Proctor v. Libby*, 85 A. 298.

BREACH OF THE PEACE.

§ 22 (Me.) A voluntary engagement by a citizen with the state to keep the peace and be of good behavior, and especially not to violate a particular law, does not create an enforceable contract.—*State v. Sturgis*, 85 A. 474.

BREAD.

See Food.

BRIBERY.

See Criminal Law, § 1186.

BRIDGES.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 5 (N.J.Sup.) Under Act March 28, 1892 (P. L. p. 308), as amended by Act March 30, 1906 (P. L. p. 93), a board of chosen freeholders is not compelled to bridge navigable waters.—*Megie v. Board of Chosen Freeholders of Morris County*, 85 A. 1020.

§ 5 (Pa.) Act May 6, 1897 (P. L. 46), as amended by acts May 13, 1901 (P. L. 191), and April 25, 1907 (P. L. 119), authorizing county commissioners to reconstruct bridges of private corporations or persons, which have been destroyed or abandoned, is not unconstitutional.—*McCune v. Berry*, 85 A. 890.

§ 22 (Pa.) Proceedings by counties for the construction of a bridge in substitution for an abandoned bridge over a river, which is the dividing line between the counties, must be under act May 6, 1897 (P. L. 46), as amended by acts May 13, 1901 (P. L. 191), and April 25, 1907 (P. L. 119).—*McCune v. Berry*, 85 A. 890.

The word "otherwise," in Act May 6, 1897 (P. L. 46), does not mean some casualty ejusdem generis with ice and flood, but means some greater power as effective in destroying the bridge.—*Id.*

It does not follow, because a bridge company has not rebuilt its bridge on another location, that a bridge, to be built in the old location by the adjoining counties, is not within the description of bridges which Act May 6, 1897 (P. L. 46), authorizes county commissioners to rebuild.—*Id.*

Where county commissioners have a right to reconstruct a bridge when it has been destroyed, and the United States government requires the elevation to be such as to require more extended approaches, the taking of additional ground for an approach, and the consequent injury to private property, does not make the building of the bridge illegal.—*Id.*

BROKERS.

See Evidence, §§ 207, 246, 441.

IV. COMPENSATION AND LIEN.

§ 40 (Md.) Where a real estate broker wrote to a landowner that an out of town customer wanted to buy a large tract of land and he wished to know if the owner's land was for sale and if so at what price, the owner's reply, fixing a price and describing his land in accordance with the request, will not create a contract entitling the broker to commissions for procuring a purchaser.—*Bond v. Humbird*, 85 A. 943.

§ 41 (Md.) A real estate broker cannot recover commissions on a sale which he was not employed or authorized to make, unless his unauthorized act has been ratified by the owner, or the circumstances are such as to estop the owner from denying his authority.—*Bond v. Humbird*, 85 A. 943.

§ 54 (Conn.) Where a broker wrote a memorandum describing the land to be sold, and seeks to recover commissions, he must show that he produced a purchaser ready, willing, and able to purchase the land as described in the memorandum.—*Abbott v. Lee*, 85 A. 526.

§ 60 (Conn.) To entitle a real estate broker to compensation, where an actual sale was not consummated, he must show that he produced a purchaser ready, able, and willing to buy in accordance with the terms of the owner.—*Abbott v. Lee*, 85 A. 526.

§ 60 (N.J.) Under a contract with real estate brokers for the payment of a commission "on the day of passing title or July 15th," the brokers are entitled to commissions only on the contingency of passing of title to the purchaser.—*Leachziner v. Bauman*, 85 A. 205.

§ 63 (Conn.) Where a vendor of land signed at the request of the broker a memorandum describing the property to be sold, and refused to sign a contract varying the description, he is not bound to prepare and present another contract which he would sign; the memorandum affording the broker sufficient description.—*Abbott v. Lee*, 85 A. 526.

§ 63 (N.J.Sup.) One who agreed in writing to pay a commission for securing a buyer for his land cannot escape paying by the mere fact that he had conveyed the land before the broker procured a customer.—*MacBride v. Rogers*, 85 A. 202.

§ 75 (N.J.Sup.) Under a contract fixing the compensation of an agent to procure a purchaser of land and fixing the time for payment as the time of the "consummation" of the sale, the "consummation" was the passing of the title, and the compensation was contingent upon that.—*Morse v. Conley*, 85 A. 196.

V. ACTIONS FOR COMPENSATION.

§ 88 (Md.) In an action by a real estate broker for compensation, where his recovery depends wholly on correspondence with the owner, it is the province of the court to determine the legal effect of the letters.—*Bond v. Humbird*, 85 A. 943.

BUILDINGS.

See Associations; Fixtures, § 18.

BULK SALES.

See Constitutional Law, § 87; Fraudulent Conveyances, §§ 3, 47.

BY-LAWS.

See Insurance, § 719.

CANALS.

See Eminent Domain, § 317.

CANCELLATION OF INSTRUMENTS.

See Aliens.

II. PROCEEDINGS AND RELIEF.

§ 37 (R.I.) A bill to set aside a voluntary conveyance held not to state a cause of action.—*Magoon v. Marshall*, 85 A. 117.

CARRIERS.

See Commerce, §§ 27, 58, 61; Courts, § 489; Food, § 25; Railroads; Statutes, §§ 64, 241.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

§ 12 (N.J.) Where a traction company contracted with a city by acceptance of an ordinance granting permission to maintain its railroad, conditioned that specified rates of fare should be charged, and no words were used in-

dicating that the parties were contracting for any other corporation, its obligation was to carry passengers for the stipulated fares only over its own lines.—*Reed v. Inhabitants of City of Trenton*, 85 A. 270.

The phrase, "continuous ride in the same general direction," in an ordinance relating to rates of fare to be charged by a traction company, means a journey over the company's own tracks.—*Id.*

§ 13 (Pa.) That a railroad's line was congested is not an excuse for refusing a siding to a coal property, where the railroad afforded siding privileges to other operators, and a reduction of the cars to other operators would have prevented an increase of the total traffic.—*Cox v. Pennsylvania R. Co.*, 85 A. 863.

§ 19 (Pa.) Refusal of a railroad company to permit plaintiff to purchase and use wooden cars on its lines held not a discrimination for which plaintiff was entitled to recover damages under Act June 4, 1883 (P. L. 72).—*Walnut Coal Co. v. Pennsylvania R. Co.*, 85 A. 440.

§ 19 (Pa.) The right of action against a railroad for discrimination in refusing a siding to a coal property was in the plaintiffs, where they held legal title during the discrimination, though they had conveyed the property to a corporation before the action was brought.—*Cox v. Pennsylvania R. Co.*, 85 A. 863.

In an action against a railroad for refusing a siding to a coal property, evidence of the sale of cars by defendant to individual shippers and as to the loading of cars from wagons is irrelevant.—*Id.*

In an action against a railroad for discrimination, there was no error in not distinguishing between interstate and intrastate commerce, it not being incumbent upon plaintiffs to show what proportion of their total tonnage would have been sold within the state.—*Id.*

Where the verdict clearly appears to be for single damages for discrimination by a carrier, it is for the court to say whether the damages shall be trebled.—*Id.*

(B) Interstate and International Transportation.

§ 32 (Pa.) Where a railroad has adopted a system of distribution of cars in violation of the interstate commerce act, leaving out of consideration private cars, the court may leave them out of consideration in an action by a shipper for departure from the system of distribution resulting in discrimination.—*Puritan Coal Mining Co. v. Pennsylvania R. Co.*, 85 A. 426.

§ 34 (Pa.) Except as to those things which the Interstate Commerce Commission has defined and denounced as undue discrimination, a discrimination complained of may be dealt with by the state courts according to their own statute or the common law.—*Puritan Coal Mining Co. v. Pennsylvania R. Co.*, 85 A. 426.

II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

§ 49 (Vt.) A shipper's acceptance of a bill of lading is presumptively an assent to its terms, as far as they are reasonable, and not inconsistent with public policy.—*Leavens v. American Express Co.*, 85 A. 557.

§ 57 (Pa.) In action against carrier to recover for negligence in issuing bills of lading for goods not actually delivered, uncontradicted evidence that the bills of lading as delivered did not include goods not received, but were fraudulently altered, required verdict for defendant.—*Franklin Trust Co. v. Philadelphia, B. & W. R. Co.*, 85 A. 855.

(D) Transportation and Delivery by Carrier.

§ 87 (N.J.Sup.) An owner is bound to receive goods shipped when tendered at the proper place, however long the delay.—*Higgins v. United States Express Co.*, 85 A. 450.

§ 91 (N.J.Sup.) An unreasonable delay in the shipment of goods does not amount to a conversion.—*Higgins v. United States Express Co.*, 85 A. 450.

§ 94 (Pa.) In action against railroad for value of goods delivered to consignee without surrender of bill of lading, evidence held to sustain a verdict that there was no waiver of provision of the bill of lading requiring its surrender before delivery, and that plaintiff did not approve of such conduct on the part of the railroad company.—*Salberg v. Pennsylvania R. Co.*, 85 A. 767.

(E) Delay in Transportation or Delivery.

§ 97 (Md.) A carrier of perishable freight owes only the duty of exercising reasonable care to protect it from injury, in the absence of any special contract as to the time of delivery.—*Pennsylvania R. Co. v. Clark*, 85 A. 613.

§ 104 (Md.) Delay in the transportation of perishable freight raises a prima facie presumption of negligence of the carrier, and to escape liability it must show that it exercised reasonable diligence in forwarding the freight.—*Pennsylvania R. Co. v. Clark*, 85 A. 613.

§ 105 (N.J.Sup.) Where mill castings were deposited with an express company without instructions as to the necessity for an expeditious transportation, and that pending their return the mill would have to be shut down, the shipper cannot recover for loss from the interruption of his business.—*Higgins v. United States Express Co.*, 85 A. 450.

For an inordinate and unnecessary delay in the carriage of goods, the consignor is entitled to recover the loss directly and proximately resulting from the delay.—*Id.*

§ 106 (Md.) Where a prima facie presumption of negligence of a carrier in transporting perishable freight is raised by undisputed proof of delay, whether the carrier's evidence to excuse delay shows reasonable diligence is for the jury.—*Pennsylvania R. Co. v. Clark*, 85 A. 613.

In an action for delay in the transportation of perishable freight, an instruction submitting the case on the theory of liability based on the carrier accepting the freight with knowledge of a wreck on its road held not justified by the evidence.—*Id.*

§ 106 (N.J.Sup.) Whether a delay in the shipment of goods was unreasonable is generally a question of fact.—*Higgins v. United States Express Co.*, 85 A. 450.

(E) Limitation of Liability.

§ 149½ (Vt.) A stipulation of a bill of lading that the carrier should not be liable for delay by reason of strikes was just, reasonable, and not inconsistent with public policy.—*Leavens v. American Express Co.*, 85 A. 557.

§ 155 (N.J.Sup.) Where the limitation of damages in a receipt for goods shipped was not in any manner called to the attention of the shipper or assented to by him, it is not binding on him.—*Higgins v. United States Express Co.*, 85 A. 450.

(I) Connecting Carriers.

§ 185 (Me.) That a terminal carrier may be presumptively liable for injuries to goods in transit, it must be shown that it was the last of a line of carriers under a through bill of lading or contract of shipment, and that the goods were received by the initial carrier in

good condition.—*Conti v. American Express Co.*, 85 A. 484.

Where the baggage of a passenger was forwarded by a steamship to New York, and then by express to her destination, but the contract of transportation was not shown, the presumption that the express company delivering the baggage in damaged condition was liable did not arise.—*Id.*

(K) Discrimination and Overcharge.

§ 199 (Pa.) Where a railroad divides mines along its line into two districts, and rates them according to their producing capacity, and during a period of shortage gives to one coal company an excess of cars, it will be liable in damages to a coal company in the other district which has been deprived of its fair share of cars.—*Puritan Coal Mining Co. v. Pennsylvania R. Co.*, 85 A. 426.

§ 201 (Pa.) The court, hearing a case against a railroad for unlawful discrimination, may include in the general damages additional damages for delay in settlement of plaintiff's claim.—*Puritan Coal Mining Co. v. Pennsylvania R. Co.*, 85 A. 426.

IV. CARRIAGE OF PASSENGERS.

(D) Personal Injuries.

§ 286 (Me.) A carrier, using part of its wharf under its control as a way for passengers on foot, was bound to use due care toward passengers so using it.—*Rodick v. Maine Cent. R. Co.*, 85 A. 41.

Where a carrier, after a heavy snowfall, scraped the sidewalk on its wharf, but allowed ice to remain at places on and outside the walk, without sanding it, it was liable to a passenger for injuries from a fall on the ice.—*Id.*

A passenger injured by falling on ice allowed to remain on a wharf, was not chargeable with negligence in failing to discover the ice, especially where she could not have seen it, if she had looked, on account of it being covered with snow.—*Id.*

A carrier should exercise all ordinary care to maintain its premises in such a reasonable and suitable condition that passengers may, in the exercise of ordinary care, use them in safety.—*Id.*

§ 286 (Me.) A railroad company maintaining a passageway from a street to a train shed at its station owes to a person on the way to take a train the duty of exercising ordinary care to maintain the way in a reasonably safe condition for passengers exercising ordinary care.—*Woodbury v. Maine Cent. R. Co.*, 85 A. 753.

A railroad company held to have exercised reasonable care in maintaining a passageway in a reasonably safe condition for a passenger walking alone, or with only one companion in broad daylight, with opportunity for observation.—*Id.*

§ 287 (R.I.) Where three persons standing on an interurban platform signaled a car to stop, and it was necessary for them to cross the track before boarding, the motorman was charged with notice that some one was relying on the car stopping, requiring him to use every effort to stop the car to avoid striking them.—*Canham v. Rhode Island Co.*, 85 A. 1050.

§ 295 (Me.) A street railroad permitting a passenger to ride on the platform is bound to observe a high degree of care in the running of the car at points where there is danger that he may be thrown off.—*Blair v. Lewiston, A. & W. St. Ry.*, 85 A. 792.

§ 298 (Vt.) Where, as a train was starting, a man ran out of the station, and fell on the edge of the platform, and was probably going under the wheels, the railroad was not negligent, in that the conductor applied the emergency air brake, so that a passenger in the train was thrown and injured.—*Stewart v. Central Vermont Ry. Co.*, 85 A. 745.

§ 317 (R.I.) In an action for death of plaintiff's intestate by being struck by a street car while intestate was waiting at a station to take a car, evidence of a former motorman as to the distance which the headlight of cars operated on that line cast their rays was not admissible, not relating to the headlight of the car in question.—*Canham v. Rhode Island Co.*, 85 A. 1050.

Plaintiff could show that the motorman, after being put upon notice that decedent intended to cross, could have stopped the car in time to have avoided the injury.—*Id.*

If plaintiff showed that rules as to the proper speed of cars were in force at the time of the accident in 1907, evidence as to what such rules were, for five years prior to 1905, was admissible.—*Id.*

Evidence as to the company's rules at the time of the accident, as to the proper speed of the car at stations, was admissible on the question of negligence, though not conclusive thereon.—*Id.*

§ 318 (Me.) Evidence in action by passenger, injured while alighting from a car, held not to support a verdict for plaintiff.—*Sayles v. Maine Cent. R. Co.*, 85 A. 2.

§ 320 (N.J.Sup.) Where a passenger was injured by the giving way of an adjustable hand rail when boarding a vestibule car, because the lower end of the rail had not been put in its socket by the servant who adjusted it, a nonsuit was properly denied.—*Machlin v. Pennsylvania R. Co.*, 85 A. 340.

§ 320 (Pa.) In an action against a street railway company for injuries to a passenger by the fall of a limb of an oak tree, evidence held to authorize binding instructions for defendant: there being nothing from its appearance to indicate that the tree was not perfectly sound.—*Sheets v. Sunbury & Northumberland Electric Ry. Co.*, 85 A. 92.

(E) Contributory Negligence of Person Injured.

§ 327 (Me.) One on a passageway maintained by a railroad company to a train shed at its station, to take a train, must exercise ordinary care for his protection, or he is guilty of contributory negligence.—*Woodbury v. Maine Cent. R. Co.*, 85 A. 753.

§ 331 (Me.) If a passenger voluntarily chooses to ride on the rear platform of a street car, he is to be held to the exercise of a high degree of care to avoid the dangers known, or to be reasonably apprehended.—*Blair v. Lewiston, A. & W. St. Ry.*, 85 A. 792.

§ 333 (Pa.) A passenger, who, after alighting at the east platform of a double-track railroad, attempts to cross to the west platform, and is struck by a train on the west track where he had an unobstructed view for 125 feet, is negligent.—*Weisenberg v. Lackawanna & W. V. R. Co.*, 85 A. 74.

§ 347 (Me.) A passenger is not negligent per se in riding upon the rear platform of a street car.—*Blair v. Lewiston, A. & W. St. Ry.*, 85 A. 792.

Contributory negligence of plaintiff's intestate thrown from defendant's car while riding on the rear platform, held, for the jury.—*Id.*

Evidence, if any, tending to show that decedent was somewhat intoxicated at the time of the accident, made it a question for the jury as to what extent, if at all, that may have contributed to the accident.—*Id.*

§ 347 (Pa.) In an action for injuries to an intending street car passenger boarding the car, plaintiff held not negligent as matter of law in standing on a pile of dirt in the street.—*Thorne v. Philadelphia Rapid Transit Co.*, 85 A. 25.

(F) Ejection of Passengers and Intruders.

§ 356 (N.J.) The authority of a ferry ticket collector is limited to the collection of cash or a ticket valid upon its face, and, where the

passenger's statements conflict with the face marks of his ticket, the collector cannot decide upon the truth of such statements, but must be governed by the intrinsic effect of the ticket.—*Wilson v. West Jersey & S. R. Co.*, 85 A. 347.

§ 366 (N.J.) In ejecting a drunken passenger, a carrier is bound to exercise reasonable care, and should use due care not to expel him at a time or place which is dangerous, and will be liable for negligence in that regard, not only for injuries directly suffered, but also for subsequent injuries proximately due thereto.—*McCoy v. Millville Traction Co.*, 85 A. 358.

§ 369 (N.J.) Even as to persons partly incapacitated, a carrier is not liable for subsequent injuries, unless there was negligence as to the time and place of expulsion from the car.—*McCoy v. Millville Traction Co.*, 85 A. 358.

§ 383 (N.J.) Where the proofs would have justified findings that decedent, when ejected from defendant's trolley car, was so drunk as to be unable to stand without assistance, and that he was put off in the nighttime, where the snow was banked on either side, 20 yards from a shelter shed, the question whether reasonable care was exercised is for the jury.—*McCoy v. Millville Traction Co.*, 85 A. 358.

CARS.

See Carriers, §§ 19, 32, 199.

CAUSE OF ACTION.

See Action.

CAVEAT EMPTOR.

See Bankruptcy, § 268; Execution, § 264.

CERTIFICATE.

See Corporations, §§ 95-110, 621; Evidence, § 341; Marriage, § 45.

CERTIORARI.

See Corporations, § 613; Criminal Law, §§ 1015, 1149; Municipal Corporations, § 1014.

I. NATURE AND GROUNDS.

§ 23 (R.I.) Certiorari is appropriate for the Supreme Court to review the proceedings of a town council.—*Rice v. Town Council of Town of Westerly*, 85 A. 553.

§ 31 (N.J.Sup.) Where the removal of obstructions to the flow of surface water on a road ordered by resolution of a township committee had already been accomplished and paid for, certiorari would not then lie to review such resolutions.—*Weed v. Township Committee of Hillsdale, Bergen County*, 85 A. 329.

II. PROCEEDINGS AND DETERMINATION.

§ 41 (R.I.) An administratrix, who was present when her bondsman was released and a new bond ordered, and who secured further time to file same, but failed to do so, whereupon she was removed and another administrator appointed, was not entitled to certiorari to review such appointment, because made without notice to her, where she took no appeal or other steps within one year after the appointment.—*Sayles v. Probate Court of Town of Burrillville*, 85 A. 674.

§ 57 (N.J.Sup.) Where neither the reasons for certiorari nor the writ included the ordinance pursuant to which a township committee's resolutions sought to be reviewed were passed, such ordinance was not before the court.—*Weed v. Township Committee of Hillsdale, Bergen County*, 85 A. 329.

§ 64 (N.J.Sup.) On certiorari to review resolutions of a township committee, the court could consider only the regularity of the pro-

ceedings, and not the motives which actuated the committee.—*Weed v. Township Committee of Hillsdale, Bergen County*, 85 A. 329.

§ 64 (N.J.Sup.) On certiorari, the Supreme Court need not consider matters which, though they appear in the state of the case, are not referred to in the argument or brief.—*Treasurer of City of Elizabeth v. Lytton*, 85 A. 341.

§ 64 (Pa.) On certiorari the Supreme Court is limited to an inspection of the record to determine whether there are substantial irregularities or defects of jurisdiction.—*In re Washington Party Nominations*, 85 A. 873.

§ 64 (R.I.) On certiorari to review the determination of the town council as to the result of a liquor election, errors not alleged in the petition for the writ will be considered.—*Rice v. Town Council of Town of Westerly*, 85 A. 553.

§ 68 (R.I.) On certiorari, the court can review whether marks on an election ballot conformed to the requirements of a legal ballot; the question being one of law, instead of fact.—*Rice v. Town Council of Town of Westerly*, 85 A. 553.

CHANCERY.

See Equity.

CHARACTER.

See Adultery; Criminal Law, §§ 381, 561; Evidence, § 106.

CHARGE.

By carrier, see Carriers, § 12.

By gas company, see Gas.

To jury, see Criminal Law, §§ 785, 834, 1172; Homicide, §§ 286, 308; Trial, §§ 186-296.

CHARITIES.

See Religious Societies, § 18.

I. CREATION, EXISTENCE, AND VALIDITY.

§ 27 (Pa.) Under Act April 26, 1855 (P. L. 328), Act July 7, 1885 (P. L. 259), Act May 9, 1889 (P. L. 173), and Act May 23, 1895 (P. L. 114), next of kin of testatrix held to have no standing to object to distribution to legatee corporations, the limitation of whose assets has been increased since the death of testatrix.—*In re Kortright's Estate*, 85 A. 111.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

§ 39 (R.I.) The Salvation Army is a charitable corporation.—*Basabo v. Salvation Army*, 85 A. 120.

§ 45 (R.I.) The Salvation Army is a charitable corporation, but it is nevertheless liable for injuries to third persons caused by the negligence of its servants in the driving of its teams while engaged in the scope of their employment.—*Basabo v. Salvation Army*, 85 A. 120.

CHASTITY.

See Adultery.

CHattel MORTGAGES.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 159 (Me.) A buyer, executing a chattel mortgage to secure the price of goods bought, may, on rescinding the contract of sale for fraud of the seller, retain possession of the mortgaged chattel.—*Kennard v. Hathaway*, 85 A. 1.

V. RIGHTS AND REMEDIES OF CREDITORS.

§ 187 (Conn.) Where a buyer in possession, without paying the price, verbally declared that

he placed the goods in possession of the seller, who executed a bill of sale of the goods with other goods then sold, and there was no change of possession, the transaction at most was a mortgage to secure the price, not good as against a prior purchaser subsequently acquiring possession without notice.—*Patchin v. Rowell*, 85 A. 511.

§ 192 (N.J.Ch.) The Chattel Mortgage Act, requiring immediate possession by the mortgagee, or an immediate recording of the mortgage, means, by "immediate recording," as soon as may be by reasonable dispatch, under the circumstances.—*Gulden v. Lucas*, 85 A. 902.

Where a chattel mortgage was in mortgagee's possession between 12 and 1 o'clock on the 27th, and his place of business was not more than an hour by trolley from the register's office, and the document would have been delivered in the afternoon of a business day, if mailed in the morning, *held*, that there was not an "immediate recording," within the Chattel Mortgage Act, where the mortgage did not reach the register's office until the afternoon of the 30th.—*Id.*

CHEAT.

See False Pretenses; Fraud.

CHILDREN.

See Adoption; Bastards; Habeas Corpus.

CITIZENS.

See Elections, § 63.

CLAIMS.

See Bankruptcy, §§ 334, 363; Carriers, § 201; Corporations, § 565; Executors and Administrators, §§ 205-269; Municipal Corporations, §§ 1003, 1014.

CLASS LEGISLATION.

See Constitutional Law, § 208.

CLERKS OF COURTS.

§ 6 (Pa.) Assistant clerks of the orphans' court are "appointed officers," within Const. art. 6, § 4, authorizing the removal of appointed officers at the pleasure of the power by which they shall have been appointed.—*Seltzer v. Fertig*, 85 A. 869.

Under Const. art. 6, § 4, assistant clerks of the orphans' court appointed under Const. art. 5, § 22, by the register of wills with the approval of the court, may be removed by the register of wills without the consent of the court.—*Id.*

COLLATERAL ATTACK.

See Execution, § 258; Executors and Administrators, § 35.

COLLATERAL INHERITANCE TAXES.

See Taxation, §§ 868, 879.

COLLEGES AND UNIVERSITIES.

See Process, § 78.

COLLISION.

See Insurance, § 424; Street Railroads, §§ 90, 99, 112, 117.

COLOR OF TITLE.

See Adverse Possession.

COMITY.

See Receivers, § 210.

COMMERCE.

See Courts, § 489.

II. SUBJECTS OF REGULATION.

§ 27 (N.J.) Unloading of steel rails from a car after they had reached their destination, in which service plaintiff was injured, *held* not interstate commerce, within Employer's Liability Act April 22, 1909.—*Pierson v. New York, S. & W. R. Co.*, 85 A. 233.

§ 46 (Vt.) The sale of an article to be shipped from another state to Vermont, followed by such shipment, is interstate commerce, not subject to state control, and therefore not affected by P. S. § 776, prohibiting a foreign corporation maintaining an action in the state on a contract made in it, unless it has obtained the certificate required by section 774 for a foreign corporation to do business in the state.—*Livingstone Mfg. Co. v. Rizzi Bros.*, 85 A. 912.

III. MEANS AND METHODS OF REGULATION.

§ 58 (Vt.) Nothing can be done by a state which will operate as a burden on the business of a carrier engaged in interstate commerce, or impair the usefulness of its facilities or instruments of interstate commerce.—*Sargent v. Rutland R. Co.*, 85 A. 654.

§ 61 (Vt.) Laws 1906, No. 122, §§ 8, 10 (P. S. 4539, 4541), and Laws 1910, No. 147, § 1, forbidding any railroad to charge demurrage on cars received or placed for loading in this state until four days, after notice to the consignee, without limiting such charges to intrastate commerce, *held* repugnant to the commerce clause Const. U. S. art. 1, § 8, and to the Interstate Commerce Act, §§ 1, 6, 12, as amended June 29, 1906, enforced by the Interstate Commerce Commission by demurrage rules allowing a free time of only two days.—*Sargent v. Rutland R. Co.*, 85 A. 664.

IV. INTERSTATE COMMERCE COMMISSION.

§ 85 (Pa.) The interstate commerce act does not attempt to define what particular acts shall constitute unlawful discrimination, but commits that to the Interstate Commerce Commission.—*Puritan Coal Mining Co. v. Pennsylvania R. Co.*, 85 A. 426.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

See Commerce, § 85; Constitutional Law, § 63; Depositions; Equity, § 393; Municipal Corporations, § 62; Officers, § 36; Railroads, §§ 9, 243.

COMMISSIONERS.

See Constitutional Law, §§ 46, 48, 62, 63, 318; Municipal Corporations, § 1014; Partitions, § 94; Statutes, §§ 64, 120.

COMMISSIONS.

See Brokers.

COMMITTEE.

See Insane Persons, §§ 36, 38; Towns, § 46.

COMMON CARRIERS.

See Carriers.

COMMON COUNTS.

See Work and Labor.

COMMON LAW.

See Adoption; Eminent Domain, § 84; Justices of the Peace, § 30; Waters and Water Courses, § 176.

COMPARISON.

See Evidence, § 197.

COMPENSATION.

See Attorney and Client, §§ 130-166; Brokers; Corporations, § 308; Eminent Domain, §§ 84-126; Master and Servant, § 250½; Municipal Corporations, § 186; Party Walls, § 10; Receivers, §§ 154, 196-198.

COMPENSATORY DAMAGES.

See Damages, §§ 38-45.

COMPETENCY.

See Evidence, §§ 151, 537-543; Witnesses, §§ 37-218.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Attorney and Client, § 153; Executors and Administrators, § 269.

§ 17 (Del.Ch.) In the absence of fraud or mistake, an executed agreement of settlement of an unliquidated claim is as effectual as an estoppel against the parties again litigating it as a final judgment.—*Tatman v. Philadelphia, B. & W. R. Co.*, 85 A. 716.

CONCEALMENT.

See Contracts, § 94; Release, § 57.

CONCLUSIVENESS.

See Judgment, §§ 648-743.

CONCURRENT JURISDICTION.

See Courts, § 489.

CONDEMNATION.

See Eminent Domain.

CONDITIONS.

See Deeds, § 145; Insurance, § 146; Tender.

CONDONATION.

See Divorce, §§ 109, 135.

CONFESSION.

See Criminal Law, §§ 538, 1158; Judgment, § 50.

CONFLICT OF LAWS.

See Bastards, § 1; Descent and Distribution, § 5; Payment, § 38.

CONGRESS.

See United States.

CONNECTING CARRIERS.

See Carriers, § 185.

CONSENT.

See Assignments.

CONSIDERATION.

See Bills and Notes, §§ 103, 508.

CONSOLIDATION.

See Corporations, § 589; Insurance, § 47.

CONSPIRACY.

See Witnesses, § 359.

I. CIVIL LIABILITY.**(B) Actions.**

§ 18 (Pa.) A declaration charging defendants to have threatened plaintiff's employer that, unless he was discharged, defendants would quit work in a body, states a good cause of action.—*Bausbach v. Reiff*, 85 A. 762.

II. CRIMINAL RESPONSIBILITY.**(A) Offenses.**

§ 23 (Conn.) The crime of conspiracy is committed whether the criminal or unlawful act which is the object of the conspiracy is accomplished or not, or whether it be of heinous character or not, being an offense independent of the crime or unlawful act which is its purpose.—*Fimara v. Garner*, 85 A. 670.

A conspiracy is a confederation for an unlawful purpose or for a lawful purpose by unlawful means.—*Id.*

§ 36 (Conn.) At common law a conspiracy to commit either a misdemeanor or a felony is only a misdemeanor.—*Fimara v. Garner*, 85 A. 670.

(B) Prosecution and Punishment.

§ 51 (Conn.) The crime of conspiracy is "a high crime and misdemeanor" within Gen. St. 1902, § 1528, providing punishment therefor.—*Fimara v. Garner*, 85 A. 670.

CONSTITUTIONAL LAW.

See Bridges, § 5; Clerks of Courts; Elections, § 63; Food; Fraudulent Conveyances, § 3; Judgment, § 815; Justices of the Peace, § 30; Municipal Corporations, § 62; Officers, § 36; Pleading, § 236; States, §§ 32, 51, 59; Statutes, §§ 26-121, 138; Taxation, §§ 49, 193; Towns, § 46.

I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

§ 7 (N.H.) An ordinance fixing the time when amendments proposed by a constitutional convention and approved by the people shall take effect is a law that can be made by the Legislature, vested by Const. pt. 2, art. 2, with the legislative power, and articles 99, 100, providing for constitutional conventions, do not impliedly confer on conventions the power to adopt such an ordinance.—*Opinion of the Justices*, 85 A. 781.

Where the constitutional convention of 1889, as authorized by Laws 1887, c. 107, § 8, fixed the time when amendments proposed by it and ratified by the people should take effect, a subsequent Legislature had no power to fix the time when the amendments should take effect.—*Id.*

§ 8 (N.H.) A constitutional convention, called under Const. pt. 2, arts. 99, 100, does not possess legislative power vested in the Legislature by part 2, art. 2, but is a committee to propose amendments to the people without legislative capacity, unless an incidental one implied is necessary for the business of preparing questions of revision and submitting them to the people.—*Opinion of the Justices*, 85 A. 781.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 13 (Pa.) The intention of a constitutional provision, as well as of a legislative act, to transfer or affect rights of the commonwealth, must be plainly expressed or necessarily implied.—*Booth & Flinn v. Miller*, 85 A. 457.

§ 19 (R.I.) The court, in construing an ambiguous provision of the Constitution, may seek extrinsic aid by ascertaining the contemporaneous construction at the time of its adoption.—*In re Opinion to Governor*, 85 A. 1056.

§ 20 (Pa.) In construing Const. art. 3, § 7, relating to local or special acts as being inapplicable to liens in favor of the commonwealth, the courts give weight to the fact that the Legislature both before and after the adoption of the Constitution passed numerous acts creating and enforcing liens in favor of the commonwealth.—*Booth & Flinn v. Miller*, 85 A. 457.

§ 20 (R.I.) The court in construing an ambiguous provision of the Constitution, may seek extrinsic aid by ascertaining the construction, since adoption by those whose duty it has been to construe, execute, and apply it in practice.—*In re Opinion to Governor*, 85 A. 1056.

Where the practical construction placed on an ambiguous constitutional clause by the Legislature or executive department has been uniform and of long standing, and has been acquiesced in by the people, the construction may determine the question of its meaning.—*Id.*

§ 26 (Me.) The powers of the state Legislature are not measured by grants, but by limitations of the Constitution.—*Inhabitants of Bayville Village Corporation v. Inhabitants of Boothbay Harbor*, 85 A. 300.

§ 46 (Md.) Racing commissioners having been appointed by and qualified under Acts 1912, c. 132, regulating horse racing in H. county, the court would not declare the act unconstitutional during their term of office because the commission was made self-perpetuating.—*Clark v. Harford Agricultural & Breeders' Ass'n*, 85 A. 503.

§ 46 (Vt.) The constitutionality of an act will not ordinarily be considered, unless such consideration is necessary to the disposition of the cause.—*Sabre v. Rutland R. Co.*, 85 A. 693.

§ 48 (Vt.) A statute is never to be held unconstitutional if it can be reasonably held constitutional.—*Sargent v. Rutland R. Co.*, 85 A. 654.

The constitutionality of a law is to be tested, not by what has been done under it, but by what may rightfully, by its authority, be done.—*Id.*

§ 48 (Vt.) Laws 1906, No. 126, creating a Board of Railroad Commissioners, and defining and regulating its powers and duties, should be so construed as to make it constitutional if such construction is reasonably possible.—*Sabre v. Rutland R. Co.*, 85 A. 693.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

§ 55 (Vt.) The penalties imposed by Laws 1906, No. 126, on witnesses refusing or neglecting to appear and testify before the board of railroad commissioners, on persons refusing to furnish information, and on persons failing to obey the board's orders or decrees, are enforceable in the courts.—*Sabre v. Rutland R. Co.*, 85 A. 693.

§ 56 (Vt.) The Legislature may create courts not named in the Constitution, but may not confer upon them powers which could not have been conferred upon the courts already existing.—*Sabre v. Rutland R. Co.*, 85 A. 693.

§ 60 (Vt.) There are many powers so far legislative that they may properly be exercised by the Legislature, but which may nevertheless be delegated.—*Sabre v. Rutland R. Co.*, 85 A. 693.

§ 62 (N.H.) Laws 1911, c. 15, §§ 1-5, forbidding unsanitary condition in any place where food is produced, stored, or sold, defining such conditions and empowering the state board of health to make all necessary regulations for the enforcement of the act, held complete in itself, and hence that an order of the board requiring bakers to wrap loaves of bread in paper was not invalid as an exercise of legislative power.—*State v. Normand*, 85 A. 899.

When a statute is incomplete as legislation and authorizes an executive board to decide what shall and what shall not be an infringement of the law, or where its authorization is general and the board makes a rule which conflicts with other statutory or constitutional rights, the action of the board cannot be sustained.—*Id.*

§ 62 (Vt.) Laws 1906, No. 126, creating a board of railroad commissioners, and defining and regulating its powers and duties, does not in its general features conflict with the constitutional provision as to the distribution of the powers of government.—*Sabre v. Rutland R. Co.*, 85 A. 693.

While the General Assembly cannot delegate purely legislative functions, it may confer upon the Public Service Commission the power to apply the general provisions of law already existing to particular circumstances, and may leave much of detail to the discretion of the commission.—*Id.*

§ 63 (Md.) Acts 1912, c. 132, creating a commission to supervise horse racing in H. county, held not unconstitutional as delegating legislative powers to the commission.—*Clark v. Harford Agricultural & Breeders' Ass'n*, 85 A. 503.

(B) Judicial Powers and Functions.

§ 68 (N.J.) The courts do not undertake to determine so fundamental a political question as the existence of the government they serve.—*Carpenter v. Cornish*, 85 A. 240.

§ 74 (Vt.) The power conferred upon boards such as the board of railroad commissioners, to make rules and regulations, is construed as only authorizing reasonable regulations, and the question of whether its regulations are reasonable is a judicial one, determinable by the courts.—*Sabre v. Rutland R. Co.*, 85 A. 693.

IV. POLICE POWER IN GENERAL

§ 81 (N.H.) The Legislature in the exercise of the police power may regulate, restrain, and prohibit whatever is injurious to the public health and morals, and, if upon a reasonable construction of the act there is some substantial reason why such regulations will promote the public health, they will be sustained.—*State v. Normand*, 85 A. 899.

§ 81 (Vt.) A state, under its police power, has the same power to provide for the public safety and convenience as to protect the public health and morals.—*Sabre v. Rutland R. Co.*, 85 A. 693.

Under Const. c. 1, art. 5, the people of the state may provide for the exercise of visitatorial and police powers to secure compliance with laws enacted under the general reserved powers of government never surrendered to the federal government, and all corporations and persons are subject to this power.—*Id.*

A state cannot divest itself of its right and duty in respect to the full exercise of the police power.—*Id.*

The exercise of the police power by a state is beyond interference by the federal government, except by virtue of some authority derived from the Constitution of the United States.—*Id.*

V. PERSONAL, CIVIL, AND POLITICAL RIGHTS.

§ 87 (Me.) Pub. Laws 1905, c. 114, regulating the sale of merchandise in bulk, is not violative of Const. art. 1, § 6, prohibiting the depriva-

tion of persons of their privileges and liberty to control their property.—*McGray v. Woodbury*, 85 A. 491.

VI. VESTED RIGHTS.

§ 111 (Conn.) Parties have no vested rights to an appeal, and, where a statute giving an appellate court jurisdiction of the appeal is repealed without a saving clause, an appeal, though previously taken, falls with the statute.—*Neilson v. Perkins*, 85 A. 686.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

§ 186 (Pa.) The Legislature has power to legislate retrospectively on all matters not penal or in violation of contracts not expressly forbidden by the Constitution.—*Swartz v. Borough of Carlisle*, 85 A. 847.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

§ 208 (Md.) Acts 1912, c. 132, providing for the regulation and licensing of horse racing in H. county, *held* not unconstitutional as creating an arbitrary and unreasonable classification with reference to those authorized to conduct such races.—*Clark v. Harford Agricultural & Breeders' Ass'n*, 85 A. 503.

XI. DUE PROCESS OF LAW.

§ 318 (Vt.) Laws 1906, No. 126, authorizes a sufficiently adequate review by the courts of the orders of the Board of Railroad Commissioners to prevent it being held invalid as authorizing the taking of property without due process of law, especially as under Const. c. 2, § 4, the question whether the board has exceeded its powers is reviewable by the courts, regardless of the statute.—*Sabre v. Rutland R. Co.*, 85 A. 693.

CONSTRUCTION.

See Constitutional Law, §§ 13-48; Contracts, §§ 152-170; Deeds, § 100; Evidence, § 448; Insurance, § 146; Licenses, § 8; Pleading, § 34; Release, § 29; Sales, §§ 54-88; Statutes, §§ 181, 227; Trusts, §§ 135-140; Wills, §§ 456-684.

Lease, see Landlord and Tenant, §§ 37, 47. Of instructions to jury, see Trial, § 295.

CONTEMPT.

See Grand Jury, § 36; Statutes, § 64.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§ 21 (N.J.) The orphans' court has no authority, under Orphans' Court Act, § 152, to attach an executor for contempt upon failing to turn over the assets of the estate to his co-executor while he is still in office.—*Smith v. Smith*, 85 A. 226.

CONTEST.

See Elections, §§ 271-278.

CONTINUANCE.

See Appeal and Error, § 966.

§ 26 (Del.Super.) In divorce cases, the first term after the bringing of the suit is the trial term as well as the appearance term, and a defendant must make reasonable effort to be ready for trial at the first term; but a failure to take out a commission to procure the testimony of nonresident witnesses immediately after the action is docketed, so as to be prepared for trial at the first term, does not show want of dili-

gence, and a continuance to obtain the testimony may be granted.—*Bancroft v. Bancroft*, 85 A. 561.

Rules of court governing the taking of the testimony of nonresident witnesses and relative to a continuance must be construed with reference to the circumstances of the particular case and the statutes increasing the number of terms of court.—*Id.*

The rules of court governing the taking of testimony of nonresident witnesses will be liberally construed in divorce cases, so that they may be heard on their merits, though a defendant, desiring a commission to procure the testimony of nonresident witnesses, must exercise due diligence.—*Id.*

CONTRACTS.

See Accord and Satisfaction; Action, § 53; Action on the Case; Assignments; Assignments for Benefit of Creditors, § 11; Bills and Notes; Boundaries, § 46; Breach of the Peace; Brokers; Cancellation of Instruments; Carriers, §§ 12, 49, 57, 94, 149½, 155; Chattel Mortgages; Compromise and Settlement; Corporations, §§ 398-423, 521; Covenants; Customs and Usages; Damages, §§ 40, 45, 124, 176; Deeds; Equity, § 29; Estoppel, §§ 78, 90; Evidence, §§ 184, 208, 429-448, 596; Frauds, Statute of; Husband and Wife, § 208; Indemnity; Injunction, §§ 59, 60, 62; Innkeepers; Insane Persons, § 77; Insurance; Interest; Licenses, § 39; Limitation of Actions, § 25; Logs and Logging, § 8; Mechanics' Liens, § 61; Mines and Minerals, § 55; Mortgages; Municipal Corporations, §§ 173, 225, 226, 237, 294-360; Partnership, § 139; Pleading, §§ 18, 35, 58; Railroads, § 99; Release; Sales; Schools and School Districts, §§ 80, 81, 85; Specific Performance; Statutes, § 120; Subrogation; Towns, § 39; Trial, §§ 191, 250, 280, 396; Vendor and Purchaser; Waters and Water Courses, §§ 201, 206; Work and Labor.

I. REQUISITES AND VALIDITY.

(B) Parties, Proposals, and Acceptance.

§ 23 (Pa.) An acceptance of an offer, to be effectual, must be identical with the offer and unconditional; and, where it is conditional or introduces a new term, it does not consummate a contract.—*Jaxtheimer v. Sharpsville Borough*, 85 A. 994.

(E) Validity of Assent.

§ 93 (Me.) Owner, who was an experienced contractor, *held* put on inquiry as to whether contractor in making bid misunderstood specifications, in view of the amount of the bid and the fact that another contractor had misinterpreted the specifications.—*Hudson Structural Steel Co. v. Smith & Rumery Co.*, 85 A. 384.

§ 93 (N.H.) A contract may be rescinded for mutual mistake as to the legal rights of the parties, though the mistake is one of law.—*Healy v. Healy*, 85 A. 156.

§ 94 (Me.) The concealment or suppression by a party to a contract, with intent to deceive, of a material fact which he is in good faith bound to disclose, amounts to a false representation.—*Barrett v. Lewiston, B. & B. St. Ry. Co.*, 85 A. 306.

A party to a contract, concealing any material fact peculiarly or exclusively within his own knowledge, knowing that the other party acts on the belief that no such fact exists, is guilty of fraud.—*Id.*

The duty of a party to a contract to disclose to the other party facts within his knowledge may arise from a trust relation, confidence, or inequality of condition and knowledge.—*Id.*

The "concealment" of facts by a party to a contract, which amounts to fraud, implies de-

sign or purpose, and mere silence is not itself concealment.—Id.

The concealment of material facts by a party to a contract is not fraud, unless the other party is thereby misled.—Id.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 152 (Pa.) In construing a contract, a word will not be given a different meaning from what it fairly and ordinarily imports, unless there is something to show that the word was used in an unusual sense.—Thompson v. Craft, 85 A. 1107.

§ 153 (Pa.) A word not plainly inserted by mistake or accident in a contract is never to be thrown out entirely, while there is a plain and natural construction that can be given to it, not manifestly destructive of the general intent of the sentence.—Thompson v. Craft, 85 A. 1107.

§ 170 (N.J.) A practical construction of a contract becomes evidential only when the writing is ambiguous, and the acts done were those of the parties thereto, and in pursuance and by reason of it.—Reed v. Inhabitants of City of Trenton, 85 A. 270.

(B) Parties.

§ 187 (N.J.) A contract between vendor and vendee, providing that the deed should be delivered at the office of plaintiffs, who were recognized by defendant as brokers and entitled to a certain commission, authorizes such brokers to receive their commission on a completed sale, under P. L. 1902, p. 709, conferring the right to recover on a third party on a contract made for his benefit.—Tapscott v. McVey, 85 A. 343.

III. MODIFICATION AND MERGER.

§ 245 (Pa.) Where the terms of a contract are inconsistent with those of a former contract between the same parties, relating to the same subject, so that they cannot subsist together, the latter contract discharges the former.—Thompson v. Craft, 85 A. 1107.

IV. RESCISSION AND ABANDONMENT.

§ 265 (N.J.) The rule that one who seeks to rescind a contract for fraud must restore his adversary to the position he was in at the time of the contract applies only to a contract partly executed, and not to one wholly executory.—Roberts v. James, 85 A. 244.

§ 270 (N.J.) What is a reasonable time to rescind depends on the circumstances of each case, and, unless the situation of the other party is changed to his detriment, the rescinding party may wait until an action is brought against him.—Roberts v. James, 85 A. 244.

Delay in rescinding a contract is evidence of an election to treat it as valid, but does not operate as an estoppel, unless superior rights of third persons have intervened.—Id.

V. PERFORMANCE OR BREACH.

§ 284 (N.J.) A contract providing for certificate of approval by a third person requires an approval of the subject-matter comprised within its terms, unless a contrary meaning clearly appears.—Schauffele v. Greenburg, 85 A. 178.

§ 303 (N.J.Ch.) The plea of necessity is never a valid defense against the performance of a contract.—Poole v. Supreme Circle, Brotherhood of America, 85 A. 821.

§ 322 (Vt.) In view of defendant's evidence that plaintiff's failure to perform his contract was not due to defendant's default, but to plaintiff's neglecting his contract and working for another, plaintiff could testify he was helping such other to get out of his way so he could do his work

for defendant.—Boville v. Dalton Paper Mills, 85 A. 623.

Plaintiff's testimony held not subject to the construction that his only reason for abandoning his contract for driving wood for defendant was because the dam was no good.—Id.

VI. ACTIONS FOR BREACH.

§ 329 (Me.) A right of action for breach of a contract accrues when the contract is broken, although no injury results from the breach until afterwards.—Blunt v. McCoombs, 85 A. 742.

§ 352 (Conn.) In action on contract defended on ground of fraud, court held to have properly left the question to the jury whether acts of defendants constituted a sufficient repudiation of the contract.—McLaughlin v. Thomas, 85 A. 370.

§ 352 (Pa.) In an action for work and materials under a contract providing for payment after completion of the work, acceptance and certificate, the grant of a nonsuit held proper.—Erbeck v. Meadville & Conneaut Lake Traction Co., 85 A. 82.

CONTRIBUTORY NEGLIGENCE.

See Negligence, § 85.

CONVENTIONS.

See Constitutional Law, §§ 7, 8.

CONVERSION.

See Trover and Conversion.

§ 15 (Pa.) The doctrine of conversion does not apply where the intention of the testator fails, and, if there is a total failure, the heir at law takes, and may require a conveyance of real estate to him; while in case of a partial failure he takes his share according to the intestate law.—In re Reed's Estate, 85 A. 135.

Where a will provides for the conversion of testator's realty, and for its distribution as personalty, but a beneficiary dies before testator, the lapsed share passes under the intestate laws to heirs of the testator, and is not distributed as personalty to his next of kin.—Id.

§ 15 (Pa.) Where a will devises testator's homestead to his wife for life and directs that the administrator then sell it and divide the proceeds between testator's sons, and also directs the division of the residue of moneys from a sale of other real estate between the sons, and directs the administrator to sell in accordance with the foregoing, an equitable conversion of all testator's real estate is effected.—In re McClarren's Estate, 85 A. 1119.

§ 22 (Pa.) A petition for the discharge of an executor holding title to converted real estate and a conveyance of part of the same held to effect a reconversion from personalty into realty.—Lincoln v. Wakefield, 85 A. 133.

An agreement to reconvert personalty into real estate was not invalid because one of the parties was a married woman, and was not joined by her husband, subsequent to Act June 3, 1887 (P. L. 352), nor because the guardian of a minor joined without leave of court.—Id.

§ 22 (Pa.) A release by the sons of testator to the executor does not work a reconversion of realty converted by power of sale in his will, where the release merely waives the appointment of an auditor and acknowledges receipt of the fund, and is intended merely to save the expense of distribution through the orphans' court.—In re McClarren's Estate, 85 A. 1119.

That the sons of testator joined with the executor in a deed of lands sold pursuant to a power in the will does not work a reconversion of the real estate, but deeds by the sons alone work a reconversion.—Id.

Where a power of sale in a will works an equitable conversion of realty, and the pro-

ceeds of sale are to be divided between testator's sons, the sons work a reconversion by taking possession of the land and dealing with it as real estate.—*Id.*

CONVEYANCES.

See Deeds; Dower, § 49; Equity, § 393; Registers of Deeds; Religious Societies, §§ 17, 18, 20.

COPY.

See Attachment, § 164; Evidence, §§ 184, 341.

CORPORATIONS.

See Banks and Banking; Carriers; Charities, §§ 80, 45; Courts, §§ 8, 19; Evidence, § 157; Executors and Administrators, § 225; Gas; Husband and Wife, §§ 11, 162; Indemnity; Insurance; Judgment, § 17; Mandamus, § 129; Mortgages, § 487; Municipal Corporations; Railroads; Receivers, §§ 154, 197, 210; Religious Societies, §§ 17, 18; Street Railroads; Taxation, §§ 166, 371½-397, 868; Telegraphs and Telephones.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) Subscription to Stock.

§ 89 (N.J.) Where, in an action by an officer of a corporation to recover claims for salary, the corporation set up as a counterclaim plaintiff's unpaid subscription to its stock, the counterclaim was a sufficient demand to fix plaintiff's obligation.—*Robson v. C. E. Fenniman Co.*, 85 A. 356.

§ 90 (N.J.) An incorporator cannot defeat the collection of his unpaid subscription for stock by showing that another incorporator agreed to pay for the stock subscribed by him.—*Robson v. C. E. Fenniman Co.*, 85 A. 356.

Payment of a subscription to corporate stock cannot be defeated on the ground that the actual certificates were never delivered to the subscriber.—*Id.*

(C) Issue of Certificates.

§ 95 (Md.) The word "trustee," following the name of a person to whom stock is issued, is notice of a trust.—*Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 85 A. 949.

§ 99 (N.J.) Stock of a corporation may be issued in payment for work and labor performed.—*Vineland Grape Juice Co. v. Chandler*, 85 A. 213.

§ 109 (Md.) A corporation issuing stock in the name of an individual followed by the word "trustee" may refuse to issue a duplicate certificate to a receiver of his estate after his death until it is determined that the stock was his property at his death.—*Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 85 A. 949.

Where the word "trustee" follows the name of a person to whom stock is issued, the corporation, when the receiver of the estate of the person who is dead demands a duplicate certificate, does not have the burden of proving the beneficiary in the trust, and a mere lapse of time of the beneficiary to claim the stock or dividends raises no presumption of personal ownership.—*Id.*

Where a corporation issuing stock in the name of a person as trustee retained all cash and stock dividends, and none of the avails of the trust had ever been in the hands of the stockholder, the court at the suit of a receiver of his estate appointed on the petition of his administrator *c. t. a.* was without jurisdiction of a suit by him to compel the issuance of a duplicate certificate and the payment of due and unpaid dividends.—*Id.*

§ 110 (N.J.) Where corporation issued stock to promoters in consideration of future services

which were actually rendered, the corporation could not repudiate the transaction without tendering the value of the services.—*Vineland Grape Juice Co. v. Chandler*, 85 A. 213.

(E) Interest, Dividends, and New Stock.

§ 151 (Pa.) A stockholder in a corporation has no legal title to any interest in the profits until a dividend has been declared by the directors.—*In re Goetz's Estate*, 85 A. 65.

§ 152 (Pa.) Profits of a corporation organized to take over a testator's business could only be distributed by the directors, and not by the orphans' court.—*In re Goetz's Estate*, 85 A. 65.

V. MEMBERS AND STOCKHOLDERS.

(A) Rights and Liabilities as to Corporation.

§ 182 (Pa.) A shareholder in a corporation has no distinct and individual title to the property of the corporation nor any actual control over it.—*In re Goetz's Estate*, 85 A. 65.

(B) Meetings.

§ 197 (N.J.) Where the president of a corporation acquired, on execution sale, the stock of a stockholder who had previously transferred the stock to a third person who acquired title, the court would restrain the president from voting the stock.—*Frostroy v. Wm. B. Corby Coal Co.*, 85 A. 578.

(C) Suing or Defending on Behalf of Corporation.

§ 202 (Pa.) The sale of all the stock by the stockholders owning it, all reserving the right to themselves as individuals to continue an action commenced by the corporation, does not deprive the corporation of the right to continue the action.—*Puritan Coal Mining Co. v. Pennsylvania R. Co.*, 85 A. 426.

VI. OFFICERS AND AGENTS.

(B) Authority and Functions.

§ 298 (N.J.) A resolution by the board of directors of a corporation passed at a meeting held without formal call or notice is valid, where every member of the board was present, and it was the result of their joint action.—*Robson v. C. E. Fenniman Co.*, 85 A. 356.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

§ 308 (N.J.) The determination whether an officer of a corporation is entitled to the annual salary fixed for that office after his entrance thereon for the time before it was fixed or only thereafter is for the court.—*Robson v. C. E. Fenniman Co.*, 85 A. 356.

Where an officer of a corporation was appointed and served for a year, he is entitled to the yearly salary fixed for that office by resolution passed some time after the beginning of his incumbency.—*Id.*

§ 308 (Pa.) Where a corporation was organized to take over and continue testator's business and one of the executors acted as business manager, compensation for his services could only be provided by the board of directors or trustees under Act April 29, 1874 (P. L. 73).—*In re Goetz's Estate*, 85 A. 65.

§ 310 (Pa.) Directors of a corporation are liable as trustees for the unlawful distribution of capital as dividends.—*Cornell v. Seddinger*, 85 A. 446.

Directors of a corporation held guilty of misfeasance, where they accepted a report of the treasurer which on its face called for explanation and distributed dividends out of the capital.—*Id.*

Where the report of a treasurer of a ship-building corporation on its face showed glaring inflations and impairment of capital, but the directors declared a dividend because the report

purported to show profits, they were not excused from liability for misfeasance because they were not practical shipbuilders and not personally familiar with the processes of construction.—Id.

§ 311 (Pa.) A director has the unqualified right to inspect corporate books upon the mere showing that he is a director and has demanded permission to examine and been refused.—*Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100.

It is no justification for refusing a director's request to inspect books that he had neglected his duties, interfered with the corporate management, and promoted a competing company, and that he did not allege wrongdoing of defendants.—Id.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

§ 370 (Pa.) Corporate powers are not created by implication nor extended by construction; and no privilege is granted, unless expressed in plain words.—*In re American Transfer Co.*, 85 A. 143.

(B) Representation of Corporation by Officers and Agents.

§ 398 (N.J.) The contract of a stockholder, made in his own name, is not binding upon a corporation, the stock of which he owns and controls.—*Reed v. Inhabitants of City of Trenton*, 85 A. 270.

§ 398 (Pa.) Shareholders of a corporation have no authority to act as its agents nor to convey or assign its property, though all unite, unless through formal action they have been made its agents.—*Puritan Coal Mining Co. v. Pennsylvania R. Co.*, 85 A. 426.

§ 406 (N.J.) A corporation is not bound by the agreement of a superintendent not shown to be within the scope of his express or implied authority and not in the course of the company's ordinary business, and not ratified, acquiesced in, or knowingly profited by.—*Hall v. Passaic Water Co.*, 85 A. 349.

A contract by a superintendent of a water company to furnish water to a private consumer for fire purposes at the regular rate charged for water for other purposes was not binding, in the absence of his authority to make the contract, or proof of other similar contracts made by him and ratified by the company.—Id.

§ 428 (N.J.) A corporation is not chargeable with information casually obtained by a director when he is not officially engaged for the corporation.—*Thomson v. Central Passenger Ry. Co.*, 85 A. 201.

Casual information to directors of a contract entered into by the president of the corporation without authority was insufficient to charge the corporation with such knowledge as to impute a ratification of the contract.—Id.

(D) Contracts and Indebtedness.

§ 479 (Pa.) Each coupon on a bond protected by a mortgage is a part of the bond, and on severance the holder thereof is equitably the owner of a proportion of the bond.—*Real Estate Trust Co. of Philadelphia v. Pennsylvania Sugar Refining Co.*, 85 A. 365.

§ 481 (Pa.) Bona fide holder of coupons secured by a corporate mortgage, who is not a holder of the bonds, is entitled to a preference on foreclosure sale given to arrears of interest under the mortgage.—*Real Estate Trust Co. of Philadelphia v. Pennsylvania Sugar Refining Co.*, 85 A. 365.

(F) Civil Actions.

§ 521 (Pa.) In an action on a verbal contract entered into by a corporation's president with a subcontractor to erect brick work on a building of the corporation to pay the subcontractor an amount due by the principal contractor, who had failed, and also for the completion of his work at the contract price, evidence held to present a case for the jury.—*Krimmel v. S. R. Moss Cigar Co.*, 85 A. 154.

Evidence held to present a question for the jury whether a receipt given by the subcontractor and an attempt by him to collect the sum due from the principal contractor were inconsistent with the contract alleged.—Id.

VIII. INSOLVENCY AND RECEIVERS.

§ 553 (Md.) A corporation is not bound to invest dividends due its stockholders or to pay interest thereon, where the stockholders permit the dividends to remain in the corporation's hands, and loss of interest arising from the neglect of the stockholder to claim dividends does not constitute a necessity for the appointment of a receiver of the corporation.—*Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 85 A. 949.

§ 563 (Md.) Where a corporation goes into the hands of a receiver, a decree of dissolution is a prerequisite to the recovery of an illegal preference, under Code Pub. Civ. Laws, art. 23, §§ 78, 79.—*Hughes v. Hall*, 85 A. 944.

§ 565 (Pa.) Where a fund arising from the sale of property of certain corporations was held in trust to pay the debts of the corporation, account barred by limitations was properly disallowed.—*Reid v. Reid*, 85 A. 87.

X. CONSOLIDATION.

§ 589 (Pa.) A statute authorizing merger and consolidation of corporations does not in general extend the rights and obligations of the constituents to all of the property of the consolidated company, but only severally to the property of each company taken over by the consolidated company.—*Punxsutawney Borough v. T. W. Phillips Gas & Oil Co.*, 85 A. 1003.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 613 (Pa.) No appeal lies from an order of the common pleas dissolving a corporation, and, if taken, can only be regarded as a certiorari bringing up the record alone.—*Commonwealth v. Tradesmen's Trust Co. of Philadelphia*, 85 A. 363.

§ 621 (Md.) Under Code Pub. Civ. Laws, art. 23, § 80, making the directors of a corporation in process of dissolution trustees, the court, in a suit against a corporation in liquidation, may compel it to issue a duplicate certificate of stock, may not appoint a receiver for the corporation.—*Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 85 A. 949.

§ 622 (N.J.Ch.) A foreign corporation which has brought suit to wind up an insolvent corporation, and holds shares of stock in the insolvent company, has a standing to move the Chancery Court to direct the domestic receiver to discontinue his attack on the sale by a suit in the federal court.—*Denver City Waterworks Co. v. American Waterworks Co.*, 85 A. 826.

By a delay of nearly 20 years a receiver of a corporation whose assets were sold in foreclosure and its affairs wound up forfeits all right to take affirmative action to have the foreclosure proceeding declared void.—Id.

§ 629 (Pa.) In proceedings for distribution of proceeds of sale of property of a corporation under a scheme of distribution arranged by the parties, the claim of a stockholder, outlawed when asserted, was properly disallowed.—*Reid v. Reid*, 85 A. 85.

XII. FOREIGN CORPORATIONS.

§ 636 (R.I.) The Legislature may limit and restrict the operation in this state of foreign corporations, but cannot confer upon them powers not conferred by the state of their domicile.—*Riddell v. Rochester German Ins. Co. of New York*, 85 A. 273.

§ 640 (R.I.) A foreign corporation can exercise in this state no powers not conferred upon it by its charter or the laws of the state of its creation; and only such of those powers as are not repugnant to the laws of this state.—*Riddell v. Rochester German Ins. Co. of New York*, 85 A. 273.

§ 645 (Pa.) A foreign corporation having a business office and a registered agent in the state has sufficiently complied with the Constitution and Act April 22, 1874 (P. L. 108), as to registration, though it has not registered an additional agent or established another place of business where it stored ores to be smelted by a furnace company under an Ohio contract.—*Dunbar Furnace Co. v. Pennsylvania R. Co.*, 85 A. 106.

The law merely requires an agent to be registered by a foreign corporation for each separate office or place of business established within the state, and the number of places of business is determined by the corporation itself.—*Id.*

§ 645 (Pa.) A foreign corporation having a business office and a registered agent in the state has complied with the Constitution and Act April 22, 1874 (P. L. 108), as to registration, though it has not registered an additional agent or established another place of business, where it stored ores to be smelted by a furnace company under an Ohio contract.—*Dunbar Furnace Co. v. Pennsylvania R. Co.*, 85 A. 109.

§ 654 (Del.) A business which, by provision of Rev. Code 1852, amended to 1893, p. 56 (13 Del. Laws, c. 117), no one can engage in without first obtaining a license, cannot be conducted by a foreign corporation merely because of its doing the things required by the Constitution and statutes as a condition for a foreign corporation doing any business in the state.—*E. A. Strout Co. v. Howell*, 85 A. 666.

§ 670 (Vt.) Where a foreign corporation is served by attachment, it is not necessary for the return to negative the appointment of a process agent; that mode of service not being primary, but only additional.—*Somerville Lumber Co. v. Mackres*, 85 A. 977.

§ 691 (R.I.) Gen. Laws 1909, c. 213, § 9, continuing corporations in existence after dissolution to prosecute and defend actions, has no application to foreign corporations.—*Riddell v. Rochester German Ins. Co. of New York*, 85 A. 273.

CORPUS DELICTI.

See Criminal Law, § 538.

CORROBORATION.

See Divorce, § 127.

COSTS.

See Appeal and Error, §§ 370, 984; Insane Persons, § 103.

III. PERSONS, PROPERTY, AND FUNDS LIABLE.

§ 96 (Pa.) Where a school board acted under a mistake of law and not in bad faith in rejecting a bid, the costs of a suit in equity to compel acceptance of the bid will be imposed on the school district and not on the board personally.—*Zimmerman v. Miller*, 85 A. 871.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 230 (N.J.) Where the reversal was due solely to mistakes of law by the trial judge, the Court of Errors and Appeals will not allow plaintiff costs in that court, upon reversing a judgment for defendant and awarding a new trial, under

P. L. 1910, p. 211, re-enacted by P. L. 1911, p. 756, § 1, entitling the successful party to costs, unless the court shall otherwise order.—*Lynch v. Public Service Ry. Co.*, 85 A. 343.

COTENANCY.

See Tenancy in Common.

COUNTIES.

See Bridges.

II. GOVERNMENT AND OFFICERS.

(D) Officers and Agents.

§ 65 (N.J.) The provisions of P. L. 1902, p. 67, § 6, "An act to reduce the number of members of boards of chosen freeholders," concerning the terms of certain officers, do not apply to a mere clerkship in a county institution; such employment not being an "office."—*Walker v. Board of Chosen Freeholders of Essex County*, 85 A. 166.

COURTS.

See Aliens; Appeal and Error; Arrest; Bankruptcy, §§ 144, 391; Carriers, § 34; Clerks of Courts; Constitutional Law, § 318; Contempt; Corporations, § 152; Criminal Law, § 90; Discovery; Divorce, § 294; Executors and Administrators, §§ 327, 507; Process, § 31; Prohibition; Receivers, §§ 29, 110; Trial, §§ 186-194, 386-404.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 8 (R.I.) New York Insurance Law, § 129, relative to abatement of actions upon consolidation of corporations, held not an attempt to control the procedure of courts of other states, or to impose liabilities upon persons or property outside of its jurisdiction, and valid.—*Riddell v. Rochester German Ins. Co. of New York*, 85 A. 273.

§ 19 (N.J.) Where a New Jersey corporation licensed a defendant to manufacture a patented device which the corporation owned, and he assigned the license to a New York corporation, stockholders of the New Jersey corporation cannot file a bill to set aside the license as fraudulent, the subject-matter of the suit being a right claimed by the New York corporation, which right had no situs in New Jersey which would sustain the bill.—*Elmendorf v. American Combustion Co.*, 85 A. 199.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(C) Rules of Court and Conduct of Business.

§ 82 (N.H.) Even if the rule of court forbidding the entry of an action on the docket until the writ or petition is filed applies to the issuance of a scire facias to revive an action against a party's administrator, the court may suspend the rule, and issue the writ without the filing of a written petition.—*Shea v. Starr*, 85 A. 788.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 169 (R.I.) The district court, under the power given it by Gen. Laws 1909, c. 336, § 4, to order plaintiff in replevin to give further bond, cannot, after plaintiff has furnished a bond of \$600, order it to give a further bond of \$1,000; its jurisdiction being limited to actions for property not exceeding \$500 in value, and a bond of double the value of the property being all that can be required.—*Angell v. Sprague*, 85 A. 790.

VI. COURTS OF APPELLATE JURISDICTION.

(B) Courts of Particular States.

§ 214 (Conn.) Act Aug. 29, 1911 (16 Sp. Laws, p. 500), effective on passage without any saving clause, expressly repealing Act April 17, 1905 (14 Sp. Laws, p. 600) § 10, giving an appeal from the city court of Hartford to the superior court, *held* to take from the superior court appellate jurisdiction of a pending action in which no appeal had been taken; the intent being clear and Gen. St. 1902, § 1, declaring that a repeal shall not affect any pending action, having no application.—Neilson v. Perkins, 85 A. 686.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(B) State Courts and United States Courts.

§ 489 (Pa.) Under Act of Congress April 22, 1908, c. 149, 35 Stat. 65, and amendment April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324), a state court has jurisdiction of an action by a railroad employe for personal injuries on train engaged in interstate commerce.—Golligher v. Pennsylvania R. Co., 85 A. 129.

§ 489 (Pa.) A state court has jurisdiction, in the absence of an order of the Interstate Commerce Commission, over a suit by a shipper of coal for a departure by a railroad from the system adopted by it for the equitable distribution of cars, resulting in unlawful discrimination against plaintiff, whether the cars are intended for interstate or intrastate shipments.—Puritan Coal Mining Co. v. Pennsylvania R. Co., 85 A. 426.

Where Congress proscribes a particular act in reference to interstate commerce, which is not in itself an offense at common law, jurisdiction over it attaches to the federal courts.—*Id.*

Where an act is an offense at common law, and is also made one by state statute, there is concurrent jurisdiction of it in the state and federal courts, except as other reasons may be shown limiting the jurisdiction.—*Id.*

When the Interstate Commerce Commission has by its orders declared any particular practice or regulation of an interstate corporation unreasonably discriminating, the federal tribunals have exclusive jurisdiction.—*Id.*

§ 489 (Pa.) Interstate commerce act *held* not to deprive state courts of jurisdiction to entertain actions at common law, or under Act June 4, 1883 (P. L. 72), for discrimination relating to supply of cars used in interstate commerce.—Walnut Coal Co. v. Pennsylvania R. Co., 85 A. 440.

COVENANTS.

See Deeds, § 145; Easements, § 50; Husband and Wife, § 152; Insurance, § 378; Landlord and Tenant, § 130.

II. CONSTRUCTION AND OPERATION.

(D) Covenants Running with the Land.

§ 73 (N.J.) An assignee of a mortgage is not bound by a covenant of the vendor-mortgagee to fill the land conveyed, where, after time for full performance and breach of the covenant, the vendor and the owner of the equity of redemption agreed to a waiver of damages and extension of time for performance.—Peterson v. Reid, 85 A. 250.

COVERTURE.

See Husband and Wife.

CREDITORS.

See Assignments for Benefit of Creditors; Bankruptcy; Dower, § 49; Executors and Administrators, §§ 205-269; Fraudulent Conveyances; Insane Persons, §§ 62, 71; Subrogation; Tender.

CRIMINAL CONVERSATION.

See Husband and Wife, §§ 325-335.

CRIMINAL LAW.

See Abortion; Adultery; Bigamy; Conspiracy, §§ 23-51; Embezzlement; Grand Jury; Homicide; Indictment and Information; Injunction, § 105; Intoxicating Liquors, §§ 61, 24; Judgment, § 648; Jury; Justices of the Peace, § 30; Municipal Corporations, §§ 174, 642; Perjury; Supersedeas; Witnesses.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ 25 (N.J.Sup.) The general principle that the intent of an act determines the legal character of its consequences though they operate upon a different person from the one intended, applies to statutory as well as common-law crimes.—State v. Gallagher, 85 A. 207.

§ 27 (Conn.) The term "misdemeanor" is descriptive of a crime not so grievous as a felony.—Fimara v. Garner, 85 A. 670.

"High crimes and misdemeanors" are the more serious or aggravated misdemeanors which are not equal in guilt to a felony.—*Id.*

IV. JURISDICTION.

§ 90 (N.J.Sup.) Recorders in boroughs have no jurisdiction of proceedings for violation of the sanitary code of the board of health, and the fact that the recorder is a justice of the peace is immaterial, where he does not assume to act in such capacity.—Streeter v. Board of Health of Borough of Vineland, 85 A. 1029.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

§ 308 (Del.Gen.Sess.) Every person accused of crime is presumed to be innocent until proven guilty beyond a reasonable doubt.—State v. Brown, 85 A. 797.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 358 (Vt.) Refusal to permit witness who testified that defendant and a woman were at another place at the time of the alleged adultery to also testify as to what they were then doing *held* error.—State v. Snyder, 85 A. 984.

(C) Other Offenses, and Character of Accused.

§ 369 (Del.Super.) Proof of distinct offense is admissible to rebut an inference of mistake, want of guilty knowledge, lawful purpose, or innocent intent.—Efler v. State, 85 A. 731.

In a prosecution for conspiracy to steal, *held* that admission of testimony of a witness to the effect that three months after the offense charged he had been robbed by defendant in the same way was error.—*Id.*

To prove identity by defendant's participation in another offense, there must be some connection between the two offenses, and it is not sufficient that they are similar offenses committed by him.—*Id.*

§ 369 (Del.Gen.Sess.) The prosecution cannot prove the commission of other and distinct offenses, though of the same kind with that charged, for the purpose of proving the one charged, or of rendering it more probable that accused committed the offense for which he is on trial.—State v. Brown, 85 A. 797.

§ 369 (N.J.Supp.) On a trial for an assault on E. with intent to kill E., proof of defendant's intention to kill G. is relevant and not evidence of a distinct offense.—State v. Gallagher, 85 A. 207.

§ 371 (Del.Gen.Sess.) Where criminal intent is a material element of the offense charged, and accused's intent becomes an issue at the trial, proof of other similar offenses, within reasonable limits, is admissible to throw light on his intention.—State v. Brown, 85 A. 797.

Where criminal intent need not be specifically proved, or is necessarily established by proof of the commission of the act, evidence of the perpetration or attempted perpetration of similar offenses is inadmissible.—Id.

Evidence of similar offenses is admissible, on a trial for abortion, to show criminal intent, which is an essential element.—Id.

On a trial for abortion, evidence of similar offenses can be considered by the jury only when satisfied from the other evidence that accused committed the acts charged, and then only on the question of his intent in so committing them.—Id.

§ 381 (Del.Gen.Sess.) Testimony as to accused's good character should be considered as other evidence tending to prove his innocence, and should be given such weight as under the circumstances of the cases it is reasonably entitled to.—State v. Brown, 85 A. 797.

(E) Best and Secondary and Demonstrative Evidence.

§ 400 (Del.Gen.Sess.) Defendant, after showing prosecuting witness a paper for identification of her signature only, was not entitled to embody any part of the contents of the paper in a question as to whether the witness made an affidavit containing the matters stated; the paper being the best evidence of its contents.—State v. Johnson, 85 A. 883.

(F) Admissions, Declarations, and Hearsay.

§§ 419, 420 (R.I.) The testimony of a witness as to statements made by a person not a witness is hearsay.—State v. Grills, 85 A. 281.

(K) Confessions.

§ 538 (N.J.) Crimes Act, § 107, providing that in no case shall the plea of guilty to murder be received, does not prevent a conviction on a voluntary confession by the defendant, even if uncorroborated, provided the corpus delicti be proven.—State v. Kwiatkowski, 85 A. 200.

The only limitation upon the use as evidence against him of a prisoner's confession of murder, voluntarily made, is the want of proof of the corpus delicti.—Id.

(M) Weight and Sufficiency.

§ 553 (Del.Gen.Sess.) The jury should reconcile conflicts in the evidence, if they can, and accept the testimony of those witnesses who they think, under all the facts, are most entitled to credit, and should reject the testimony of those whom they think unworthy of belief.—State v. Brown, 85 A. 797.

In determining the credibility of witnesses, the jury may consider their bearing on the stand, their apparent fairness, their interest, if any, their intelligence and opportunity of knowing the facts, and any other facts disclosed by the evidence which indicate their reliability or unreliability.—Id.

§ 561 (Del.Gen.Sess.) A "reasonable doubt," which will justify an acquittal, is not a mere imaginary doubt of accused's guilt, but is such a substantial doubt naturally arising out of the relevant evidence as intelligent and impartial men may reasonably entertain after a careful consideration thereof.—State v. Brown, 85 A. 797.

§ 561 (N.J.) Though good reputation of accused may not prevail against a belief that he committed the crime charged, the jury may consider the good reputation, which may be sufficient to raise a reasonable doubt and so lead to an acquittal.—State v. Thome, 85 A. 452.

XII. TRIAL.

(C) Reception of Evidence.

§ 670 (Vt.) The exclusion of questions for want of materiality was proper, where no statement was made of what was expected of the witness, and nothing appeared to indicate materiality.—State v. Cushing, 85 A. 770.

§ 681 (Vt.) Exclusion of question asked an alleged eyewitness on cross-examination as to where defendant was at a certain time held proper, where it did not clearly appear that the time inquired about was the time of the offense.—State v. Snyder, 85 A. 984.

(E) Arguments and Conduct of Counsel.

§ 729 (Vt.) In a prosecution for adultery, where the accused did not testify, but the woman did, a statement of the state's attorney, "In the terrible disaster of the Titanic * * * the cry was, 'The woman first,' and in this case a like fact stands out in favor of the respondent; the cry was 'Woman first,' and the woman took the stand"—was susceptible of the construction that it was a comment on defendant's failure to take the stand, but being ambiguous, and any intent to so comment being disclaimed, was not reversible error.—State v. Neiburg, 85 A. 769.

§ 730 (Del.Gen.Sess.) Comment by the Attorney General on defendant's failure to deny a fact, though in violation of Rev. Code 1852, amended to 1893, p. 798 (19 Del. Laws, c. 777) § 1, held cured by its withdrawal by the attorney and by the court's instructions to the jury not to consider it, and that such failure should not influence them in reaching their verdict.—State v. Johnson, 85 A. 883.

(G) Necessity, Requisites, and Sufficiency of Instructions.

§ 785 (N.J.) An instruction held proper comment and argument on the conflicting testimony of prosecutrix and accused.—State v. Thome, 85 A. 452.

(H) Requests for Instructions.

§ 834 (R.I.) A requested instruction is properly modified, by calling the attention of the jury to the testimony which must be considered in making application of the principle of law in the instruction.—State v. Grills, 85 A. 281.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§ 982 (Me.) After judgment and sentence, the court cannot relieve the convict from its execution, indefinitely postpone execution, commute the punishment, exempt the prisoner from it in whole or in part, or in any way cancel the sentence, since that would be the exercise of the power of pardon vested exclusively in the Governor.—State v. Sturgis, 85 A. 474.

§ 991 (Me.) Rev. St. c. 136, § 5, providing that, where a convict is sentenced to jail, he may, in addition, be sentenced to other punishment provided by law, where he cannot be received at the jail to which he was sentenced, or if he becomes incorrigible or unsafe, held special and limited in its operation, and not authorizing alternative sentences generally.—State v. Sturgis, 85 A. 474.

Under Rev. St. c. 22, § 2, as amended by Laws 1909, c. 231, prescribing the punishment for the maintenance of a liquor nuisance, and Rev. St. c. 136, § 1, 9, relating to the form of sentence and authorizing the court to require a recognizance to keep the peace, held, that a sentence providing for the cancellation of the

imprisonment part thereof by payment of the fine was void because in the alternative, so that a recognizance given in compliance therewith was not enforceable.—Id.

§ 992 (Md.) Where the verdict in a prosecution for unlawfully selling intoxicants was a general verdict, it was error to render a judgment as for the commission of a second offense by imposing an increased fine.—Goeller v. State, 85 A. 954.

§ 995 (Me.) A sentence must be definite and certain and not dependent on any contingency or condition, and, in the absence of statute, a sentence in the alternative is bad for uncertainty.—State v. Sturgis, 85 A. 474.

§ 1001 (Me.) After defendant had been sentenced for the illegal keeping of intoxicating liquors, the taking of a recognizance conditioned that he should not violate the prohibitory liquor laws for two years, and thereby suspending execution of sentence, was unauthorized, and the recognizance void.—State v. Talberth, 85 A. 296.

§ 1001 (Me.) The court may temporarily suspend the execution of its sentence pending review, and also in cases where cumulative sentences are imposed, and perhaps in some cases on extreme necessity or emergency.—State v. Sturgis, 85 A. 474.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1015 (N.J.Sup.) A writ of certiorari, bringing up two convictions in separate proceedings for separate violations of municipal regulations, is multifarious.—Istvan v. Naar, 85 A. 1012.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1043 (N.J.) The Supreme Court is not bound to consider an objection upon any other ground than that brought to the attention of the trial court.—State v. MacRae, 85 A. 455.

§ 1050 (N.H.) Where no exception is taken to the form of a complaint, its sufficiency in that respect must be assumed.—State v. Normand, 85 A. 899.

(D) Record and Proceedings Not in Record.

§ 1105 (N.J.) Where a writ of error from a conviction does not certify that "the entire record of the proceedings had upon the trial" is sent up, as required by P. L. 1898, p. 915, § 136, providing for a determination upon the record below, the appellant is confined to a strict writ of error.—State v. MacRae, 85 A. 455.

§ 1111 (N.J.Sup.) Where after conviction the record shows that the judgment and sentence were regularly postponed, a contention that the sentence when imposed was a new judgment cannot prevail on error, as the record imports verity.—State v. Gehrmann, 85 A. 1018.

§ 1120 (N.J.) Objection to the state's offer of the copy of the divorce decree in another state as to the form thereof cannot be considered, where defendant does not bring up such document.—State v. MacRae, 85 A. 455.

(E) Assignment of Errors and Briefs.

§ 1129 (N.J.) Criminal Procedure Act (P. L. 1898, p. 915) § 136, extending the right of review beyond errors assigned on the record, or on bills of exception, does not supersede review on assignments of error, nor require plaintiff in error to relinquish any of the advantages of such a review.—State v. Merkle, 85 A. 330.

A review may be had under a single writ of error both for errors properly assigned upon the record or bills of exceptions, and for mat-

ters in the record disclosing manifest wrong to plaintiff in error, from the conduct of the trial.—Id.

§ 1129 (N.J.) A general exception to the charge is unavailable to question the correctness of a part unless error has been assigned on such part.—State v. Thome, 85 A. 452.

(G) Review.

§ 1149 (N.J.) The denial of a motion to quash an indictment, being a matter of discretion, is not reviewable on error assigned on a bill of exceptions.—State v. Merkle, 85 A. 330.

§ 1149 (N.J.Sup.) An order quashing indictments is discretionary and not subject to review by certiorari where it is not apparent that the judicial discretion has been abused.—State v. Potter, 85 A. 216.

§ 1153 (Vt.) Where no abuse of discretion was shown, the court's action in allowing a state's attorney to ask a leading question could not be disturbed on appeal.—State v. Snyder, 85 A. 984.

§ 1158 (N.J.) The finding of the trial court that a defendant's confession was voluntarily made will not be reversed if there be any legal evidence to support it.—State v. Kwiatkowski, 85 A. 209.

§ 1170 (N.J.) Where the official character of a document was a relevant circumstance, the refusal to admit it in evidence was not rendered harmless by the admission of oral testimony as to the same facts.—State v. Merkle, 85 A. 330.

§ 1170½ (R.I.) Alleged error in overruling an objection to a question propounded to a witness was not prejudicial, where the witness apparently did not understand the question and gave a meaningless answer.—State v. Grilla, 85 A. 281.

§ 1172 (N.J.) Where the evidence showed that prosecutrix and accused had made statements conflicting with their testimony, an instruction that proof of such statements had been admitted to test their credibility was not prejudicial to accused.—State v. Thome, 85 A. 452.

(H) Determination and Disposition of Cause.

§ 1186 (N.J.) Conceding the right to review the denial of a motion to quash an indictment for soliciting a bribe under Criminal Procedure Act (P. L. 1898, p. 915) § 136, the judgment will not be reversed where defendant was not prejudiced by the ruling in maintaining his defense on the merits.—State v. Merkle, 85 A. 330.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1208 (Conn.) Under Gen. St. 1902, § 152, which, after prescribing the punishment for "high crimes and misdemeanors" in state prison, provides that, for "any other offense at common law," the offender shall be imprisoned in jail not more than one year, the latter provision has reference to petty or simple misdemeanors.—Fimara v. Garner, 85 A. 670.

CROPS.

See Agriculture; Bankruptcy, § 268.

CROSS-EXAMINATION.

See Witnesses, §§ 267-288, 350, 372, 387.

CROSSINGS.

See Railroads, §§ 333-350.

CURTESY.

§ 12 (Vt.) The right of a husband in one-third of his wife's realty, of which they were seized in her right at the time of her death, given by P. S. 2934 (Acts 1890, No. 44, § 15), in lieu of

curtesy, is subject to be defeated by sale for payment of debts and expenses of administration.—In re Bidgood's Estate, 85 A. 6.

CUSTODIA LEGIS.

See Insane Persons, § 59.

CUSTODY.

Of child, see Divorce, § 294.

CUSTOMS AND USAGES.

§ 17 (Me.) Evidence of custom held incompetent to vary the terms of an insurance agent's unambiguous employment contracts so as to entitle him to commissions on renewal premiums contrary to such contracts.—Gooding v. Northwestern Mut. Life Ins. Co., 85 A. 391.

DAMAGES.

See Action on the Case; Appeal and Error, §§ 843, 978, 1004, 1068; Carriers, §§ 19, 105, 201; Eminent Domain, §§ 122, 126, 166, 182; False Imprisonment, § 36; Fraud, § 59; Husband and Wife, §§ 333, 334; Judgment, § 713; Landlord and Tenant, § 180; Libel and Slander, § 114; Malicious Prosecution, §§ 67, 69; Municipal Corporations, § 392; Navigable Waters, § 39; New Trial, § 76; Release, § 29; Trial, §§ 114, 256; Trover and Conversion, § 47; Waters and Water Courses, § 76.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

§ 38 (Pa.) For permanent disability plaintiff can recover for the loss of earning power during the remainder of his life.—Reitler v. Pennsylvania R. Co., 85 A. 1000.

§ 40 (Conn.) Where defendant refused to recognize plaintiff's interest in a contract to share the cost and profits to be derived from real estate, plaintiff's measure of damages was the reasonable compensation for the loss sustained, to be determined by proof of past profits, and such as might be reasonably expected to accrue in the future.—Maguire v. Kiesel, 85 A. 689.

§ 45 (Me.) Owner who had paid contractor according to architect's certificates held entitled to recover outstanding lien claims on the property for labor and materials which he was required to pay.—L'Union Musicale v. Chevalier, 85 A. 52.

Owner held entitled to recover from contractor his necessary expenditures in repairing and strengthening the part of the building constructed by the contractor.—Id.

V. EXEMPLARY DAMAGES.

§ 87 (Vt.) Exemplary damages do not go to the right of recovery, but only to the amount of recovery in the discretion of the jury.—Miller v. Pearce, 85 A. 620.

§ 94 (Me.) Recovery of \$708.15 for willful and malicious suspension of plaintiff's horse by race track judges held not excessive; the actual damage being at least \$50.—Carleton v. Fletcher, 85 A. 395.

VI. MEASURE OF DAMAGES.

(A) Injuries to the Person.

§ 100 (Pa.) Where the loss of future earning power is anticipated in a verdict, it should be the present worth of his future loss of earnings during his life expectancy.—Reitler v. Pennsylvania R. Co., 85 A. 1000.

Where there is a partial loss of earning power, the jury should determine the number of years it is likely to continue, and then find its present worth.—Id.

(C) Breach of Contract.

§ 124 (Vt.) Plaintiff's failure to do something according to the contract having been because he was prevented by defendant's noncompliance with the contract, defendant cannot have its loss therefrom applied in reduction of plaintiff's claim for services before he was obliged by defendant's default to abandon the contract.—Boville v. Dalton Paper Mills, 85 A. 623.

Where plaintiff's contract was an entire one by which he was to deliver wood at defendant's mill, and he was compelled by defendant's default to abandon it, his claim for work performed may not be reduced by the increase in the cost to defendant of getting the wood to the mill because of the manner in which plaintiff had delivered it at a stream.—Id.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 132 (Me.) Where a woman earning \$1,400 a year was injured in her foot and ankle, as the result of which her earning capacity was reduced, and her injuries were probably permanent, and caused her severe suffering and large expense, a verdict of \$4,830 was not excessive.—Rodick v. Maine Cent. R. Co., 85 A. 41.

§ 132 (Me.) A verdict of \$1,494 in an action for personal injuries held not excessive where the thumb and forefinger of the right hand were lost, and blood poisoning caused several months' illness.—Hill v. Libbey, 85 A. 487.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(B) Evidence.

§ 176 (Conn.) In an action for breach of contract to divide profits to be derived from a real estate transaction, evidence of past profits held admissible as bearing on the profits reasonably expected in the future.—Maguire v. Kiesel, 85 A. 689.

(C) Proceedings for Assessment.

§ 197 (Pa.) A judgment for want of a sufficient affidavit of defense in replevin, authorized by Act April 19, 1901 (P. L. 89) § 5, merely determines the title to the property in dispute, and plaintiff must resort to a writ of inquiry for the assessment of damages.—Westinghouse Air Brake Co. v. Harris, 85 A. 78.

§ 208 (Md.) Evidence held to authorize submission of the permanency of personal injuries to the jury.—Agricultural & Mechanical Ass'n of Washington County v. Gray, 85 A. 291.

§ 208 (Md.) In an action for personal injuries from a defective highway, held, on the evidence, that whether plaintiff's injuries were permanent and calculated to disable her from engaging in employment for which she would have otherwise been qualified was for the jury.—Board of Com'rs of Howard County v. Pindell, 85 A. 1041.

§ 216 (Pa.) In an action for injuries to a servant, it was proper for the court to direct the jury that the measure of damages was the present worth of plaintiff's future earnings.—O'Brien v. Pennsylvania Coal Co., 85 A. 180.
Defendant could not complain of an instruction that the jury should not consider a claim of plaintiff's counsel that the capitalization of plaintiff's future earnings should be from \$5,000 to \$6,000.—Id.

§ 216 (Pa.) Instruction as to measure of damages authorizing recovery for what plaintiff is likely to earn during the remainder of his life is erroneous, as his recovery depends on whether he is permanently disabled, or only partially so.—Reitler v. Pennsylvania R. Co., 85 A. 1000.

DAMS.

See Waters and Water Courses, § 160.

DEATH.

See Appeal and Error, § 1050; Attachment, § 272; Carriers, § 317; Divorce, § 167; Electricity, §§ 16, 19; Evidence, §§ 266, 472, 474; Landlord and Tenant, § 169; Limitation of Actions, § 127; Master and Servant, §§ 265, 288; Street Railroads, §§ 114, 117; Trial, §§ 133, 140; Witnesses, §§ 236, 248.

II. ACTIONS FOR CAUSING DEATH.**(A) Right of Action and Defenses.**

§ 9 (R.I.) Gen. Laws 1909, c. 283, § 14, giving a right of action for death from wrongful act, being in derogation of the common law, confers only such rights as may be consistent with a strict construction of its language.—Carrigan v. Cole, 85 A. 934.

§ 30 (R.I.) An action for death by wrongful act, brought under Gen. Laws 1909, c. 283, § 14, authorizing such action against the person or corporation which would have been liable had death not resulted, will not survive the death of the wrongdoer.—Carrigan v. Cole, 85 A. 934.

(B) Jurisdiction, Venue, and Limitations.

§ 38 (N.J.) The one-year limitation in actions for death in General Railroad Law, § 58, is superseded by Death Act, by which actions for death may be brought at any time within two years.—Eldridge v. Philadelphia & R. R. Co., 85 A. 179.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Bankruptcy; Dower, § 49; Executors and Administrators, §§ 205-269; Fraudulent Conveyances; Subrogation; Tender.

DECEDENTS.

See Descent and Distribution.

DECEIT.

See False Pretenses; Fraud.

DECLARATION.

See Pleading, §§ 18, 34, 51-67, 94.

DECLARATIONS.

See Evidence, §§ 266-313.

DEDICATION.

See Appeal and Error, § 1108.

I. NATURE AND REQUISITES.

§ 33 (N.J.) Atlantic City, as trustee for the public, has a right to accept a dedication of lands for a public street, granted by deed from the owner of the fee.—Jarman v. Freeman, 85 A. 184.

II. OPERATION AND EFFECT.

§ 53 (N.J.) When a city accepts a dedication of lands for a street, the private right of way therein of an abutting owner becomes merged in the public easement, or is suspended thereby.—Jarman v. Freeman, 85 A. 184.

DEEDS.

See Acknowledgment; Boundaries, § 36; Covenants; Dedication, § 33; Dower, § 49; Ejectment, §§ 90, 95; Equity, § 393; Mortgages; Quieting Title, § 44; Registers of Deeds; Religious Societies, §§ 17, 18, 20; Tenancy in Common, § 43; Waters and Water Courses, § 156.

III. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

§ 100 (R.I.) A deed should be construed with reference, not only to the words themselves, but to the circumstances surrounding the parties at and before the execution and delivery of the deed.—Cram v. Chase, 85 A. 642.

(B) Conditions and Restrictions.

§ 145 (R.I.) "Condition" and "covenant," as used in deeds, defined and distinguished.—Perkins v. Kirby, 85 A. 648.

IV. PLEADING AND EVIDENCE.

§ 196 (N.J.) Evidence, in a suit by an administrator to set aside the transfer to defendant, as made while intestate was incompetent, and by the undue influence of the grantee, held not to show that the grantee occupied a dominant position with relation to the intestate, so as to shift the burden of proof from plaintiff to defendant.—Wain v. Meirs, 85 A. 260.

DE FACTO OFFICERS.

See Officers, § 104.

DEFAULT.

See Judgment, §§ 17, 102-173.

DEGREES.

See Homicide, § 282.

DELAY.

See Carriers, §§ 91, 97-106, 149½, 201; Contracts, § 270; Telegraphs and Telephones.

DELEGATION OF POWER.

See Constitutional Law, §§ 56-63; Taxation, § 28.

DELIVERY.

See Carriers, § 87; Sales, §§ 79, 88, 181, 202.

DEMAND.

See Bills and Notes, § 396; Replevin, § 11; Specific Performance, § 105; Trover and Conversion, § 9.

DEMONSTRATIVE EVIDENCE.

See Evidence, §§ 194, 197.

DEMURRER.

See Equity, § 220; Pleading, §§ 190, 217, 406.

DENTISTS.

See Physicians and Surgeons, § 18.

DEPOSIT.

See Banks and Banking, §§ 119-154; Embellishment, § 9; Gifts, § 49.

DEPOSITIONS.

See Appeal and Error, §§ 1053, 1064; Divorce, § 137; Trial, § 234.

§ 95 (Conn.) Where defendant introduced parts of a deposition taken in his behalf, plaintiff was entitled to introduce other parts which were relevant and competent.—Walter v. Sperry, 85 A. 739.

A party offering in evidence a deposition taken in his behalf must present the entire deposition, so far as competent and pertinent to the issues involved.—Id.

§ 101 (Vt.) Defendants, contesting a claim of trespass on the ground of a license from the plaintiff, which the plaintiff denies, are not "claiming under" the plaintiff, within the mean-

ing of P. S. 1630, and cannot use a deposition taken at his request.—*Lee v. Follensby*, 85 A. 915.

§ 107 (R.I.) Defendant could not object to portions of a deposition covered by questions which were not objected to upon the taking of the deposition, though his counsel was aware of the defense to which the testimony objected was pertinent.—*Ralph v. Taylor*, 85 A. 941.

DEPOSITS IN COURT.

See Subrogation.

DESCENT AND DISTRIBUTION.

See Adoption; Bastards, §§ 100, 102; Curtesy; Executors and Administrators; Taxation, §§ 868, 879.

I. NATURE AND COURSE IN GENERAL.

§ 5 (Me.) The disposition of the personal property of an intestate, wherever situated, is governed by the law of his domicile.—*Holmes v. Adams*, 85 A. 492.

§ 6 (Me.) The statutes in force at the time of one's death govern the disposition of his estate.—*Holmes v. Adams*, 85 A. 492.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

(A) Heirs and Next of Kin.

§ 45 (Pa.) While a testator's intention should prevail as to that part of his estate disposed of by will, it does not alter the course of inheritance or the character of that part of the estate which passes under the intestate law.—*In re Reed's Estate*, 85 A. 138.

(B) Surviving Husband or Wife.

§ 53 (Me.) Pub. Laws 1897, c. 221, as amended by Pub. Laws 1903, c. 160, relating to a widow's rights in the personal estate of her husband, held not an amendment of Pub. Laws 1895, c. 157, which enlarged a widow's distributive rights in the real estate of her husband from a life estate to a fee, but an act to bring the distribution of personal property in harmony with the descent of real estate; and, as found in Rev. St. 1903, c. 77, § 13, a statute of descent, to extend only to personal estate; and hence that a widow for whom no provision was made by will took one-half of the real estate in fee.—*Cheney v. Cheney*, 85 A. 387.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

§ 71 (Me.) One claiming a share of the personal property of one dying domiciled in Nevada has no remedy in this state until he has obtained a decree in his favor in the probate court in that state.—*Holmes v. Adams*, 85 A. 492.

(C) Debts of Intestate and Incumbrances on Property.

§ 130 (Pa.) Where an instrument to continue a lien against a decedent's estate, under Act June 14, 1901 (P. L. 562), fails to comply with a statutory requirement on which the right to continue the lien depends, the court may declare it void and strike the instrument from the record.—*Green v. Green*, 85 A. 70.

A copy of an alleged covenant to continue a lien on certain real property held self-sustaining and sufficient, within Act June 14, 1901 (P. L. 562).—*Id.*

DILIGENCE.

See Carriers, §§ 104, 106; Equity, § 82.

DIRECTING VERDICT.

See Trial, §§ 139, 148, 420.

DIRECTORS.

See Corporations, §§ 152, 298-311, 428.

DISCHARGE.

See Accord and Satisfaction; Bankruptcy, §§ 391-436; Principal and Surety, § 108; Receivers, § 60.

DISCOVERY.

I. IN EQUITY.

§ 8 (N.J.) A prayer for discovery in a bill in equity, to give jurisdiction in a suit otherwise cognizable at law, is not sufficient, if it is not in aid of the facts necessary to establish complainant's case.—*Franklin Tp. v. Jones*, 85 A. 347.

§ 8 (N.J.) A discovery prayed for by the bill will not give jurisdiction to a court of equity where it relates solely to matters of defense, and is not matter sought for in aid of the facts necessary to establish complainant's case.—*Franklin Tp. v. Crane*, 85 A. 408; *Same v. Trammell*, *Id.* 411.

§ 20 (N.J.) Discovery alone will not sustain a bill for an accounting.—*Franklin Tp. v. Crane*, 85 A. 408; *Same v. Trammell*, *Id.* 411.

§ 23 (N.J.Ch.) Wherever letters or papers are evidential in a cause and relevant, and are in the possession of either party, the court of equity has the inherent power to order the production of such papers for inspection by the other party.—*Singer Mfg. Co. v. Bowne*, 85 A. 449.

DISCRETION OF COURT.

See Appeal and Error, §§ 966-984; Criminal Law, §§ 1149, 1153; Evidence, §§ 271, 359; Mandamus, § 7; Receivers, § 198; Specific Performance, § 8; Trial, §§ 59, 207; Writs, §§ 260, 267, 388.

DISCRIMINATION.

See Carriers, §§ 19, 32, 201.

DISMISSAL AND NONSUIT.

See Appeal and Error, §§ 105, 781-801; Carriers, § 320; Contracts, § 352; Street Railroads, § 117; Wills, § 865.

DISORDERLY CONDUCT.

See Breach of the Peace.

DISSOLUTION.

See Attachment, § 272; Corporations, §§ 613-629, 691; Injunction, § 176.

DISTRIBUTION.

See Corporations, § 629; Descent and Distribution; Executors and Administrators, §§ 288-318.

DISTRICTS.

See Schools and School Districts.

DIVIDENDS.

See Corporations, §§ 310, 553.

DIVORCE.

See Appeal and Error, § 1060.

III. DEFENSES.

§ 54 (Del.Super.) A wife, who is sued for divorce for adultery, may not interpose as a de-

fense the husband's guilt of extreme cruelty.—*Bancroft v. Bancroft*, 85 A. 561.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(B) Parties, Process, and Incidental Proceedings.

§ 79 (N.J.Ch.) Where notice of an order for publication stated that the suit was brought to obtain an absolute divorce for desertion, but the suit was brought for an absolute divorce for adultery, the notice of the order was not published as required by P. L. 1907, p. 474, in not stating the ground of the suit.—*Scott v. Scott*, 85 A. 1022.

(C) Pleading.

§ 99 (Del.Super.) An answer in a suit for divorce for adultery, which alleges the commission of adultery by plaintiff, *held* insufficient, and will be stricken out on motion.—*Bancroft v. Bancroft*, 85 A. 561.

Where a wife is sued for divorce on the ground of her adultery, the answer alleging the adultery of the husband must set forth the defense with the same particularity and specification as is required in a libel for divorce.—*Id.*

An answer, in a suit by a husband for divorce on the ground of the adultery of his wife, which alleges that the husband at divers times during a period of about three years committed adultery with two women named at a place named, is bad, because too broad as to time.—*Id.*

(D) Evidence.

§ 109 (N.J.Ch.) In an action for divorce for adultery, the wife, who admitted adultery, but set up condonation, had the burden of proving it.—*Redding v. Redding*, 85 A. 712.

§ 115 (Del.Super.) In a suit by a husband for divorce for the adultery of the wife, and for the establishment of the illegitimacy of a child of the wife, nonaccess of the husband with the wife during the period of gestation may be proved.—*Bancroft v. Bancroft*, 85 A. 561.

§ 125 (Del.Super.) 24 Del. Laws, c. 221, § 20, prohibiting a divorce unless cause is shown by affirmative proof aside from any admissions, a confession may be proved after evidence tending to establish the charge has been introduced.—*Bancroft v. Bancroft*, 85 A. 561.

In a suit by a husband for a divorce for the adultery of the wife, and for a decree establishing the illegitimacy of a child of the wife, admissions of the wife's adultery cannot be excluded merely because they tend to prove the illegitimacy of the child.—*Id.*

§ 127 (N.J.Ch.) The rule that a divorce will not be granted on the uncorroborated testimony of the plaintiff applies not only to the cause for divorce but to every necessary element in the proofs.—*Williams v. Williams*, 85 A. 611.

Where complainant relied on a letter alleged to have been written by her husband to her solicitor, it was necessary that her evidence that the letter was in the handwriting of her husband be corroborated.—*Id.*

§ 135 (N.J.Ch.) Evidence, in a husband's action for divorce where the wife admitted the adultery charged and set up condonation, *held* sufficient to affirmatively establish such defense.—*Redding v. Redding*, 85 A. 712.

§ 137 (Del.Super.) Under 24 Del. Laws, c. 221, § 18, as amended by 25 Del. Laws, c. 213, § 5, providing that hearings and trials in divorce cases shall be before the court, the court, in a suit for divorce, may issue commissions to take testimony of nonresident witnesses.—*Bancroft v. Bancroft*, 85 A. 561.

(F) Judgment or Decree.

§ 167 (N.J.Ch.) Equity will not open a final decree of divorce after the spouse that obtained it is dead; but, where the decree was obtained fraudulently, the defrauded spouse may sue to enforce any civil right notwithstanding that

the decree, if honest, would be a complete bar.—*Givernaud v. Givernaud*, 85 A. 830.

A bill of review to set aside a fraudulent divorce after the death of the other spouse, which states that the object was to prevent the bar of limitations from interfering with the collection of a judgment rendered 40 years before will be held good as a bill to collect the judgment.—*Id.*

Where a wife obtained a limited divorce in France charging adultery, and got a judgment against the husband, and he came to America, got an absolute divorce, and had many relatives living in the vicinity of his first wife, during which time she refused to have anything to do with him, she cannot recover on the judgment: 40 years after, and after his death, claiming that she did not know of the absolute divorce.—*Id.*

VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 294 (N.J.Ch.) The court has no jurisdiction over the custody of a child, where the divorce is not granted.—*Redding v. Redding*, 85 A. 712.

DOCKETS.

See Trial, § 9.

DOCUMENTS.

See Evidence, §§ 341-382.

DONATIONS.

See Gifts.

DOWER.

See Courtesy; Wills, § 792.

I. NATURE AND REQUISITES.

§ 4 (Me.) Pub. Laws 1895, c. 157, amending Rev. St. 1893, c. 75, § 1, and by section 1, par. 1, and sections 3 and 4 establishing the rights of a widow or widower in the estates of the deceased spouse, was a substitute for the old provision for dower as at common law, and enlarged the widow's estate from a life estate to one in fee; but thereunder she took as widow, and not as heir.—*Cheney v. Cheney*, 85 A. 357.

II. INCHOATE INTEREST.

(B) Bar, Release, or Forfeiture.

§ 49 (N.J.) When a husband conveyed land to his wife through an intermediary, and the wife joined in the deed to the intermediary, she lost her inchoate right of dower and took an estate in fee simple, subject to the right of a judgment creditor to have the conveyance treated as void as against his debt.—*Campbell v. Weber*, 85 A. 225.

DRAMSHOPS.

See Intoxicating Liquors.

DRUGGISTS.

§ 9 (Me.) A party who negligently fills a prescription is liable for resulting injuries, though he is not a registered druggist.—*Coughlin v. Bradbury*, 85 A. 294.

Party undertaking to fill a prescription, but failing to distribute the phenacetin in equal amount in each powder, *held* negligent, and liable for injuries from child receiving an overdose of phenacetin as a result thereof.—*Id.*

A mother *held* not negligent in administering, without consulting a physician, a powder negligently compounded by defendant from prescription calling for a certain mixture of phenacetin and sugar of milk, where she had previously administered with favorable results a medicine compounded from the same prescription.—*Id.*

DRUNKARDS.

See Carriers, §§ 386, 388.

DRY TRUST.

See Trusts, § 136.

DUES.

See Insurance, § 719.

DUPLICITY.

See Pleading, § 217.

EASEMENTS.

See Adverse Possession, § 8; Appeal and Error, § 855; Dedication; Eminent Domain, § 10; Municipal Corporations, § 392; Railroads, § 82; Trial, § 330.

I. CREATION, EXISTENCE, AND TERMINATION.

§ 2 (Md.) A party cannot have an easement in his own land.—Stewart v. May, 85 A. 957.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 43 (R.I.) The extent of an implied or secondary easement depends upon the purpose and extent of the grant of the primary easement.—Cram v. Chase, 85 A. 642.

§ 50 (Pa.) A right of way grant expressed in general terms includes any reasonable use to which the right of way may be put.—Bowers v. Myers, 85 A. 860.

In the absence of any covenant restricting the use of an alley between two dwelling houses, the owner of one may use it for the passage of horses and vehicles, as well as for foot passengers, if he does not interfere with its use by the owner of the adjoining property.—Id.

§ 58 (Pa.) The owner of a dominant estate *held* entitled to restrain the building of a curb which would prevent the use of an alley over the servient estate as a driveway.—Bowers v. Myers, 85 A. 860.

§ 69 (Conn.) In an action for damages for obstructing a right of way claimed over a lane adjoining plaintiff's property, the will under which plaintiff claimed his land was properly admitted in evidence.—Raughtigan v. Norwich Nickel & Brass Co., 85 A. 517.

In an action for damages for obstructing a right of way over an adjoining land, in which a deed essential to the chain of title which was executed by an administrator *de bonis non* was admitted, probate records showing his accounts and receipt of the purchase price *held* admissible in evidence.—Id.

EJECTION.

See Carriers, §§ 356-383.

EJECTMENT.

See Adverse Possession, § 44; Equity, § 47; Evidence, § 158; Judgment, §§ 707, 743.

I. RIGHT OF ACTION AND DEFENSES.

§ 6 (N.J.) The title and right to possession of a tunnel, under the surface of land which a party other than the owner of the surface claims to have acquired by adverse possession, should be determined by an action of ejectment, and not by a suit in equity.—Condict v. Erie R. Co., 85 A. 612.

§ 9 (Md.) A plaintiff in ejectment must recover on the strength of his own title, and must show a legal title and a right to possession not

barred by limitations.—Joseph v. Bonaparte, 85 A. 962.

A plaintiff in ejectment, who deduces title from a patent granted by the state, and who proves his right of possession, is entitled to recover.—Id.

§ 9 (N.J.) Ejectment will lie to recover land for highway purposes against the owner of the fee.—Board of Chosen Freeholders of Camden County v. Sharpless, 85 A. 222.

§ 10 (Md.) Plaintiff in ejectment, who shows a good title by adverse possession, is entitled to recover.—Joseph v. Bonaparte, 85 A. 962.

III. PLEADING AND EVIDENCE.

§ 90 (Md.) In ejectment a copy of a deed not tending in the remotest degree to show title in plaintiff is properly excluded.—Joseph v. Bonaparte, 85 A. 962.

A plaintiff in ejectment, who fails to establish a good legal title, may not inquire into the character of the title of defendant, and evidence relating thereto is properly excluded.—Id.

§ 95 (Md.) Where in ejectment defendant admitted the dates of a deed, and a decree of foreclosure under which the deed was executed, it was not necessary to show the dates by the introduction of the deed.—Joseph v. Bonaparte, 85 A. 962.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 115 (N.J.) Under Ejectment Act, § 19, defendants *held* not entitled to object to so much of a judgment for plaintiff as covered the part of the locus in quo not embraced in the plea.—Board of Chosen Freeholders of Camden County v. Sharpless, 85 A. 222.

ELECTION.

See Wills, § 792.

ELECTION OF REMEDIES.

See Pleading, § 369.

ELECTIONS.

See Certiorari, § 68; Intoxicating Liquors, § 35; Statutes, § 95; United States.

I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

§ 1 (N.J.) The right to vote is not a natural inherent right, but is the creation of Constitutions and statutes.—Carpenter v. Cornish, 85 A. 240.

IV. QUALIFICATIONS OF VOTERS.

§ 63 (N.J.) Const. art. 4, §§ 2, 3, provide that senators and members of assembly shall be elected by the legal voters, and legal voters are the male citizens who, by article 2, are given a vote for officers elected by the people.—Carpenter v. Cornish, 85 A. 240.

Women are not entitled to vote for officers, delegates, presidential electors, or upon questions referred to the people.—Id.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

§ 154 (Pa.) Where a party is entitled to three representatives, and there are four candidates, and the nomination of three has priority over the fourth in point of time, the burden is on the fourth to show invalidity of the nomination of the other candidates.—In re Brown's Nomination Papers, 85 A. 872.

§ 154 (Pa.) Proceeding in the common pleas to determine legality of nomination papers is not appealable.—In re Washington Party Nominations, 85 A. 873.

VII. BALLOTS.

§ 192 (R.I.) In an election in which printed ballots were used, two of which happened to be blank on the face, but with the official indorsement on the back, one with "yes" written on the face and the other so written on the back by the voter, should not have been counted, under Gen. Laws 1909, c. 11, §§ 24, 46.—*Rice v. Town Council of Town of Westerly*, 85 A. 553.

§ 194 (R.I.) Under Gen. Laws 1909, c. 11, § 46, prohibiting identification marks, and providing that lines crossing at any angle shall be a valid voting mark, ballots containing a proper X will not be disregarded because it appeared to have been retraced, or faint lines were drawn from the top of one line to the top of another.—*Rice v. Town Council of Town of Westerly*, 85 A. 553.

Under Gen. Laws 1909, c. 11, § 46, ballots marked with two lines which practically form a Y should be counted.—Id.

Ballots marked with a cross in two places other than the proper voting square should be disregarded under Gen. Laws 1909, c. 11, § 46.—Id.

Under Gen. Laws 1909, c. 11, §§ 41, 46, ballots marked with ink should be disregarded.—Id.

Where it appeared that it was not caused by inadvertence ballots marked with four lines which crossed at the center like an asterisk should be disregarded under Gen. Laws 1909, c. 11, § 46.—Id.

Where a question was submitted by ballots which were marked "Yes" and "No," a ballot on which the "Yes" had been marked through, and the proper voting mark had been placed in the "No" square, must be disregarded because of the identification mark.—Id.

IX. COUNT OF VOTES, RETURNS, AND CANVASS.

§ 237 (Me.) A candidate who did not receive a plurality of all the votes cast is not elected, although his opponent was not properly nominated, and, his opponent not being ineligible to the office, the votes cast for him are effectual so as to prevent the election of the candidate.—*Heald v. Payson*, 85 A. 576.

X. CONTESTS.

§ 271 (N.J.Sup.) Under Election Act, § 159, authorizing a recount, a candidate is given a right to a recount to arrive at a correct result, but not to detect fraud or crime, which may be incidentally disclosed.—*In re Van Noort*, 85 A. 813.

Where a petition for a recount of election returns was based on mere conjecture, and made after a partial recount had resulted in the incumbent's favor, a recount could not be allowed; the petitioner not having "reason to believe" an error had changed the result of such election, as the words quoted are used in Election Act, § 159.—Id.

§ 273 (Me.) Under Rev. St. c. 6, §§ 70, 73, providing for the contest of elections, and that the officer found to be duly elected shall be, by the court, inducted into office, one, not himself elected, cannot demand the ouster of one in possession of the office, though his nomination was illegal.—*Heald v. Payson*, 85 A. 576.

§ 278 (N.J.Sup.) Election Act, § 159, limiting the time within which a candidate may present his petition for a recount to 10 days after the election, is mandatory.—*In re Van Noort*, 85 A. 813.

Where, under authority of Election Act, § 159, authorizing a recount on application made within 10 days, the court granted an application for a partial recount, it had no power, more than 10 days after the election, to grant a recount of the vote of the entire county, regardless of whether the second application was a new or an amended petition.—Id.

ELECTRICITY.

See Eminent Domain, § 10.

§ 16 (Md.) One permitting its electric light wires, heavily charged, to remain detached from its support and hanging so as to touch a gutter at the side of a street, from Saturday until Wednesday, is guilty of negligence and liable for death caused by electric shock on Wednesday.—*State v. Crisfield Ice Mfg. Co.*, 85 A. 615.

A boy 11½ years old, who picked up an electric light wire, before the lights were turned on, and who was warned by two passers-by to put it down or he would be killed when the lights would be turned on, and who held the wire until the lights were turned on, when he received a fatal shock, held guilty of contributory negligence.—Id.

§ 19 (Md.) Whether a boy 11½ years old killed by electric shock by coming in contact with a broken electric light wire, was guilty of contributory negligence, held for the jury.—*State v. Crisfield Ice Mfg. Co.*, 85 A. 615.

§ 19 (Pa.) In an action for death of a boy burned by a broken live wire, where there was no evidence as to the cause of the break nor how long the broken wire lay upon the ground, no recovery for plaintiff can be had.—*Kahn v. Kittanning Electric Light Co.*, 85 A. 1117.

EMBEZZLEMENT.

§ 9 (R.I.) Where a depositor directed the banker to set aside \$600 of his deposit and transmit the same to a bank in a foreign country, and the banker entered in the passbook the withdrawal of \$600, and made an entry of the amount of the balance, the amount withdrawn was a special deposit, and where the banker failed to transmit the same, but appropriated it to his own use, he was guilty of embezzlement.—*State v. Grills*, 85 A. 281.

§ 38 (R.I.) On trial for embezzlement of money entrusted to defendant for transmission to a foreign bank, it was not error to permit the prosecutor to be asked if he knew whether defendant ever sent the money.—*State v. Grills*, 85 A. 281.

§ 39 (N.J.) On a trial for the fraudulent conversion by an attorney of \$30 paid to him for the fee for filing a certificate extending the corporate existence of a company, the exclusion of evidence that the company had never paid the attorney an agreed fee of \$75 for his services was error.—*State v. Strasser*, 85 A. 227.

§ 41 (R.I.) A receipt given by defendant, in a prosecution for embezzlement of money entrusted to him by prosecutor, was admissible, though the receipt ran to prosecutor's son, and to that extent did not correspond with the indictment, especially where accused testified that he made a mistake in writing the receipt.—*State v. Grills*, 85 A. 281.

EMINENT DOMAIN.

See Appeal and Error, §§ 171, 604; Evidence, § 142.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 10 (Pa.) The American Transfer Company, possessing the powers granted by Acts April 11, 1806 (P. L. 1807, p. 1447), April 26, 1870 (P. L. 1872, p. 1240), and March 16, 1868 (P. L. 331), cannot exercise the power of eminent domain to appropriate rights of way over private property to transmit the electric power.—*In re American Transfer Co.*, 85 A. 143.

§ 47 (N.J.Sup.) The Legislature may authorize one public agency to condemn property already devoted to a public use; but the intention must be manifested in express terms, or by

necessary implication.—*Plainfield-Union Water Co. v. Inhabitants of City of Plainfield*, 85 A. 321.

Act April 21, 1876 (Comp. St. 1910, p. 823), did not authorize the condemnation, either in whole or in part, of a water supply plant supplying several municipalities.—*Id.*

§ 56 (Conn.) The necessity of the taking of private property for a public use must be a reasonable one, and the property taken must reasonably serve the purposes of the incorporation and not be taken for speculative purposes, to secure a monopoly, to forestall rivalry, or in bad faith.—*In re New Haven Water Co.*, 85 A. 636.

"Necessary," in legislative acts, according the right of eminent domain, does not mean an absolute or indispensable necessity, but only that the taking provided for is reasonably necessary.—*Id.*

§ 58 (Conn.) The property taken in condemnation proceedings must be restricted to that which will reasonably serve the public use.—*In re New Haven Water Co.*, 85 A. 636.

II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

§ 84 (N.H.) The common-law right of a riparian owner to a reasonable usufruct of the water for power development by the erection of a dam is a valuable interest in the stream extending ordinarily to its thread, and cannot be appropriated without compensation.—*Swain v. Pemigewasset Power Co.*, 85 A. 288.

Under Flowage Act (Laws 1868, c. 20, §§ 1, 2; Pub. St. 1901, c. 142, §§ 12, 13), authorizing the maintenance of a water mill or dam to raise or back the flow of water, and providing for compensation for injury to land, *held*, that the flowing out or taking of the head or falls of a stream located upon petitioner's land but which he had neither utilized nor developed, was an "injury" to "land," for which compensation must be made.—*Id.*

(C) Measure and Amount.

§ 122 (Conn.) That the damages from a proposed condemnation are not such that they may be fully compensated will not prevent the condemnation.—*In re New Haven Water Co.*, 85 A. 636.

§ 126 (N.H.) The practical measure of damages for undeveloped water power taken under the Flowage Act ([Laws 1868, c. 20] Pub. St. 1901, c. 142) is the difference between what petitioner's land was worth before the flowage and after.—*Swain v. Pemigewasset Power Co.*, 85 A. 288.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 166 (Conn.) A "condemnation proceeding" is a special proceeding at law to determine in a single action the damages done by the taking, but it is not a civil action, or a civil process.—*In re New Haven Water Co.*, 85 A. 636.

§ 180 (Conn.) The necessity of giving reasonable notice of condemnation proceedings will be implied where the statute makes no provision for notice.—*In re New Haven Water Co.*, 85 A. 636.

§ 181 (Conn.) The reasonableness of the notice in condemnation proceedings is not governed by the period for service of civil process.—*In re New Haven Water Co.*, 85 A. 636.

§ 182 (Conn.) Where an application for appointment of a committee to assess damages for water rights to be condemned was brought under the water company's charter prescribing that the superior court could determine the no-

tice to be given, notice served by mail pursuant to the court's order was sufficient.—*In re New Haven Water Co.*, 85 A. 636.

A notice by mail in condemnation proceedings was given in sufficient time where a copy of the application reached each person from 8 to 10 days prior to the date of hearing.—*Id.*

§ 191 (Conn.) A water company's application in condemnation proceedings was not demurrable because it alleged in the terms of its charter the taking of the water to be both "necessary and expedient," though Gen. St. 1902, § 2600, as amended by Pub. Acts 1903, c. 192, modifies its charter so as to authorize such taking as be "necessary" only.—*In re New Haven Water Co.*, 85 A. 636.

§ 196 (Conn.) Evidence in condemnation that a water company had long been prepared to take the water, and had recently at great expense constructed a tunnel for the same purpose, *held* admissible on the issues of necessity and the applicant's good faith.—*In re New Haven Water Co.*, 85 A. 636.

§ 241 (Conn.) A judgment in condemnation proceedings that a water company take all the water of certain streams in excess of a certain amount was not for an indefinite quantity of water.—*In re New Haven Water Co.*, 85 A. 636.

§ 262 (Conn.) A court's determination that certain water should be taken by condemnation by a water company supplying the public will not be disturbed where it appears that there is a reasonable necessity for such taking.—*In re New Haven Water Co.*, 85 A. 636.

A trial court's conclusion that a reasonable necessity existed for the taking of waters by a water company could not be disturbed on the ground that the company by requiring the use of meters could so lessen consumption that the condemnation would be unnecessary, where there was nothing before the reviewing court to clearly show facts relating to the use of meters.—*Id.*

The trial court's conclusion that the taking of certain waters by a water company was necessary, could not be disturbed on the ground that by using storage reservoirs the present supply would be sufficient, where the court's finding showed that by reason of their great expense and little value such reservoirs would be impracticable.—*Id.*

V. TITLE OR RIGHTS ACQUIRED.

§ 317 (Pa.) Where canal commissioners, under Acts Feb. 25, 1826 (P. L. 55), and April 9, 1827 (P. L. 192), took lands for the erection of a dam for the purpose of storing water for the Pennsylvania Canal, the title in fee to the land was vested in the commonwealth in perpetuity.—*Foust v. Dreutlein*, 85 A. 68.

EMPLOYERS' LIABILITY ACTS.

See Master and Servant, § 180.

ENTRY.

See Judgment, § 273.

EQUITABLE ESTOPPEL

See Estoppel, §§ 52-119.

EQUITY.

See Account; Appeal and Error, § 1009; Cancellation of Instruments; Conversion; Discovery; Divorce, § 167; Ejectment, § 6; Estoppel, §§ 52-119; Executors and Administrators, §§ 469, 507; Injunction; Partition; Quieting Title; Receivers, §§ 29, 35; Release, § 16; Religious Societies, § 20; Specific Performance; Trial, § 392; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.**(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.**

§ 29 (N.J.) The trusts which equity administrators are principally private trusts arising from contracts, and a public office does not rest on contract, but on duty, and the appropriate forum to enforce official duties is a court of law, by mandamus, or action at law.—Franklin Tp. v. Crane, 85 A. 408; Same v. Trammell, Id. 411.

§ 42 (Md.) Objection on the ground of want of jurisdiction may be taken advantage of at the hearing.—Baltimore Trust Co. v. George's Creek Coal & Iron Co., 85 A. 949.

(B) Remedy at Law and Multiplicity of Suits.

§ 47 (N.J.) The title and right to possession of a tunnel, under the surface of land which a party other than the owner of the surface claims to have acquired by adverse possession, should be determined by an action of ejectment, and not by a suit in equity.—Condict v. Erie R. Co., 85 A. 612.

II. LACHES AND STALE DEMANDS.

§ 82 (Md.) The mere institution of a suit does not of itself relieve a person of the charge of laches; and, if he fail in the diligent prosecution of the action, the consequences are as though no action had been begun.—Rupp v. Rogers, 85 A. 774.

III. PARTIES AND PROCESS.

§ 97 (N.J.Ch.) A decree granting the relief prayed for in a bill by one suing for himself and all others of a class coming in and contributing to the expense of the suit beneficially affects all of the class.—Poole v. Supreme Circle, Brotherhood of America, 85 A. 453.

§ 97 (N.J.Ch.) Where a bill is brought by one on behalf of himself and all other members of a benefit fund, being a class bill, the decree, if successful, will beneficially affect all of the class, although none of them have made themselves active parties.—Poole v. Supreme Circle, Brotherhood of America, 85 A. 821.

§ 117 (Md.) Objection on the ground of the capacity of plaintiff instituting a suit in equity may be made by demurrer, plea, answer, or taken advantage of at the hearing.—Baltimore Trust Co. v. George's Creek Coal & Iron Co., 85 A. 949.

IV. PLEADING.**(B) Plea, Answer, and Disclaimer.**

§ 160 (Md.) Objection on the ground of want of jurisdiction may be made by plea.—Baltimore Trust Co. v. George's Creek Coal & Iron Co., 85 A. 949.

§ 178 (Md.) Objection on the ground of want of jurisdiction may be made by answer.—Baltimore Trust Co. v. George's Creek Coal & Iron Co., 85 A. 949.

(E) Demurrer, Exceptions, and Motions.

§ 220 (Md.) Objection on the ground of want of jurisdiction may be made by demurrer.—Baltimore Trust Co. v. George's Creek Coal & Iron Co., 85 A. 949.

(F) Amended and Supplemental Pleadings and Revivor.

§ 302 (Del.Super.) Before granting leave to file an additional answer, it must appear by affidavit that the new matters set forth have come to the knowledge of defendant since the filing of the original answer.—Bancroft v. Bancroft, 85 A. 561.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.

§ 373 (Del.Ch.) When the complainant elects to go to hearing on bill and answer, all the well-

pleaded averments of the answer are taken to be true.—Curlett v. Emmons, 85 A. 1079.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

§ 393 (N.J.Ch.) The conduct of a master in chancery in making affidavit that he did not know parties whose acknowledgment to a deed he had taken, when he did in fact know one of them, who introduced the others, though grossly careless and reprehensible, does not require the revocation of his commission, or other punishment than the court's censure.—In re H—C—, Jr., 85 A. 336.

Under section 22 of the act concerning conveyances (2 Comp. St. 1910, p. 1542), where a master in chancery certifies an acknowledgment upon introduction of the person making it by one with whom the master is acquainted though he is deceived, his action is blameless, but, where a man introduces himself, and the officer takes the acknowledgment, he should be deprived of his office, or otherwise punished.—Id.

ERROR, WRIT OF.

See Appeal and Error; Criminal Law, § 1105.

ESCROWS.

See Specific Performance, § 101.

ESTATES.

See Curtesy; Descent and Distribution; Dower; Executors and Administrators; Joint Tenancy; Perpetuities; Tenancy in Common; Trusts, § 140; Wills.

ESTOPPEL.

See Appeal and Error, § 171; Boundaries, § 47; Contracts, § 270; Insurance, § 378; Landlord and Tenant, § 180; Replevin, § 52; Set-Off and Counterclaim, § 21.

III. EQUITABLE ESTOPPEL.**(A) Nature and Essentials in General.**

§ 52 (Me.) Estoppel is a rule of law which prevents a party from asserting his rights when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth.—Holt v. New England Telephone & Telegraph Co., 85 A. 159.

(B) Grounds of Estoppel.

§ 68 (Vt.) Where plaintiff's counsel said that they would not claim a recovery on certain additional counts, and the court said he had the right to waive recovery on such counts, and defendant's counsel moved for judgment because plaintiff's waiver on the record left no answer to certain pleas, defendant could not thereafter move in arrest for misjoinder of counts, based on the fact that the counts were not formally stricken.—Lee v. Follensby, 85 A. 915.

§ 78 (Me.) In an action to recover an amount fixed by contract as a forfeiture upon certain conditions, held, that plaintiff by his conduct had estopped himself from claiming the same.—Holt v. New England Telephone & Telegraph Co., 85 A. 159.

§ 78 (Pa.) One party to a contract may not, after agreeing to a modification of terms of payment, refuse to accept the terms agreed upon and defeat the right to exercise an option.—Schaeffer v. Coldren, 85 A. 98.

§ 90 (Vt.) Where defendant prepared a written contract which plaintiff signed, and, though defendant did not, plaintiff went on with the work in accordance with the terms and defendant led plaintiff to suppose he was proceeding under that contract, defendant cannot claim the benefit of the rule which measures the value of plaintiff's services by the benefit

which defendant receives.—*Boville v. Dalton Paper Mills*, 85 A. 623.

(E) Pleading, Evidence, Trial, and Review.

§ 119 (Me.) Estoppel is a question of law.—*Holt v. New England Telephone & Telegraph Co.*, 85 A. 159.

EVICTION.

See Landlord and Tenant, § 180.

EVIDENCE.

See Abortion; Accord and Satisfaction, § 27; Acknowledgment; Adultery; Adverse Possession, §§ 44, 114; Agriculture; Appeal and Error, §§ 233, 274, 728, 926-934, 970, 996, 1001, 1002, 1004, 1005, 1011, 1012, 1048, 1050-1058; Attachment, § 47; Attorney and Client, § 166; Bankruptcy, §§ 363, 436; Banks and Banking, § 154; Bigamy, §§ 8, 10; Bills and Notes, §§ 503, 511; Boundaries, §§ 36, 37; Carriers, §§ 19, 317, 318; Continuance; Contracts, § 322; Criminal Law, §§ 308-681, 1120, 1153, 1170; Customs and Usages; Damages, §§ 176, 208; Deeds, § 196; Depositions; Discovery; Divorce, §§ 109-137; Easements, § 69; Ejectment, § 90; Elections, § 154; Embezzlement, §§ 38, 39, 41; Eminent Domain, § 196; Executors and Administrators, §§ 52, 237; False Imprisonment, §§ 23, 25, 31; Fraud, §§ 50, 52; Gifts, § 47; Grand Jury, § 36; Homicide, § 332; Husband and Wife, § 333; Infants, § 98; Insurance, § 665; Justices of the Peace, § 128; Landlord and Tenant, §§ 18, 169, 180; Libel and Slander, §§ 101-104; Marriage, §§ 40-50; Master and Servant, §§ 265-281, 330; Municipal Corporations, § 186; Navigable Waters, § 39; Negligence, §§ 122, 134, 135; New Trial, §§ 70-72; Nuisance, § 33; Partition, § 63; Physicians and Surgeons, §§ 6, 18; Principal and Agent, §§ 23, 119; Property, § 9; Quiet-ting Title, § 44; Railroads, §§ 348, 443; Release, § 57; Sales, §§ 52, 181; Sheriffs and Constables, § 138; Street Railroads, §§ 112, 114; Taxation, § 493; Trespass, § 46; Trial, §§ 45-105, 139, 142, 143, 164, 207, 250-252, 386; Trusts, § 44; Waters and Water Courses, §§ 179, 209; Wills, §§ 52-55, 302; Witnesses; Work and Labor, § 28.

II. PRESUMPTIONS.

§ 80 (Conn.) Where the law of a sister state is not proved, the court must follow it as far as it can ascertain it from the decisions of the sister state; and, where that cannot be done, it must presume that the law of the sister state is like the law of the forum.—*American Woolen Co. v. Maaget*, 85 A. 583.

§ 87 (Pa.) In an action by a husband and wife for injuries to the wife, it is not error to instruct that the jury may find a verdict for the husband, though he was not present or called as a witness; his absence raising at most an unfavorable inference, which must be drawn by the jury.—*Wingrove v. Central Pennsylvania Traction Co.*, 85 A. 850.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

§ 106 (Me.) In an action for deceit, evidence of character of defendant is inadmissible.—*Pierce v. Cole*, 85 A. 567.

Where evidence of character is admissible, it must be shown by general reputation, and not by specific acts.—*Id.*

§ 110 (Conn.) In an action for the price of lumber, which defendant claimed was sold to a tenant, a question asked plaintiff's driver, as to what the tenant said when he delivered the lumber, was properly excluded.—*Walter v. Sperry*, 85 A. 739.

§ 115 (Conn.) In an action for the price of lumber, which defendant claimed was sold to a tenant, where plaintiff proved that defendant's intestate showed him a sketch of the buildings to be erected and asked him to submit figures therefor, defendant should have been permitted to show that the sketch was made at the tenant's request.—*Walter v. Sperry*, 85 A. 739.

(B) Res Gestæ.

§ 121 (R.I.) The admissions of an agent or employé, made while acting within the scope of his authority, may be given in evidence against his employer, when a part of the res gestæ.—*Canham v. Rhode Island Co.*, 85 A. 1050.

§ 123 (R.I.) Relevant evidence of what a motorman said with reference to the accident immediately thereafter, and after he had stopped the car and ran up the track a short distance in an agitated condition, was admissible as res gestæ.—*Canham v. Rhode Island Co.*, 85 A. 1050.

(C) Similar Facts and Transactions.

§ 129 (Conn.) Where a defendant sued for lumber, claimed that the lumber was furnished to a tenant, evidence that another lumber dealer also furnished materials for bathhouses erected with such lumber, on the order of the tenant, should have been admitted.—*Walter v. Sperry*, 85 A. 739.

§ 130 (Conn.) Where defendant claimed that lumber sold, was purchased by a tenant, a bill of sale by the tenant of the buildings erected therewith to defendant's intestate should have been admitted.—*Walter v. Sperry*, 85 A. 739.

§ 135 (Conn.) In an action on a written instrument defended on the ground of fraudulent representations, the testimony of a witness as to similar representations to induce him to sign a similar writing was competent.—*McLaughlin v. Thomas*, 85 A. 370.

§ 142 (N.J.) To determine the amount to be paid for lands condemned for park purposes, evidence is admissible of the price paid at private purchase for other lands to become part of the same park, where they are substantially similar.—*Curley v. Jersey City*, 85 A. 197.

(E) Competency.

§ 151 (Del.Super.) In an action for alienation of the affections of plaintiff's husband, a question why defendant wrote certain letters to plaintiff's husband held admissible to show motive or intent.—*Lupton v. Underwood*, 85 A. 966.

In an action for the alienation of a husband's affections, a question whether defendant had any other motive than sympathy or friendship for the husband in writing certain letters held proper.—*Id.*

V. BEST AND SECONDARY EVIDENCE.

§ 157 (N.J.) Where no minute is made of actions of the board of directors of a private corporation, parol evidence thereof is receivable; such being the best evidence available.—*Robson v. C. E. Fenniman Co.*, 85 A. 366.

§ 158 (Conn.) The evidence of qualified witnesses is not competent to prove the ownership of realty, unless title is merely collaterally involved as in an action for damages because of ejectment from rented rooms, in which case the prima facie right of ownership may be proved by parol evidence.—*Mathews v. Livingston*, 85 A. 529.

§ 178 (Vt.) Where plaintiff testified that he had received a receipt from defendants, and referred to it in a letter to the defendants which was in evidence, and that a letter from defendants referred to the contents of this letter, sufficient connection was shown between his letter, the receipt, and defendants' letter to permit him

to testify to the contents of defendants' letter, which was lost.—*Lee v. Follensby*, 85 A. 915.

§ 184 (Vt.) To account for failure to have the copy of his contract with defendant, claimed to have been signed by defendant and delivered to him by its agent, plaintiff may testify to the agent's borrowing it of him, with a promise to return, not kept.—*Boville v. Dalton Paper Mills*, 85 A. 623.

§ 185 (Del.Super.) Whether a notice to produce documents not given until the case was on trial was too late depended on the ability of the party notified to produce the document in compliance with the notice.—*Lupton v. Underwood*, 85 A. 985.

VI. DEMONSTRATIVE EVIDENCE.

§ 194 (Conn.) It is not error to overrule the objection to Exhibit B, claimed to have been sent by defendant to plaintiff, that it had not been shown defendant sent it, the court having before it Exhibit A, acknowledged to have been written by her, and the address on the wrapper of Exhibit B, and the opinions of witnesses that the address was her writing.—*Hayward v. Maroney*, 85 A. 379.

§ 197 (Me.) The genuineness of handwriting may be proved by comparison with other handwriting admitted or proved to be genuine.—*Williams v. Williams*, 85 A. 43.

A writing need not be relevant to the other issues of the case to be admissible as a standard for comparison of handwriting.—*Id.*

The admissibility of a writing as a standard of comparison is addressed to the sound discretion of the trial court.—*Id.*

The genuineness of a standard of comparison may be proved by any person having knowledge of the alleged writer's handwriting from having seen him write, from correspondence with him, or from having seen handwriting acknowledged or proved to be his.—*Id.*

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

§ 207 (Conn.) In an action by a real estate broker to recover commissions for producing a purchaser ready, willing, and able to buy, statements by plaintiff's counsel to the court are admissible against plaintiff as evidence of the facts so admitted.—*Abbott v. Lee*, 85 A. 526.

§ 208 (Conn.) In an action for assault, the complaint and substituted complaint which were filed during a period of nearly two years showing that they did not allege that defendant had assaulted plaintiff was evidential on the question of assault.—*Mathews v. Livingston*, 85 A. 529.

§ 208 (Vt.) Plaintiff's paper moving for filing of the contract "whereon his cause of action is based," being to secure possession and inspection of the contract in preparation for the trial, is not a judicial admission that his cause of action was based solely on express contract.—*Boville v. Dalton Paper Mills*, 85 A. 623.

§ 220 (Vt.) The exclusion of a statement made by a witness to a party who made no reply was not erroneous, where it did not appear what the witness said, or that any unfavorable inference could be drawn against the party because of his silence.—*Miller v. Pearce*, 85 A. 620.

(D) By Agents or Other Representatives.

§ 246 (Conn.) In an action by a real estate broker to recover commissions for producing a purchaser ready, willing, and able to buy, statements by plaintiff's counsel to the court are admissible against plaintiff as evidence of the facts so admitted.—*Abbott v. Lee*, 85 A. 526.

(E) Proof and Effect.

§ 258 (Vt.) Evidence held to tend to show one's agency so as to authorize admission of his declarations against his principal.—*Boville v. Dalton Paper Mills*, 85 A. 623.

Reception of evidence of what B. said, after a discussion in which its admissibility was treated as depending on the fact of B.'s agency, involved an implied preliminary finding of such agency.—*Id.*

§ 258 (Vt.) Before the acts and declarations of an alleged agent can be received against the principal, there must be evidence of the agency.—*Livingstone Mfg. Co. v. Rizzi Bros.*, 85 A. 912.

§ 262 (Conn.) Plaintiff may introduce a portion of defendant's testimony on a former trial claimed to be an admission of a material fact without putting in all of such testimony, that relating to other facts as well as the one in question.—*Hope v. Valente*, 85 A. 541.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

§ 266 (Conn.) Under Gen. St. 1902, § 705, relating to the declarations of decedents in actions by their representatives, the declarations of a deceased tenant, made to her son-in-law, as to repairs, were admissible in her husband's action for her death from a defective stair rail.—*Koskoff v. Goldman*, 85 A. 588.

§ 269 (Pa.) Where a person's state of mind or the reason why he did an act is a relevant fact to be determined, his statements concerning it are usually the best evidence on the subject, but the proofs must be restricted to declarations indicating the state of mind at the time of their utterance.—*Ickes v. Ickes*, 85 A. 885.

§ 271 (Me.) On an issue as to whether defendant had paid to plaintiff's intestate money collected for testator as agent, testimony of an attorney as to what he did for testator after the alleged payment was properly excluded as a self-serving act.—*Williams v. Williams*, 85 A. 43.

Declarations of a decedent are not admissible on the issue as to whether money was paid to him in satisfaction of a debt.—*Id.*

It is largely a matter of discretion with the presiding justice whether he shall permit the jury to examine disputed handwriting with a microscope.—*Id.*

(B) Proof and Effect.

§ 313 (Pa.) When evidence of declarations showing intention is produced, the intention may be assumed to continue and control a subsequent act if one would naturally associate the two, and it is for the jury to draw the conclusion.—*Ickes v. Ickes*, 85 A. 885.

IX. HEARSAY.

§ 322 (N.J.) Applicant's reputation as being an intemperate user of alcoholic beverages is inadmissible to contradict a statement in the application that, while he used intoxicating liquors, he did so temperately.—*Smith v. Prudential Ins. Co. of America*, 85 A. 190.

X. DOCUMENTARY EVIDENCE.

(B) Exemplifications, Transcripts, and Certified Copies.

§ 341 (N.J.) A certificate issued by the commissioner of motor vehicles, certifying that his files failed to show a driver's license issued to a party named, is not a copy of any act or decision made by the commissioner, or of any paper in his office, and is inadmissible.—*Meyer & Peter v. Creighton*, 85 A. 344.

(C) Private Writings and Publications.

§ 353 (Me.) In an action against a trustee in bankruptcy, individually, to recover money paid for hay on bankrupt's farm, which plaintiff did not cut because of objection by a mortgagee, the receipt of the purchase price and a warranty of title, though signed by the trustee

as such, were admissible.—*Carney v. Averill*, 85 A. 494.

§ 355 (Conn.) In an action against an administrator, who claimed that lumber, the price of which was sued for, was sold to a tenant, a memorandum made by intestate as to such lumber, and his testimony as to what the intestate told him relative thereto, should have been admitted, under Gen. St. 1902, § 705, making the memorandum of deceased persons admissible.—*Walter v. Sperry*, 85 A. 739.

Where an action is continued against an administrator of defendant, who dies pending the suit, a relevant memorandum made by the deceased defendant is admissible, under Gen. St. 1902, § 705, though made after the bringing of the suit.—Id.

A memorandum made by a deceased person is admissible, in an action by or against his representative, under Gen. St. 1902, § 705, although it contains no facts to which deceased could have testified, if living.—Id.

Under Gen. St. 1902, § 705, making memoranda by deceased persons admissible in evidence, all of such memoranda are admissible, no matter how many times the deceased may have detailed the transaction in writing or orally.—Id.

Gen. St. 1902, § 705, providing that in actions by or against the representatives of deceased persons relevant memoranda by deceased shall be admissible in evidence, should be given a liberal construction to uphold the legislative intent.—Id.

§ 359 (Me.) The admission of photographs being largely within the discretion of the trial judge, the admission of a photograph showing plaintiff standing at a place on defendant's wharf where she was alleged to have fallen was not such abuse of discretion as to call for a new trial.—*Rodick v. Maine Cent. R. Co.*, 85 A. 41.

Photographs should simply show the conditions existing at the time, to aid the jury in applying the oral evidence to the particular location, and should represent inanimate, not animate, objects, as otherwise they tend to unduly emphasize the claims or evidence of one of the parties.—Id.

(D) Production, Authentication, and Effect.

§ 374 (N.J.Sup.) The refusal to receive a bill of sale in evidence was proper, where there was a subscribing witness who was not produced, nor proof made that he could not be obtained.—*Nelson v. Bock*, 85 A. 1009.

§ 380 (Conn.) Photograph, which a competent witness stated to be a correct representation of the objects shown, held admissible, though not vouched for by the photographer.—*Temple v. Gilbert*, 85 A. 380.

§ 382 (Conn.) The sufficient verification of a photograph is a preliminary question of fact for the trial judge.—*Temple v. Gilbert*, 85 A. 380.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(B) Invalidating Written Instrument.

§ 429 (Pa.) To contradict or vary the terms of a written contract by an oral contemporaneous agreement, there must be allegation and proof, not only of the agreement, but of its omission through fraud, accident, or mistake from the writing.—*Lowry v. Roy*, 85 A. 986.

§ 434 (Conn.) Parol evidence of fraudulent representations held competent, although it varied the terms of a written contract.—*McLaughlin v. Thomas*, 85 A. 370.

(C) Separate or Subsequent Oral Agreement.

§ 441 (Conn.) Where a broker wrote a memorandum describing the land to be sold, that de-

scription superseded all oral representations as to the extent of the property.—*Abbott v. Lee*, 85 A. 526.

§ 441 (Pa.) An alleged oral agreement by a contractor, that the bond of a surety of a subcontractor should be based on the location of a line of water pipe of the water company by which the contractor was employed and that there should be no change in such line, was merged in the written bond and was inadmissible in defense to an action on the bond.—*Lowry v. Roy*, 85 A. 986.

A contract reduced to writing is understood as expressing the final conclusions of the contracting parties and as merging all prior negotiations and understandings, whether agreeing or inconsistent with it.—Id.

(D) Construction or Application of Language of Written Instrument.

§ 448 (Me.) Parol evidence of interpretations placed upon clear and unambiguous employment contracts by acts of the parties held incompetent to vary the terms of the contract.—*Gooding v. Northwestern Mut. Life Ins. Co.*, 85 A. 391.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

§ 471 (Conn.) Item in memorandum made by deceased person, showing that plaintiff's bill was against a tenant instead of against deceased, held a statement of fact, and not a mere opinion, and hence improperly excluded.—*Walter v. Sperry*, 85 A. 739.

A question asked plaintiff, whether he sold goods to defendant, did not call for a conclusion of the witness, where there was a dispute as to whether the goods were sold to the defendant or to a tenant.—Id.

§ 472 (R.I.) Evidence, in an action for decedent's death, while crossing a street car track, that he stepped down "to go across the track" was properly excluded as purporting to show decedent's intention.—*Canham v. Rhode Island Co.*, 85 A. 1050.

§ 474 (Conn.) A witness who had no knowledge of the market value at a certain time and place was not qualified to give an opinion thereon.—*Mathews v. Livingston*, 85 A. 529.

§ 474 (R.I.) In an action for decedent's death by being struck at night by a street car rounding a curve, in which it appeared that decedent must have crossed the west track before he was struck, a question as to how far north witness could observe one standing in the center of the west track, opposite the station, held proper, though witness' measurements were taken in the daytime.—*Canham v. Rhode Island Co.*, 85 A. 1050.

§ 474½ (Me.) Evidence involving an opinion of the witness was properly excluded in an action against an agent for money received on the principal's behalf.—*Williams v. Williams*, 85 A. 43.

§ 501 (Del.Super.) The subscribing witnesses to a will may testify to their opinion of the soundness of mind of the testator, and all other witnesses must testify as to facts, and, if allowed to give their opinions, must base them on such facts.—In re *Miller's Will*, 85 A. 803.

(B) Subjects of Expert Testimony.

§ 506 (Me.) Though physicians may testify as to the mental condition of their patients, they may not give opinions as to the direct question to be determined.—In re *Whiting*, 85 A. 791.

§ 511 (Me.) Exclusion of expert testimony to rebut the defendant's opinion as to the genuineness of standards of comparison offered in proof of the principal's handwriting held error.—*Williams v. Williams*, 85 A. 43.

§ 514 (Conn.) The question whose duty it is to watch the glass and keep a proper amount of water in locomotive boiler *held* proper subject for expert testimony, in an action against an engineer for injuries from boiler explosion.—*Temple v. Gilbert*, 85 A. 380.

§ 533 (Conn.) Opinion of an expert as to the cost of repainting defendants' automobile and renewing certain woodwork and trimmings, claimed to have been rendered necessary by plaintiff's negligent treatment of it, and so properly chargeable to it, is competent.—*Holcomb Co. v. Clark*, 85 A. 376.

(C) Competency of Experts.

§ 537 (Me.) Attending physicians of good repute, who are not experts in mental diseases, may testify as to the mental condition of their patients.—In re *Whiting*, 85 A. 791.

§ 538 (Vt.) Doctors *held* not incompetent to testify, in an action for malpractice, as to the proper local standard treatment in the neighborhood in which defendant practiced, though they were somewhat more prominent, and their principal practice was in a community a few miles distant.—*Willard v. Norcross*, 85 A. 904.

§ 539 (R.I.) A question asked the witness, as to whether the headlight of a street car was of greater candle power than was used on other cars in the city, was improper as calling for technical knowledge which witness did not appear to possess.—*Canham v. Rhode Island Co.*, 85 A. 1050.

§ 543 (Md.) On an issue of the value of plaintiff's services in nursing decedent preceding his death, a witness, who had acted as an untrained nurse for 15 years, was properly permitted to state the value of the services rendered by plaintiff, who was also an untrained nurse.—*Doyle v. Gibson*, 85 A. 961.

§ 543 (Vt.) Where an experienced lumberman testified that he had done much cutting in the vicinity, knew the distance and the roads over which the lumber was taken, knew that there was quite a hill on the farm, but had not been on the land where this lumber was cut, and another witness testified that he thought that he knew where the lumber was cut, and that it was on the mountain across a certain pond, they were both qualified to testify as to the stumpage value of merchantable lumber of kinds taken.—*Lee v. Follensby*, 85 A. 915.

Where a witness testified that he had estimated the value of stumpage in a number of towns near the timber in question, and that he had special knowledge in respect to the value of stumpage, he was properly allowed to testify as to the stumpage value.—*Id.*

(D) Examination of Experts.

§ 553 (R.I.) A hypothetical question should embody all the conditions upon which it was based.—*Canham v. Rhode Island Co.*, 85 A. 1050.

Questions to an expert as to the proper and reasonable speed of approaching an interurban street car station, without referring to any rules of the company, or the surrounding conditions, were properly excluded as too general.—*Id.*

§ 554 (Vt.) Where a witness, called upon to give his opinion on the stumpage value of timber generally, limited his answers to "lumber of good quality, lumber that was solid, and lumber that was sound and all right," his testimony was sufficiently confined to a definite grade of lumber.—*Lee v. Follensby*, 85 A. 915.

§ 555 (Conn.) A question to a lawyer who had acted as counsel in the case whether in his judgment \$5,000 was a reasonable fee for the services performed by plaintiff's attorney was objectionable as not showing upon what facts the opinion was based.—*Stoddard v. Sagal*, 85 A. 519.

§ 555 (Me.) Opinions of physicians as to mental condition of their patients *held* admissible

when the facts upon which they base them are detailed to the jury.—In re *Whiting*, 85 A. 791.

XIV. WEIGHT AND SUFFICIENCY.

§ 586 (Del.) Testimony that no warning was given which deceased could have heard was not purely negative in character, when given by witnesses who, by reason of similar dangerous occupations, had special opportunities to better apprehend, and remember any such warning, if any had been given.—*Philadelphia, B. & W. R. Co. v. Gatta*, 85 A. 721.

§ 588 (Del.Super.) Where testimony is conflicting, it is the jury's duty to reconcile it, if possible, and, if they cannot, to accept that which is most worthy of credit, and reject the rest.—*Lupton v. Underwood*, 85 A. 965.

§ 596 (Pa.) Evidence of a contemporaneous parol agreement modifying a written contract must be clear and precise and carry a clear conviction of its truth and be sufficient to move the conscience of a chancellor to reform the instrument.—*Lowry v. Roy*, 85 A. 986.

EXAMINATION.

See Evidence, §§ 553-555; Witnesses, §§ 236-260.

EXCEPTIONS.

See Appeal and Error, §§ 261-275; Criminal Law, § 1050; Trial, §§ 280, 420.

EXCEPTIONS, BILL OF.

See Appeal and Error, §§ 422, 635, 712; Criminal Law, § 1149.

II. SETTLEMENT, SIGNING, AND FILING.

§ 40 (Del.Super.) Under Rev. Code 1892 amended to 1893, c. 851, c. 113, § 3, as amended by 25 Del. Laws, c. 238, authorizing extension of time for preparation and signing of a bill of exceptions, the court may only extend the time beyond the term, when an application therefor is made during the term.—*Lupton v. Underwood*, 85 A. 965.

§ 55 (R.I.) Where a petition to establish the truth of defendant's exceptions and the correctness of the transcript was supported by affidavits, and nothing was shown to the contrary, it will be granted.—*Kendall v. Rossi*, 85 A. 922.

EXCESSIVE DAMAGES.

See Damages, §§ 94, 132.

EXCISE.

See Intoxicating Liquors.

EXECUTION.

See Attachment; Exemptions; Recognizances. § 7; Scire Facias, § 1; Sheriffs and Constables, § 120.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 18 (Pa.) Where the name of defendant is changed after verdict for plaintiff from that of a joint-stock company to its president, and on a second trial a verdict is again rendered for plaintiff, an execution may properly be issued against the property of the association.—*Lepore v. Barrett*, 85 A. 21.

VII. SALE.

(A) Manner, Conduct, Validity, and Confirming or Vacating.

§ 258 (Pa.) An execution issued more than five years after entry of judgment, and levied on land acquired after such entry, was subject to the lien, not of the judgment, but of the levy, and, where no objection is raised that

a scire facias was not issued, the defendant cannot object in a collateral proceeding to the validity of the sale.—*Bryan v. Jones & Laughlin Steel Co.*, 85 A. 1089.

(B) Title and Rights of Purchaser.

§ 264 (N.J.Supp.) The purchaser at a judicial sale under execution takes only the interest of the defendant in execution; the doctrine of caveat emptor applying.—*Nelson v. Bock*, 85 A. 1009.

(E) Proceeds.

§ 326 (Pa.) Where proceeds of execution in one county are sufficient to pay a first lien except a small balance, the proceeds of an execution in another county after payment of the balance will not be applied to a second lien held by the creditor in the first county, which is subject to the lien of a claim of a third person in the other county.—*Herr v. Lancaster Trust Co.*, 85 A. 443.

The payment to an execution creditor of the proceeds of a sheriff's sale being involuntary, the creditor cannot apply the proceeds to whatever lien he pleases, but the law applies them to such liens as are divested in the order of their priority.—*Id.*

EXECUTORS AND ADMINISTRATORS.

See Abatement and Revival; Appeal and Error, §§ 77, 934, 1109; Attachment, § 272; Certification, § 41; Courts, § 82; Deeds, § 196; Descent and Distribution; Evidence, § 355; Trusts, §§ 156, 169; Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 35 (Conn.) Orders of the probate court removing an executor and appointing an administrator de bonis non could not be collaterally attacked for irregularity in the preliminary proceedings.—*Raughtigan v. Norwich Nickel & Brass Co.*, 85 A. 517.

§ 35 (R.I.) In order to have an administrator removed, petitioner must show some improper acts or neglect of duty, and cannot have him removed merely by showing that he was unfit for appointment in the first instance.—*Sayles v. Steere*, 85 A. 929.

III. ASSETS, APPRAISAL, AND INVENTORY.

§ 41 (Del.Ch.) Administrator of cestui que trust for life held entitled to the interest and income of the trust property calculated to the date of her death.—*Ford v. Wilson*, 85 A. 1073.

§ 47 (Pa.) Where a will gives an annuity to a son of testatrix for life, and then to his children, an excess of income after the son's death, applicable to the payment of arrearages, goes to the personal representatives of the son and not to his children.—*In re Reed's Estate*, 85 A. 16.

§ 52 (Me.) Where an agent admits the collection of money for his principal, he has the burden of proving payment of such money to the principal in an action by the principal's executrix to recover the same.—*Williams v. Williams*, 85 A. 43.

Evidence held to show that a tenant in common had not paid to his cotenant the latter's share of the proceeds of the common property so as to defeat the action of the cotenant's executrix to recover the same.—*Id.*

On an issue as to whether defendant had made large payments of money to plaintiff's testator within a certain period in satisfaction of indebtedness, evidence that during that time testator borrowed small sums of money was admissible.—*Id.*

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) In General.

§ 91 (R.I.) It is the policy of the courts to sustain, if possible, irregular acts of executors or administrators, where done in good faith and without detriment to the estate.—*Duffy v. McHale*, 85 A. 36.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

§ 205 (Md.) Plaintiff is entitled to recover against decedent's estate on an implied assumpsit for nursing and boarding him for three years preceding his death and following his discharge from the Soldiers' Home; plaintiff not being a member of decedent's family.—*Doyle v. Gibson*, 85 A. 961.

§ 218 (Pa.) Where a woman domiciled in England disposes of her personalty in England by one will, and that in Pennsylvania by another, held that, under the terms of the English will, the estate duty payable to the British government under St. 57 and 58 Vict. c. 30, was a testamentary expense payable out of the English property alone.—*In re Kortright's Estate*, 85 A. 109.

(B) Presentation and Allowance.

§ 224 (R.I.) While Gen. Laws 1896, c. 215, § 2, providing for the presentation of claims against decedent's estate to the administrator, was still in force, it was not necessary for an administrator, having a claim against his decedent, to file his claim in the probate court.—*Duffy v. McHale*, 85 A. 36.

§ 225 (Conn.) An assessment of a stockholder's liability by a court against stock held by a decedent's estate, accruing within the time limited for presenting claims against the estate, but not presented during that time, was barred under Gen. St. 1902, § 326.—*Bidwell v. Beckwith*, 85 A. 682.

§ 233 (Me.) Creditor delaying prosecution of claim against administratrix held not to have shown facts justifying relief in equity under Rev. St. c. 89, § 21, authorizing such relief where justice and equity require it, and the creditor has not been guilty of culpable neglect.—*Blunt v. McCoombs*, 85 A. 748.

§ 237 (Pa.) An orphans' court decree, awarding to a creditor his claim against the decedent's estate, is prima facie evidence in other proceedings of the correctness of the claim.—*Reichner v. Reichner*, 85 A. 877.

(D) Priorities and Payment.

§ 269 (Conn.) Assessments of a stockholder's liability against an estate of a deceased person ordered by a court, one accruing within the time allowed for presenting claims against the estate of a deceased person and one after that time, were "doubtful or disputed claims" within Gen. St. 1902, § 347, authorizing their compromise.—*Bidwell v. Beckwith*, 85 A. 682.

VII. DISTRIBUTION OF ESTATE.

§ 288 (Del.Ch.) Upon death of cestui que trust for life, where remainder failed, distribution, as in case of intestacy, held to be made by the testamentary trustee and not by the executor.—*Ford v. Wilson*, 85 A. 1073.

§ 293 (Del.Ch.) Where a surviving husband was his wife's administrator, it was immaterial in which capacity he settled for a distributable part of a personal estate to which his wife was entitled.—*Ford v. Wilson*, 85 A. 1073.

§ 297 (Del.Ch.) An executor was entitled to require a release from a testamentary trustee in making final settlement before paying over the amount to which the trustee was entitled.—*Ford v. Wilson*, 85 A. 1073.

§ 307 (Conn.) Where the beneficiaries under a will all approve of a division otherwise than provided for by the will, such distribution is valid, and the executor is protected against any inequity.—*Bidwell v. Beckwith*, 85 A. 682.

§ 310 (Pa.) Where, in the distribution of a partial account, a distributee does not appear, on a subsequent distribution when he does appear, the inequality will be corrected by awarding him enough to make up his portion of the distributive share of both funds.—*In re Reed's Estate*, 85 A. 138.

§ 315 (Pa.) The report of an auditor construing a legacy and awarding a sum to each of testator's grandchildren who were then minors was not conclusive on the grandchildren as to the share of one who died before the legacy was payable.—*In re Grothe's Estate*, 85 A. 141.

A distribution by an auditor of funds in the hands of an administrator, confirmed by court, was conclusive only as to the fund he was appointed to distribute, and an attempt to make an award out of the proceeds of real estate not sold was beyond his power.—*Id.*

§ 318 (Conn.) Where a probate court, upon due application, authorized the settlement of claims against the estate, and from its order no appeal had been taken, one taking under the will, who had actual notice of the application for leave to settle, cannot set up a defense thereto in an action against him by the executor for contribution.—*Bidwell v. Beckwith*, 85 A. 682.

Where the court has found that an executor has, without knowledge of an existing claim, distributed the estate, and thereafter an accruing claim is presented, the executor may, after due defense, await judgment and then compel the beneficiaries to satisfy the judgment, or he may compel them to repay a sufficient amount to satisfy the claim and his own legitimate expenses in its settlement.—*Id.*

In an action to compel contribution by distributees to an after-accruing claim, evidence held to warrant a finding that the settlement between the executor and a beneficiary of an estate was a distribution of the estate and not a sale.—*Id.*

Where the life tenant and the remainderman of an estate mutually entered into a distribution of the estate, the life tenant being the executor of the estate, each should pay his proportion of an after-accruing claim, regardless of which had the real estate.—*Id.*

An order of a probate court authorizing the compromise of certain claims accruing after distribution was a determination of the existence thereof, and it made no difference that authority had not yet been given to the receiver, with whom such compromise was made, by the court, and the executor could at once compel the beneficiaries to repay an amount sufficient to cover the amount agreed on.—*Id.*

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(A) When Authorized.

§ 327 (Pa.) Direction by testator to executor to sell his real estate and distribute the proceeds does not cut jurisdiction of court to order sale to pay debts.—*In re Acklin's Estate*, 85 A. 862.

(C) Sale.

§ 372 (Pa.) A purchaser at an executors' sale will not be compelled to take a lot three feet less in frontage than the width advertised, and three feet more in distance from a cross-street.—*Keily v. Saunders*, 85 A. 9.

§ 380 (Pa.) Two years after sale of decedent's real estate to pay debts has been made, party in interest cannot have the sale set aside for inadequacy of price.—*In re Acklin's Estate*, 85 A. 862.

§ 388 (Pa.) That a purchaser at an executors' sale saw the premises does not prevent him from demanding a conveyance of a lot of the full width advertised, where the decedent

owned an adjoining lot, and a simple inspection would not have disclosed a discrepancy in the frontage.—*Keily v. Saunders*, 85 A. 9.

X. ACTIONS.

§ 437 (Me.) Where notes were renewed by new notes executed by all the parties except a deceased indorser, a right of action by another indorser against the deceased indorser on the agreement of indemnity accrued within Rev. St. c. 89, § 17, concerning limitation of actions against executors and administrators.—*Blunt v. McCoombs*, 85 A. 748.

XL ACCOUNTING AND SETTLEMENT.

(B) Proceedings for Accounting.

§ 469 (N.J.Ch.) Equity will not interfere in the settlement of accounts of executors and administrators if any progress has been made in the probate court, unless some good cause is shown.—*Outwater v. Benson*, 85 A. 206.

§ 471 (R.I.) Under Gen. Laws 1909, c. 313, §§ 1, 2, requiring an inventory and sworn appraisal, chapter 319, § 2, specifying the items to be contained in an executor's account, chapter 320, § 1, requiring a bond conditioned to return an inventory, and chapter 311, § 8, relating to the validity of decrees of the probate court in matters within its jurisdiction, and that the filing of an executor's inventory and appraisal was a prerequisite to a legal accounting.—*Hayes v. Welling*, 85 A. 630.

§ 472 (Pa.) On application for citation to compel executors to file an account, whether they should be charged with any assets, in addition to the estate shown by the account, cannot be determined.—*In re Farmer's Estate*, 85 A. 148.

(E) Stating, Settling, Opening, and Review.

§ 507 (N.J.) The orphans' court has no power, under Orphans' Court Act, §§ 122, 126, to refer to a master in chancery the matter of stating the accounts of an executor until he has filed his account, and exceptions are made thereby some interested party.—*Smith v. Smith*, 85 A. 226.

§ 507 (Pa.) Where the property of an estate was transferred to a corporation to continue the testator's business, the orphans' court had no jurisdiction in auditing the executor's accounts to distribute the corporation's profits, nor allow an executor compensation for services as manager of the corporation.—*In re Goetz's Estate*, 85 A. 65.

§ 510 (R.I.) Where the court on appeal from a decree allowing an executor's account has sustained the first exception, and determined that a remission to the superior court with direction to reverse was necessary, it cannot proceed to decide questions raised by the other exceptions.—*Hayes v. Welling*, 85 A. 630.

§ 513 (R.I.) The acceptance and recording of an inventory is not a judgment concluding the correction of a mistake therein, and under Gen. Laws 1909, c. 319, § 8, providing that an executor's account shall charge him with all property, though not inventoried, the parties to an accounting are not so concluded by the inventory and appraisal as to prevent a full and fair accounting ultimately.—*Hayes v. Welling*, 85 A. 630.

EXEMPLARY DAMAGES.

See Damages, §§ 87, 94.

EXEMPTIONS.

See Homestead; Taxation, §§ 183, 318.

I. NATURE AND EXTENT.

(C) Property and Rights Exempt.

§ 48 (Me.) In view of Rev. St. c. 88, § 53, subd. 6, as amended by Laws 1909, c. 256, and

further amended by Laws 1911, c. 175, providing that \$10 of the debtor's wages earned within the month preceding the service of process "shall be exempt in all cases," \$8 due the debtor for wages held exempt from attachment within Rev. St. c. 114, § 28.—*Jumper v. Moore*, 85 A. 485.

EXHIBITS.

See Evidence, § 194.

EXPENSES.

See Executors and Administrators, § 218.

EXPERT TESTIMONY.

See Evidence, §§ 506-555.

EXPLOSIVES.

See Master and Servant, §§ 150, 158, 281, 286, 332; Trial, §§ 194, 251.

EX POST FACTO LAWS.

See Constitutional Law, § 186.

EXPRESS COMPANIES.

See Master and Servant, §§ 192, 316.

EXTENSION.

See Exceptions, Bill of, § 40.

FACTORS.

See Brokers.

FAIRS.

See Agriculture.

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 6 (Me.) A plaintiff, suing for false imprisonment based on her wrongful detention by defendant on a yacht, must show physical restraint, which is done by showing that defendant refused to furnish a boat to enable her to land.—*Whittaker v. Sandford*, 85 A. 399.

(B) Actions.

§ 23 (Me.) A plaintiff suing for false imprisonment may show when and how he obtained his liberty, and may show that he was discharged from restraint by habeas corpus.—*Whittaker v. Sandford*, 85 A. 399.

In an action for false imprisonment based on plaintiff's wrongful detention by defendant on a yacht, evidence that plaintiff obtained her liberty on habeas corpus held admissible to show that she had been restrained of her liberty.—*Id.*

§ 25 (Me.) In an action for false imprisonment based on plaintiff's wrongful detention by defendant on a yacht, evidence that, by virtue of the religious character attributed to defendant as leader of a sect, he possessed and exercised supreme control over the members, held admissible.—*Whittaker v. Sandford*, 85 A. 399.

§ 31 (Me.) In an action for false imprisonment based on plaintiff's wrongful detention by defendant on a yacht, evidence held to justify a finding that defendant wrongfully detained plaintiff.—*Whittaker v. Sandford*, 85 A. 399.

§ 36 (Me.) \$1,100 damages for false imprisonment held excessive and to be reduced to \$500.—*Whittaker v. Sandford*, 85 A. 399.

FALSE PRETENSES.

§ 51 (N.J.) In a prosecution for obtaining money upon the faith of a false written statement of financial conditions, evidence held sufficient to go to the jury.—*State v. Fenn*, 85 A. 454.

FEDERAL COURTS.

See Courts, § 489.

FEES.

See Appeal and Error, § 370; Attorney and Client, §§ 130-166.

FEE SIMPLE.

See Dower, §§ 4, 49; Wills, § 600.

FELLOW SERVANTS.

See Master and Servant, §§ 177-192.

FIDELITY INSURANCE.

See Insurance, § 436.

FILING.

See Abatement and Revival; Appeal and Error, § 455.

FINAL JUDGMENT.

See Appeal and Error, §§ 77, 78.

FINDINGS.

See Appeal and Error, §§ 268, 981, 1008-1022, 1071; Trial, §§ 392-404.

FINES.

See Criminal Law, § 992; Recognizances, § 2.

FIRE INSURANCE.

See Insurance.

FIREMEN.

See Officers, § 69.

FIXTURES.

§ 15 (Me.) Heavy machines which the owner has attached to a building on which he has a lease are not fixtures and exempt from attachment on the ground that they are part of the realty.—*Tolman v. Carleton*, 85 A. 390.

§ 15 (Pa.) The casing in an oil well, and other necessary appliances and machinery for pumping a well on leased premises, are trade fixtures and removable by the owner during the term of the lease.—*Robinson v. Harrison*, 85 A. 879.

§ 18 (Del.Ch.) A lease of mortgaged land having authorized the lessee to build on the premises and remove the building during the term, the lessee may, as against the mortgagee, during the term, the mortgage not having been foreclosed, remove it, where the original security will not be thus impaired.—*Equitable Guarantee & Trust Co. v. Hukill*, 85 A. 60.

§ 21 (Pa.) Where trustees for corporate creditors sell machinery of the company, and it is detached from the real estate and part of it removed, a subsequent purchaser of the realty, with notice of the sale of the machinery, cannot claim the portion of the machinery allowed to remain on the premises.—*Igoe v. Hansen*, 85 A. 1131.

§ 31 (Del.Ch.) In the absence of an agreement in a lease to the contrary, a tenant owing rent in arrear may remove trade fixtures, subject to the landlord's right to distrain.—*In re Delaware Candy Co.*, 85 A. 1069.

§ 31 (Pa.) The right of a tenant to remove trade fixtures arises from an implied grant that they were placed on the leased premises to enable the lessee to use them during the term and then remove them.—*Robinson v. Harrison*, 85 A. 879.

§ 32 (Pa.) Where a tenant having trade fixtures on premises secures an extension without reservation of right to remove the fixtures, the landlord has no right to restrain their removal before the expiration of the second lease.—*Robinson v. Harrison*, 85 A. 879.

§ 33 (Del.Ch.) A provision in a lease that the tenant might remove trade fixtures provided there was no rent in arrear held to displace the tenant's common-law right of removal, and the fixtures having been removed by the tenant's receiver in insolvency and sold, the landlord was entitled to a lien on the proceeds for rent in arrear.—*In re Delaware Candy Co.*, 85 A. 1069.

FLOWAGE.

See *Waters and Water Courses*, § 179.

FOOD.

§ 1 (N.H.) That the wrapping of loaves of bread in paper before they are offered for sale, as required by statute, is attended with some expense, does not prove that the requirement is unreasonable.—*State v. Normand*, 85 A. 899.

Laws 1911, c. 15, by section 1, forbidding the maintenance of any unhealthful condition where food is produced, stored, or sold, and by section 2, defining such conditions, held within the police power so far as its purpose to secure greater cleanliness in food was concerned.—*Id.*

§ 25 (Me.) A carrier of passengers is not an insurer of the quality of canned goods furnished on its dining cars, and is not liable for injuries to a passenger eating canned goods bought from a reliable dealer and guaranteed under the Pure Food Law, and containing no defect discoverable by the eye, smell, or taste.—*Bigelow v. Maine Cent. R. Co.*, 85 A. 396.

FORECLOSURE.

See *Mortgages*, §§ 323-567.

FOREIGN CORPORATIONS.

See *Corporations*, §§ 636-691.

FOREIGNERS.

See *Aliens*.

FOREIGN JUDGMENTS.

See *Judgment*, §§ 815, 828.

FORFEITURES.

See *Associations*; *Estoppel*, § 78; *Landlord and Tenant*, §§ 103, 111, 112; *Recognizances*, § 7; *Sheriffs and Constables*, § 120.

FORGERY.

See *Aliens*.

FRANCHISES.

See *Gas*.

FRATERNAL INSURANCE.

See *Insurance*, §§ 719-815.

FRAUD.

See *Appeal and Error*, § 1050; *Bankruptcy*, § 426; *Bills and Notes*, § 103; *Contracts*, §§ 94, 265; *Courts*, § 19; *Divorce*, § 167; *Evidence*, §§ 106, 135, 429, 434; *False Pretenses*; *Fraudulent Conveyances*; *Insurance*, §§ 553, 665; *Release*, § 57; *Schools and School*

Districts, § 27; *Sheriffs and Constables*, § 120, 138; *Trial*, § 140; *Vendor and Purchaser*, § 306.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 9 (Me.) A plaintiff suing for fraud must show that the representation was intentionally made with intent that plaintiff should act on it; that it was false and known by defendant to be false; that the representation was not an opinion, was material, and relied on by plaintiff to his damage.—*Pierce v. Cole*, 85 A. 567.

§ 11 (Me.) Where an agent, employed by an owner of an undivided interest in land to sell it, stated to a prospective purchaser as a fact and as an inducement to purchase, that the owner was the sole owner, and the prospective purchaser, inexperienced in such transactions, relied on the representations and purchased the premises, the agent was guilty of making actionable misrepresentations.—*Welch v. McGlinchey*, 85 A. 942.

§ 12 (Conn.) While a promise to do an act in the future cannot be untrue at the time it is made if made in bad faith and with no intention of performing, it constitutes a fraudulent representation.—*McLaughlin v. Thomas*, 85 A. 370.

II. ACTIONS.

(A) Rights of Action and Defenses.

§ 31 (Conn.) Where plaintiff discovered that his joint purchaser of land had fraudulently exaggerated the amount paid for the land, he could either rescind the contract and recover payments made, or accept the contract and recover damages occasioned by the fraud.—*Lowe v. Hendrick*, 85 A. 795.

(B) Parties and Pleading.

§ 41 (Md.) Fraud must be distinctly alleged and proved to be available.—*American Surety Co. of New York v. Spice*, 85 A. 1031.

(C) Evidence.

§ 50 (Me.) Fraud must be proved and not merely surmised.—*Spiller v. Bechard*, 85 A. 732.

§ 52 (Me.) In an action for deceit in the sale of a farm, evidence of an admission by defendant that he had set a dishonest trap for a third person with reference to a sale of personal property which plaintiff thereafter bought was inadmissible.—*Pierce v. Cole*, 85 A. 567.

(D) Damages.

§ 59 (Conn.) Where a copurchaser fraudulently exaggerated the price he paid for land, the measure of damages was the difference between what was paid by plaintiffs for their shares and what they should have paid; it being immaterial what the true value was.—*Lowe v. Hendrick*, 85 A. 795.

(E) Trial, Judgment, and Review.

§ 65 (Conn.) Instruction that facts and circumstances from which fraud might be inferred should be such as to lead fairly and reasonably to the inference, as "fraud is not otherwise to be presumed," held not erroneous, as implying that fraud might be presumed in some cases.—*McLaughlin v. Thomas*, 85 A. 370.

FRAUDS, STATUTE OF.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 56 (Conn.) A contract to share in the profits to be derived from the purchase, improvement, renting, and sale of certain land was not within the statute of frauds, as contemplating a transfer of lands, or of some interest therein.—*Maguire v. Kiesel*, 85 A. 689.

§ 56 (Me.) A contract to extend the time for redemption of a mortgage between a mortgagee

and one having no legal or equitable interest in the equity of redemption is within the statute of frauds and unenforceable unless in writing and supported by a valuable consideration.—*Dow v. Bradley*, 85 A. 896.

Bankrupt mortgagor held to have a right to redeem, and hence an oral agreement to extend the time to redeem was not void.—*Id.*

IX. OPERATION AND EFFECT OF STATUTE.

§ 129 (Me.) An oral agreement between a mortgagee and mortgagor to extend the time of redemption, supported by no consideration except the promise of the redemption, when acted upon so that the parties cannot be placed in statu quo, is not within the statute of frauds.—*Dow v. Bradley*, 85 A. 896.

FRAUDULENT CONVEYANCES.

I. TRANSFERS AND TRANSACTIONS INVALID.

(A) Grounds of Invalidity in General.

§ 3 (Me.) Pub. Laws 1905, c. 114, regulating the sale of merchandise in bulk, held constitutional.—*McGray v. Woodbury*, 85 A. 491.

(C) Property and Rights Transferred.

§ 47 (Conn.) Pub. Acts 1909, c. 21, relative to sales of goods in bulk, held to have no application to persons selling only at wholesale.—*Connecticut Steam Brown Stone Co. v. Lewis*, 85 A. 534.

Such act held to have no application to retail dealers selling goods produced or manufactured by themselves.—*Id.*

Whether such act applies to persons changing materials purchased before selling depends upon the extent of the changes and the other facts of each case.—*Id.*

Whether such act applies to persons selling at retail in connection with another business depends on the extent of such sales and the other facts of each case.—*Id.*

Such act held inapplicable to stonecutters purchasing stone slabs and making therefrom stone articles, the large proportion of the value of which is made up of their labor.—*Id.*

§ 47 (Me.) Where a contract for the sale of merchandise in bulk was modified by mutual consent and the parties undertook to comply with Pub. Laws 1905, c. 114, but creditors attached the merchandise within five days thereafter, there could be no sale.—*McGray v. Woodbury*, 85 A. 491.

(I) Retention of Possession or Apparent Title by Grantor.

§ 139 (Conn.) The title of a buyer who does not take possession is not good as against a subsequent attaching creditor, without notice.—*Patchin v. Rowell*, 85 A. 511.

§ 147 (Conn.) Where a buyer in possession, without paying the price, verbally declared that he placed the goods in possession of the seller, who gave the buyer a bill of sale of goods with other goods then sold, but there was no change of possession, the transaction, even if constituting a sale, did not convey title as against attaching creditors without notice.—*Patchin v. Rowell*, 85 A. 511.

FRIGHT.

See Railroads, § 443.

GAMING.

See Telegraphs and Telephones.

GARBAGE.

See Municipal Corporations, § 237.

GARNISHMENT.

See Justices of the Peace, §§ 87, 128.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 41 (R.I.) A person who contracted to pay plaintiff's debtor a certain sum for certain work, payment to be made in July, could not be charged as garnishee in an action against the debtor under a writ served on him in June and while the work was not completed.—*Johnson v. Healey*, 85 A. 938.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 127 (Pa.) A garnishee in an attachment execution may generally have any defense against the plaintiff that he could have made against his original creditor.—*Reichner v. Reichner*, 85 A. 877.

GAS.

§ 6 (Pa.) A consolidated company, one of whose constituents, organized in 1883 under Act April 29, 1874 (P. L. 73), supplied a borough with natural gas, and in 1886 accepted the provisions of the Natural Gas Act of May 29, 1885 (P. L. 29), while the other company had a right to serve the borough, but never did so, may serve the borough under the franchises of the first company without restrictions as to rates imposed by the franchises of the second company.—*Punxsutawney Borough v. T. W. Phillips Gas & Oil Co.*, 85 A. 1003.

That the stock of a gas company was acquired by the owners of the stock of another company, and that the proceeds of its product, after payment of expenses, were turned into the treasury of the latter company, does not extinguish the former company's individual franchise or rights.—*Id.*

GIFTS.

See Husband and Wife, § 49½.

I. INTER VIVOS.

§ 47 (Pa.) One claiming money as a gift from a person since deceased has the burden of showing executed gift by clear and convincing evidence.—*In re Smith's Estate*, 85 A. 76.

§ 49 (Pa.) An administrator, a grandson of the decedent, will be surcharged with the balance of moneys claimed by him as a gift from decedent; the only evidence of the gift being a writing without consideration, whereby she did "agree to give" him such sum and the acceptance by her from him of the balance of the amount due her.—*In re Smith's Estate*, 85 A. 76.

§ 49 (R.I.) There could be no finding of a gift of a savings bank deposit by decedent, where the evidence did not show that he ever intended to make a gift, and it appeared that he always retained the passbook in his possession down to the time of his death.—*Providence Inst. for Savings v. Wallace*, 85 A. 923.

GRAND JURY.

See Indictment and Information; Witnesses, § 196.

§ 7 (N.J.) 3 Comp. St. 1910, p. 2966, § 8, providing that grand jurors shall be summoned by the sheriff or deputy or coroner or elisors, empowers the court of oyer and terminer to appoint elisors to select and summon grand jurors, when both the sheriff and coroners are disqualified.—*State v. Zeller*, 85 A. 237.

§ 26 (N.J.Sup.) Persons concerned in the publication of a libelous article being offenders against the law, such publication was a proper subject of investigation by the grand jury.—*In re Grunow*, 85 A. 1011.

§ 36 (N.J.Sup.) Where a grand jury was investigating the publication of a libel by a newspaper, the names of the persons who gave the reporter the information on which the article was based were both material and relevant, so that the reporter's refusal to disclose the same constituted a contempt.—*In re Grunow*, 85 A. 1011.

GUARANTY INSURANCE.

See Insurance, § 436.

GUARDIAN AD LITEM.

See Infants, §§ 77-92.

GUARDIAN AND WARD.

See Conversion, § 22; Infants, §§ 77-92; Insane Persons, §§ 36, 38; Limitation of Actions, § 102.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

§ 37 (R.I.) It is the policy of the courts to sustain, if possible irregular acts of a guardian, where done in good faith and without detriment to the estate.—*Duffy v. McHale*, 85 A. 36.

§ 68 (R.I.) A guardian may recover advances to preserve his ward's real estate, when the ward's income is insufficient to pay his debts and provide for his maintenance.—*Duffy v. McHale*, 85 A. 36.

VI. ACCOUNTING AND SETTLEMENT.

§ 153 (R.I.) An annual partial account by a guardian, not containing all his disbursements and advancements, is not a final account.—*Duffy v. McHale*, 85 A. 36.

HABEAS CORPUS.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 99 (N.J.Ch.) Where parents live separately, either parent has the right, in a proper case, to see a legitimate child in the custody of the other parent, and the same right exists in case of a bastard child, in absence of a showing by the objecting party that such right is detrimental to the child's best interests.—*Baker v. Baker*, 85 A. 816.

HANDWRITING.

See Evidence, §§ 197, 271, 511.

HARMLESS ERROR.

See Appeal and Error, §§ 1048-1071; Criminal Law, §§ 1170-1172.

HAWKERS AND PEDDLERS.

§ 3 (Del.Gen.Sess.) An agent of a merchant having a permanent place of business in a town in the state, who solicits orders for merchandise, and who forwards them to the merchant, who sends the goods ordered to the agent, who delivers them to the prospective purchasers and collects the price, is not a peddler within Rev. Code 1852, amended to 1893, p. 548, c. 68, § 3, imposing a license on peddlers.—*State v. Dressner*, 85 A. 881.

HEALTH.

See Criminal Law, § 90; Insurance, § 291.

I. BOARDS OF HEALTH AND SANITARY OFFICERS.

§ 3 (N.J.Sup.) P. L. 1911, p. 462, being an act relating to regulating and providing for the government of cities, does not abolish the boards of health organized under the general act of 1887 (2 Comp. St. 1910, p. 2656 et seq.)

in municipalities which adopt such act as a governmental scheme.—*Istvan v. Naar*, 85 A. 1012.

§ 18 (N.J.Sup.) If the local boards of health transcend their authority in establishing quarantine regulations in a given case, the health act, conferring the power to make such regulations, itself provides a remedy to a party aggrieved.—*Board of Health of Cranford Tp. in Union County v. Court of Common Pleas in and for Union County*, 85 A. 217.

II. REGULATIONS AND OFFENSES.

§ 24 (N.J.Sup.) It was not within the legislative intent, in conferring on local boards of health the power to prescribe quarantine regulations, to subject the discretion of the boards to the review of the local courts.—*Board of Health of Cranford Tp. in Union County v. Court of Common Pleas in and for Union County*, 85 A. 217.

HEARING.

See Equity, § 373.

HEARSAY.

See Criminal Law, §§ 419, 420.

HEARSAY EVIDENCE.

See Evidence, § 322.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

See Adverse Possession, § 8; Bridges; Certiorari, § 31; Damages, § 208; Dedication; Ejectment, § 9; Street Railroads, § 86; Towns, § 39; Trial, § 203.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(D) Title to Fee and Rights of Abutting Owners.

§ 86 (N.J.) A member of the general public and an abutting owner, has a privilege of passage and use of a public highway not incongruous with the purpose for which it was created.—*Jarman v. Freeman*, 85 A. 184.

A member of the general public, and an abutting owner, cannot be enjoined from using a public highway, so long as he does not unreasonably interfere with other persons in their enjoyment of it.—*Id.*

V. REGULATION AND USE FOR TRAVEL.

(A) Obstructions and Encroachments.

§ 157 (N.J.Sup.) Right of property owner to attack ordinance passed pursuant to P. L. 1899, p. 372 (4 Comp. St. 1910, p. 5585), empowering a township committee to make ordinances for the removal of dirt from highways, held barred by laches where he made no attack until six years after its passage.—*Weed v. Township Committee v. Hillsdale*, Bergen County, 85 A. 329.

Under an ordinance passed pursuant to P. L. 1899, p. 372 (4 Comp. St. 1910, p. 5585), empowering township committees to require the removal of obstructions, a township committee was empowered to require the removal of an accumulation of sand from the gutter fronting a party's premises within five days, as an alternative to prosecution.—*Id.*

A property owner can possess no interest in a road superior to the public easement which carries with it the implied power to remove obstructions.—*Id.*

A requirement that a property owner remove sand from the gutter in front of his premises, being a ministerial act of the township committee, was properly made by resolution.—*Id.*

(B) Use of Highway and Law of the Road.

§ 184 (N.H.) One charged with negligence in driving a horse on a highway may show that he understood that the horse was safe and kind.—*Ferryall v. Youlden*, 85 A. 786.

Under a declaration alleging that defendant was negligent in driving an unsafe horse on a highway, evidence that one who had sold the horse to defendant stated that his wife had driven the horse, was competent to prove defendant's understanding of the character of the horse.—*Id.*

(C) Injuries from Defects or Obstructions.

§ 213 (Md.) In an action against a county for injuries to plaintiff's person, horse, wagon, and harness from a defective road, *held*, on the evidence, that the question of defendant's liability was for the jury.—*Board of Com'rs of Howard County v. Pindell*, 85 A. 1041.

§ 213 (Pa.) In an action to recover for injuries received by alleged defects in a highway, whether the supervisors were negligent in failing to furnish a guard rail on a narrow road next to a declivity was for the jury.—*Kerr v. Kiskiminetas Tp.*, 85 A. 1084.

HOMESTEAD.**I. NATURE, ACQUISITION, AND EXTENT.****(D) Property Constituting Homestead.**

§ 62 (Vt.) The owner of a homestead right, not set out, is not entitled thereby to license the cutting of timber on lands three-fourths of a mile from the dwelling house, and separated by a fence from the intervening pasture land; there being but one dwelling house on the farm, and this and the outbuildings being worth \$2,000; the homestead not extending to any part beyond that portion of the dwelling and land in connection therewith to the value of \$500.—*Lee v. Follensby*, 85 A. 915.

HOMICIDE.

See Criminal Law, §§ 369, 538.

VI. INDICTMENT AND INFORMATION.

§ 142 (N.J.Sup.) An indictment charging that defendant committed an assault upon E. with intent to kill him, may be sustained by proof that the assault was upon E. with the intent to kill G.—*State v. Gallagher*, 85 A. 207.

VIII. TRIAL.**(B) Questions for Jury.**

§ 282 (Pa.) On trial for murder the question of degree is for the jury.—*Commonwealth v. Harris*, 85 A. 875.

(C) Instructions.

§ 286 (N.J.) An instruction that the human mind acts so quickly that if defendant shot and had an interval of time, however short, to form the intention, it is enough if he formed the intention and carried it out, and that is what is meant by deliberation, is erroneous.—*State v. Clayton*, 85 A. 173.

§ 308 (Pa.) Instruction that the theory of the commonwealth is that the homicide was a willful, premeditated killing, followed by instructions on the subject and a charge that the jury should fix the degree, did not take the question of degree from the jury.—*Commonwealth v. Harris*, 85 A. 875.

X. APPEAL AND ERROR.

§ 332 (Pa.) Under Act March 15, 1870 (P. L. 15), the Supreme Court, on appeal from a conviction of murder of the first degree, is limited,

on review of evidence, to the inquiry whether competent evidence to sustain a conviction was presented to the jury.—*Commonwealth v. Harris*, 85 A. 875.

§ 340 (N.J.) An instruction that if defendant had any interval of time, however short, to form the intention to shoot, and did form the intention, and carried it out, that is what is meant by deliberation, is not rendered harmless by a correct definition in the charge as to the degrees of murder.—*State v. Clayton*, 85 A. 173.

HORSE RACING.

See Officers, § 36.

HOSPITALS.

See States, § 110; Statutes, §§ 82, 121.

HUSBAND AND WIFE.

See Adoption; Adultery; Appeal and Error, §§ 422, 1057; Bigamy; Conversion, § 22; Curtesy; Descent and Distribution, § 53; Divorce; Dower; Evidence, §§ 87, 151, 266; Executors and Administrators, § 293; Marriage; Trial, § 133; Witnesses, §§ 188, 190, 240, 267, 359, 391.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 11 (Conn.) Where a husband treats stock held by his wife as though owned by a feme sole, and does not assert his right to its possession and income, he will be deemed to have divested himself of his marital statutory rights over it, and to have vested her with its sole and separate estate.—*Bidwell v. Beckwith*, 85 A. 682.

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

§ 49½ (Me.) That a husband owning a deposit in a savings bank caused the entries in the bank ledger and the deposit book to be changed so as to make the deposit stand in the joint names of himself and wife, with a statement that the money "may be drawn by either in any event," *held* insufficient to show any gift of the bank deposit by the husband to the wife in his lifetime.—*Staples v. Berry*, 85 A. 303.

V. WIFE'S SEPARATE ESTATE.**(C) Liabilities and Charges.**

§ 152 (Pa.) Coverture of a covenantor, in an instrument filed to create a lien on real property, was not ground for striking the covenant from the record.—*Green v. Green*, 85 A. 70.

§ 162 (Conn.) The acceptance of stock in 1899 by a woman, married in 1872, created a contract between her and the corporation, and she became liable for any part of the share of the capital stock unpaid, and also for the amount of an assessment thereafter arising through an obligation created by law existent at the date of the acceptance.—*Bidwell v. Beckwith*, 85 A. 682.

§ 169 (N.J.Ch.) Where the husband did not join in a mortgage of the separate estate of the wife, it was not valid as a mortgage or a specific lien, but equity will declare and enforce a lien against such estate.—*Realty Title & Mortgage Co. v. Schaaf*, 85 A. 602.

VI. ACTIONS.

§ 208 (N.J.) Implied promise of a lodger to pay for nursing and board furnished by a married woman in the house of her husband *held* to be to the husband and not the wife, so that she could not recover thereon.—*Stevenson v. Akarman*, 85 A. 168.

§ 214 (Conn.) If a husband acted alone, independently of his wife, in ejecting plaintiff from rooms rented, he alone would be liable, but if she acted alone, or he acted as her agent, or if she knew of and acquiesced in his acts, she would be liable, and, if they acted in concert, both would be liable.—*Mathews v. Livingston*, 85 A. 529.

X. ENTICING AND ALIENATING.

§ 325 (Del.Super.) Alienation of the affections of plaintiff's husband is an injury to her property rights for which the wrongdoer is liable in damages.—*Lupton v. Underwood*, 85 A. 965.

The gist of an action for alienation of affections is the loss of the consortium; loss of the affections being matter of aggravation, and loss of husband's services or other pecuniary loss immaterial.—*Id.*

In an action for alienation of affections, it is sufficient to sustain a recovery that defendant's wrongful acts were the controlling cause of plaintiff's loss of consortium; it not being essential that they were the sole cause.—*Id.*

§ 325 (Vt.) A wife suing for the alienation of the affections of her husband must, to recover compensatory damages, show an intentional alienation, but need not show that defendant's acts were malicious.—*Miller v. Pearce*, 85 A. 620.

A defendant in an action by a wife for the alienation of the affections of her husband based on her adultery with the husband as a means of alienation is liable whether she was the seducer or the seduced.—*Id.*

§ 326 (Del.Super.) Unhappiness or even separation between plaintiff and her husband, or the fact that he had little affection for her, was no defense to an action for alienation.—*Lupton v. Underwood*, 85 A. 965.

§ 326 (Vt.) An action by a wife for the alienation of the affections of her husband is not defeated by the fact that the wife was entirely estranged from her husband before his acquaintance with defendant.—*Miller v. Pearce*, 85 A. 620.

§ 330 (Del.Super.) Under 14 Del. Laws, c. 550, § 4, a married woman *held* entitled to sue in her own name for the alienation of the affections of her husband.—*Lupton v. Underwood*, 85 A. 965.

§ 332 (Vt.) An action for alienation of affections and an action for criminal conversation are for the same cause of action based on loss of consortium, and, where the declaration alleging adultery as one means of alienation is proved, a recovery is authorized.—*Miller v. Pearce*, 85 A. 620.

§ 333 (Del.Super.) In an action for alienation of affections, it will be presumed that plaintiff's husband had affection for her up to the time of their separation, in the absence of evidence to the contrary.—*Lupton v. Underwood*, 85 A. 965.

In an action for alienation of a husband's affection, evidence that he had little affection for the wife *held* admissible in mitigation of damages.—*Id.*

§ 333 (Pa.) In an action by a wife against her father-in-law for alienation of her husband's affections, the proof required is greater than against a mere stranger.—*Ickes v. Ickes*, 85 A. 885.

In an action for alienation of affections of plaintiff's husband, resulting in his desertion of plaintiff, defendant may show declarations made by the husband the day before leaving as to his intention to leave.—*Id.*

In an action against plaintiff's father-in-law for alienation of her husband's affections, evidence of her efforts and expenses to support her child, and cross-examination of defendant as to authority to collect the wages of plaintiff's husband and the amount received therefrom, was inadmissible.—*Id.*

§ 333 (Vt.) A wife suing for the alienation of the affections of her husband, and demanding

exemplary damages, may prove the value of defendant's property.—*Miller v. Pearce*, 85 A. 620.

An action by a wife for the alienation of her husband's affections is sustained by proof that defendant enticed, induced, and persuaded the husband.—*Id.*

§ 334 (Del.Super.) In an action for alienation of affections of plaintiff's husband, plaintiff is entitled to recover compensatory damages for loss of husband's comfort, society, and support.—*Lupton v. Underwood*, 85 A. 965.

Where defendant's conduct causing alienation of the affections of plaintiff's husband was wanton and malicious, plaintiff was entitled to recover punitive damages.—*Id.*

In a suit by a wife for alienation of the affections of her husband, a verdict allowing her \$4,000 was excessive, and should be reduced to \$2,500.—*Id.*

§ 335 (Del.Super.) In an action for alienation of the affections of plaintiff's husband, evidence *held* to require submission of defendant's liability to the jury.—*Lupton v. Underwood*, 85 A. 965.

§ 335 (Pa.) In an action by a wife against father-in-law for alienating her husband's affections, if there is evidence to sustain a verdict, it must go to the jury.—*Ickes v. Ickes*, 85 A. 885.

HYPOTHETICAL QUESTIONS.

See Evidence, §§ 553, 554.

ICE.

See Carriers, § 286.

IDENTIFICATION.

See Elections, § 194.

IDENTITY.

See Judgment, §§ 584, 585.

ILLEGITIMATE CHILDREN.

See Bastards.

IMPEACHMENT.

See Witnesses, §§ 321-388.

IMPRISONMENT.

See Arrest; Criminal Law, § 1208.

IMPROVEMENTS.

See Municipal Corporations, §§ 294-586.

INCOME.

See Executors and Administrators, § 41; Wills, § 728.

INCOMPETENT PERSONS.

See Insane Persons.

INDEMNITY.

See Bankruptcy, § 426.

§ 9 (Me.) Where an accommodation indorser by arrangement with the other indorsers paid a number of notes, a person agreeing to indemnify him against loss on some of the notes was liable, although the notes actually paid by him were not those subject to the agreement.—*Blunt v. McCoombs*, 85 A. 748.

§ 11 (Me.) Right of action by accommodation indorsers of corporation's notes against an indemnitator *held* to have accrued when they took assignments of the notes and participated in a reorganization by which they received preferred stock in exchange for the notes.—*Blunt v. McCoombs*, 85 A. 748.

INDEPENDENT CONTRACTORS.

See Master and Servant, §§ 316-332.

INDEX.

See Registers of Deeds, § 7.

INDICTMENT AND INFORMATION.

See Abortion; Criminal Law, §§ 1149, 1186; Homicide, § 142; Intoxicating Liquors, § 248; Municipal Corporations, § 174; Perjury, § 25; Physicians and Surgeons, § 6.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 56 (Md.) Acts 1908, c. 179, § 14, fining one convicted of violating the liquor law the second time, and providing that the second conviction may be ascertained by the court from its dockets, violates Maryland Declaration of Rights, art. 21, entitling every person to be informed of the accusation against him, as not requiring indictment to charge a second offense.—Goeller v. State, 85 A. 954.

§ 101 (Del.Gen.Sess.) A count in an indictment for abortion was not rendered insufficient by a clerical omission of the name of the person operated on in one part of the count.—State v. Brown, 85 A. 797.

§ 111 (Del.Gen.Sess.) An indictment for abortion, alleging that accused with intent to procure a miscarriage administered medicine to a pregnant woman, the same not being necessary to preserve her life, was not insufficient as negating only the necessity of the medicine, and not the necessity of the miscarriage.—State v. Brown, 85 A. 797.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 136 (N.J.Sup.) The discretion to quash an indictment will not be exercised unless upon the clearest ground; but defendant will be left to a demurrer, motion in arrest of judgment, or writ of error.—State v. Sweeten, 85 A. 309.

§ 137 (N.J.) It was not ground for quashing an indictment that a prior grand jury had been unlawfully discharged.—State v. Zeller, 85 A. 237.

An indictment will not be quashed because the venire was directed to elisors, on disqualification of the sheriff, instead of to a coroner.—Id.

§ 137 (N.J.Sup.) An indictment charging excise commissioners of the city of Camden with misconduct in granting a license to sell liquors to a person altogether unfit to be granted a license will not be quashed on the ground that it failed to charge wrongful intent.—State v. Sweeten, 85 A. 309.

An indictment charging excise commissioners of the city of Camden with misconduct in refusing a license to sell liquors to an applicant of good character will not be quashed on the ground that it failed to charge wrongful intent.—Id.

IX. ISSUES, PROOF, AND VARIANCE.

§ 169 (N.J.Sup.) Facts pleaded in an indictment according to their legal effect may be proved by evidence that determines their legal character.—State v. Gallagher, 85 A. 207.

INDORSEMENT.

See Bills and Notes, § 396; Elections, § 192; Indemnity.

INDUCEMENT.

See Pleading, § 125.

INFANTS.

See Adoption; Divorce, § 294; Guardian and Ward; Habeas Corpus; Negligence, §§ 85, 122; Street Railroads, § 114; Trial, § 140.

VII. ACTIONS.

§ 77 (Del.Super.) The court has inherent power to appoint a guardian ad litem for an infant defendant properly served with process.—Bancroft v. Bancroft, 85 A. 561.

§ 84 (R.I.) A guardian ad litem of an infant defendant cannot admit anything against the infant, nor waive anything in his favor; but plaintiff must prove his whole case.—Greene v. Mabey, 85 A. 118.

A guardian ad litem of an infant, in proceedings for the probate of a will disinheriting the infant, may not enter into an agreement stating facts on which the decree must be based.—Id.

§ 92 (Del.Super.) An answer of an infant defendant, for whom a guardian ad litem has been appointed, may only be interposed by the guardian.—Bancroft v. Bancroft, 85 A. 561.

§ 98 (N.H.) Evidence, in assumpsit for medical services rendered to defendant while a minor, living with her father and supported by him, held sufficient to sustain a verdict for plaintiff on the ground of ratification.—Smith v. Mooney, 85 A. 619.

INFERIOR COURTS.

See Courts, § 169.

INHERITANCE.

See Descent and Distribution.

INHERITANCE TAX.

See Taxation, §§ 868, 879.

INJUNCTION.

See Appeal and Error, §§ 787, 1108; Corporations, § 197; Easements, § 58; Fixtures, § 32; Judgment, §§ 815-828; Justices of the Peace, § 128; Municipal Corporations, § 993; Nuisance, §§ 19, 33; Prohibition, § 3; Quo Warranto, § 3; Receivers, § 210; Release, § 16; Waters and Water Courses, § 75.

I. NATURE AND GROUNDS IN GENERAL.**(B) Grounds of Relief.**

§ 23 (Pa.) Where an agreement provided that a gas company in drilling a gas well through a coal company's seam should fill the space between the outer and inner casings with liquid cement, equity will not enjoin the completion of the well until the space was so filled, where it would cause great loss to the gas company and be of no benefit to the coal company.—Penn Gas Coal Co. v. Greensboro Gas Co., 85 A. 1093.

II. SUBJECTS OF PROTECTION AND RELIEF.**(C) Contracts.**

§ 59 (N.J.Sup.) The public duty to supply consumers, created by contract between a private water company and a municipality pursuant to statute, may be enforced by injunction against the cutting off of a supply already begun.—Plainfield-Union Water Co. v. Inhabitants of City of Plainfield, 85 A. 321.

§ 60 (Md.) Though a contract for services as a piano salesman and collector provided that defendant should not work for any other firm, held that, where it did not appear that he was peculiarly fitted for the services or that they were in any way extraordinary, no injunction

would lie to prevent a breach of his agreement.—*Rosenstein v. Zentz*, 85 A. 675.

§ 62 (N.J.) A written agreement between adjoining lot owners that each should not build nearer than three feet to the common line in certain places, though not enforceable at law, will be enforced in equity against an alienee with notice.—*Cotton v. Cresse*, 85 A. 600.

(E) Criminal Acts, Conspiracies, and Prosecutions.

§ 105 (Md.) Where complainant had procured a license to operate a horse race meet, and had expended large sums in preparing and carrying on the same on the faith of the validity of Acts 1912, c. 132, equity had jurisdiction pending determination of the constitutionality of the statute, to enjoin criminal prosecutions against persons carrying forward such enterprise, in order to protect complainant's property rights.—*Clark v. Harford Agricultural & Breeders' Ass'n*, 85 A. 503.

III. ACTIONS FOR INJUNCTIONS.

§ 108 (Del.Ch.) Where defendant railroad company paid a claim for personal injuries by way of compromise without admitting liability, plaintiff should repay the consideration received as a condition to restraining the use of the release as a bar to further recovery on the ground of mistake.—*Tatman v. Philadelphia, B. & W. R. Co.*, 85 A. 716.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

§ 135 (Pa.) The refusal to grant or continue a preliminary injunction is error only when the right threatened with invasion is an unquestionable one, and the only protection from irreparable injury is to be found in a court of equity.—*Crawford v. Sullivan*, 85 A. 1090.

(B) Continuing, Modifying, Vacating, or Dissolving.

§ 176 (Md.) On denial of a motion to dissolve a preliminary injunction, the court will not render a final decree, but will merely continue the injunction till final hearing.—*Wilmer v. Picka*, 85 A. 778.

V. PERMANENT INJUNCTION AND OTHER RELIEF.

§ 194 (N.J.) A complainant, who in a suit to restrain the use of a secret process also seeks an accounting of profits, elects to treat defendant as a quasi trustee; and he may only recover the net profits of the business.—*Vulcan Detinning Co. v. American Can Co.*, 85 A. 318.

A complainant, suing to restrain the use of a secret process, and for an accounting of profits from the use thereof, is entitled to interest on the net profits; and the account must be stated with annual rests.—*Id.*

§ 199 (N.J.) A defendant, in a suit to restrain him from the use of a secret process, and for an accounting of profits, is entitled to be credited with moneys paid for repairs to the plant and machinery, insurance and taxes thereon, and depreciation in value.—*Vulcan Detinning Co. v. American Can Co.*, 85 A. 318.

INNKEEPERS.

See Landlord and Tenant, §§ 1, 18.

§ 8 (Conn.) There is a substantial distinction between a tenant and a lodger, since a tenant may maintain ejectment *quare clausum* *fregit* and trespass, while the lodger may not.—*Mathews v. Livingston*, 85 A. 529.

The relation established by the hiring of rooms in another's house depends upon the terms of the contract as interpreted in view of the circumstances showing the intention of the parties.—*Id.*

A lodger merely has the use of rooms furnished by the landlord without exclusive posses-

sion, the landlord retaining the care and occupation, while a tenant has exclusive possession of rooms rented.—*Id.*

If the hirer of rooms in a lodging house has exclusive possession and the keeper retains no control, in the absence of contract or circumstances indicating a contrary intention, the law will presume that it was the intention to create the relation of tenant and not that of lodger.—*Id.*

That the care of rooms rented was taken by the hirer who procured her own board and furniture, and that the price charged was at the rate made to a tenant rather than a lodger, and the receipt read "for rent," tended to show that the relation of tenant, and not that of lodger, existed.—*Id.*

§ 13 (Conn.) A landlord has a lien upon the goods of a lodger, but has no lien upon those of a tenant.—*Mathews v. Livingston*, 85 A. 529.

IN PAIS.

See Estoppel, §§ 52-119.

INSANE PERSONS.

See Appeal and Error, § 1109; Insurance, § 719; Wills, §§ 21-55.

III. GUARDIANSHIP.

§ 36 (Md.) Where the petition prays for the appointment of a committee of a lunatic's "person and estate," but the decree only appoints a committee of the estate, it cannot be assumed that the court also intended to appoint a committee of the "person."—*Rutledge v. Rutledge*, 85 A. 661.

§ 36 (R.I.) Neither under Gen. Laws 1909, c. 318, §§ 5, 6, relating to abatement of actions and to judgment against executors, nor under any statute in this state, is an attachment lien against the realty of an insane defendant dissolved by the appointment of a guardian for him.—*Smart v. Burgess*, 85 A. 742.

§ 38 (Pa.) The guardian of an incompetent will be removed, where he is also administrator of an estate in which his ward has an interest antagonistic to his own.—*Hill v. White-side*, 85 A. 425.

V. PROPERTY AND CONVEYANCES.

§ 59 (R.I.) The property of a lunatic, after he has been adjudicated insane, is in custodia legis, to be managed by the guardian under the direction of the court appointing him.—*Smart v. Burgess*, 85 A. 742.

§ 62 (Md.) Since a lunatic cannot contract after inquisition found, claims of creditors must exist before the inquisition, or may consist of liens on his property created before that time.—*Rutledge v. Rutledge*, 85 A. 661.

§ 71 (Md.) A creditor of a lunatic may collect his debt or enforce a lien on the lunatic's property only by an adversary proceeding under Code Pub. Gen. Laws 1904, art. 16, § 118, providing that on application by the committee to sell the property, etc., the court shall take proof as in other chancery cases as to the value, etc., of the property, and order a sale if deemed to the lunatic's interest.—*Rutledge v. Rutledge*, 85 A. 661.

In view of Code Pub. Gen. Laws 1904, art. 16, § 121, authorizing a sale of a lunatic's property for such purposes "where a trustee had been appointed by the court for the management of the person and estate," the court may order a sale only where the application is by a trustee of the "person" and estate.—*Id.*

While the formal chancery proceedings prescribed by Code Pub. Gen. Laws 1904, art. 16, § 118, for the sale of a lunatic's realty or personality, are not necessary when the sale is made pursuant to section 121 for the lunatic's support or the payment of expenses incurred by his committee, an application for the sale of

realty for such purposes should at least show the object and necessity for the sale.—Id.

The language of the report of a sale of a lunatic's realty that "your committee believes the same to be for the interest and advantage of" the lunatic indicated that the purpose was for reinvestment, and not for support or payment of the committee's expenses.—Id.

Where a sale of a lunatic's realty was invalid, her devisee, if she retains the proceeds, must do equity by giving the purchaser a valid deed, and, if the purchaser does not have the sale perfected, the proceeds, less reasonable compensation for use of the land and injury done it, should be returned to the purchaser.—Id.

VI. CONTRACTS.

§ 77 (R.I.) In an action on a note made by an insane person, the plaintiff cannot recover on the ground that he was ignorant of the fact of the maker's insanity, and that the dealings were fair.—Campbell v. Campbell, 85 A. 930.

IX. ACTIONS

§ 99 (R.I.) Where, in an action on a claim against estate of an insane person on a promissory note, the defenses were lack of consideration and insanity, and evidence was conflicting on both issues, refusal of instruction that, though the maker was insane, plaintiff should recover reasonable compensation for services rendered and for which the note was given, was error; it not being a different claim.—Campbell v. Campbell, 85 A. 930.

§ 103 (Md.) Upon reversing a decree denying the petition of a devisee of a lunatic for the proceeds of the sale of her land by a committee because the sale was invalid, and adjudging the devisee's rights, the costs should be paid out of such proceeds, and not out of the estate or by the committee—defendants individually.—Rutledge v. Rutledge, 85 A. 661.

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy; Banks and Banking, §§ 73, 77; Corporations, §§ 553-565, 622.

INSPECTION.

See Corporations, § 311; Evidence, § 208; Master and Servant, § 124.

INSTRUCTIONS.

To jury, see Criminal Law, §§ 785, 884, 1172; Homicide, §§ 286, 308; Trial, §§ 186-296.

INSURANCE.

See Customs and Usages; Landlord and Tenant, §§ 47, 103, 111; Principal and Agent, § 136.

II. INSURANCE COMPANIES.

(A) Stock Companies.

§ 47 (R.I.) Insurance corporations merged or consolidated under New York Insurance Law, § 129, do not cease to exist absolutely, but retain a sufficient existence to maintain or defend existing suits wherever pending.—Riddell v. Rochester German Ins. Co. of New York, 85 A. 273.

Action against a New York insurance corporation held not abated by the consolidation of such corporation with another, under New York Insurance Law, § 129.—Id.

(B) Mutual Companies.

§ 59 (Pa.) Where a life insurance company charter provides that the net profits shall be divided pro rata among the policy holders, as the directors may determine, and it has ac-

cumulated a large surplus, the directors are bound to ascertain and pay over their equitable proportion of the surplus.—White v. Provident Life & Trust Co., 85 A. 463.

III. INSURANCE AGENTS AND BROKERS.

(A) Agency for Insurer.

§ 84 (Me.) In a contract that a subagent upon death or retirement of the general agent should be entitled to two years' renewal commission on business already placed, provided he continued as agent during such two years, the proviso did not extend the period during which the commissions on renewal premiums were to be paid.—Gooding v. Northwestern Mut. Life Ins. Co., 85 A. 391.

An insurance agent was not entitled to commissions on renewal premiums while he was acting under no contract with the company.—Id.

The fact that a mutual life insurance company fixed its rates on the assumption that commissions on renewal premiums would be paid the agent as long as the policy remained in force did not entitle an insurance agent to a commission on renewals contrary to his employment contract.—Id.

V. THE CONTRACT IN GENERAL.

(B) Construction and Operation.

§ 146 (N.J.) That construction of an insurance policy is to be adopted which is most favorable to the insured, and conditions and stipulations are to be construed most strongly against the insurer.—Harris v. American Casualty Co. of Reading, Pa., 85 A. 194.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(C) Matters Relating to Person Insured.

§ 291 (N.J.) Where applicant for life insurance certifies that his health is good according to the best of his knowledge, a recovery may be had on his death, if he had reason to believe that he was in good health, though this was not in fact his condition.—Smith v. Prudential Ins. Co. of America, 85 A. 190.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

§ 318 (Pa.) A provision that the working of carpenters, etc., in building or repairing the premises without permission of the insurer will avoid the policy, does not apply to repairs necessary for the preservation of the property.—Lebanon County v. Franklin Fire Ins. Co. of Philadelphia, 85 A. 419.

§ 326 (Pa.) Under a provision in a fire policy prohibiting the keeping or use of gasoline on the premises without the consent, where a fire occurs from the use of a gasoline torch in the burning off of old paint, such use will not prevent a verdict for the insured.—Lebanon County v. Franklin Fire Ins. Co. of Philadelphia, 85 A. 419.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 378 (Pa.) Where a fire policy is issued without a written application, and the insurance agent knows that the covenant as to unconditional and sole ownership in insured is untrue, and the insured has been guilty of no fraud, the company is estopped from setting up the

breach of the covenant in a suit on the policy.—*Clymer Opera Co. v. Flood City Mut. Fire Ins. Co.*, 85 A. 1111.

XII. RISKS AND CAUSES OF LOSS.

(B) Insurance of Property and Titles.

§ 424 (N.J.) "Collision," within the meaning of a policy, *held* to mean the act of colliding, and imports striking together; violent contact. Both bodies need not be in motion.—*Harris v. American Casualty Co. of Reading, Pa.*, 85 A. 194.

Water and land are "objects" within a policy insuring against loss from injury from collision of an automobile with an object or objects.—*Id.*

A provision in a policy that damages to an automobile from collision due to upsets shall be excluded does not defeat recovery, where an automobile ran off a highway bridge and landed at the bottom of the stream upside down; the upset being rather the result of the collision than the reverse.—*Id.*

(C) Guaranty and Indemnity Insurance.

§ 436 (N.J.) Insurer against dishonesty of plaintiff's treasurer *held* not liable where plaintiff's auditing committee, in examining the treasurer's books, failed to verify the cash on hand by inquiry at the bank, where he deposited the money received.—*Atlantic City Aerie No. 64, Fraternal Order of Eagles, v. International Fidelity Ins. Co.*, 85 A. 325.

XIV. NOTICE AND PROOF OF LOSS.

§ 553 (Me.) No recovery could be had under a fire insurance policy where the insured parties, in their proofs of loss and in their testimony, in an action thereon, falsely and fraudulently misstated the quantity and value of the goods destroyed.—*Pottle v. Liverpool & London & Globe Ins. Co.*, 85 A. 1058.

XVIII. ACTIONS ON POLICIES.

§ 665 (Me.) In an action on a fire insurance policy, evidence *held* to show that plaintiffs, in their proofs of loss and in their testimony, falsely and fraudulently misstated the quantity and value of the goods destroyed.—*Pottle v. Liverpool & London & Globe Ins. Co.*, 85 A. 1058.

§ 668 (Pa.) Where a provision that the working of carpenters, etc., in building or repairing the premises without permission of the insurer will avoid the policy, does not apply to repairs necessary for the preservation of the property. The necessity of repairs is a question for the jury.—*Lebanon County v. Franklin Fire Ins. Co. of Philadelphia*, 85 A. 419.

XX. MUTUAL BENEFIT INSURANCE.

(B) The Contract in General.

§ 719 (Md.) A reserved power to amend the by-laws of an association or a condition in the certificate binding the insured to compliance with subsequently adopted laws, rules, and regulations will authorize the adoption of a law reducing the benefit payable in case of suicide of the member while sane, but will not permit such a law as to suicide while insane.—*Supreme Conclave Improved Order of Heptasophs v. Rehan*, 85 A. 1035.

§ 719 (N.J.Ch.) The court in a suit by a member of a fraternal order to restrain the increase of dues will on motion for preliminary injunction permit the order to attempt to collect the increased dues, and, if paid, the excess must be credited to future accruing dues if complainant finally succeeds, or members may pay at the old rates and be given a reasonable opportunity to pay the increased rates if valid.—*Poole v. Supreme Circle, Brotherhood of America*, 85 A. 453.

§ 719 (N.J.Ch.) One who entered into a death benefit fund which had a by-law that the dues

would be 50 cents, except that when the receipts were insufficient they would be increased to 60 cents until the liabilities were paid, cannot be made to pay dues of 90 cents under a law allowing, in general terms, alterations and amendments to the laws.—*Poole v. Supreme Circle, Brotherhood of America*, 85 A. 821.

(F) Actions for Benefits.

§ 804 (R.I.) A member of a mutual benefit order cannot consistently claim sick benefits provided for by the laws of the order, and that such laws are, in other respects, of no validity, because the constitution and by-laws had not been regularly adopted.—*Cohen v. Superior Lodge No. 516, I. O. B. A.*, 85 A. 653.

§ 805 (R.I.) One who voluntarily submits himself to a law of an order that, if he feels aggrieved at the action of the lodge, he must appeal to the executive committee and await its final decision before suing in a public court must exhaust his remedy within the order before he can prosecute his claim in a court of law.—*Cohen v. Superior Lodge No. 516, I. O. B. A.*, 85 A. 653.

§ 815 (Md.) In an action against a benefit association by a beneficiary of a deceased member an answer to the complaint that a member committed suicide was demurrable, where it did not allege that the member was not insane at the time, where a by-law, providing that a full benefit would be paid where the member committed suicide, was not binding on such beneficiary if the member committed suicide while insane.—*Supreme Conclave Improved Order of Heptasophs v. Rehan*, 85 A. 1035.

INTENT.

See Abortion; Constitutional Law, § 13; Criminal Law, §§ 25, 371; Descent and Distribution, § 45; Evidence, §§ 151, 313; Fraud, § 9; Sales, § 54; Statutes, § 181; Wills, § 470.

INTEREST.

See Banks and Banking, § 154; Corporations, § 553; Executors and Administrators, § 41; Injunction, § 194; Principal and Surety, § 108; Receivers, § 101; Trusts, § 219; Wills, § 734.

I. RIGHTS AND LIABILITIES IN GENERAL.

§ 19 (Conn.) Interest was properly allowed in an action for legal services upon the balance found due from the date of its presentation to the date of the verdict.—*Stoddard v. Sagal*, 85 A. 519.

INTERLOCUTORY JUDGMENT.

See Appeal and Error, §§ 77, 78.

INTERNATIONAL LAW.

See Aliens.

INTERPRETATION.

See Constitutional Law, §§ 13-48; Contracts, §§ 152-170; Deeds, § 100; Evidence, § 448; Statutes, §§ 181, 227.

Lease, see Landlord and Tenant, §§ 37, 47. Of instructions to jury, see Trial, § 295.

INTERROGATORIES.

See Depositions.

INTERSTATE COMMERCE.

See Commerce.

INTERSTATE COMMERCE COMMISSION.

See Commerce, § 85.

INTERVENTION.

See Appeal and Error, § 78; Parties, § 40; Partition, § 49.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

See Criminal Law, §§ 901, 902, 1001; Indictment and Information, §§ 56, 157.

III. LOCAL OPTION.

§ 35 (R.I.) Where the previous election had authorized the licensing of the sale of intoxicating liquors, the continuance of such sale is properly licensed under Gen. Laws 1909, c. 123, § 4, providing that, if a majority of the votes shall be for the granting of such licenses, they shall be granted until the city or town shall vote not to grant such licenses, though the next succeeding election was a tie.—*Rice v. Town Council of Town of Westerly*, 85 A. 553.

IV. LICENSES AND TAXES.

§ 45 (Conn.) Gen. St. 1902, § 2669, allowing a taxpayer to appeal from a permit to a liquor licensee to remove his business, *held* not repealed by Acts 1909, c. 287, amending Gen. St. 1902, § 2660, by giving such appeal on the refusal to grant transfer of any such license.—*Appeal of Bridgeport Malleable Iron Co.*, 85 A. 580.

§ 59 (N.J.Supp.) Within a resolution of the excise commissioners denying new licenses to sell liquors till January 1, 1913, a place which had been previously licensed, but which had not been abandoned, but repaired for continuance of business when licensed, was not a new place; and the excise commissioners properly granted a license to the owner.—*Londa v. Kling*, 85 A. 220.

§ 61 (N.J.Supp.) Though the excise commissioners of the city of Camden have discretionary power to grant or refuse a license to sell liquors, yet, if this discretion be willfully abused, an indictment will lie against the commissioners who grant or refuse a license from corrupt and improper motives.—*State v. Sweeten*, 85 A. 309.

§ 104 (Conn.) The word "appeal," in relation to an appeal from the permission of county commissioners to a liquor licensee to remove his place of business, is a misnomer, since the proceeding does not transfer the jurisdiction of the commissioners to hear purely administrative questions, but only judicial questions involving the legality of their conduct.—*Appeal of Bridgeport Malleable Iron Co.*, 85 A. 580.

In the absence of statutory provision for notice to a licensee of a taxpayer's appeal from county commissioners' permission to remove his place of business, *held*, that he was not entitled to any formal notice.—*Id.*

IX. SEARCHES, SEIZURES, AND FORFEITURES.

§ 248 (Me.) Under Rev. St. c. 29, § 49, *held*, that a complaint in a proceeding to search for and seize intoxicating liquors unlawfully kept, is void, where it designates the keeper by a fictitious name, as "John Doe," without stating that his real name is unknown to complainant.—*State v. Intoxicating Liquors*, 85 A. 1060.

INVENTORY.

See Executors and Administrators, §§ 471, 513.

ISSUES.

See Appeal and Error, §§ 171, 173.

JOINDER.

See Action, §§ 41-50; Parties, § 25.

JOINT TENANCY.

See Tenancy in Common.

§ 1 (Me.) An estate in joint tenancy does not exist unless there is unity of interest, title, time, and possession.—*Staples v. Berry*, 85 A. 303.

JUDGES.

See Courts.

JUDGMENT.

See Appeal and Error, § 1108; Attachment, § 177; Bankruptcy, § 391; Criminal Law, §§ 962-1001, 1111; Divorce, § 167; Ejectment, § 115; Eminent Domain, § 241; Execution; Executors and Administrators, § 513; Justices of the Peace, § 128; Limitation of Actions, § 25; Master and Servant, § 78; Quieting Title, § 52; Replevin, § 108; Scire Facias, § 1; Specific Performance, § 131; Supersedeas.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 17 (Conn.) A default judgment rendered on a substituted complaint, which set up a different cause of action from the complaint served with the summons, is irregular, as, in effect, the institution of an action by the service of a summons alone.—*Gallup v. Thomas B. Jeffery Co.*, 85 A. 374.

§ 17 (Vt.) Where a foreign corporation, doing business in the state, did not designate a resident agent upon whom process could be served, service by attachment of the corporation's property in accordance with P. S. 1450, 1458, is sufficient, not only to bring the property attached within the custody of the court, but to support a personal judgment.—*Somerville Lumber Co. v. Mackres*, 85 A. 977.

II. BY CONFESSION.

§ 50 (Pa.) Where a lease authorized the lessors, on breach of any covenant by the lessee, to confess judgment for the whole of the rent for the unexpired term, and affidavit by the lessor, filed with the lease, and averring a breach of condition as to subletting, is sufficient to support judgment.—*Purvis v. Dempsey*, 85 A. 1091.

IV. BY DEFAULT.**(A) Requisites and Validity.**

§ 102 (Conn.) Where a default judgment was entered on a substituted complaint, which was, in effect, a new cause of action, the judgment should be set aside.—*Gallup v. Thomas B. Jeffery Co.*, 85 A. 374.

(B) Opening or Setting Aside Default.

§ 143 (R.I.) Allegations that defendant had a good defense to the action, that the facts stated in the affidavit for scire facias were untrue, and that he had employed an attorney to defend, which the attorney did not do, denying the employment, *held* insufficient to justify a trial, on the ground that the judgment was entered by accident, mistake, or unforeseen cause.—*Dunham v. Deslandes*, 85 A. 921.

§ 143 (R.I.) Where between the service of the writ and the filing of the declaration plaintiff executed a release of all damages from defendant's negligence, and defendant informed its counsel that the case was settled, a default for defendant's failure to file pleas is properly vacated.—*Fox v. Artesian Well & Supply Co.*, 85 A. 937.

§ 144 (R.I.) Falsity of the affidavit on which a writ of scire facias was granted would not, of

itself, entitle defendant to a trial on the merits after judgment by default.—*Dunham v. Deslandes*, 85 A. 921.

§ 151 (Conn.) Where a judgment was entered by default upon a substituted complaint, where no recovery could be had on the original complaint, it was entirely bad, and could be set aside by the court unasked, or on a motion setting up a defense which would not defeat nominal damages.—*Gallup v. Thomas B. Jeffery Co.*, 85 A. 374.

§ 173 (Vt.) Where an audita querela, to set aside a judgment by default, was tried on its merits, the judgment should be for defendant, instead of for the dismissal of the writ.—*Somerville Lumber Co. v. Mackres*, 85 A. 977.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

§ 199 (Pa.) Act April 22, 1905 (P. L. 286), gives a party the right to move for a judgment non obstante veredicto on the whole record only when he has presented a written point requesting binding instructions.—*Reichner v. Reichner*, 85 A. 877.

§ 228 (Me.) Alternative or conditional judgments at law are void in civil, as well as in criminal, cases.—*State v. Sturgis*, 85 A. 474.

(D) Arrest of Judgment.

§ 266 (Vt.) A motion in arrest of judgment reaches only defects apparent of record.—*Boville v. Dalton Paper Mills*, 85 A. 623.

Specifications are not a part of the record for purposes of pleading, and so may not be considered on a motion in arrest.—Id.

A motion in arrest of judgment cannot be sustained by matters which appeared on the trial, as shown by the transcript.—Id.

VII. ENTRY, RECORD, AND DOCKETING.

§ 273 (Pa.) Where a plaintiff or defendant dies after final argument, but before the entry of the decree, the court may direct the decree to be entered as if prior to the death of the party.—*Schaeffer v. Coldren*, 85 A. 98.

IX. OPENING OR VACATING.

§ 340 (Pa.) All courts of record have authority to vacate a judgment or decree which is utterly void and a mere nullity.—*In re Macoluso's Naturalization*, 85 A. 149.

§ 386 (Md.) Laches could not be urged as a defense to a motion to strike a fiat judgment, unless the defense made the ground of the application could have been made available as against a scire facias by the use of proper care and diligence.—*American Surety Co. of New York v. Spice*, 85 A. 1031.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 584 (N.J.Sup.) A matter is not res judicata unless there is identity of the thing sued for, of the cause of action, of the parties, the quality of the persons for and against whom the claim is made, and the judgment controls the issue in the latter action.—*Hoffmeier v. Trost*, 85 A. 221.

§ 584 (Pa.) That a judgment may be res judicata, there must be identity in the thing sued for, in the cause of action, in the parties, and in the quality in the persons for or against whom the claim is made.—*Seigfried v. Boyd*, 85 A. 72.

§ 585 (N.J.Sup.) Where the evidence necessary to sustain an action would have authorized a recovery in a former action, a prior judgment is a bar, but if it authorizes a recovery in the second action, but could not have produced a different result in the first action,

the failure of the plaintiff in the first action is no bar to his recovery in the second.—*Hoffmeier v. Trost*, 85 A. 221.

§ 592 (N.J.Ch.) It is the duty of one who brings a suit to include in it every cause of action available to him, which is consistent with the general purpose of his bill, and an available claim not therein alleged is forever lost.—*Denver City Waterworks Co. v. American Waterworks Co.*, 85 A. 826.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

§ 648 (Pa.) Judgments in criminal cases are generally inadmissible to establish the facts of a civil case, and vice versa.—*Wingrove v. Central Pennsylvania Traction Co.*, 85 A. 850.

(B) Persons Concluded.

§ 675 (Pa.) One summoned as a witness is not concluded by the judgment, unless directly connected with the litigation.—*Seigfried v. Boyd*, 85 A. 72.

§ 707 (Pa.) Judgment in trespass to recover certain land held not res judicata of ejectment by one not a party to the action in trespass.—*Seigfried v. Boyd*, 85 A. 72.

(C) Matters Concluded.

§ 713 (N.J.Ch.) An award fixing the amount of damages suffered by a landowner during a stated length of time from the pollution of a stream by a city is not an adjudication of the amount of damages suffered subsequently.—*Doremus v. City of Paterson*, 85 A. 606.

§ 743 (Pa.) A judgment, in an action for trespass, is not res judicata of the title in a subsequent suit in ejectment to recover the same land.—*Seigfried v. Boyd*, 85 A. 72.

§ 743 (R.I.) Where, in a former action between the parties, the boundary of complainant's land was established, and it was found that her piazza was on the land of defendant, defendant will not be enjoined from removing it until title can be established at an action of law.—*Hawkins v. Co-Operative Bldg. Bank*, 85 A. 641.

XVII. FOREIGN JUDGMENTS.

§ 815 (N.J.Ch.) Where a receiver, a party to a proceeding in another state attacking a foreclosure sale of the assets of his insolvent, was forever enjoined from claiming title thereto, this court will not thereafter permit him to attack the sale, since to do so would violate the full faith and credit clause of the federal Constitution.—*Denver City Waterworks Co. v. American Waterworks Co.*, 85 A. 826.

§ 828 (N.J.Ch.) A receiver made a party to a proceeding in another state, and there enjoined from attacking the validity of a foreclosure sale of the assets of the corporation held precluded from bringing suit in the federal court attacking the sale.—*Denver City Waterworks Co. v. American Waterworks Co.*, 85 A. 826.

JUDICIAL POWER.

See Constitutional Law, §§ 68, 74.

JUDICIAL SALES.

See Bankruptcy, § 257; Sheriffs and Constables, § 138.

JURISDICTION.

See Aliens; Appeal and Error, § 1002; Arrest; Attachment, § 142; Bankruptcy, § 391; Courts; Criminal Law, § 90; Discovery; Divorce, § 294; Equity, §§ 29, 42, 160, 178, 220; Executors and Administrators, §§ 327, 507; Justices of the Peace, § 87; Process, § 31; Prohibition, §§ 3, 5, 25; Quieting Title, § 52; Receivers, § 110; Wills, § 249.

JURY.

See Appeal and Error, § 727; Grand Jury; Homicide, §§ 286, 308; Jury; New Trial, § 44; Trial, §§ 136-143.

III. QUALIFICATIONS OF JURORS AND EXEMPTIONS.

§ 53 (Vt.) Previous service as a juror does not disqualify one from serving as a talesman under the statute providing that a juror, drawn from a town of more than 200, shall be disqualified from again serving for two years.—*State v. Neuburg*, 85 A. 769.

JUSTICES OF THE PEACE.

See Criminal Law, § 90; Quo Warranto, § 3.

II. RIGHTS, DUTIES, AND LIABILITIES.

§ 30 (Del.Super.) The object of Rev. Code 1852, amended to 1893, p. 697, c. 92, § 2, is to give the judges of the Superior Court supervisory powers over justices of the peace, though not so as to conflict with Const. art. 1, § 8, article 4, § 30, and article 5, §§ 7, 8; and a justice of the peace guilty of oppression and favoritism is guilty of an offense indictable at common law and under section 18, c. 127, p. 928, and may not be proceeded against under chapter 92.—*In re Lewis*, 85 A. 593.

IV. PROCEDURE IN CIVIL CASES.

§ 87 (Md.) Service of process upon the daughter of a garnishee did not confer jurisdiction over the garnishee, though she had actual knowledge of the proceedings.—*Wilmer v. Picka*, 85 A. 778.

§ 128 (Md.) Evidence, in an action to enjoin the enforcement of a justice's judgment taken against a garnishee in her absence, *held* inadequate to prove either personal service or a voluntary appearance.—*Wilmer v. Picka*, 85 A. 778.

The sufficiency of the evidence to show whether jurisdiction was acquired by the justice by service or by voluntary appearance was for the court, in an act to enjoin enforcement of the justice's judgment rendered against plaintiff as a garnishee.—*Id.*

A statement, in a bill to enjoin the enforcement of a justice's judgment, that when plaintiff "was notified to appear" before the justice she was ill was not necessarily an admission of personal service.—*Id.*

KNOWLEDGE.

See Corporations, § 428; Principal and Agent, § 166; Registers of Deeds, § 7; Witnesses, § 37.

LACHES.

See Corporations, § 622; Equity, § 82; Judgment, § 386; Specific Performance, § 105; Trusts, § 365.

LANDLORD AND TENANT.

See Acknowledgment; Action, §§ 47, 50; Appeal and Error, §§ 1068, 1082; Assault and Battery; Evidence, §§ 129, 130; Fixtures, §§ 15, 18, 31-33; Husband and Wife, §§ 208, 214; Innkeepers; Judgment, § 50; Mines and Minerals, § 74; Property, § 9; Subrogation; Trespass, § 20; Trial, § 133.

I. CREATION AND EXISTENCE OF THE RELATION.

§ 1 (Conn.) There is a substantial distinction between a tenant and a lodger, since a tenant may maintain ejectment *quare clausum fregit* and trespass, while the lodger may not.—*Mathews v. Livingston*, 85 A. 529.

The relation established by the hiring of rooms in another's house depends upon the terms of the contract as interpreted in view of the circumstances showing the intention of the parties.—*Id.*

A lodger merely has the use of rooms furnished by the landlord without exclusive possession, the landlord retaining the care and occupation, while a tenant has exclusive possession of rooms rented.—*Id.*

§ 5 (Pa.) Writing construed, and *held* a receipt and not a lease; it not being signed by the lessee nor providing for payment of rent in the future.—*Cohen v. Smith*, 85 A. 1007.

§ 18 (Conn.) If the hirer of rooms in a lodging house has exclusive possession, and the keeper retains no control, in the absence of contract or circumstances indicating a contrary intention, the law will presume that it was the intention to create the relation of tenant, and not that of lodger.—*Mathews v. Livingston*, 85 A. 529.

That the care of rooms rented was taken by the hirer who procured her own board and furniture, and that the price charged was at the rate made to a tenant rather than a lodger, and the receipt read "for rent," tended to show that the relation of tenant, and not that of lodger, existed.—*Id.*

II. LEASES AND AGREEMENTS IN GENERAL.**(B) Construction and Operation.**

§ 37 (R.I.) A lease or other writing must, if possible, be so construed that meaning may be given to all its parts.—*Perkins v. Kirby*, 85 A. 648.

§ 47 (R.I.) No particular form is essential to create a condition in a lease.—*Perkins v. Kirby*, 85 A. 648.

Whether the parties to a lease intended that a requirement that the lessee maintain insurance against fire, accidents, and boiler explosions should have the force of a condition, breach of which by their lessee would work a forfeiture, must be determined from an examination of the lease itself.—*Id.*

Provision in a lease requiring the lessee to insure the premises against fire, etc., *held* to constitute a condition, breach of which would work a forfeiture.—*Id.*

Under a lease requiring the lessee to procure insurance policies covering the premises and to assign and deliver them to the lessor, failure to so assign and deliver cannot be regarded as a mere technical or immaterial breach, though the insurance has been effected.—*Id.*

Where a lease requires the lessee to insure the premises against fire, etc., and to deliver the policies to the lessor, but does not fix any time within which such delivery shall be made, the lessee is entitled to a reasonable time in which to make it.—*Id.*

The "reasonable time" to which a lessee is entitled to perform a condition of the lease, where no time for performance is specifically fixed, is such time as is necessary in the circumstances to do what is required.—*Id.*

IV. TERMS FOR YEARS.**(D) Termination.**

§ 103 (R.I.) A lessee's estate is defeated on breach of terms showing that a condition was intended.—*Perkins v. Kirby*, 85 A. 648.

The right of lessors to forfeit a lease for the lessee's breach of a condition requiring him to insure the premises against fire, etc., and to deliver the policies to them, is not affected by a power reserved to them to insure.—*Id.*

§ 104 (Me.) The act of a tenant in subletting a part of the premises without the consent of the landlord in violation of the lease renders the lease voidable at the option of the landlord.—*Linn Woolen Co. v. Brown*, 85 A. 404.

§ 111 (R.I.) Under a lease binding the lessee to insure the premises against fire, etc., and to deliver the policies to the lessor, the latter need not demand such delivery before proceeding to give notice of forfeiture under the lease for such breach.—*Perkins v. Kirby*, 85 A. 648.

§ 112 (Me.) A landlord who for several months, with knowledge of a subletting without his consent, takes no steps to re-enter, but who treats the lease with the tenant as subsisting, thereby waived the right to re-enter for the subletting made in violation of the lease.—*Linn Woolen Co. v. Brown*, 85 A. 404.

A landlord, who assigned to a third person rent due and unpaid, thereby recognized the lease as effective for the term covered by such rent and waived his right under the lease to re-enter for nonpayment.—*Id.*

Where a landlord indebted to a subtenant in excess for the rent agreed to accept his order for the rent, but after the maturity of the rent refused to do so, but not on the ground that it had not been given on the day of the maturity, he waived the right to forfeit the lease for nonpayment of rent.—*Id.*

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(B) Possession, Enjoyment, and Use.

§ 130 (N.J.Supp.) Where a landlord agrees to furnish a hall boy and telephone service, and later dispenses with both, the remedy of the tenant is for a breach of the implied covenant of quiet enjoyment.—*Metropole Const. Co. v. Hartigan*, 85 A. 313.

§ 142 (Me.) Where a tenant is in possession, the landlord may not maintain trespass *quare clausum*, except in case of a permanent injury to the freehold, but the action must be brought by the tenant.—*Linn Woolen Co. v. Brown*, 85 A. 404.

(D) Repairs, Insurance, and Improvements.

§ 150 (Conn.) The duty of maintenance and repair rests upon a landlord as to common passageways and approaches in or to a building occupied by several tenants and which are retained under his control for the use of the tenants.—*Koskoff v. Goldman*, 85 A. 588.

(E) Injuries from Dangerous or Defective Condition.

§ 162 (Conn.) A landlord having the duty of repairing the premises cannot escape liability by employing a competent carpenter to do what the conditions seemed to demand, since any negligence on the carpenter's part is the negligence of defendant himself.—*Koskoff v. Goldman*, 85 A. 588.

§ 164 (Conn.) A landlord is liable for injuries received by a tenant resulting from his neglect of his duty to keep passageways and approaches in repair.—*Koskoff v. Goldman*, 85 A. 588.

§ 164 (N.J.) That a tenant has occupied the top floor of an apartment house for more than a year raises no conclusive legal presumption that she had knowledge that there were no fire escapes and waived their erection.—*Cittadino v. Schackter*, 85 A. 174.

Mere length of occupancy, unaccompanied by any affirmative act or circumstance on a tenant's part, cannot relieve the landlord from responding in damages where on fire the tenant suffers from the absence of fire escapes.—*Id.*

A tenant owes no duty to the landlord to ascertain whether any fire escapes have been provided and may reasonably assume that the landlord has performed the duty imposed by statute.—*Id.*

Though a tenant has discovered that the landlord failed to provide fire escapes, she may reasonably assume that he will perform that duty at any time and not continue to disregard the law.—*Id.*

§ 168 (Conn.) Where the contact of deceased with the rail which gave way and permitted the fatal fall was involuntary and the result of a sudden fright, she was not guilty of contributory negligence.—*Koskoff v. Goldman*, 85 A. 588.

§ 169 (Conn.) On facts which might have been reasonably found under the evidence in a tenant's action for the death of his wife from defendant's negligence in failing to repair an outside stair railing, *held*, that a verdict for plaintiff was justified.—*Koskoff v. Goldman*, 85 A. 588.

In a tenant's action for the death of his wife resulting from a defective stairway railing where the only issue on which evidence was admitted as to the time when the broken railing was repaired by defendant after the accident was the credibility of a witness, evidence to establish such time was not in violation of the rule excluding evidence of subsequent repair for the purpose of showing prior negligence.—*Id.*

§ 169 (N.J.) Evidence *held* to present a question for the jury whether plaintiff had knowledge of the absence of fire escapes prior to a fire in which she suffered injury.—*Cittadino v. Schackter*, 85 A. 174.

It was not error to permit the jury to find from the evidence that the absence of fire escapes was the proximate cause of plaintiff's injuries.—*Id.*

§ 169 (N.J.) In an action to recover damages by negligence of landlord in failing to repair, a request that, if an inspection made did not disclose the danger, the verdict should be for defendant, was properly refused, for failing to include the requirement that the inspection be carefully made.—*Battschinger v. Robinson*, 85 A. 317.

(F) Eviction.

§ 180 (Conn.) One ejected from rooms rented was entitled to recover the present value of the unexpired term; that is, the rental value less the amount of rent unpaid.—*Mathews v. Livingston*, 85 A. 529.

One unlawfully ejected from rooms rented whose goods were converted by the landlord could recover so far as proximately caused by the ejection for mental suffering, exposure, time lost, the expense in endeavoring to recover possession, and for any property lost in the eviction.—*Id.*

In an action for dispossessing plaintiff from rooms rented and conversion of goods, plaintiff could recover the expense incurred in sending a team for the goods the first time, and, if the circumstances made it reasonable to do so, in sending a second time.—*Id.*

§ 180 (Me.) Evidence in lessee's action for constructive eviction *held* to show that the plaintiff, by encouraging the act of which he complained, waived his right to object thereto, and was estopped to maintain the action.—*Seiger v. Gerber*, 85 A. 297.

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

§ 190 (N.J.Supp.) Where a tenant entered into possession with an agreement for the use of telephone service and a hall boy, and later the landlord dispensed with the services of both, his continued occupancy of the premises was inconsistent with a claim of eviction, and he was liable for the rent.—*Metropole Const. Co. v. Hartigan*, 85 A. 313.

In determining the question of suspension of rent by eviction, only that should be considered as "rent" which is to be given as a return for the use of realty.—*Id.*

§ 208 (Pa.) Under a lease for years, the remedy of the lessors for subletting without consent, by forfeiture of the lease, *held* not exclusive, but to permit judgment for the rent for the balance of the term.—*Furris v. Dempsey*, 85 A. 1091.

(C) Lien.

§ 246 (Conn.) A landlord has no lien upon the goods of a tenant.—*Mathews v. Livingston*, 85 A. 529.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 285 (R.I.) Whether a lessee acted within a reasonable time delivering to the lessors policies insuring the premises against fire, etc., as required by the lease, *held*, under the evidence, a jury question.—*Perkins v. Kirby*, 85 A. 648.

LARCENY.

See Criminal Law, § 369.

LAW.

See Evidence, § 80.

LAW OF THE CASE.

See Appeal and Error, § 1099.

LAWYERS.

See Attorney and Client.

LEADING QUESTIONS.

See Criminal Law, § 1153; Witnesses, § 240.

LEASE.

See Landlord and Tenant.

LEGACY TAX.

See Taxation, §§ 868, 879.

LEGISLATIVE POWER.

See Constitutional Law, §§ 55-63.

LEGISLATURE.

See Constitutional Law, § 26; States, §§ 32, 59.

LEX LOCI.

See Bastards, § 1; Descent and Distribution, § 5.

LIBEL AND SLANDER.

See Grand Jury, §§ 26, 36; Witnesses, §§ 196, 350, 372.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

§ 50 (N.J.Sup.) The board of protectors of a township appointed under Act April 20, 1909 (P. L. p. 306) being an act to prevent drunkenness, serving a saloon keeper with notice not to sell to persons named in a list furnished, are not liable in an action for libel by a person whose name was in such list, because the list was made up from unsworn statements.—*Johnson v. Marsh*, 85 A. 761.

IV. ACTIONS.**(C) Evidence.**

§ 101 (R.I.) That witnesses in an action for slander, in attempting to repeat the alleged slanderous words as uttered, testified in a contemptuous and sneering tone, *held* insufficient to warrant an inference that defendant, in uttering the slander on a privileged occasion, was actuated by express malice.—*Hayden v. Habbrough*, 85 A. 283.

§ 103 (Conn.) Testimony as to the speaking of the slanderous words is properly received, over objection that it did not appear they were uttered before the bringing of the action; witness fixing the date as of the day of a certain event, and that being otherwise shown to have

been before the action was brought.—*Hayward v. Maroney*, 85 A. 379.

As tending to fix the time when the slander was uttered, a letter from defendant to plaintiff is properly admitted, in connection with testimony that it was the one referred to by witness R., that it was received three days before the bringing of the action, and that plaintiff at once telephoned R. she had received it; R. having testified that defendant spoke the slanderous words the day R. learned that plaintiff had received a certain letter from defendant.—*Id.*

§ 104 (Conn.) Testimony of the repetition by defendant of the slanderous words concerning plaintiff is admissible to prove actual bias, and thus lay the foundation for enhanced damages.—*Hayward v. Maroney*, 85 A. 379.

(D) Damages.

§ 114 (Conn.) The slanderous words being actionable per se, and found false and malicious, claim that plaintiff was entitled to only nominal damages was properly overruled.—*Hayward v. Maroney*, 85 A. 379.

LICENSES.

See Appeal and Error, § 882; Attorney and Client, § 130; Corporations, § 654; Courts, § 19; Intoxicating Liquors, §§ 35, 45-104; Physicians and Surgeons, § 6; Railroads, § 274; Theaters and Shows; Trespass, § 43.

I. FOR OCCUPATIONS AND PRIVILEGES.

§ 8 (Me.) Pub. Laws 1907, c. 15, § 6, as amended by Pub. Laws 1909, c. 34, § 3, and Pub. Laws 1911, c. 84, § 1, and chapter 176, § 3, requiring persons who wished to sell nursery stock to procure an agent's license, and prescribing a penalty for its violation, must be strictly construed.—*State v. Staples*, 85 A. 1063.

§ 16 (Me.) The mere offer to take or solicitation and reception of an order for nursery stock, by one who has no license, and who had no stock with him, *held* not a violation of Pub. Laws 1907, c. 15, § 6, as amended by Pub. Laws 1909, c. 34, § 3, and Pub. Laws 1911, c. 84, § 1, and chapter 176, § 3, requiring persons who "wished to sell" nursery stock to apply for a license and file the names and addresses of those "from whom they purchased their stock," especially where defendant never owned the stock for which the order was taken.—*State v. Staples*, 85 A. 1063.

§ 34 (N.J.Sup.) That a payment of a license fee to a city board of health was accompanied by a written protest against the right of the board to exact it does not relieve the payment of the character of having been voluntarily made.—*M. L. Shoemaker & Co. v. Board of Health of Gloucester City*, 85 A. 312.

§ 36 (Conn.) Under Laws 1909, c. 211, § 8, permitting any dealer, instead of registering each motor, to apply for a general distinguishing number, and providing that every vehicle controlled by him until sold or loaned for more than five days shall be regarded as registered thereunder, a car not registered by the owner under section 2, but placed with a dealer for sale, could be loaned to the owner and used under the dealer's general registration number without the owner being deprived, by section 16, of the right to recover for its injury.—*Shaw v. Connecticut Co.*, 85 A. 536.

§ 39 (Del.) While primarily a revenue statute, Rev. Code 1852, amended to 1893, p. 56 (13 Del. Laws, c. 117), prohibiting the engaging in certain kinds of business, including that of a real estate agency, without first obtaining a license, and making it a misdemeanor to do so, is a regulative statute, so that a contract made in such business by one engaging in it without a license is unenforceable.—*E. A. Strout Co. v. Howell*, 85 A. 666.

LIENS.

See Appeal and Error, § 1068; Attachment, § 177; Descent and Distribution, § 130; Execution, § 326; Husband and Wife, §§ 152, 169; Innkeepers, § 13; Insane Persons, § 71; Landlord and Tenant, § 246; Mechanics' Liens; Pleading, § 35; States, § 110; Statutes, §§ 64, 82, 121; Taxation, §§ 509, 511.

§ 8 (Pa.) Whether an instrument filed for record to continue a statutory lien is defective, must be determined solely by what appears of record.—*Green v. Green*, 85 A. 70.

LIFE ESTATES.

See Curtesy; Dower, § 4; Executors and Administrators, § 41; Wills, §§ 545, 616.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

See Adverse Possession; Corporations, §§ 565, 622; Death, § 38; Executors and Administrators, § 437; Mechanics' Liens, § 260; Specific Performance, § 105.

I. STATUTES OF LIMITATION.

(B) Limitations Applicable to Particular Actions.

§ 25 (R.I.) Probate court decrees, allowing accounts and balances in favor of a guardian, being ex parte, are not judgments, as affecting the operation of the statute of limitations.—*Duffy v. McHale*, 85 A. 36.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 95 (N.H.) Under Pub. St. 1901, c. 217, § 3, which requires that personal actions shall be brought within six years after the cause of action accrued, action by a member of an association, who knew in 1890 that another member had taken possession and was holding the building thereon adversely to the association, not begun until 1898, was barred.—*Rowell v. Sanborn*, 85 A. 665.

§ 102 (R.I.) A statute of limitations does not run in favor of a guardian, as against a ward, while the guardianship relation continues.—*Duffy v. McHale*, 85 A. 36.

(H) Commencement of Action or Other Proceeding.

§ 127 (Del.) Where an action for wrongful death was instituted within the one-year limitation period prescribed by 20 Del. Laws, c. 594, and the declaration alleged that deceased was defendant's employé, the cause stated by an amended declaration filed after one year, and alleging that deceased was the employé of another company, was not barred.—*Philadelphia, B. & W. R. Co. v. Gatta*, 85 A. 721.

§ 127 (Pa.) A statement of claim against a railroad for unlawful discrimination by two discriminatory acts may be amended after the running of limitations by alleging additional damages from the two acts.—*Puritan Coal Mining Co. v. Pennsylvania R. Co.*, 85 A. 426.

LIMITATION OF LIABILITY.

See Carriers, §§ 149½, 155.

LIQUOR SELLING.

See Intoxicating Liquors.

LOCAL LAWS.

See Statutes, §§ 82-95.

LOCAL OPTION.

See Intoxicating Liquors, § 85.

LODGES.

See Insurance, § 806.

LODGING HOUSES.

See Innkeepers.

LOGS AND LOGGING.

See Evidence, §§ 543, 554; Navigable Waters, § 39; Taxation, § 193; Tenancy in Common, §§ 43, 55; Trespass, §§ 43, 46; Trial, §§ 140, 191, 260.

§ 8 (Vt.) Under the contract of employment of plaintiff to log for defendant, defendant to repair the dams as now existing, defendant must repair them in a reasonably careful and prudent manner, having in view existing conditions and the use to be made of the dams, notwithstanding the provision, "all of which is to be done as directed by the agent of" defendant.—*Boville v. Dalton Paper Mills*, 85 A. 623.

LOST INSTRUMENTS.

See Evidence, § 178.

LUNATICS.

See Insane Persons.

MACHINERY.

See Attachment, § 164; Fixtures, §§ 15, 21; Steam.

MALICIOUS PROSECUTION.

V. ACTIONS.

§ 67 (Conn.) The circumstances of aggravation, bodily pain, mental anguish, and injury to reputation, and expenses of litigation less taxable costs, are proper elements of damages for malicious prosecution.—*Seidler v. Burns*, 85 A. 369.

§ 69 (Conn.) A verdict of \$500 in an action for malicious prosecution held not excessive.—*Seidler v. Burns*, 85 A. 369.

MALPRACTICE.

See Physicians and Surgeons, §§ 14-18.

MANDAMUS.

See Equity, § 29.

I. NATURE AND GROUNDS IN GENERAL.

§ 7 (Md.) The remedy by mandamus is granted or withheld largely in the court's discretion: such discretion, however, not being an arbitrary one to be capriciously exercised.—*Kinlein v. City of Baltimore*, 85 A. 679.

§ 15 (Md.) The writ of mandamus will not be granted where it is unnecessary or would work injustice.—*Kinlein v. City of Baltimore*, 85 A. 679.

A writ of mandamus directed to the municipal authorities will not be granted where it would introduce great confusion or disorder into the municipal administration.—*Id.*

§ 16 (Md.) Mandamus will not be granted where it would be unavailing or nugatory.—*Kinlein v. City of Baltimore*, 85 A. 679.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 116 (Md.) Where a judgment against a city was rendered after ordinance of estimates for 1912 had been introduced in city council under Code Pub. Loc. Laws, art. 4, § 36, as amended by Laws 1904, c. 677, a special levy to pay such judgment prior to the making of the appropriation for the year 1913 will not be com-

pelled by mandamus.—Kinlein v. City of Baltimore, 85 A. 679.

(C) Acts and Proceedings of Private Corporations and Individuals.

§ 129 (Pa.) Resident directors and officers of a foreign corporation may be compelled by mandamus to permit another director to inspect its books and papers.—Machen v. Machen & Mayer Electrical Mfg. Co., 85 A. 100.

§ 133 (N.J.Supp.) The public duty to supply consumers, created by contract between a private water company and municipalities pursuant to statute, may be enforced by mandamus by one not already supplied.—Plainfield-Union Water Co. v. Inhabitants of City of Plainfield, 85 A. 321.

MANDATE.

See Appeal and Error, § 1207.

MARK.

See Elections, § 194.

MARKET VALUE.

See Evidence, § 474.

MARRIAGE.

See Adultery; Appeal and Error, §§ 1008, 1011; Bigamy; Divorce; Husband and Wife.

§ 40 (Pa.) In order to give rise to a presumption of marriage, cohabitation must be such as is consistent with and would naturally result from the marriage relation, and the reputation of marriage must be general.—In re Patterson's Estate, 85 A. 75.

Where the relation between parties was illicit in its inception, a marriage will not be presumed, because of cohabitation and reputation, without proof of a change of the relation.—Id.

§ 45 (N.J.) A marriage certificate is admissible in evidence without the production of the witnesses thereto, who are without the jurisdiction.—State v. MacRae, 85 A. 455.

§ 50 (Pa.) Evidence held to sustain a finding that a woman had not sustained her claim to be the common-law wife of decedent, notwithstanding evidence of cohabitation.—In re Patterson's Estate, 85 A. 75.

MASTER AND SERVANT.

See Appeal and Error, § 1053; Conspiracy, § 18; Courts, § 489; Trial, §§ 140, 260, 280, 296.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

§ 78 (Pa.) Widow of member of railroad benefit association suing a road held his "legal representative" within provision of by-law that judgment in action against railroad by legal representative shall release the benefit association.—Snyder v. Pennsylvania R. Co., 85 A. 991.

Judgment of nonsuit in action against railroad for death of husband is a "judgment in such suit" within by-laws of benefit association, providing that judgment in suit against the railroad for injuries shall preclude claim on the relief fund.—Id.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§ 88 (Pa.) Under facts stated, defendant held not entitled to say that plaintiff was not in its employ at the time of his injuries.—Smith v. York Rys. Co., 85 A. 367.

(B) Tools, Machinery, Appliances, and Places for Work.

§ 118 (Pa.) In employing servants to work in excavations, the duty is on the master to furnish a reasonably safe place for the work; and, to prevent the caving in of the walls of a pit, the employer should brace it and shore its sides.—Smith v. York Rys. Co., 85 A. 367.

§ 124 (N.J.Supp.) Inspection by a master of a locomotive which exploded, killing a fireman, need not have been so thorough as to disclose any defects in a locomotive and such as would keep it in perfect condition; the duty of the master being limited to the use of reasonable care.—Ruane v. Erie R. Co., 85 A. 178.

(D) Warning and Instructing Servant.

§ 150 (Pa.) A master held liable for injuries to an employé while unloading explosives, where the master failed to warn the employé of the danger.—Martin v. Atlantic Transport Co., 85 A. 29.

§ 153 (Me.) An employer who directs his employé to perform a dangerous service requiring skill and caution to avoid the danger, with knowledge that the employé is inexperienced and ignorant of the danger, must inform him of the danger and instruct him.—Hill v. Libbey, 85 A. 487.

Where an employé engaged in blasting was injured by the explosion of a fuse cap, and he testified that he knew that dynamite was dangerous but did not know of the danger of fuse caps exploding while being placed in position, he did not appreciate the risk, and the employer was guilty in failing to instruct and warn him.—Id.

§ 153 (N.H.) Defendant's knowledge of the danger of injury to an inexperienced employé, directed to pass friction through the rolls of a rubber cloth machine, held to impose on defendant a duty to warn and instruct.—Marcotte v. Maynard Shoe Co., 85 A. 284.

§ 154 (Me.) Employer held not negligent in failing to warn of danger 18 year old mill employé, who had nearly three years' experience in mills, and was familiar with machinery, and had assisted at least twice in operating the washing machine causing his injury.—Gamrat v. Worumbo Mfg. Co., 85 A. 569.

§ 158 (Me.) Where an employer failed to instruct an employé of the dangers of using fuse caps in blasting, and an explosion of a fuse cap occurred because of such failure, the fact that the jury could not determine where in the cylinder of the cap the friction occurred that caused the explosion was immaterial.—Hill v. Libbey, 85 A. 487.

(E) Fellow Servants.

§ 177 (Me.) The injury to a servant being due to a fellow servant giving an order to hoist before other fellow servants had properly readjusted clamps, the master is not liable.—Sullivan v. Rockland, T. & C. St. Ry., 85 A. 55.

§ 180 (N.J.) Employer's Liability Act, April 22, 1908, held only applicable to injuries happening when both the carrier and the employé injured are engaged in interstate commerce.—Pierson v. New York, S. & W. R. Co., 85 A. 233.

§ 185 (Pa.) An employé, injured by the negligence of a fellow servant in obeying an order of the foreman, cannot recover under Act June 10, 1907 (P. L. 253), where the only negligence shown is in the manner in which the proper order of the foreman was executed.—Hurley v. Western Allegheny R. Co., 85 A. 1133.

§ 192 (N.H.) In an action against an express company for negligence of one of its employés, who was also an employé of the railroad, of which the plaintiff was an employé, the question of the doctrine of fellow servant cannot

enter into the case.—*Lockwood v. American Express Co.*, 85 A. 783.

(F) Risks Assumed by Servant.

§ 219 (R.I.) While a servant assumes obvious risks, he is under no duty to investigate for latent defects, and to test the fitness and safety of his place of work, or appliances provided for him by the master.—*Stimson v. Whitmore*, 85 A. 113.

A stool used in a shoe store to reach boxes of shoes on shelves, and containing a horizontal and slanting side with legs attached by concealed screws, held not such a simple appliance that the employé assumed the risk of injury.—*Id.*

§ 221 (N.J.) Where a carpenter told his foreman that the small circular saw he was using needed setting, and the foreman promised to have it set, as the complaint and promise referred to the work to be turned out by the saw, and not to any increased danger in using it, the employé assumed the risk of any resulting injury.—*Dunphy v. Farr & Bailey Mfg. Co.*, 85 A. 203.

(G) Contributory Negligence of Servant.

§ 228 (Pa.) A track repairer in a mine, injured by being struck by a "trip" of loaded cars, held not guilty of contributory negligence in failing to give signals, under Mining Act June 2, 1891 (P. L. 176), art. 12, rule 21.—*O'Brien v. Pennsylvania Coal Co.*, 85 A. 130.

§ 234 (Me.) The care required by an employé depends on his knowledge of the risks and dangers of the work, and, where he does not know of a danger, he is not chargeable with negligence for failing to avoid it.—*Hill v. Libbey*, 85 A. 487.

§ 245 (Pa.) Where a foreman directs a servant to ascend a ladder in performing his service, the servant may assume that the foreman will not direct the operation of a crane in such manner as to injure him.—*Powell v. S. Morgan Smith Co.*, 85 A. 416.

(H) Actions.

§ 250½ [New, vol. 16 Key-No. Series] (N.J. Sup.) An employé earning \$8.50 per week, who lost the first phalange of the index finger, was entitled, under the Workmen's Compensation Act, to \$5 per week for 35 weeks, besides the cost of reasonable medical and hospital services and medicines for two weeks.—*James A. Banister Co. v. Kriger*, 85 A. 1027.

In commuting periodical payments under the Workmen's Compensation Act, it is erroneous to multiply the weekly minimum by the prescribed number of weeks, and a deduction must be made to reduce the lump sum to the present value of the payments.—*Id.*

§ 250¾ [New, vol. 16 Key-No. Series] (N.J. Sup.) Under the Workmen's Compensation Act of 1911, compensation may be awarded to a mother who is an actual dependent upon a deceased son, although the son leaves no widow, when there is a provision for compensation to a mother when decedent leaves a widow.—*Blanz v. Erie R. Co.*, 85 A. 1030.

§ 250¾ [New, vol. 16 Key-No. Series] (N.J. Sup.) In Workmen's Compensation Act, § 12, prescribing the liability of an employer to "actual dependents" and making the compensation greater where a widow and father or mother are left than where a widow alone is left, the words "actual dependents" mean dependents in fact; the contrast between those who are actually dependent and those who are not dependent.—*Miller v. Public Service Ry. Co.*, 85 A. 1030.

§ 265 (Pa.) What an employer ought reasonably to know to be dangerous to his employés, he is presumed to know.—*Martin v. Atlantic Transport Co.*, 85 A. 29.

§ 265 (Vt.) In an action for the wrongful death of his intestate, plaintiff has the burden

of proving that deceased did not assume the risk of the accident.—*Fowlie's Adm'x v. McDonald, Cutler & Co.*, 85 A. 692.

§ 270 (N.H.) Evidence of a similar injury to another servant under similar conditions held competent.—*Marcotte v. Maynard Shoe Co.*, 85 A. 284.

§ 276 (Pa.) In an action for personal injuries, caused by failure to guard dangerous machinery, evidence held to sustain a judgment for plaintiff.—*Weaverling v. Thropp*, 85 A. 90.

§ 281 (Me.) In an action for injuries to an employé by the explosion of the fuse cap while being placed in position for blasting, a finding that the employé was not negligent in using a defective cap held justified.—*Hill v. Libbey*, 85 A. 487.

§ 286 (Pa.) Where part of a cargo of a ship was marked "knall kärke," the German for "explosive corks," it was a question for the jury whether the unloading company should have known of the dangerous nature of the cargo and warned an employé.—*Martin v. Atlantic Transport Co.*, 85 A. 29.

§ 286 (Pa.) Negligence of mine operator in failing to provide a slope sufficiently wide for cars to pass employés, or to provide escape holes in the side, as required by Mining Act June 2, 1891 (P. L. 176), art. 12, rule 43, resulting in injury to the miner, held for the jury.—*O'Brien v. Pennsylvania Coal Co.*, 85 A. 130.

A safe passageway on one side of a slope in a mine held not a compliance with Act June 2, 1891 (P. L. 176), art. 12, rule 43, as a matter of law.—*Id.*

§ 286 (Pa.) In an action for personal injuries to a servant, evidence held to present a question for the jury as to defendant's negligence.—*Powell v. S. Morgan Smith Co.*, 85 A. 416.

§ 286 (Pa.) In an action against a steel company for injuries to an employé through being struck by a moving crane, evidence held to present a question for the jury as to defendant's negligence.—*Thorson v. Carnegie Steel Co.*, 85 A. 1114.

§ 288 (N.H.) In an action for injuries to a servant by getting his hand caught between the rolls of a friction machine, the danger held not so obvious that plaintiff would be held to have assumed the risk as a matter of law.—*Marcotte v. Maynard Shoe Co.*, 85 A. 284.

§ 288 (R.I.) The question as to whether a servant assumes the risk of injury from a simple tool held a question for the jury, except where, from the simplicity of the tool and the circumstances of the case, but one conclusion can be drawn.—*Stimson v. Whitmore*, 85 A. 113.

§ 288 (Vt.) In an action for a servant's wrongful death, where plaintiff has the burden of proving that deceased did not assume the risk of the accident, facts tending to show that he was ignorant of the risk and evidence as to the character of the risk are sufficient to take the question of his assumption of risk to the jury.—*Fowlie's Adm'x v. McDonald, Cutler & Co.*, 85 A. 692.

§ 289 (Pa.) In an action for injuries to a servant, evidence held to present a question for the jury as to plaintiff's contributory negligence.—*Powell v. S. Morgan Smith Co.*, 85 A. 416.

§ 289 (Pa.) In an action against a steel company for injuries to an employé through being struck by a moving crane, evidence held to present a question for the jury as to contributory negligence.—*Thorson v. Carnegie Steel Co.*, 85 A. 1114.

§ 291 (Pa.) In a servant's action for injuries, instruction that the burden of proof of plaintiff's contributory negligence was on defendant was not erroneous, where the court also instructed that plaintiff could not recover if

any evidence showed his contributory negligence.—*Husvar v. Delaware, L. & W. R. Co.*, 85 A. 368.

§ 293 (N.H.) In an action for injuries to a servant by getting his hand caught between the rolls of a machine, an instruction on the master's duty to provide a safe place *held* proper.—*Marcotte v. Maynard Shoe Co.*, 85 A. 284.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

§ 301 (Me.) A servant may be hired to another so as to become the servant of the other, with all the legal consequences of the new relation, but, in the absence of a special contract, or of interference by such other person, he remains the servant of his original master.—*Wilbur v. Forgiione & Romano Co.*, 85 A. 48.

The driver of a coal company's team, hired by the day to a contractor and under the contractor's general control, remained the servant of the coal company, and the contractor was not liable for personal injuries to a third person resulting from the driver's negligence.—*Id.*

(B) Work of Independent Contractor.

§ 316 (Conn.) An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own method and without being subject to the control of his employer save as to the result of his work.—*Alexander v. R. A. Sherman's Sons Co.*, 85 A. 514.

§ 316 (N.H.) A contract by a railroad with an express company *held* not to render the railroad an independent contractor, so that the express company was liable for negligence of an employé of the railroad, while acting for the express company in moving one of its trucks.—*Lockwood v. American Express Co.*, 85 A. 783.

§ 316 (R.I.) One who contracted to erect a dwelling house, but had no control over the subcontractor, who, after the work was completed, placed a mortar box in a position so that plaintiff fell over it and was injured, was not liable for the injuries.—*Grandy v. Anderson*, 85 A. 641.

§ 319 (Conn.) That work is done by an independent contractor is no protection to the contractee, where it is of such a dangerous character that injury necessarily results to the person or property of another.—*Alexander v. R. A. Sherman's Sons Co.*, 85 A. 514.

(C) Actions.

§ 330 (Conn.) Where the allegations that plaintiff was injured by stone thrown from a blast negligently set off by defendant's servant were denied by defendant, evidence that the person who set off the blast was the servant of an independent contractor who was doing the blasting for defendant, is admissible.—*Alexander v. R. A. Sherman's Sons Co.*, 85 A. 514.

§ 330 (Me.) In an action for personal injuries by a third person against a master for alleged negligence of a servant, the burden of proving the proximate cause of the accident was on the plaintiff.—*Wilbur v. Forgiione & Romano Co.*, 85 A. 48.

§ 330 (N.H.) In an action for personal injuries by one hit by a truck too near the track, while riding on an engine, evidence *held* to show that a servant of the railroad was acting at the time as agent of the defendant express company, for whose negligence it was liable.—*Lockwood v. American Express Co.*, 85 A. 783.

§ 330 (Pa.) In an action against a contracting company for injuries from falling into an excavation in a private alley, an ordinance, a contract for work by the company in a street, and evidence as to the borough's duty to the alley *held* admissible.—*Call v. Hallam Const. Co.*, 85 A. 1126.

§ 332 (Conn.) In an action for injuries from a blast, where the defense of an independent contract was set up, an instruction that, if the injury was caused by the independent contractor's lack of care, defendant was not liable, *held* proper.—*Alexander v. R. A. Sherman's Sons Co.*, 85 A. 514.

§ 332 (N.H.) In a brakeman's action for personal injuries, where the negligent person was alleged to be an agent for the defendant express company as well as the railroad, an instruction that if such agent was hired and paid by, and was subject to the control of, the railroad, and if the express company had not hired him, did not pay him, and had no power to discharge him, then the defendant was not liable, etc., was misleading, and its refusal proper.—*Lockwood v. American Express Co.*, 85 A. 783.

MASTERS IN CHANCERY.

See Equity, § 393.

MEASURE OF DAMAGES.

See Damages, §§ 40, 100, 124, 218.

MECHANICS' LIENS.

See Schools and School Districts, § 86.

II. RIGHT TO LIEN.

(C) Agreement or Consent of Owner.

§ 61 (Del.Super.) Under the mechanic's lien statute the lien may be had where the materials were furnished either under an express or an implied contract.—*Richards v. Naudain*, 85 A. 559.

III. PROCEEDINGS TO PERFECT.

§ 122 (Pa.) A materialman's notice of intention to file a mechanic's lien which fails to set forth the contract under which he claims is insufficient.—*Herr v. S. R. Moss Cigar Co.*, 85 A. 151.

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.

(A) Waiver of Right to Lien.

§ 207 (Pa.) Under Act June 4, 1901 (P. L. 438), § 15, as amended by Act April 24, 1903 (P. L. 297), and Act June 20, 1883 (P. L. 136), a stipulation against mechanics' liens filed Monday, June 3d, was within the 10 days allowed therefor after a contract entered into on May 23d.—*Herr v. S. R. Moss Cigar Co.*, 85 A. 151.

(C) Extinguishment, Release, or Payment.

§ 240 (R.I.) The owner, on a building contractor defaulting, may pay claims of laborers and materialmen without waiting for liens to be established; but to recover of the contractor must prove they were the amounts to which the claimants were entitled.—*Bagaglio v. Paolino*, 85 A. 1048.

VII. ENFORCEMENT.

§ 260 (Del.Super.) In an action to obtain a mechanic's lien, the only limitation that can be pleaded is that provided in the act itself, that a statement of claim must be filed within 90 days, or within 30 days after the expiration of 90 days.—*Richards v. Naudain*, 85 A. 559.

§ 272 (Del.Super.) Under Court Rule No. 9, § 13, relating to mechanics' liens, pleas of non assumpsit, "never indebted," "nil debet," "non est factum," or the general issue, are not proper pleas; and, independent of the rule, an owner cannot plead non assumpsit, where the labor or materials were furnished by a person employed by the contractor, and not by him.—*Richards v. Naudain*, 85 A. 559.

Pleas of "non est factum," and that the contract was made with another party, etc., were

irrelevant, in an action to obtain a mechanic's lien by one employed by the contractor, and not the owner.—Id.

In an action to obtain a mechanic's lien, a plea "that the statement was not filed within the time prescribed by the statute in such cases made and provided" will be held to mean the act relating to mechanics' liens.—Id.

§ 288 (N.J.) In a suit upon a mechanic's lien claimed between the materialman and the owners and builder, evidence *held* to present an issue of fact on the question of payment, so that direction of verdict for defendant was error.—Kaighn v. Friday, 85 A. 342.

MEETINGS.

See Corporations, § 197.

MEMORANDA.

See Appeal and Error, § 1058; Evidence, §§ 355, 441, 471.

MILEAGE.

See States, § 59.

MILLS.

See Waters and Water Courses, § 160.

MINES AND MINERALS.

See Fixtures, § 15; Injunction, § 23; Master and Servant, § 286; Waters and Water Courses, § 67.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(B) Conveyances in General.

§ 55 (Pa.) Where an option to purchase coal underlying land was conditional on the signature of the vendor's wife to the deed, the term "absolute," in an indorsement by the vendor accepting notice of the acceptance of the option, and stating that the contract of sale is made absolute, indicates a contract in contradistinction to that created by the option and free from the condition.—Thompson v. Craft, 85 A. 1107.

(C) Leases, Licenses, and Contracts.

§ 74 (Pa.) The record of an assignment of an oil and gas lease, probate of which is taken by the prothonotary of the court of common pleas, is a nullity.—Midland Gas Co. v. Jefferson County Gas Co., 85 A. 853.

A person claiming assignment of an oil and gas lease without evidence to support it cannot prevent the lessors from entering into a new lease by inducing the lessors, through false representations, to accept rentals, and receipts given under such circumstances cannot be treated as evidence of a written contract of lease.—Id.

MISCARRIAGE.

See Abortion.

MISCEGENATION.

See Constitutional Law, § 46.

MISDEMEANOR.

See Conspiracy, § 36.

MISJOINDER.

See Action, § 50; Pleading, §§ 341, 362.

MISREPRESENTATION.

See Bills and Notes, § 103; Contracts, § 94; False Pretenses; Fraud.

MISTAKE.

See Contracts, § 93; Costs, § 96; Evidence, § 429; Principal and Agent, § 37; Release, § 18.

MONEY RECEIVED.

See Evidence, § 474½; Principal and Agent, § 136.

§ 1 (Me.) The action for money had and received is maintainable when the defendant has money which in equity and good conscience belongs to plaintiff.—Dow v. Bradley, 85 A. 884.

§ 3 (Me.) Where mortgagee sold land in violation of agreement to extend time to redeem, mortgagor could recover surplus over the mortgage deed by an action at law for money had and received.—Dow v. Bradley, 85 A. 890.

MONOPOLIES.

See Eminent Domain, § 56.

MORTGAGES.

See Appeal and Error, §§ 984, 1000, 1207; Attorney and Client, § 98; Chattel Mortgages; Corporations, §§ 479, 481; Covenants; Fixtures, § 18; Frauds, Statute of, § 56, 129; Husband and Wife, § 169; Judgment, §§ 815, 823; Money Received, § 3; Quietening Title, § 44; Registers of Deeds, § 7; States, § 110; Tenancy in Common, § 34.

V. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 244 (N.J.Ch.) The title of a bona fide purchaser for a valuable consideration without notice of an unrecorded assignment of a mortgage, the vendor having informed the purchaser that the mortgage was lost, cannot be attacked by the assignee of the mortgage, under the act respecting conveyances, sections 21, 54 (2 Comp. St. 1910, pp. 1541, 1553).—Leonard v. Leonia Heights Land Co., 85 A. 602.

An act concerning mortgages (3 Comp. St. 1910, p. 3419) § 34, is meant to protect the purchaser of the land itself who believes the mortgage to be lost, as well as purchasers of the mortgage.—Id.

Facts *held* to show that the purchaser of land acted in good faith and after all possible inquiry, in taking title relying on the vendor's assurance that a mortgage standing of record in the vendor's name had been lost, though in fact he had assigned it.—Id.

§ 244 (Pa.) Where a lease of mortgaged premises was recorded, an assignee of the mortgage took it with constructive notice of the contents of the lease and of the conditions existing as a result thereof at the time of the assignment.—Hopkins Mfg. Co. v. Ketterer, 85 A. 421.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§ 274 (N.J.) Where a vendor mortgagee covenanted to fill land conveyed, and, after partial breach of the covenant, assigned the mortgage and subsequently the owner of the equity waived the damages and extended the time for performance, and mesne conveyances recited that the land was subject to the mortgage, it is not subject to a deduction for breach of the covenant.—Peterson v. Reid, 85 A. 250.

Where land is conveyed subject to a mortgage, and only a definite equity above the mortgage is meant to be conveyed, the grantee cannot claim a deduction from the mortgage by reason of an antecedent equity in his grantor.—Id.

VIII. FORECLOSURE BY ENTRY, POSSESSION, AND NOTICE.

§ 323 (Me.) An entry by a mortgagee for the purpose of foreclosure *held* to negative his claim that he entered and took possession of a hay crop, and constituted an abandonment of whatever intention he may have had with respect to the crop, or purpose to foreclose his mortgage.—Carney v. Averill, 85 A. 494.

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

§ 357 (R.I.) A mortgagee under the terms of the mortgage held entitled to adjourn a sale by giving proper notice, though the auctioneer was not present on the date fixed for the first sale.—*Harris v. Spring*, 85 A. 923.

§ 369 (Md.) A sale by a trustee in a deed of trust of the mortgaged lands for \$10,600 could be rescinded by the purchaser, where, after the sale, he discovered that there was an unreleased mortgage on the property for \$15,000.—*Oldenberg & Kelley v. Register*, 85 A. 411.

§ 373 (Md.) Interest, ground rent, and taxes should not be charged to the purchaser of lands at a trustee's sale, where prior to time for ratification an unreleased mortgage exceeding the purchase price was discovered and the trustee failed to secure a release and delayed ratification for six months.—*Oldenberg & Kelley v. Register*, 85 A. 411.

X. FORECLOSURE BY ACTION.**(D) Judgment or Decree and Execution.**

§ 487 (Vt.) A decree of strict foreclosure, permitting redemption by a corporation as such, was erroneous, where part of the shares of stock in the corporation were not subject to rights of the orators.—*Roberts v. W. H. Hughes Co.*, 85 A. 982.

§ 492 (Vt.) Where no cross-bill is filed, a decree of strict foreclosure of a mortgage need not make any disposition of a lien superior to that of the orators, other than to declare its superiority.—*Roberts v. W. H. Hughes Co.*, 85 A. 982.

(L) Disposition of Proceeds and Surplus.

§ 567 (R.I.) A plaintiff who has attached realty of the defendant, on which, before judgment, a mortgage has been foreclosed, may have satisfaction of his judgment out of the balance in the hands of the mortgagee over the mortgage debt.—*Smart v. Burgess*, 85 A. 742.

XI. REDEMPTION.

§ 599 (Me.) The right to redeem mortgaged real estate may be kept open by the express agreement of the parties or by circumstances from which an agreement may be inferred, although it would be foreclosed except for such agreement.—*Dow v. Bradley*, 85 A. 896.

MOTIONS.

See Abatement and Revival; Appearance; Judgment, § 266; New Trial, §§ 162-168; Pleading, §§ 341-369; Trial, § 89.

MOTIVE.

See Evidence, § 151.

MUNICIPAL CORPORATIONS.

See Certiorari, §§ 23, 64; Counties; Criminal Law, § 1015; Dedication; Eminent Domain, § 47; Evidence, § 142; Health, § 3; Licenses, § 34; Mandamus, §§ 15, 116; Railroads, §§ 99, 243; Schools and School Districts; Statutes, §§ 26, 94, 95; Street Railroads, § 99; Taxation, §§ 49, 557, 561, 911; Theaters and Shows; Towns; Waters and Water Courses, §§ 201-209.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.**(C) Amendment, Repeal, or Forfeiture of Charter, and Dissolution.**

§ 49 (Pa.) The word "assessors" in the constitutional amendment of 1909 (P. L. 954), relating to the terms of certain officers, is not confined to election assessors, but includes city

or property assessors.—*Commonwealth v. Samuel*, 85 A. 1101.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§ 62 (Pa.) Act May 24, 1901 (P. L. 294), is not violative of Const. art. 3, § 20, prohibiting the General Assembly from delegating to any special commission, private corporation, or association any power to interfere with any municipal function.—*In re McKeown*, 85 A. 1085.

III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES.

§ 64 (Me.) Municipal corporations are but instruments of government created for political purposes, and are subject to legislative control.—*Inhabitants of Bayville Village Corporation v. Inhabitants of Boothbay Harbor*, 85 A. 300.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.**(B) Ordinances and By-Laws in General.**

§ 115 (N.J.) A mere resolution will not repeal or modify a duly enacted ordinance; the same formality being required therefor as for the enactment of the original ordinance.—*American Malleables Co. v. Town of Bloomfield*, 85 A. 167.

An ordinance judicial in its nature cannot be repealed wholly or in part, except upon due notice.—*Id.*

V. OFFICERS, AGENTS, AND EMPLOYÉS.**(A) Municipal Officers in General.**

§ 124 (Pa.) Under Act Feb. 7, 1906 (P. L. 7), and Act April 24, 1905 (P. L. 307), Const. art. 5, § 11, and Act March 2, 1911 (P. L. 8), there was no authority for electing an alderman for the new Third ward of Pittsburgh at the general election of November, 1911, the terms of three of the aldermen in office extending to May, 1912, and 1913, respectively.—*Commonwealth v. McAfee*, 85 A. 413.

§ 149 (Pa.) In a city of the third class, the term of office of an assessor, chosen at the February election in 1910, ends on the first Monday in December, 1911, under the schedule of constitutional amendments adopted in 1909; and a vacancy is created to be filled at the municipal election in November, 1911.—*Commonwealth v. Samuel*, 85 A. 1101.

§ 173 (Pa.) City treasurer or his sureties held not liable to assignee of part of city contractor's claim because he assented to the assignment without authority.—*Pittsburgh-Buffalo Co. v. Schmidt*, 85 A. 20.

The bond of a city treasurer imposes no liability on his surety for acts not done in connection with his official duty.—*Id.*

Municipal officer proposing to bind city by contract is under no personal liability because contract is ultra vires.—*Id.*

§ 174 (N.J.Sup.) An indictment stating facts showing that a member of the board of commissioners of a city was indirectly interested in a contract made by the board with a corporation of which he was a stockholder and officer, in violation of 2 Comp. St. 1910, p. 1755, § 32, is not bad, though it concludes that he was unlawfully and corruptly interested and directly concerned in the contract.—*State v. Kuehnle*, 85 A. 1014.

(B) Municipal Departments and Officers Thereof.

§ 184 (Me.) Where at the time the board of police of Biddeford was appointed under Private Laws 1893, c. 625 (approved and taking effect March 28, 1893), the full number of pa-

trolmen provided for by ordinance were legally in office, the removal of a patrolman without cause and the appointment of another in his stead was illegal.—*Ducharme v. City of Biddeford*, 85 A. 157.

§ 186 (Me.) A de facto patrolman is not entitled to the salary for duties performed under color of an appointment, but without legal title.—*Ducharme v. City of Biddeford*, 85 A. 157.

Burden held on patrolman in action for salary to show death, resignation, or legal removal, creating a vacancy to fill which he could have legally been appointed.—*Id.*

VI. PROPERTY.

§ 225 (Me.) Sale of a horse by a municipal corporation, in consideration of purchaser's agreement to keep her, give her a good home, avoid overworking her, and to put her out of the way and bury her when her usefulness was over, held valid, and not subject to repudiation in the absence of fraud.—*City of Rockland v. Anderson*, 85 A. 1066.

VII. CONTRACTS IN GENERAL.

§ 226 (N.J.) A municipal body has no power to indemnify one against his own act which may result in damage to the property of another, where public rights are not concerned.—*American Malleables Co. v. Town of Bloomfield*, 85 A. 167.

§ 237 (N.J.Sup.) Under Act March 27, 1902 (P. L. p. 200), a contract for the removal of garbage cannot lawfully be awarded for five years beginning December 15, 1911, when the advertisements called for proposals for a term beginning September 25, 1911.—*O'Malley v. Mayor and Council of the City of Hoboken*, 85 A. 449.

Under Act March 27, 1902 (P. L. p. 200), a garbage contract cannot lawfully be awarded in accordance with specifications annexed, when the advertisement was for bids in accordance with specifications on file, and, in fact, none were then in existence.—*Id.*

IX. PUBLIC IMPROVEMENTS.

(B) Preliminary Proceedings and Ordinances or Resolutions.

§ 294 (Pa.) Resolution of a borough council, accepting a bid of contractors subject to the entering into of a contract, is not in itself a "contract," within Act April 3, 1851 (P. L. 323, § 3), requiring prior posting and advertising of the ordinance before contracting.—*Jaxtheimer v. Sharpville Borough*, 85 A. 994.

A contract, entered into between a borough and contractors 21 days after passage of a resolution accepting the contractors' bid, 19 days after its posting, and 13 days after its publication, is binding on the borough.—*Id.*

§ 314 (Pa.) That specifications for paving contract were prepared or procured by the borough engineer and street committee instead of the burgess and paving committee, as provided by ordinance, is immaterial, where the street committee and paving committee for the current year were the same.—*Jaxtheimer v. Sharpville Borough*, 85 A. 994.

(C) Contracts.

§ 360 (Pa.) Where a sewer contractor substituted different pipe for that called for in the specifications, though with the consent of the city engineer, and leakage resulted, the contractor was not entitled to charge as for extra work for stopping the leakage.—*Brobst v. City of Reading*, 85 A. 31.

Where a sewer contract specified pipe of a particular character, the contractor was bound to take notice of the engineer's lack of authority to authorize a substitution of different pipe.—*Id.*

(D) Damages.

§ 392 (N.J.Sup.) Under Town Act, § 61, damages cannot be assessed for the vacation of a

portion of a street in favor of owners of land not abutting on the vacated portion.—*Newark & B. R. Co. v. Town of Montclair*, 85 A. 1028.

The interest of abutting owners in the public easement in a street is not a private interest of part owners, but an interest shared with the whole public; and the abandonment of the public easement in a portion on which they do not abut is not a taking of their property.—*Id.*

(E) Assessments for Benefits, and Special Taxes.

§ 406 (Me.) An assessment for benefits for a local improvement is made under the taxing power of the Legislature by municipal officers acting as agents of the state, and the validity of the assessment must be determined by the rules governing the validity of other assessments.—*City of Auburn v. Paul*, 85 A. 571.

Priv. & Sp. Laws 1903, c. 137, as amended by Priv. & Sp. Laws 1905, c. 109, creating a board of public works for a city, does not authorize the board to make assessments for benefits for the construction of sewers, but such assessments are governed by Rev. St. c. 21, §§ 5, 6.—*Id.*

§ 408 (Me.) A statute authorizing assessments for local improvements according to the benefits conferred on the property sufficiently fixes the standard of assessment and designates the property to be assessed.—*City of Auburn v. Paul*, 85 A. 571.

Rev. St. c. 21, § 5, providing for the assessment of benefits for the construction of a sewer, held to sufficiently prescribe the manner in which the assessment shall be made.—*Id.*

§ 453 (Me.) Rev. St. c. 21, § 6, providing for a board of arbitration to determine the amount of an assessment for benefits for a local improvement, provides for a disinterested board, though declaring that the interest of the general taxpayer of the municipality is not a disqualification, but no other interest is permissible.—*City of Auburn v. Paul*, 85 A. 571.

§ 486 (Conn.) In the establishment of a building line, one who received notice, under New Haven Charter, §§ 78-80, of the public hearing and of the hearing before the bureau of compensation, was chargeable with notice of the entire proceedings down to the accepting and recording of the report of the department of public works.—*Katsch v. City of New Haven*, 85 A. 523.

§ 511 (Conn.) Under New Haven City Charter, § 81, relating to the establishment of building lines, where the damages and benefits are equal the assessments will be deemed to have been made when the council accepts the report of the department of public works, and the time within which an appeal may be taken under section 85 begins to run then.—*Katsch v. City of New Haven*, 85 A. 523.

On appeal from the assessment of damages for the establishment of a building line, in the absence of averments to the contrary, it will be assumed that notice was given, as provided in New Haven City Charter, §§ 78-80, of the public hearing, and of the hearing before the bureau of compensation.—*Id.*

§ 511 (Me.) An appeal from an assessment for benefits for the construction of a local improvement is not a constitutional right, but a privilege which can be granted by the state alone.—*City of Auburn v. Paul*, 85 A. 571.

§ 511 (Pa.) Under Act June 13, 1874 (P. L. 283), where the affidavit of affiant, accompanying an appeal from an award of viewers in proceedings to improve a street, avers nothing except that the statement set out in the paper filed is correct and true; the appeal will be quashed.—*Butler Engine & Foundry Co. v. Butler Borough*, 85 A. 1112.

Appearance through counsel, under an issue framed by the court on appeal from an award of viewers in proceedings to improve a street, does not waive the right of appellee to take advantage of the appellant's failure to file the

affidavit required by the act of June 13, 1874 (P. L. 283).—Id.

§ 513 (N.J.) Methods of assessments of benefits from street improvement *held* not so clearly invalid as to support an action to quiet title by an owner whose assessment was not disproportionate to his benefits.—Adams v. Village of South Orange, 85 A. 351.

(F) Enforcement of Assessments and Special Taxes.

§ 586 (N.J.) Under the charter of the village of South Orange, assessments for benefits for street improvements *held* made on the lands specially benefited and not on the owners.—Adams v. Village of South Orange, 85 A. 351.

X. POLICE POWER AND REGULATIONS.

(B) Violations and Enforcement of Regulations.

§ 642 (N.J.Sup.) Under 2 Comp. St. 1910, p. 2686, § 16, the common pleas is without jurisdiction to try de novo an appeal from the small cause court adjudging a defendant guilty of violating the sanitary code of a municipality ordained under the act creating local boards of health.—Board of Health of Cranford Tp. in Union County v. Court of Common Pleas in and for Union County, 85 A. 217.

Even if an appeal lies to the common pleas from a conviction in the small cause court of violating a municipal sanitary code, the common pleas cannot adjudicate on the reasonableness of the regulation of the local board of health.—Id.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

§ 705 (Del.Super.) A pedestrian, injured by an automobile which is being driven on the left-hand side of a public highway, is *prima facie* entitled to recover.—Grier v. Samuel, 85 A. 759.

§ 706 (Conn.) A complaint alleging that plaintiff was kicked by defendant's horse, "negligently left unattended, unguarded and unharnessed and tied to the rear of a wagon," in a street, and that the horse was a vicious horse, as defendant knew, charges negligence independently of, and also in view of, the horse's vice.—Hope v. Valente, 85 A. 541.

Whether, regardless of its viciousness, it is negligence to leave a horse unharnessed tied to the rear of a wagon at the side of a street, where the sidewalk is obstructed, in going around which in the street a pedestrian is kicked by it, is a question for the jury.—Id.

§ 706 (Md.) In an action for injuries to plaintiff in a collision between his vehicle and that driven by defendant's servant in a city street, evidence *held* to require submission of the questions of negligence and contributory negligence to the jury.—Knecht v. Mooney, 85 A. 775.

§ 706 (N.J.) In an action by a child eight years old for injuries by a motor cycle, a charge that if plaintiff had started to cross the street, and then started back on a walk and was struck, the jury might infer that the cyclist was negligent, and that it was his duty to be on the lookout, so that, if any one crossed in front of him, he might be in a position to stop the motor cycle, was error.—Francis v. Atlantic City Gas Co., 85 A. 232.

§ 706 (N.J.) Where defendant's automobile, running at 45 miles an hour, overtook and collided with plaintiff's motor vehicle, a nonsuit on the ground that plaintiff's proof showed his driver guilty of contributory negligence was

properly denied.—Mayer & Peter v. Creighton, 85 A. 344.

In an action for injuries to plaintiff's motor cycle from a collision with defendant's automobile, evidence that defendant's car was running at a speed of 45 miles an hour when it overtook and collided with plaintiff was evidence of negligent operation sufficient to put defendant on his defense; Acts 1909, p. 465, amending Acts 1906, p. 189, fixing the maximum speed on highways at 25 miles per hour.—Id.

XII. TORTS.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 756 (N.J.Sup.) Road Act 1859, § 20 (4 Comp. St. 1910, § 68a19, p. 4451), authorizing suit for injuries from the defective condition of highways, applies to townships only; and section 84 does not extend it to boroughs.—Van Valkenburgh v. Borough of Bergenfield, 85 A. 269.

§ 803 (Pa.) A borough is not liable for injuries to plaintiff stopping his wagon so near the tracks of a railroad on a borough street that it was struck by a train, though there was ample room for the wagon on the street between the track and the sidewalk.—Kurel v. Borough of Shamokin, 85 A. 83.

§ 816 (N.J.Sup.) A declaration, alleging that defendant removed from the sidewalk a large quantity of snow and deposited it on his adjoining premises and permitted it to remain for a long time, so that it melted and the water ran on the sidewalk, where it congealed, and plaintiff stepped on the ice and was injured, was not subject to demurrer.—Aull v. Lee, 85 A. 1018.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

§ 859 (Pa.) Want of signification by municipal authorities of desire to increase indebtedness before election, failure to certify and sign ballots by county commissioners, failure to make proper return, and failure of the court to count the votes, *held* irregularities as to matters of detail which were cured by retroactive legislation. Act June 19, 1911 (P. L. 1044).—Swartz v. Borough of Carlisle, 85 A. 847.

§ 864 (Pa.) Water bonds issued by a borough under Act May 31, 1907 (P. L. 355), as amended by Act April 22, 1909 (P. L. 135), though secured only by the works, constitute a debt forbidden by Const. art. 9, § 8, if their aggregate with the prior indebtedness amounts to more than 7 per cent. of the taxable property of the borough.—Lesser v. Warren Borough, 85 A. 839.

§ 864 (Pa.) Act June 19, 1911 (P. L. 1044), validating municipal elections for increasing indebtedness, invalid because of failure to observe statutory requirements, *held* not in violation of Const. art. 9, § 8, limiting municipal indebtedness.—Swartz v. Borough of Carlisle, 85 A. 847.

(B) Administration in General, Appropriation, Warrants, and Payment.

§ 902 (Pa.) A bank with which a city treasurer, without authority, pledged certificates of indebtedness of the city, which had been indorsed in blank by the original holders, as security for a note in the name of the city to the bank, cannot recover on the certificates independently.—First Nat. Bank v. City of New Castle, 85 A. 1098.

(C) Bonds and Other Securities, and Sinking Funds.

§ 938 (N.J.) Municipal bonds payable to bearer issued since the passage of negotiable in-

struments act *held* negotiable instruments, the rights of the holders of which were governed by that act.—*Linbarger v. Board of Education of West New York*, 85 A. 235, 237.

(B) Rights and Remedies of Taxpayers.

§ 993 (Pa.) A taxpayer held entitled to enjoin a city from paying a sewer contractor for extra work in stopping leakages of sewers, made necessary by the substitution of a different kind of pipe from that specified.—*Brobst v. City of Reading*, 85 A. 31.

XIV. CLAIMS AGAINST CORPORATION.

§ 1003 (Pa.) Assignment of part of claim against city cannot be enforced unless it is shown that assent of city treasurer to the assignment was authorized.—*Vetter v. City of Meadville*, 85 A. 19.

§ 1014 (N.J.Sup.) An approval by the water commissioners of Atlantic City of a false bill, containing items for cost of assistant engineer when none was employed, which bill was not verified as required by statute, will be set aside on certiorari.—*Wahl v. Board of Water Com'rs of Atlantic City*, 85 A. 1024.

NAMES.

See Execution, § 18; Religious Societies, § 17.

NATURALIZATION.

See Aliens.

NAVIGABLE WATERS.

III. RIPARIAN AND LITTORAL RIGHTS.

§ 39 (Me.) The remedy of one whose land, bordering on a river, has been damaged by another negligently allowing his logs to jam on piers to such an extent as to cause the water to overflow the land and deposit thereon logs and debris is, under Rev. St. c. 43, §§ 7, 8, for forfeiting the logs and recovering damages.—*Howe v. Ashland Lumber Co.*, 85 A. 160.

A lumber company, authorized by special act to erect piers and booms to collect and sort logs coming down a river, may, in the exercise of due care, use its piers and booms for all proper purposes, without liability for damages incident to or consequent on the result of such use.—*Id.*

Where the negligence of a lumber company maintaining piers and booms for the sorting of logs floating down a river co-operated with an unusual flood in causing damage to adjacent land, the company was liable for the damages sustained.—*Id.*

Evidence *held* to support a finding that a lumber company maintaining, as authorized by special act, piers and booms for the collecting and sorting of logs floating down a river negligently allowed an accumulation of logs and debris on the piers.—*Id.*

An owner of land bordering on a river may not recover for damages sustained by flowage of his land by proving negligence on the part of a lumber company maintaining piers and booms; but he must show that the company should have anticipated that such a rainfall as caused the damage might occur.—*Id.*

In an action against a lumber company maintaining piers and booms for the collection of logs on a river, for damages to a riparian owner by an overflow of his land, evidence *held* to show that the rainfall causing the overflow, with the aid of the negligence of the company, was not so unprecedented that the company was not required to anticipate it.—*Id.*

NECESSITY.

See Contracts, § 303.

NEGLIGENCE.

See Appeal and Error, §§ 1001, 1064; Carriers, §§ 57, 286-347, 366, 369; Charities, § 45; Death, Druggists, § 9; Electricity, §§ 16, 19; Highways, §§ 184, 213; Landlord and Tenant, §§ 162-169; Master and Servant, §§ 88-332; Municipal Corporations, §§ 705, 706; Navigable Waters, § 39; Physicians and Surgeons, §§ 14-18; Railroads, §§ 274-445; Steam; Street Railroads; Telegraphs and Telephones; Trial, §§ 143, 194, 251, 295, 296.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

§ 1 (Conn.) "Negligence" is the failure to do that degree of care for the protection of another which the ordinarily reasonably careful and prudent man would use under like circumstances.—*Temple v. Gilbert*, 85 A. 380.

(C) Condition and Use of Land, Buildings, and Other Structures.

§ 31 (Pa.) A fireman, injured by failure of the occupant of a building to keep elevator gates shut, as required by Act April 25, 1906 (P. L. 304), can recover therefor from the occupant.—*Drake v. Fenton*, 85 A. 14.

III. CONTRIBUTORY NEGLIGENCE.

(B) Children and Others Under Disability.

§ 85 (Conn.) In determining the question of contributory negligence of an infant who was killed by a street car, the age of the infant, his experience, intelligence, and capacity to understand and avoid the danger to which he exposed himself must all be considered.—*Jollimore v. Connecticut Co.*, 85 A. 373.

IV. ACTIONS.

(B) Evidence.

§ 122 (Conn.) A boy of 11 years cannot be presumed incapable of contributory negligence where it appeared that he was a bright boy for his years, and, if no evidence is offered upon this subject, judgment must go against the plaintiff.—*Jollimore v. Connecticut Co.*, 85 A. 373.

§ 134 (N.H.) In an action for personal injuries to a brakeman, hit while riding on an engine by an express truck too near the track, evidence *held* to warrant a finding that the accident was caused by the negligence of one P. who was in charge of the trucks.—*Lockwood v. American Express Co.*, 85 A. 783.

In a negligence case, where a plaintiff charges certain acts as the cause of an accident, he is not bound to exclude all other possible causes; but it is sufficient if he makes it appear more probable than otherwise that the fact was as he claimed.—*Id.*

§ 135 (N.H.) In an action for personal injuries to a brakeman, while riding on the running board of a locomotive, from being struck by a baggage truck of defendant express company too near the track, evidence *held* to warrant a finding that plaintiff exercised due care.—*Lockwood v. American Express Co.*, 85 A. 783.

(C) Trial, Judgment, and Review.

§ 136 (Me.) Whether a person was negligent in a given case is generally a question for the jury, and it is always so when the facts are in dispute or are to be determined from conflicting testimony, and also when intelligent and fair-minded men might reasonably differ as to the inferences to be drawn from undisputed facts.—*Blair v. Lewiston, A. & W. St. Ry.*, 85 A. 792.

When a person is required to act in an emergency, and in suddenly impending personal peril, the question of his contributory negligence in choosing any particular one of the alternatives presented is for the jury.—*Id.*

§ 136 (Pa.) The question of negligence is for the jury, unless the standard of care and the standard of duty are defined by law, and are the same under all circumstances.—*Thorne v. Philadelphia Rapid Transit Co.*, 85 A. 25.

§ 136 (Pa.) In an action by a woman against a contracting company for injuries sustained from falling into an unguarded excavation made by defendant in a private alley, evidence held to present a question for the jury.—*Call v. Hallam Const. Co.*, 85 A. 1126.

§ 138 (Pa.) In an action for personal injuries, instruction held not erroneous as putting on plaintiff the burden to show freedom from contributory negligence.—*Call v. Hallam Const. Co.*, 85 A. 1126.

§ 139 (Me.) In action for negligently deserting plaintiff while on a fishing trip, it was proper to submit the question to the jury whether, if plaintiff left the fishing grounds before defendant did, this relieved defendant of the charge of negligence, instead of charging, as a matter of law, that it did so relieve him.—*Dyer v. Collins*, 85 A. 1.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

See New Trial, § 168.

NEWSPAPERS.

See Grand Jury, §§ 26, 36; Witnesses, § 196.

NEW TRIAL.

See Appeal and Error, §§ 270, 933, 977, 978.

II. GROUNDS.

(B) Misconduct of Parties, Counsel, or Witnesses.

§ 32 (Pa.) A new trial will not be granted for refusal to withdraw a juror on account of improper remarks of counsel, where the court compelled counsel to withdraw his statement, and the opposing counsel made no further objection, and took no exception.—*Krimmel v. S. R. Moss Cigar Co.*, 85 A. 154.

(C) Rulings and Instructions at Trial.

§ 40 (N.J.Sup.) A verdict based on an erroneous rule of law may be set aside on rule to show cause, though no exception to the erroneous instruction was taken at the trial.—*Clark v. Public Service R. Co.*, 85 A. 189.

(D) Disqualification or Misconduct of or Affecting Jury.

§ 44 (Pa.) It is not an abuse of discretion to refuse a new trial asked for on the ground of intoxication of a juror, where the court finds, from depositions offered in support of the motion, that the juror was not incapacitated from an intelligent consideration and disposition of the case.—*Call v. Hallam Const. Co.*, 85 A. 1126.

(F) Verdict or Findings Contrary to Law or Evidence.

§ 69 (Me.) Where a party commits willful perjury or knowingly makes use of false testimony and thereby obtains a verdict, the court in its discretion may set it aside.—*Hill v. Libbey*, 85 A. 487.

Where the successful party, contradicting the stenographer's report of former testimony, might have believed what he testified to, though he was mistaken and it was probable that the jury was not materially influenced by his false testimony, a new trial should not be granted on the ground of willful perjury obtaining a verdict.—*Id.*

§ 70 (Conn.) The trial court should not set aside a verdict where there is some evidence to support it.—*Seidler v. Burns*, 85 A. 369.

§ 70 (Conn.) Where the evidence in a negligence case reasonably sustained the verdict for plaintiff, and there was no indication that the jury were improperly influenced, a new trial was properly refused.—*Temple v. Gilbert*, 85 A. 380.

§ 70 (Conn.) The trial court cannot set aside a verdict when it is apparent that there was some evidence upon which the jury might have reasonably reached their conclusion.—*Stern v. Max Rippes Co.*, 85 A. 543.

§ 70 (Me.) Where the evidence reasonably supported plaintiff's contention, a verdict for plaintiff could not be set aside on motion for new trial before the law court, though defendant's liability under the evidence was not free from doubt.—*Carleton v. Fletcher*, 85 A. 395.

§ 71 (Del.) Where plaintiff's evidence alone showed that the accident was due to defendant's negligence, while the deceased was exercising due care, the court properly refused to disturb a verdict, though defendant's evidence conflicted therewith and was of a more positive character.—*Philadelphia, B. & W. R. Co. v. Gatta*, 85 A. 721.

§ 71 (Me.) A finding, on conflicting evidence, that plaintiff fell upon a part of defendant's wharf set apart for passenger travel held not so manifestly wrong as to require it to be set aside.—*Rodick v. Maine Cent. R. Co.*, 85 A. 41.

§ 72 (Del.) The trial court will not disturb a verdict, as against the evidence, where the evidence, though it preponderates against it, warrants a submission of the issues of fact.—*Philadelphia, B. & W. R. Co. v. Gatta*, 85 A. 721.

§ 76 (Conn.) A new trial will not be granted because of awarding a very inconsiderable and inconsequential sum in excess of what a party was entitled to.—*Mathews v. Livingston*, 85 A. 529.

§ 77 (Conn.) The trial court should not refuse to set aside a verdict, the manifest injustice of which plainly indicates mistake, prejudice, corruption, or partiality.—*Seidler v. Burns*, 85 A. 369.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 162 (Conn.) The court may grant a motion to set aside a verdict unless a remittitur of a certain amount be filed, and, on such amount being remitted, enter judgment for the balance.—*Holcomb Co. v. Clark*, 85 A. 376.

§ 168 (Me.) A verdict based on the credibility of witnesses and the value of documentary evidence will not be disturbed on motion in the Supreme Judicial Court for a new trial, where nothing appears inherently contrary to the truth.—*Robertson v. Burke & Warren*, 85 A. 295.

§ 168 (Vt.) On petition for a new trial, it was the petitioner's duty to call the court's attention to the missing evidence necessary to his recovery.—*Willard v. Norcross*, 85 A. 904.

It was not ground for a new trial, in an action for malpractice, that the ruling of the presiding judge that a certain physician was not qualified to testify to the local standard of treatment was a surprise to the plaintiff, especially where it appeared that plaintiff had ample time to call other witnesses on this point.—*Id.*

It was not ground for a new trial to plaintiff, in an action for malpractice, that the trial judge expressed an erroneous opinion that there was evidence tending to show that defendant's conduct fell below the local standard.—*Id.*

Under the rules of the Supreme Court, a petition for a new trial should have been supported by the affidavit of the petitioner, and also by

the affidavit of all the attorneys then acting for her.—Id.

The rule of the Supreme Court, relative to the taking of testimony to be used on a motion for a new trial, contemplates that such testimony shall be taken upon notice to the petitioner, though it does not expressly so provide.—Id.

Where the newly discovered evidence relied on by plaintiff, in her motion for a new trial, is apparently neither newly discovered nor sufficient to change the result, the motion will be denied.—Id.

NEXT OF KIN.

See Descent and Distribution.

NOMINATION.

See Elections, § 154.

NON OBSTANTE VEREDICTO.

See Appeal and Error, § 733; Judgment, § 199.

NONRESIDENCE.

See Attachment, § 47.

NOTARIES.

See Bridges, § 5.

§ 2 (N.J.Ch.) Under section 22 of the Act concerning conveyances (2 Comp. St. 1910, p. 1542), where an officer certifies an acknowledgment upon introduction of the person making it by one with whom the officer is acquainted, though he is deceived, his action is blameless; but where a man introduces himself, and the officer takes the acknowledgment, he should be deprived of his office, or otherwise punished.—In re H—C—, Jr., 85 A. 336.

NOTES.

See Bills and Notes.

NOTICE.

See Aliens; Appeal and Error, §§ 422, 1053; Attorney and Client, § 153; Bills and Notes, § 396; Carriers, § 287; Commerce, § 61; Corporations, §§ 95, 298, 428; Divorce, § 79; Eminent Domain, §§ 180-182; Evidence, § 185; Intoxicating Liquors, § 104; Landlord and Tenant, § 111; Mechanics' Liens, § 122; Mortgages, § 357; Municipal Corporations, §§ 486, 511; Prohibition, § 5; Receivers, § 35; Sales, § 234; Schools and School Districts, § 86; Trespass, § 20; Wills, § 269.

§ 6 (Me.) Notice sufficient to put a person on inquiry imposes on him such a degree of diligence as will enable him to ascertain the truth, and in failing to do so he will be charged with the knowledge he ought to have obtained by reasonable investigation.—Hudson Structural Steel Co. v. Smith & Rumery Co., 85 A. 384.

NUISANCE.

See Criminal Law, § 991.

I. PRIVATE NUISANCES.

(A) Nature of Injury, and Liability Therefor.

§ 3 (R.I.) The carrying on of a business in a manner to create noises and jarring vibrations held a nuisance for which suit would lie in equity to recover damages for interference with the enjoyment of property.—Blomen v. N. Barstow Co., 85 A. 924.

(C) Abatement and Injunction.

§ 19 (R.I.) Persons residing in a residence neighborhood are entitled to enjoin a nearby manufacturer from operating drop hammers in such manner as to constitute a nuisance by pro-

ducing disturbing noises, jarring, etc.—Blomen v. N. Barstow Co., 85 A. 924.

§ 33 (R.I.) On bills for injunction, evidence held to sustain findings that operation of drop hammers by a manufacturer disturbed the comfort of neighbors through producing noises, jarring, etc.—Blomen v. N. Barstow Co., 85 A. 924.

OATH.

See Officers, § 36; Pleading, § 301.

OBJECTIONS.

See Appeal and Error, §§ 204-233; Depositions, § 107; Equity, §§ 42, 160, 178, 220; Trial, §§ 85, 105.

OBSTRUCTIONS.

See Easements, § 69; Highways, § 157.

OFFER.

Of proof, see Trial, §§ 45-48.

OFFICERS.

See Account; Acknowledgment; Clerks of Courts; Constitutional Law, § 46; Counties; Criminal Law, § 90; Equity, § 29; Grand Jury, § 7; Health, §§ 3, 13, 24; Indictment and Information, § 137; Justices of the Peace; Municipal Corporations, §§ 49, 124-186; Notaries; Paupers, § 5; Quo Warranto, § 3; Receivers; Registers of Deeds, § 7; Schools and School Districts, § 97; Sheriffs and Constables; States, §§ 51, 59; Taxation, §§ 317, 371½, 557, 561; Towns, §§ 39, 59; Weights and Measures.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(C) Eligibility and Qualification.

§ 36 (Md.) Members of a horse racing commission appointed under Acts 1912, c. 132, to regulate horse racing in H. county, held not appointed to an office of profit or trust, and were not required to take the oath of office, either pursuant to Const. art. 1, § 6, or Code 1904, art. 70, § 10.—Clark v. Harford Agricultural & Breeders' Ass'n, 85 A. 503.

(G) Resignation, Suspension, or Removal.

§ 69 (N.J.Sup.) In the absence of local ordinance or by-law, no person can be an exempt fireman of the Dover Fire Department unless it is provided for by statute.—Bowlby v. Board of Chosen Freeholders of Morris County, 85 A. 229.

P. L. 1889, p. 19, § 14, as amended by P. L. 1890, p. 44 (2 Gen. St. 1895, p. 1513, § 188), fixing the period of service entitling one to become an exempt fireman, at seven years, is restricted to the object of the act stated in its title to provide for the incorporation of associations of exempt firemen, as supplemented by section 6, providing for a fund for the relief, support, or burial of members, their widows and orphans.—Id.

The character of exempt firemen established by P. L. 1889, p. 19, § 14, as amended by P. L. 1890, p. 44 (2 Gen. St. 1895, p. 1513, § 188), has no other force than the fixing of qualifications for membership in associations formed under the act, and cannot be relied on to bring a person within P. L. 1911, p. 444, relating to removal from office.—Id.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 104 (N.J.) The validity of an officer's act does not depend upon the perfectness of his title, but it is enough that his title be colorable.—State v. Zeller, 85 A. 237.

§ 114 (N.J.Sup.) The members of a public board acting in performance of a public duty

are not personally liable for acts done in good faith.—*Johnson v. Marsh*, 85 A. 761.

OPINION EVIDENCE.

See Evidence, §§ 471-555.

OPTIONS.

See Specific Performance, §§ 57, 97.

ORDER OF PROOF.

See Trial, §§ 59, 60.

ORDERS.

See Appeal and Error; Attachment, § 142; Railroads, § 9.

ORDINANCES.

See Municipal Corporations, § 115.

OWNERSHIP.

See Evidence, § 158; Property, § 9.

PARENT AND CHILD.

See Adoption; Bastards; Divorce, § 294; Guardian and Ward; Habeas Corpus.

PAROL EVIDENCE.

See Evidence, §§ 429-448.

PARTIES.

See Bankruptcy, § 299; Contracts, § 187; Equity, §§ 97, 117; Husband and Wife, § 330; Landlord and Tenant, § 142; Partition, § 49; Pleading, § 341; Specific Performance, §§ 106, 126.

II. DEFENDANTS.

(B) Joinder.

§ 25 (Conn.) An action in replevin against two persons for goods in possession of each, in which the other has no interest, presents a case of misjoinder of parties.—*Patchin v. Rowell*, 85 A. 511.

III. NEW PARTIES AND CHANGE OF PARTIES.

§ 40 (Pa.) Where one who has exercised an option to purchase land sues for specific performance, his assignees may be permitted to intervene as parties plaintiff.—*Schaeffer v. Herman*, 85 A. 94.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 76 (Conn.) Under Gen. St. 1902, § 609, where defendants merely denied an allegation that plaintiffs accepted a trust, they were only entitled to attack their standing as trustees because of such a failure.—*Goodsell v. McElroy Bros. Co.*, 85 A. 509.

PARTITION.

See Appeal and Error, § 78.

II. ACTIONS FOR PARTITION.

(A) Right of Action and Defenses.

§ 17 (Del.Ch.) An intervention proceeding for the partition of real estate of their ancestor raising a question of law upon undisputed facts will not be stayed until the dispute as to the title is adjudicated elsewhere.—*In re Cochran's Estate*, 85 A. 1070.

(B) Proceedings and Relief.

§ 49 (Del.Ch.) In a proceeding by devisees to partition real estate of a decedent, an intervention by heirs of the deceased claiming an interest therein, and raising a purely legal ques-

tion on undisputed facts, may be allowed, and their claims therein adjudicated.—*In re Cochran's Estate*, 85 A. 1070.

§ 63 (Pa.) A finding in a partition suit that a married woman had sold her interest to a cotenant held not sustained by the evidence.—*Lincoln v. Wakefield*, 85 A. 133.

§ 86 (Pa.) An adjustment of rents between tenants in common must take place as of the date of the final partition or distribution of the proceeds of the sale of property, under Act June 24, 1895 (P. L. 237).—*Lincoln v. Wakefield*, 85 A. 133.

Adjustment of rents between tenants in common in partition must be heard before the trial court, unless the parties agreed that the master in partition should act as referee therefor.—*Id.*

§ 94 (R.I.) Complainants in partition in appealing from an award of owely cannot complain because the commissioners refused to testify in support of their report, since the report is not conclusive, and could be overcome by other evidence showing unfairness or inequality of the award.—*Kenyon v. Kenyon*, 85 A. 936.

PARTNERSHIP.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Representation of Firm by Partner.

§ 139 (N.J.) One of the members of a firm held authorized to bind the firm by a contract with a corporation for certain alterations in the building in which the firm proposed to transact its business.—*William L. Blanchard Co. v. Hilton*, 85 A. 456.

§ 146 (N.J.Sup.) A partner with others, in the building of two houses, is not liable on a note in the firm name given by another partner four years after completion of the houses, in the absence of proof that it was customary for a firm in that business to give negotiable notes, and that the authority of one partner continued after the object of the partnership was accomplished.—*Harris v. Heilig*, 85 A. 1023.

PARTY WALLS.

See Pleading, § 144.

§ 10 (Del.Super.) In an action under Wilmington City Charter, § 131, for compensation for use of party walls, pleas invoking an interpretation of such statute from usage and understanding of it were not demurrable, though such method of interpretation could not be implied until the facts were proven; they being sufficient to apprise plaintiff of the defense.—*Pfrommer v. Taylor*, 85 A. 760.

PASSENGERS.

See Carriers, §§ 286-383.

PASSIVE TRUST.

See Trusts, § 136.

PAUPERS.

II. POOR-LAW DISTRICTS AND OFFICERS.

§ 5 (Pa.) The terms of office of overseers of the poor, elected at the February election, 1910, expired, under the constitutional amendment of 1909, the first Monday of December, 1911, and were not extended by Act June 19, 1911 (P. L. 1052), changing the term of overseers from two to four years.—*Commonwealth v. Bailey*, 85 A. 876.

PAYMENT.

See Accord and Satisfaction; Appeal and Error, §§ 171, 1057, 1058; Estoppel, § 78; Li-

censes, § 34; Mechanics' Liens, § 240; Principal and Surety, § 108; Release, § 29; Sales, §§ 196, 202; Schools and School Districts, § 88; Specific Performance, § 97; Subrogation; Tender.

II. APPLICATION.

§ 36 (Conn.) The law governing the application of payments is the same whether the payments are made on an ordinary running mercantile account, or on an account made up of as many independent causes of action as there are bills of goods sold.—*American Woolen Co. v. Maaget*, 85 A. 583.

The application of payment to one of two or more debts or items of account may be by express designation or the intention to apply may be inferred from the circumstances of the payment.—*Id.*

§ 38 (Conn.) The application of payments by a buyer is governed by the law of the state where the payment is made.—*American Woolen Co. v. Maaget*, 85 A. 583.

§ 39 (Conn.) Ordinarily, a debtor may direct at the time of payment to which one of two or more debts or items of account a payment shall be applied, and, where he fails to do so, the creditor may make the application.—*American Woolen Co. v. Maaget*, 85 A. 583.

A creditor who has the right to apply payments to one of two or more debts or items of account must make the application before suit.—*Id.*

Where the right of a creditor to apply a payment to one of two or more debts or items of account is lost before he sues, the commencement of the suit does not evidence an intention to apply the payments to the debts or items of the account other than those sued on.—*Id.*

§ 43 (Conn.) In the absence of application by debtor or creditor of a payment to one of two or more debts or items of account, the court will make it according to the justice of the case best promoted by carrying out the intention of the parties, whether express or implied.—*American Woolen Co. v. Maaget*, 85 A. 583.

Where an account on the debit side consisted of continuous charges for various bills of goods sold on different dates with entries of the several different dates when the same became due, and on the credit side appeared entries for goods returned, and cash payments entered as cash on account, the account was an ordinary mercantile account.—*Id.*

In the absence of evidence to the contrary, the law presumes that the entry of payments generally as credits on open running merchants' account indicates the intention of the creditor to apply the payments to the earliest items of the account, and where the creditor credited payments generally on the account without showing any application to the later items, and on the bankruptcy of the debtor filed proof of the entire account, the payments must be applied to the earliest items.—*Id.*

Payments made after the commencement of an action aided by attachment will not be credited on the items of the account sued on, though they are the earliest items of the account.—*Id.*

PEDDLERS.

See *Hawkers and Peddlers*.

PENALTIES.

See Constitutional Law, § 55; Pleading, § 246.

I. NATURE AND GROUNDS, AND EXTENT OF LIABILITY.

§ 7 (N.H.) Under the direct provisions of Laws 1899, c. 31, a private action for a penalty is abolished, and no private action can be brought under Pub. St. 1901, c. 57, § 16.—*Bartlett v. Mansfield*, 85 A. 756.

PERJURY.

II. PROSECUTION AND PUNISHMENT.

§ 25 (N.J.Sup.) An indictment for perjury, alleging that the grand inquest was investigating the misconduct of excise commissioners and application for licenses and that defendant falsely testified that the applicant while having a license continually opened his saloon before 5 o'clock in the morning, will not be quashed on the ground that the testimony was not material.—*State v. Sweeten*, 85 A. 311.

PERPETUITIES.

§ 9 (Pa.) While a limitation violating the rule against perpetuities is wholly void, a provision for accumulation contrary to the statute is void only for the excess.—*In re Leisenring's Estate*, 85 A. 80.

PERSONAL INJURIES.

See Agriculture; Appeal and Error, §§ 1004, 1064, 1068; Carriers, §§ 286-347, 368, 384; Charities, § 45; Courts, § 489; Damages, §§ 38, 100, 132, 208, 216; Highways, § 21; Railroads, §§ 274-350; Release, §§ 16, 17, 57; Steam; Street Railroads; Trial, §§ 114, 203, 251, 252, 260.

PETITION.

See Elections, §§ 271, 278; Exceptions, Bill of, § 55; Schools and School Districts, § 27; Wills, § 365.

PHOTOGRAPHS.

See Evidence, §§ 359, 380, 382.

PHYSICIANS AND SURGEONS.

See Appeal and Error, § 712; Evidence, §§ 506, 538, 555; New Trial, § 168.

§ 6 (R.I.) One not a licensed physician, who held himself out as a chiropractor, able to cure practically any disease without the use of drugs, based on a thorough knowledge of the nervous system, is guilty of a violation of Gen. Laws 1909, c. 193, § 8, making it a misdemeanor for any one not a licensed physician to practice medicine.—*Swarts v. Siveny*, 85 A. 31.

An information charging that accused, though not a licensed physician, held himself out as a medical practitioner, able to cure, alleviate, and prevent disease, held sufficiently definite.—*Id.*

In a prosecution for practicing medicine without a license, brought on the complaint of the secretary of the board of health, evidence as to the secretary's reason for making the complaint is inadmissible.—*Id.*

Evidence as to the cures effected by accused charged with practicing medicine without a license, is inadmissible.—*Id.*

In a prosecution for practicing medicine without a license, where accused claimed to be a chiropractor, books and pamphlets descriptive of his treatment were admissible.—*Id.*

Where a chiropractor was prosecuted for practicing medicine without a license, the question for the jury is whether accused was guilty of practicing medicine or surgery without a license, and not whether the chiropractic science is the practice of medicine.—*Id.*

§ 14 (Vt.) To warrant a recovery for malpractice, the plaintiff must prove that the defendant in his treatment did not exercise the care and skill then had and exercised by physicians and surgeons in the treatment of like cases in the same general neighborhood.—*Willard v. Norcross*, 85 A. 904.

A physician is not responsible for injurious treatment, where he exercises the requisite care and skill.—*Id.*

Whether a physician, in failing to distinguish a Colle's fracture from a sprain, exercised a proper skill and care must be determined from the conditions existing at the time of the treatment, and not from conditions subsequently developing.—*Id.*

§ 15 (Vt.) Where a physician in the exercise of proper skill and care makes a mistake in his diagnosis, and treats the injury properly according to this diagnosis, he is not liable for malpractice.—*Willard v. Norcross*, 85 A. 904.

Where a physician determines a Colle's fracture to be merely a sprain, and in the exercise of proper skill and care, either in original diagnosis or during treatment, he would have discovered the true nature of the injury, his failing to make such discovery is actionable negligence.—*Id.*

§ 16 (Vt.) That the final result of a physician's treatment of an injured wrist is as good as can be expected by the most skillful treatment is not conclusive upon the question of the physician's liability for negligent treatment.—*Willard v. Norcross*, 85 A. 904.

§ 18 (Pa.) In an action against a dentist to recover for physical injuries, plaintiff alleging that defendant in extracting a tooth had fractured her jaw, and introduced by unclean instruments poisonous germs, a nonsuit *held* properly entered.—*Friend v. Kramer*, 85 A. 12.

§ 18 (Vt.) Evidence *held* insufficient to show malpractice in defendant's treatment of Colle's fractures of plaintiff's wrists.—*Willard v. Norcross*, 85 A. 904.

Where defendant tried the case, and the court instructed on the theory that the local standard would determine the defendant's liability for malpractice, there was no broadening of the issue to the standard of good surgery generally, so as to authorize consideration of evidence as to good surgery, aside from locality, given by physicians incompetent to testify to the local standard.—*Id.*

PLEADING.

See Appeal and Error, §§ 78, 231, 232, 274; Appearance; Banks and Banking, § 77; Bills and Notes, § 489; Cancellation of Instruments; Conspiracy, § 18; Divorce, § 99; Eminent Domain, § 191; Equity, §§ 117, 160-302, 373; Fraud, § 41; Highways, § 184; Husband and Wife, § 332; Infants, § 92; Insurance, § 815; Judgment, § 102; Limitation of Actions, § 127; Mechanics' Liens, § 272; Municipal Corporations, §§ 706, 816; Party Walls, § 10; Prohibition, § 25; Trespass, § 43; Trial, §§ 250-252; Vendor and Purchaser, § 349.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 18 (Vt.) Declaration alleging breach of contract to pay an assessment upon lands purchased by defendant, "provided it was sustained by the court," *held* not objectionable for uncertainty.—*Thorworth v. Blanchard*, 85 A. 6.

§ 34 (N.J.Sup.) The rule that a pleading is to be construed most strongly against the pleader is not abolished by the Practice Act (P. L. 1912, p. 377), especially in view of schedule A, rule 25.—*Murphy v. Patten*, 85 A. 56.

§ 34 (Vt.) Where the allegation in a declaration as to the time defendant agreed to pay an assessment on land purchased by him was uncertain, it would be construed to refer to a late most favorable to defendant.—*Thorworth v. Blanchard*, 85 A. 6.

§ 35 (Vt.) Allegation, in action for breach of a contract to pay an assessment on lands, that such assessment was entered on the tax records and thereby became a lien on the land, *held* superfluous, so that it could be rejected.—*Thorworth v. Blanchard*, 85 A. 6.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§ 51 (Del.) A declaration may contain any number of counts providing it does not violate the rule against vexatious pleading, and each count presents a separate and distinct cause of action appropriate to the form of action pleaded.—*Philadelphia, B. & W. R. Co. v. Gatta*, 85 A. 721.

§ 58 (Vt.) Only traversable facts need be laid with time and place; and in an action for breach of a contract to pay an assessment on land purchased by defendant, a former assessment, which defendant undertook to pay, but which was vacated, is such matter of inducement, and hence not required to be laid with time and place.—*Thorworth v. Blanchard*, 85 A. 6.

A declaration alleging breach of a contract to pay an assessment need not allege with particularity the nature of the proceeding in which the assessment was made, that being matter of inducement.—*Id.*

§ 67 (Del.Super.) Declaration in a pedestrian's action for injuries from being struck by an automobile driven on the left-hand side of a public road *held* not demurrable for failure to allege that the presence of the automobile on the wrong side was not due to circumstances consistent with proper caution by defendant's driver.—*Grier v. Samuel*, 85 A. 759.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

§ 94 (Del.) The defendant must make separate answer to each count, where the declaration contains several proper counts.—*Philadelphia, B. & W. R. Co. v. Gatta*, 85 A. 721.

(C) Traverses or Denials and Admissions.

§ 125 (Vt.) Matter of inducement is not traversable, unless essential to make out the case.—*Thorworth v. Blanchard*, 85 A. 6.

(E) Set-Off, Counterclaim, and Cross-Complaint.

§ 144 (Del.Super.) Plea of set-off, in an action for compensation for the use of a party wall, brought under Wilmington City Charter, § 131, providing for such compensation, *held* demurrable, in that it embodied plural defenses and lacked particularity.—*Pfommer v. Taylor*, 85 A. 760.

Superior Court rule 8, § 4, providing that a plea of set-off shall, if required, be drawn out, and shall state matters of set-off with reasonable certainty, means that a set-off may be pleaded by a memorandum plea, which, when required, shall be drawn out and state the matters of set-off sufficiently and with all the certainty of a bill of particulars.—*Id.*

V. DEMURRER OR EXCEPTION.

§ 199 (Vt.) That specifications exceed the amount of the ad damnum in the writ is not ground for ignoring the rule requiring demurrer to be filed within 10 days after the filing of specifications.—*Boville v. Dalton Paper Mills*, 85 A. 623.

§ 217 (N.J.Sup.) On demurrer to replication to a plea, where examination shows that the latter is bad for duplicity, judgment will go against defendant, though the replication be bad.—*Horwitz v. American Surety Co. of New York*, 85 A. 219.

§ 217 (N.J.Sup.) On demurrer, the court will, notwithstanding the defect in the pleading demurred to, give judgment against the party whose pleading was first defective in substance.—*Board of Education of City of Millville v. Empire State Surety Co. of New York*, 85 A. 223.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 236 (Del.) Under Const. 1897, art. 4, § 24, and Rev. Code 1852, c. 112, § 11, authorizing the superior court to allow amendments, the court in its discretion may allow an amendment at any time before judgment, regardless of whether the statute of limitations would have run against the cause stated in the amendment, if made the subject of a separate action.—*Philadelphia, B. & W. R. Co. v. Gatta*, 85 A. 721.

§ 246 (Conn.) A cause of action for the breach of a penal bond, founded on a condition, could not be inserted in a complaint under the common counts as an amendment, under Gen. St. 1902, § 627.—*Gallup v. Thomas B. Jeffery Co.*, 85 A. 374.

§ 251 (Conn.) A proposed amendment not affecting the sufficiency of a complaint to which a demurrer had been sustained *held* properly denied.—*Katsch v. City of New Haven*, 85 A. 523.

VII. SIGNATURE AND VERIFICATION.

§ 301 (Del.Super.) Under Act April 6, 1905, a deputy prothonotary may administer the oath to the affiant in an affidavit of demand, as a ministerial act and within the authority of his office.—*First Nat. Bank v. Collins*, 85 A. 412.

IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

§ 324 (Vt.) Specifications are not a nullity because the items thereof exceed the amount of the ad damnum in the writ.—*Boville v. Dalton Paper Mills*, 85 A. 623.

XI. MOTIONS.

§ 341 (N.J.Sup.) Under Practice Act (P. L. 1912, p. 377) schedule A, rules 26, 27, a motion on the ground of misjoinder of parties and causes, although designated a motion to strike out the complaint, may be treated as an objection covered by rule 27.—*Murphy v. Patten*, 85 A. 50.

§ 362 (N.J.Sup.) Under the Practice Act (P. L. 1912, p. 377) schedule A, rule 14, subd. "f," and rule 15, an objection to a complaint for misjoinder of causes of action must be determined solely on the allegations of the complaint.—*Murphy v. Patten*, 85 A. 56.

§ 369 (N. J. Sup.) Where causes against a defendant and other causes against such defendant and another were joined, plaintiff *held* entitled to elect whether he would amend to show the propriety of such joinder, or discontinue as to the second defendant.—*Murphy v. Patten*, 85 A. 56.

§ 369 (Pa.) Where a statement of claim sets out two causes of action, and defendant fails to demur, but pleads generally, it cannot thereafter compel plaintiff to elect.—*Walnut Coal Co. v. Pennsylvania R. Co.*, 85 A. 440.

XII. ISSUES, PROOF, AND VARIANCE.

§ 388 (Conn.) A variance, in order to be available, must be a disagreement between the allegation and proof with reference to a matter essential to the charge or claim sued on.—*Maguire v. Kiesel*, 85 A. 689.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 406 (Vt.) Defendant cannot go to trial, without having demurred to the declaration, and defeat the result of the trial for a defect of the declaration insufficient to sustain a motion in arrest.—*Boville v. Dalton Paper Mills*, 85 A. 623.

PLEDGES.

See Municipal Corporations, § 902; Sales, § 209.

POLICE POWER.

See Constitutional Law, § 81; Food; Theater and Shows.

POLICY.

See Insurance

POLLUTION.

See Waters and Water Courses, §§ 67-76.

POSSESSION.

See Adverse Possession; Chattel Mortgages, § 159, 187; Ejectment, §§ 6, 9; Equity, § 4; Fraudulent Conveyances, § 147; Property, § 9; Quieting Title, § 52; Replevin, §§ 8, 11; Trespass, § 20.

POWERS.

See Principal and Agent, § 37.

PRACTICE.

See Courts; Criminal Law; Trial. For practice in particular actions and proceedings, see the various specific topics.

PREFERENCES.

See Corporations, § 563.

PREJUDICE.

See Appeal and Error, §§ 1048-1071; Criminal Law, §§ 1170-1172.

PRELIMINARY INJUNCTION.

See Injunction, §§ 135-176.

PRESCRIPTION.

See Adverse Possession; Druggists, § 9; Limitation of Actions.

PRESUMPTIONS.

See Appeal and Error, §§ 926-934; Criminal Law, § 308; Evidence, §§ 80, 87.

PRICE.

See Executors and Administrators, § 380.

PRINCIPAL AND AGENT.

See Appeal and Error, § 1050; Attorney and Client; Bankruptcy, § 426; Brokers; Chattels, § 45; Corporations, §§ 89, 152, 298-311, 398-428, 645; Counties; Customs and Usages; Evidence, §§ 121, 258, 271; Executors and Administrators, § 52; Insurance, § 84.

I. THE RELATION.

(A) Creation and Existence.

§ 23 (Vt.) Acts and sayings of an alleged agent are not sufficient to show his agency.—*Livingstone Mfg. Co. v. Rizzi Bros.*, 85 A. 912.

(B) Termination.

§ 37 (N.H.) Where defendants joined in a power of attorney on the erroneous belief that plaintiffs were entitled to share in the distribution of an intestate's estate, defendants, on ascertaining their mistake, were entitled to rescind on reimbursing plaintiffs for what they had expended on the faith of the power.—*Healy v. Healy*, 85 A. 156.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

§ 119 (N.J.) One who seeks to charge another with the act of an agent must prove that the agent acted within the scope of his authority, actual or apparent, or ratification or acquiescence.

cence, or acceptance of benefits by the employer.—Hall v. Passaic Water Co., 85 A. 349.

§ 136 (R.I.) Where money paid by plaintiff to defendant as a premium upon a policy of insurance was received by defendant as agent for the insurance company, from which he was receiving a salary and to which he turned over all the moneys so received, plaintiff had no action for money received.—Crafts v. Trafford, 85 A. 673.

(D) Ratification.

§ 166 (Vt.) Before agency by ratification can be shown, it must appear that the alleged principal knew what had been done, and that it had been done for him, and assented thereto.—Livingstone Mfg. Co. v. Rizzi Bros., 85 A. 912.

PRINCIPAL AND SURETY.

See Evidence, § 441; Replevin, § 33; Subrogation; Trusts, § 194.

III. DISCHARGE OF SURETY.

§ 108 (Me.) The payment of interest in advance is a sufficient consideration for an agreement to extend the time of payment of the debt, so as to release a surety from liability.—Stuart v. Oliver, 85 A. 747.

PRIORITIES.

See Attachment, § 180; Mortgages, § 244.

PRIVILEGE.

See Witnesses, § 5.

PRIVILEGED COMMUNICATIONS.

See Witnesses, §§ 188-219.

PROBATE.

See Wills, §§ 249-433.

PROCEEDS.

See Execution, § 326.

PROCESS.

See Appearance; Arrest; Attachment, § 47; Corporations, § 670; Divorce, § 79; Eminent Domain, §§ 166, 181; Garnishment; Habeas Corpus; Judgment, § 17; Justices of the Peace, § 87.

I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

§ 31 (Conn.) Writ *held* not insufficient to confer jurisdiction because it stated that the defendant was "now of parts unknown, county of New Haven, state of Connecticut," on the theory that it described defendant as a nonresident of the state.—Temple v. Gilbert, 85 A. 380.

II. SERVICE.

(B) Substituted Service.

§ 78 (N.J.Sup.) Under Practice Act, § 52, providing that, in absence of personal service, a defendant may be served at his usual place of abode, *held* that, as to defendant, a student at a college in another state living at his father's home during vacation, service of a summons at his father's home was a good service at his "usual place of abode."—Missell v. Hayes, 85 A. 818.

PROFITS.

See Corporations, §§ 151, 152.

PROHIBITION.

I. NATURE AND GROUNDS.

§ 3 (R.I.) Prohibition to restrain the district court from taking cognizance of liquors and

vessels seized and taken from a dwelling house, on the ground of want of jurisdiction to hear the complaint for forfeiture, will not issue; Gen. Laws 1909, c. 123, § 34, providing a remedy by appeal in such cases.—Caldarone v. Hebert, 85 A. 940.

§ 5 (Conn.) Act of probate court in issuing notice for hearing as required by Gen. St. 1902, § 301, upon the filing of an application for the probate of a will, *held* not an assumption of jurisdiction which could form the basis for a writ of prohibition.—Whitehead v. Roberts, 85 A. 538.

§ 10 (Conn.) The "writ of prohibition," being a prerogative writ to be issued with great caution to secure order and regularity where there is no other regular and ordinary remedy, will not lie to arrest the proceedings in the probate court upon the ground that the testator is not a resident of the district; that issue being open in the probate court and subject to appeal.—Whitehead v. Roberts, 85 A. 538.

§ 11 (Conn.) That the probate court might render an erroneous decision in deciding the question of the testatrix's residence at the time of her death could not be ground for issuing a writ of prohibition.—Whitehead v. Roberts, 85 A. 538.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 25 (Conn.) A demurrer to an application for writ of prohibition where such application alleged a fact showing want of jurisdiction in the probate court *held* to admit such fact only to test the sufficiency of the application and not to admit the probate court's jurisdiction.—Whitehead v. Roberts, 85 A. 538.

PROMISSORY NOTES.

See Bills and Notes.

PROOF.

See Insurance, § 553.

PROPERTY.

See Adverse Possession; Dedication.

§ 9 (Conn.) Evidence that one leased premises and conducted a lodging house, and rented rooms therein, supported a finding that she owned the premises, in absence of contrary evidence.—Mathews v. Livingston, 85 A. 529.

§ 9 (N.J.Sup.) Possession of personal property is *prima facie* evidence of ownership.—Nelson v. Bock, 85 A. 1009.

PROTHONOTARIES.

See Pleading, § 301.

PROVINCE OF COURT AND JURY.

See Trial, §§ 186-194.

PUBLIC DEBT.

See Towns, §§ 46-59.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 294-586.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Dedication.

PUNISHMENT.

See Criminal Law, § 1208.

PUNITIVE DAMAGES.

See Damages, §§ 87, 94.

QUALIFICATIONS.

See Elections, § 63; Jury, § 53.

QUANTUM MERUIT.

See Work and Labor.

QUARANTINE.

See Health, §§ 18, 24.

QUASHING.

See Indictment and Information, §§ 136, 137.

QUESTIONS OF LAW AND FACT.

See Trial, §§ 136-143.

QUIET ENJOYMENT.

See Landlord and Tenant, § 180.

QUIETING TITLE.

See Municipal Corporations, § 513.

I. RIGHT OF ACTION AND DEFENSES.

§ 7 (Pa.) A suit in equity does not lie to set aside an alleged cloud on title, which is void on its face.—*Green v. Green*, 85 A. 70.

II. PROCEEDINGS AND RELIEF.

§ 44 (Md.) Evidence held to show defendants had no title to a strip of land in controversy, entitling plaintiff to quiet title as against a deed and mortgage given by them.—*Stewart v. May*, 85 A. 957.

§ 52 (N.J.Ch.) Under the "act to compel the determination of claims to real estate and to quiet title to the same" (4 Comp. St. 1910, p. 5399), a court of equity, if title is shown to be in a defendant, has jurisdiction to issue a writ of assistance to put him in possession; but he must plead, and the decree must show, his right to "immediate possession," as well as title.—*Brady v. Carterett Realty Co.*, 85 A. 823.

Where the decree merely adjudicated title in defendant, but not the right to possession, and in ejectment by defendant thereon its motion for judgment over a plea of not guilty, as sham, was denied, a motion for writ of assistance, based on the chancery decree, was held to be denied; the right to possession being too doubtful to be disposed of on motion.—*Id.*

QUO WARRANTO.**I. NATURE AND GROUNDS.**

§ 3 (Pa.) A justice of the peace, transacting official business outside of the borough for which he was elected may be enjoined and quo warranto does not lie to oust him from office.—*Commonwealth v. Small*, 85 A. 1088.

RACING.

See Officers, § 36; Theaters and Shows.

RAILROADS.

See Accord and Satisfaction, § 21; Appeal and Error, § 230; Constitutional Law, §§ 48, 62, 818; Courts, § 489; Limitation of Actions, § 127; Master and Servant; Statutes, § 64; Street Railroads; Taxation, §§ 390, 452, 493.

I. CONTROL AND REGULATION IN GENERAL.

§ 9 (Vt.) Where Public Service Commission based its order on the investigation of its ex-

pert without any opportunity for cross-examination or evidence in rebuttal, its order was erroneous.—*Sabre v. Rutland R. Co.*, 85 A. 626.
Under Laws 1906, No. 126, and Laws 1907, No. 116, the Board of Railroad Commissioners, known as the Public Service Commission, is an administrative body clothed with some quasi judicial functions, and also having auxiliary or subordinate legislative powers.—*Id.*

In construing minor provisions of Laws 1906, No. 126, creating a Board of Railroad Commissioners, the policy of the state in legislating on this subject should be regarded, and the cardinal purpose of the Legislature to render that policy efficient should control.—*Id.*

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

§ 82 (Conn.) While, by express provision of Gen. St. 1902, § 4047, one cannot by adverse possession acquire title to any part of the land of a railroad, abandonment of its easement in part of its right of way may be found from nonuser, accompanied by adverse possession, under claim of title, with recognition thereof by the railroad, or when such occupation is inconsistent with existence of the easement.—*New York, N. H. & H. R. Co. v. Cella*, 85 A. 521.

Statements of a decedent as to the location of the road as originally constructed on land of deceased, being entirely different from the one now claimed, are properly excluded in an action by a railroad for land claimed to be part of its right of way, they not appearing to have referred to the place in controversy.—*Id.*

VI. CONSTRUCTION, MAINTENANCE AND EQUIPMENT.

§ 86 (Vt.) It is the duty of a railroad company to make the surroundings and approaches to its stations reasonably safe.—*Sabre v. Rutland R. Co.*, 85 A. 693.

§ 99 (N.J.) There is power to amend a contract between a railroad and a municipality under 3 Comp. St. 1910, pp. 4234, 4258, 4266, for the elimination of grade crossings, provided the amendments concern the objects of the legislation, namely, the security of life and property to be effected.—*American Malleables Co. v. Town of Bloomfield*, 85 A. 167.

X. OPERATION.**(B) Statutory, Municipal, and Official Regulations.**

§ 243 (Vt.) Notwithstanding P. S. 4433, the Board of Railroad Commissioners, under section 4611, can require a dangerous crossing outside a city or village, but which is near a station, and used by large numbers of persons going to and from the station, to be made safe by the erection of gates.—*Sabre v. Rutland R. Co.*, 85 A. 693.

The Legislature had power to authorize the Public Service Commission to make an investigation and order the erection of gates at a railroad crossing near a station as it did by P. S. 4611.—*Id.*

(D) Injuries to Licensees or Trespassers in General.

§ 274 (Me.) In a town where the last passenger train for the night, has gone, the turning out of all the lights is notice that the station is closed, and the railroad is not liable for injuries to one stepping off the platform; such person being but a mere licensee, to whom its duty was only negative.—*Sherman v. Maine Cent. R. Co.*, 85 A. 755.

§ 275 (Me.) A railroad company held liable for plaintiff's injuries while unloading potatoes into a standing car, under the directions of defendant's servants, due to the engine being backed against the cars without warning.—*Gage v. Maine Cent. R. Co.*, 85 A. 1065.

(F) Accidents at Crossings.

§ 333 (Pa.) A pedestrian seeing a train a very short distance away, and attempting to cross the track and struck by the train, was guilty of contributory negligence.—*Easley v. Pennsylvania R. Co.*, 85 A. 1132.

§ 348 (Pa.) A verdict for plaintiff held sustained by the evidence.—*Kauffman v. Pennsylvania R. Co.*, 85 A. 138.

§ 350 (Pa.) The question of the contributory negligence of plaintiff held for the jury.—*Kauffman v. Pennsylvania R. Co.*, 85 A. 138.

§ 350 (Pa.) In an action for death of plaintiff's husband at a railroad crossing, binding instructions for defendant held required under the evidence.—*Weikel v. Philadelphia & R. Ry. Co.*, 85 A. 872.

§ 350 (Pa.) In an action for injuries at a grade crossing, where the evidence as to plaintiff's care was conflicting, question of negligence was for the jury.—*Reitler v. Pennsylvania R. Co.*, 85 A. 1000.

(H) Injuries to Animals on or near Tracks.

§ 443 (Me.) Evidence in an action against a railroad company held insufficient to sustain a finding that the disposition of plaintiff's colt was injured by being frightened by the negligent shifting of a car.—*Gage v. Maine Cent. R. Co.*, 85 A. 1065.

RATE.

Of charge by carrier, see Carriers, § 12.

Of charge by gas company, see Gas.

RATIFICATION.

See Brokers, § 41; Infants, § 98; Mortgages, § 373; Principal and Agent, § 166.

REAL ACTIONS.

See Ejectment; Partition; Quieting Title.

REASONABLE DOUBT.

See Criminal Law, § 561.

REBUTTAL.

See Trial, §§ 62, 64.

RECEIPTS.

See Embezzlement, § 41; Evidence, § 353.

RECEIVERS.

See Bankruptcy, § 144; Corporations, §§ 553, 621, 622; Judgment, §§ 815, 828; Sales, § 209.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 29 (Vt.) Since the Supreme Court sits only as a court of errors in chancery appeals, it cannot appoint a receiver.—*Roberts v. W. H. Hughes Co.*, 85 A. 982.

§ 35 (Md.) A court of equity will not appoint a receiver without notice, unless the necessity therefor is of the most stringent character.—*Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 85 A. 949.

§ 60 (N.J.Ch.) A receiver will not be discharged pending his suit in another jurisdiction to set aside a sale of the assets of the corporation.—*Denver City Waterworks Co. v. American Waterworks Co.*, 85 A. 826.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.**(A) Administration in General.**

§ 101 (Pa.) A trust company acting as receiver held not chargeable with interest on receivership funds deposited in its own bank sub-

ject to check.—*Haddock v. Plymouth Coal Co.*, 85 A. 23.

(B) Supervision and Instructions of Court.

§ 110 (N.J.Ch.) A receiver is an officer of the court having certain statutory duties to perform, but at all times subject to the court's jurisdiction.—*Denver City Waterworks Co. v. American Waterworks Co.*, 85 A. 826.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

§ 154 (Del.Ch.) Compensation to counsel for a receivership should be limited to such work done for the receivers as requires special legal skill, and not such things as the receiver himself is capable of performing.—*Deputy v. Delmar Lumber Mfg. Co.*, 85 A. 669.

Services of an attorney of a receiver in formulating a reorganization plan will not be allowed; it not being a duty of a receiver to reorganize a corporation.—*Id.*

VI. ACTIONS.

§ 174 (N.J.Ch.) The action of the Chancery Court on report of a referee refusing to permit its receiver to take proceedings in another state to set aside a foreclosure sale of the assets of his insolvent makes his right to attack the sale *res judicata*.—*Denver City Waterworks Co. v. American Waterworks Co.*, 85 A. 826.

Where a suit is a mere speculative one prosecuted as a stock jobbing operation or for the purpose of extorting money, the Chancery Court ought not to allow its receiver to have any hand in it.—*Id.*

VII. ACCOUNTING AND COMPENSATION.

§ 196 (Del.Ch.) The acts of a receiver, who, as president, before the receivership, had made preferential payments, should not affect his compensation, when such conduct did not affect his administering the estate.—*Deputy v. Delmar Lumber Mfg. Co.*, 85 A. 669.

§ 196 (Pa.) Allowance of reasonable compensation to a receiver was not error where an alleged agreement for compensation was never consummated or was subsequently waived.—*Haddock v. Plymouth Coal Co.*, 85 A. 23.

§ 197 (Del.Ch.) It is no duty of a receiver or court to establish a new corporation to avoid the expense of a receivership, and the receiver should not receive compensation for endeavors in that direction.—*Deputy v. Delmar Lumber Mfg. Co.*, 85 A. 669.

§ 198 (Del.Ch.) While the amount is discretionary and based upon the particular facts in each case, the court should consider the responsibility assumed by the receiver, the labor and acts involved, and prices usually paid for similar services.—*Deputy v. Delmar Lumber Mfg. Co.*, 85 A. 669.

§ 198 (Pa.) Where compensation of a receiver and allowance of counsel fees were based on the responsibility assumed and successful management of the affairs of the corporation, an order fixing the amount will not be reversed without clear proof of error.—*York Trust Co. v. Pullman Automatic Ventilator Mfg. Co.*, 85 A. 143.

VIII. FOREIGN AND ANCILLARY RECEIVERSHIPS.

§ 210 (N.J.Ch.) The extent of state comity defined, and held, on facts stated, that a receiver who had been enjoined by the courts of another state from attacking a foreclosure sale of the assets of the corporation in receivership could not be permitted to thereafter attack such injunction order.—*Denver City Waterworks Co. v. American Waterworks Co.*, 85 A. 826.

RECOGNIZANCES.

See Criminal Law, §§ 991, 1001; Scire Facias, § 1.

§ 2 (Md.) An instrument reciting, "Fine and costs superseded by us for six months," signed by one sentenced to pay a fine and by two others, is not a recognizance within Code Pub. Civ. Laws, art. 87, § 40, providing for a recognizance with security for payment of it within 60 days and a stay for 60 days.—*Backus v. State*, 85 A. 501.

§ 7 (Md.) Till a recognizance has been properly forfeited, execution cannot issue on it.—*Backus v. State*, 85 A. 501.

RECORDS.

See Acknowledgment; Aliens; Appeal and Error, §§ 589-712, 743; Chattel Mortgages, § 192; Criminal Law, §§ 1105-1120; Liens, § 8; Registers of Deeds, § 7; Scire Facias, § 1; Tenancy in Common, § 43; Towns, § 59.

RECOUNT.

See Elections, §§ 271, 278.

REDEMPTION.

See Mortgages, § 599.

REFERENCE.

See Receivers, § 174.

REFORMATION OF INSTRUMENTS.

See Evidence, § 596.

REFRESHING MEMORY.

See Witnesses, §§ 255, 256.

REFUND.

See Executors and Administrators, § 318.

REGISTERS OF DEEDS.

§ 7 (N.J.Sup.) Liability of a county clerk for breach of his official duty as to indexing a mortgage delivered to him for record inures only in favor of one prejudiced thereby.—*Upton v. Slater*, 85 A. 225.

One who has actual knowledge of a mortgage and buys the property is not damaged by the failure of the county clerk to index the mortgage when delivered to him for record.—*Id.*

REGISTRATION.

See Chattel Mortgages, § 192.

RELEASE.

See Accord and Satisfaction; Bankruptcy, §§ 391-496; Bills and Notes, § 537; Executors and Administrators, § 297; Injunction, § 108; Principal and Surety, § 108.

I. REQUISITES AND VALIDITY.

§ 16 (Del.Ch.) To invalidate a release because of mutual mistake, it must relate to a past or present fact material to the contract, and not to an opinion as to future conditions.—*Tatman v. Philadelphia, B. & W. R. Co.*, 85 A. 716.

Where a release covers only particular personal injuries, while there were others unknown to both parties, there is such a mistake of fact as will authorize equitable relief, though the specific description was followed by general language.—*Id.*

Where both parties to a release thought that the injury was only a slight one to the cornea of the eye, when in fact the retina had been penetrated, resulting in subsequent loss of sight, there was such a mistake of fact as to author-

ize enjoining the use of the release to prevent further recovery.—*Id.*

§ 17 (Del.Ch.) An innocent misrepresentation by defendant's physician, relied on by parties, as to the kind of injury received by plaintiff, may avoid the release.—*Tatman v. Philadelphia, B. & W. R. Co.*, 85 A. 716.

§ 17 (Me.) Where plaintiff understood what he was doing in executing a release of defendant's liability for his injuries, there was no such inequality of condition or knowledge as made it defendant's duty to disclose its actual belief as to the extent of his injuries.—*Barrett v. Lewiston, B. & B. St. Ry. Co.*, 85 A. 306.

II. CONSTRUCTION AND OPERATION.

§ 29 (Vt.) A release of one joint tort-feasor under seal is a conclusive discharge of all, but an unsealed discharge of one will not discharge all, unless the payment was received in full satisfaction.—*Blackmer v. McCabe*, 85 A. 115.

In trover for an automobile, parol receipt agreement given to one of the joint wrongdoers on recovery of damages for the conversion, limiting the damages at \$400, and holding the wrongdoer liable for \$200 upon a continuance, leaves plaintiff the right to proceed for unsatisfied damages either against that wrongdoer or the other joint wrongdoers.—*Id.*

III. PLEADING, EVIDENCE, TRIAL AND REVIEW.

§ 57 (Me.) In an action for personal injuries in which defendant pleaded a release, evidence held insufficient to show a fraudulent concealment of facts by defendant.—*Barrett v. Lewiston, B. & B. St. Ry. Co.*, 85 A. 306.

Evidence held insufficient to show that statements by a doctor employed by defendant as to the extent of plaintiff's injuries were intentionally false, or made for the purpose of inducing an easy settlement.—*Id.*

RELIGIOUS SOCIETIES.

§ 17 (Del.Ch.) A conveyance of land to named persons as "Trustees for the Baptist Meeting in the Borough of Wilmington, State of Delaware," when the corporate name adopted was "Trustees for the Baptist Church in the Borough of Wilmington, State of Delaware," was valid.—*Trustees for Baptist Church of Borough of Wilmington v. Laird*, 85 A. 1082.

§ 18 (Del.Ch.) Where a deed conveyed land to trustees of a charitable corporation, who had no active duties to perform with respect to such land, both the legal and equitable title vested in the corporation.—*Trustees for Baptist Church of Borough of Wilmington v. Laird*, 85 A. 1082.

§ 20 (Del.Ch.) A conveyance in trust for the sole purpose of a Baptist meeting house, with a provision for perpetuating the trust, was not a conveyance upon condition, which was breached by a sale of the land, but was a conveyance in trust without any implied restriction against the sale.—*Trustees for Baptist Church of Borough of Wilmington v. Laird*, 85 A. 1082.

The power of the chancery court to direct a conveyance of a trust estate may be exercised by the Legislature, as was done by 26 Del. Laws c. 252, authorizing the trustees of the First Baptist Church of Wilmington to convey lands held in trust.—*Id.*

REMAINDERS.

See Wills, § 634.

REMITTITUR.

See New Trial, § 162.

REMOVAL.

See Executors and Administrators, § 35; Insane Persons, § 88; Municipal Corporations, § 184; Weights and Measures.

RENT.

See Landlord and Tenant, §§ 190-246; Partition, § 86.

REPLEVIN.

See Action, § 50; Courts, § 169; Damages, § 197; Parties, § 25.

I. RIGHT OF ACTION AND DEFENSES.

§ 8 (Pa.) Where plaintiff has the right of possession of personalty in the possession of another, replevin lies even if the plaintiff never had possession.—Westinghouse Air Brake Co. v. Harris, 85 A. 78.

§ 11 (Conn.) Where one comes lawfully into possession as a bona fide purchaser, a demand to surrender possession and refusal were prerequisites to action of replevin.—Patchin v. Rowell, 85 A. 511.

III. PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY.

§ 33 (R.I.) "Forms," in Gen. Laws 1909, c. 336, § 12, providing that the district court, in replevin, shall adhere in its proceedings to the "forms" herein prescribed, refers not merely to the writ but to procedure, so that such court can order further bond and surety, under section 4, as can the superior court in cases in its jurisdiction.—Angell v. Sprague, 85 A. 790.

§ 50 (N.J.) In replevin, where defendants re-bond, the suit is turned into an action for damages for the value of the property, or for the return of the goods to the plaintiff, at his option.—Nelson v. Bock, 85 A. 1009.

§ 52 (N.J.Sup.) A person, who, in replevin, filed with the constable a claim of property pursuant to District Court Act, § 190, but who failed to apply for a jury trial, was not estopped from setting up ownership in the replevin suit, except as against the constable; such statute being only intended to protect the officer.—Nelson v. Bock, 85 A. 1009.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 108 (N.J.Sup.) Under District Court Act, § 127, a judgment in a replevin suit need not specify how much is awarded for the value of the goods and how much for the detention.—Nelson v. Bock, 85 A. 1009.

REPLICATION.

See Pleading, § 217.

REPORT.

See Executors and Administrators, § 315; Partition, § 94.

REPORTERS.

See Witnesses, § 198.

REPRESENTATIVES.

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REPUTATION.

See Evidence, §§ 106, 322; Witnesses, § 37.

REQUESTS.

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RESCISSION.

See Contracts, §§ 93, 265, 270; Mortgages, § 369; Vendor and Purchaser, §§ 33, 80.

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RETROSPECTIVE LAWS.

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RETURN.

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See Taxation.

REVERSAL.

See Appeal and Error, §§ 1165, 1175.

REVIEW.

See Appeal and Error; Certiorari; Criminal Law, §§ 1015-1186.

REVIVAL.

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See Appeal and Error, § 1052; Bankruptcy, §§ 257, 268; Chattel Mortgages, §§ 159, 187; Constitutional Law, § 87; Curtesy; Deeds; Evidence, §§ 110, 115, 129, 130, 355, 374, 471; Execution, §§ 258-326; Executors and Administrators, §§ 327, 372-388; Fixtures, § 21; Fraudulent Conveyances, §§ 3, 47, 147; Insane Persons, § 71; Intoxicating Liquors; Replevin, § 11; Schools and School Districts, § 97; Trial, §§ 191, 260, 296; Trusts, § 193½; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 52 (Conn.) Evidence, in an action for the price of goods, where defendant claimed that they were sold to him individually, held sufficient to sustain a verdict for plaintiff against

made the tender at the first opportunity thereafter, this was sufficient to warrant a decree for specific performance.—*Schaeffer v. Coldren*, 85 A. 98.

§ 101 (Pa.) Failure of a vendor to place a deed in escrow, as required by the contract, *held* waived.—*Bohlen v. Black*, 85 A. 470.

IV. PROCEEDINGS AND RELIEF.

§ 105 (Pa.) A vendee in possession *held* not entitled to defend on the ground of the vendors' laches in instituting the suit.—*Bohlen v. Black*, 85 A. 470.

§ 105 (R.I.) Right of purchaser to enforce land sale contract within limitation period *held* not barred by laches where no time was fixed for performance, and delivery of deed and payment of balance of purchase price were to be concurrent acts, and vendor made no tender of, or demand for, performance.—*Bright v. James*, 85 A. 545.

§ 106 (Pa.) A bill for specific performance should not include as parties defendant persons who claim no title under the contract, but assert rights arising out of a subsequent option representing a different transaction.—*Schaeffer v. Herman*, 85 A. 94.

One of two joint optionees to purchase land may maintain specific performance without joining as plaintiff the other optionee, who has repudiated the contract.—*Id.*

§ 126 (Pa.) Where one of two joint optionees to purchase land repudiates the contract, and the other sues for specific performance on tender of the price, the court can direct a conveyance directly to the plaintiff's assignees, who have intervened as parties plaintiff.—*Schaeffer v. Herman*, 85 A. 94.

§ 131 (Pa.) A decree for specific performance of a contract for the sale of land *held* not objectionable as calling solely for the payment of money.—*Bohlen v. Black*, 85 A. 470.

SPEED.

See Evidence, § 553; Street Railroads, § 114.

SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

SPLITTING CAUSES OF ACTION.

See Action, § 53.

STATEMENT.

See Witnesses, § 387.

STATES.

See Commerce, § 58; Constitutional Law, §§ 26, 81; Statutes, § 64; Taxation, § 28; United States.

II. GOVERNMENT AND OFFICERS.

§ 32 (R.I.) Const. art. 4, § 9, limiting the power of adjournment of each house to not more than two days without the consent of the other, implies that the General Assembly can only adjourn by the joint action of the two houses.—*In re Opinion to Governor*, 85 A. 1056.

§ 51 (Pa.) The amendment to Const. art. 4, § 21, did not enlarge the term of the Auditor General elected in November, 1904, to four years, but left it at three years, so that his successor would be elected November 4, 1912, to serve four years.—*Etter v. McAfee*, 85 A. 857.

§ 59 (R.I.) Under article 11 of the Articles of Amendment, adopted in 1900, giving mileage to senators and representatives, the members are not entitled to mileage in going to and returning each day up to the limit of 60 days' attendance in any calendar year.—*In re Opinion to Governor*, 85 A. 1056.

The proviso in article 11 of the Articles of Amendment to the Constitution, adopted in

1900, that no compensation or mileage shall be allowed any senator or representative for more than 60 days' attendance in any calendar year, is restrictive, and does not enlarge the provision for mileage in going to and returning from the General Assembly.—*Id.*

III. PROPERTY, CONTRACTS, AND LIABILITIES.

§ 110 (Pa.) A lien in favor of the state reserved by Act May 13, 1909 (P. L. 835), appropriating money to the Western Pennsylvania Hospital, is prior to a mortgage subsequently executed by a hospital to secure an issue of bonds.—*Booth & Flinn v. Miller*, 85 A. 457.

STATIONS.

See Railroads, § 86.

STATUTES.

See Constitutional Law, §§ 20, 48, 62, 63, 315. Frauds, Statute of; Limitation of Actions. For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 26 (N.J.Sup.) Since Act May 1, 1911 (P. L. p. 690), authorizing municipal light, heat, and power plants, though passed by both houses, was never approved by the Governor in its present amended form, but was approved by him in its original form in which it failed of passage, it will, as authorized by act March 3, 1873 (4 Comp. St. 1910, p. 4978), be decreed void both in its amended and original form.—*In re Jaegle*, 85 A. 214.

§ 64 (Pa.) The holding that the provision of Act May 13, 1909 (P. L. 835), reserving a lien to secure refund to the state of the money appropriated under certain circumstances, is void, would render the whole act void and annul the appropriation.—*Booth & Flinn v. Miller*, 85 A. 457.

If an unconstitutional part of a statute is readily separable, the constitutional part may be sustained; but if the part which is void is vital to the whole, or the other provisions are so dependent on it that the Legislature would not have passed one without the other, the whole is void.—*Id.*

§ 64 (Vt.) Partial unconstitutionality of a statute will not invalidate the whole statute, unless its provisions are so related that they are not severable; but, if the invalid part can be eliminated leaving an enactment complete in itself, it must be sustained.—*Sargent v. Rutland R. Co.*, 85 A. 654.

Invalidity of Laws 1906, No. 122, §§ 8, 10 (P. S. 4539, 4541), and Laws 1910, No. 147, § 1, fixing demurrage charges as against consignees and consignors, because not limited to intrastate commerce, *held* inseparable from the whole enactments and to render them invalid.—*Id.*

§ 64 (Vt.) If Laws 1906, No. 126, confers powers on board of railroad commissioners which cannot be conferred on an administrative body under the constitutional provision that the departments of government shall be kept separate, this does not render the statute as a whole unconstitutional.—*Sabre v. Rutland R. Co.*, 85 A. 693.

The provision of Laws 1906, No. 126, authorizing the Board of Railroad Commissioners to compel attendance by contempt proceedings, if invalid, does not render the whole act invalid, in view of other provisions for compelling attendance of witnesses.—*Id.*

The provision of Laws 1906, No. 126, authorizing the Board of Railroad Commissioners to enforce its decrees by suitable process issuable by a court of law or equity, if invalid, does not render the whole act invalid.—*Id.*

If Laws 1906, No. 126, confers on the Board

Railroad Commissioners jurisdiction over matters over which Congress has paramount authority, the act is not thereby rendered invalid on other respects.—*Id.*

I. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 82 (Pa.) Act May 13, 1909 (P. L. 835), making an appropriation to the Western Pennsylvania Hospital and reserving a lien therefor for the use of the commonwealth, does not violate Const. art. 3, § 7, prohibiting local or special laws authorizing the creation, extension, or impairing of liens.—*Booth & Flinn v. Miller*, 85 A. 457.

§ 94 (Pa.) Act May 6, 1909 (P. L. 441), providing a method for securing moneys due subcontractors on municipal work or public improvements, violates Const. art. 3, § 7, relating to local and special laws.—*Sax & Abbott Const. Co. v. School Dist. of City of Wilkes-Barre*, 85 A. 91.

Act May 6, 1909 (P. L. 441), providing for securing moneys due subcontractors on municipal work or public improvements, is divergent from and an advance on the law as it stood prior to Const. 1874, and is invalid.—*Id.*

§ 95 (Pa.) Act June 19, 1911 (P. L. 1044), validating municipal elections for increasing indebtedness invalid for failure to observe statutory requirements, *held* not special legislation.—*Swartz v. Borough of Carlisle*, 85 A. 847.

II. SUBJECTS AND TITLES OF ACTS.

§ 107 (Pa.) That a bill contains several provisions does not offend against Const. art. 3, § 3, if they are connected with and germane to the one general subject or relate to and are a means of carrying out the one general provision.—*Booth & Flinn v. Miller*, 85 A. 457.

§ 109 (Pa.) The title of an act need not include all the distinct provisions nor serve as an index or digest, but is sufficient if it fairly gives notice of the real subject.—*Booth & Flinn v. Miller*, 85 A. 457.

§ 120 (Pa.) Act May 24, 1901 (P. L. 294), amending an act providing for the classification of townships, and authorizing township commissioners to contract for making and repairing public highways and bridges, is not violative of Const. art. 3, § 3, relating to titles of statutes, for failure to give notice that Act June 12, 1893 (P. L. 451), is extended to townships of the first class.—*In re McKeown*, 85 A. 1085.

The title to Act May 24, 1901 (P. L. 294), gives sufficient notice that the court of quarter sessions may, by its order, compel the township commissioners to execute a contract, such as is required by Act June 12, 1893 (P. L. 451), to "authorize" the township commissioners to do a thing, being to invest them with power to that effect.—*Id.*

§ 121 (Pa.) Act May 13, 1909 (P. L. 835), entitled "An act making an appropriation to the Western Pennsylvania Hospital" and making the amount appropriating a noninterest-bearing

lien, does not offend against Const. art. 3, § 3, relating to subjects and titles of acts.—*Booth & Flinn v. Miller*, 85 A. 457.

IV. AMENDMENT, REVISION, AND CODIFICATION.

§ 137 (Pa.) The title of Act May 24, 1901 (P. L. 294), is not insufficient because of failure to give notice of the date when Act April 28, 1899, P. L. 104, amended thereby, was approved.—*In re McKeown*, 85 A. 1085.

The title to Act May 24, 1901 (P. L. 294), amending Act April 28, 1899 (P. L. 104), is not insufficient because of failure to give notice that only the first subdivision of section 7 of the amended act is to be amended.—*Id.*

§ 138 (Pa.) Act May 24, 1901 (P. L. 294), is not a revival, amendment, or extension of another act, within Const. art. 3, § 6, prohibiting such revival, amendment, or extension by reference to title to the amended act.—*In re McKeown*, 85 A. 1085.

§ 142 (Me.) Where a new statute covers the same subject-matter as an existing statute and the two are plainly repugnant, the old statute is regarded as amended by the new so as to become conformable thereto.—*Jumper v. Moore*, 85 A. 485.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 181 (Me.) The intent of the Legislature is the law, when such intent can be declared without doing violence to the clear and unambiguous language of the statute.—*Cheney v. Cheney*, 85 A. 387.

§ 227 (N.J.Sup.) Affirmative words in a statute make it imperative, if they are absolute, explicit, and peremptory, and show that no discretion is intended to be given.—*In re Van Noort*, 85 A. 813.

(B) Particular Classes of Statutes.

§ 238 (Me.) The powers given by statute to subordinate local authorities are strictly construed, and every reasonable doubt as to the existence of a particular power is resolved against its existence.—*City of Auburn v. Paul*, 85 A. 571.

§ 241 (Pa.) Act June 4, 1883 (P. L. 72), prohibiting discrimination by carriers in the matter of supply of cars, is a highly penal statute and must be strictly construed.—*Walnut Coal Co. v. Pennsylvania R. Co.*, 85 A. 440.

(D) Retroactive Operation.

§ 276 (Conn.) Gen. St. 1902, § 1, which provides that the passage or repeal of an act shall not affect any pending action, is merely declaratory of a rule of construction, and is effective only when the repealing statute does not make clear the legislative intent that it shall affect pending cases.—*Neilson v. Perkins*, 85 A. 686.

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§ 6 (Conn.) The liability of an engineer for injury to another from explosion of the boiler, due to insufficient water, depends on whether he has exercised that degree of care to keep the water at the proper point in the boiler which the ordinarily careful engineer would use under like circumstances.—*Temple v. Gilbert*, 85 A. 380.

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II. REGULATION AND OPERATION.

§ 86 (Me.) Where a street railway in clearing snow from its roadbed piled it up six or seven inches high and sloping to the track in the traveled part of the highway, such trench, if sufficient to overturn a cab driven with due care, constituted a defect.—*Mansell v. Lewiston, A. & W. St. Ry.*, 85 A. 473.

§ 86 (N.J.) In the absence of statute, ordinance, or contractual obligation, the railway is not liable to a traveler who is injured by stumbling over one of its tracks, which is exposed by the highway becoming depressed, when such depression was not occasioned by the negligence of the company.—*Johnson v. Public Service Ry. Co.*, 85 A. 165.

§ 90 (Me.) A street railroad company was liable for injuries caused by its motorman's negligence in attempting to pass a team and wagon so near the track that a slight turn of the horses would throw the wagon against the car.—*Fickett v. Lewiston, A. & W. St. Ry.*, 85 A. 1067.

§ 90 (N.J.Supp.) It is error to instruct that it is the duty of the motorman and conductor to use a high degree of care to avoid a collision with plaintiff's automobile.—*Clark v. Public Service R. Co.*, 85 A. 189.

§ 99 (Conn.) A driver struck by a street car held guilty of contributory negligence as a matter of law.—*Swayne v. Connecticut Co.*, 85 A. 634, 737.

§ 99 (N.J.Supp.) A city ordinance, making it a misdemeanor to refuse the right of way or in any way obstruct any fire apparatus, did not abrogate the rule relating to contributory negligence as to a driver of a fire apparatus, injured in a collision with a street car.—*Woods v. Public Service Co.*, 85 A. 1016.

§ 103 (Me.) Street railroad company held liable where motorman ran car against wagon close to the track, although driver failed to look back to see if a car was coming.—*Fickett v. Lewiston, A. & W. St. Ry.*, 85 A. 1067.

§ 112 (Conn.) A traveler suing for injuries in a collision with a street car has the burden of proving the negligence of the street railroad company and his own freedom from contributory negligence.—*Swayne v. Connecticut Co.*, 85 A. 634, 737.

The burden of proving freedom from contributory negligence on the part of a traveler injured in a collision with a street car may be sustained only by proving that he made such use of

his faculties as an ordinarily prudent man would have done under similar circumstances.—*Id.*

§ 114 (Conn.) In an action against a street railway for the wrongful killing of an infant on its tracks, evidence held to establish contributory negligence on the part of deceased.—*Jollimore v. Connecticut Co.*, 85 A. 373.

§ 114 (Conn.) The testimony of a traveler struck by a street car that the car approached like a chain of lightning is entitled to but little weight in determining the speed of the car, where he did not see the car, but only the searchlight coming directly toward him.—*Swayne v. Connecticut Co.*, 85 A. 634, 737.

Evidence held not to support a finding of negligence in operating a street car at too high a speed.—*Id.*

Evidence held to show that the speed of a street car was not the proximate cause of a collision with a traveler.—*Id.*

§ 114 (Me.) That a cab overturned in the traveled part of a street by contact with the rail of a street railroad on both sides of which snow was piled was strong evidence that the street was unsafe for travelers.—*Mansell v. Lewiston, A. & W. St. Ry.*, 85 A. 473.

Evidence in an action for personal injuries resulting from the overturning of a cab by contact with the rail of a street railroad held to sustain a finding that plaintiff was in the exercise of due care.—*Id.*

§ 117 (Pa.) In an action against a street railway for injuries received in a collision with plaintiff's milk wagon, question of the railroad company's negligence and of plaintiff's contributory negligence held for the jury.—*Chronister v. York Rys. Co.*, 85 A. 140.

§ 117 (R.I.) In an action for death of one run over by a street car, where there was no evidence that decedent exercised due care, or of any negligence of defendant in operating the car, a nonsuit held proper.—*Pashalian v. Rhode Island Co.*, 85 A. 673.

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SUBROGATION.

§ 17 (Me.) A junior mortgagee, who redeems a prior mortgage, is subrogated to the rights of the first mortgagee for the amount paid to protect his interests.—*Allen v. Alden*, 85 A. 3.

§ 17 (Pa.) If a junior mortgagee pay a prior incumbrance to protect his own interest, he will be subrogated to the rights of the senior incumbrancer.—*Hopkins Mfg. Co. v. Ketterer*, 85 A. 421.

§ 31 (Me.) Where one redeeming from a mortgage is a surety for the mortgage debt, he is entitled to an assignment to perfect his right of subrogation.—*Allen v. Alden*, 85 A. 3.

§ 31 (Pa.) A junior mortgagee paying a prior incumbrance to protect his own interest, if necessary, may compel an assignment of the security.—*Hopkins Mfg. Co. v. Ketterer*, 85 A. 421.

A lessee who, after issuance of sci. fa. on a mortgage, tendered to the attorney of record of the nonresident mortgagee the deed, interest, costs, etc., was entitled to compel an assignment of the mortgage by bill for subrogation.—*Id.*

Where a judgment note was not executed for more than a year and a half after the recording of a lease of premises of the maker, the holder has no superior equity which would justify him in withholding the assignment to the lessee of a mortgage on the leased premises to protect the holder's subsequent judgment.—*Id.*

§ 41 (Pa.) On a bill for subrogation, it is not necessary to bring into court the money tendered, where the bill avers readiness and ability of

the plaintiff to pay, and tenders payment of, the amount due.—*Hopkins Mfg. Co. v. Ketterer*, 85 A. 421.

SUBSCRIPTIONS.

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SUPERSEDEAS.

§ 2 (Md.) Intention to confine the right of supersedeas to judgments and decrees in civil actions is shown by Code Pub. Civ. Laws, art. 17, § 28, providing that the clerks of certain courts, not including the Criminal Court of Baltimore, shall have power to take supersedeas of judgments, and by the form of supersedeas given in article 52, § 56, whereby judgment is confessed in favor of plaintiff in the original judgment.—*Backus v. State*, 85 A. 501.

§ 5 (Md.) Even if there were power to take supersedeas in a criminal case, an instrument signed by one sentenced to pay a fine and by two others, merely reciting, "Fine and costs superseded by us for six months," is invalid as disregarding the substantial requirements of Code Pub. Civ. Laws, art. 52, § 56, prescribing the form of supersedeas.—*Backus v. State*, 85 A. 501.

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See Account; Municipal Corporations, §§ 408-586, 993; Pleading, § 35; Towns, §§ 46-59.

I. NATURE AND EXTENT OF POWER IN GENERAL.

§ 28 (Me.) The Legislature may not delegate its legislative power of taxation, except to municipal corporations, so far as is necessary for their own purposes, and in such case the power must be expressly and distinctly granted.—*City of Auburn v. Paul*, 85 A. 571.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

§ 49 (Me.) Priv. & Sp. Laws 1911, c. 227, § 5, incorporating Bayville Village Corporation, providing for the distribution of taxes collected from the inhabitants and estates within the village, is not in violation of the constitutional provision requiring that all taxes shall be apportioned and assessed equally according to the just value of the property assessed.—*Inhabitants of Bayville Village Corporation v. Inhabitants of Boothbay Harbor*, 85 A. 300.

III. LIABILITY OF PERSONS AND PROPERTY.

(B) Corporations and Corporate Stock and Property.

§ 166 (Pa.) New Jersey manufacturing company doing business in Pennsylvania held subject to capital stock tax under Act June 1, 1889 (P. L. 420), as amended by Acts June 8,

1891 (P. L. 229), and June 8, 1893 (P. L. 353), but not for tax on evidences of indebtedness in deposit in the state.—*Commonwealth v. Curtis Pub. Co.*, 85 A. 360.

(D) Exemptions.

§ 193 (N.H.) The Constitution requires that all property be assessed for taxes upon the same percentage of its value; and hence the Legislature cannot exempt from taxation standing timber to the extent of 25 per cent. of its true value, and at the same time leave other property to be taxed at its true value.—*In re Opinion of the Justices*, 85 A. 757.

Laws 1911, c. 83, relating to the taxation of money on hand or at interest, and exempting from taxation loans on New Hampshire realty at 5 per cent. interest or less, is not unconstitutional, though it classifies money at interest so as to exempt one class and tax another.—*Id.*

V. LEVY AND ASSESSMENT.

(B) Assessors and Proceedings for Assessment.

§ 317 (Pa.) Act Feb. 11, 1895 (P. L. 4), does not change the duties of the auditor general as to taxation; and he is not bound to obey the rules and regulations of the banking department.—*Commonwealth v. Union Trust Co. of Pittsburgh*, 85 A. 461.

§ 318 (N.J.Sup.) Under Tax Act, §§ 7, 22, 37a, 37t, and 37w, property not exempt on May 20th is taxable, although subsequently conveyed to a city entitled to exemption.—*Mayor and Aldermen of Jersey City v. Montville Tp.*, 85 A. 838.

(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

§ 371½ (Pa.) The report required by Act June 13, 1907 (P. L. 640), to be filed by a trust company is not conclusive upon the auditor general, but he may inquire further and make settlement of taxable value according to the actual value.—*Commonwealth v. Union Trust Co. of Pittsburgh*, 85 A. 461.

Where the return of a trust company shows that securities representing undivided profits were appraised at their cost price, while their reported value was greatly in excess thereof, the auditor general may fix the higher value in ascertaining the actual value for taxation.—*Id.*

§ 386 (N.J.Sup.) In the taxation of a trust company, it is proper to compute the whole value of the capital stock, and to deduct the value of real estate, exempted securities, and nontaxable mortgages, even where the total of capital, surplus, and undivided profits is less than the value of real estate, exempted securities, and nontaxable mortgages.—*City of Camden v. Camden Safe Deposit & Trust Co.*, 85 A. 1026.

§ 390 (N.H.) Under Pub. St. 1901, c. 64, § 1, as amended by Laws 1909, c. 66, requiring railroad property to be assessed at as nearly equal a rate as may be to the average rate of taxation upon all other property, a railroad company is not entitled to an abatement of a tax if its property is not assessed for a greater percentage of its true value than the average of other property, though the assessment was otherwise illegal.—*Boston & M. R. R. v. State*, 85 A. 616.

The words "other property" in Pub. St. 1901, cc. 55-66, and chapter 64, § 1, as amended by Laws 1909, c. 66, requiring railroad property to be taxed at a rate as nearly equal as may be to the average rate of taxation upon other property, meant other "taxable" property and not merely other property "taxed," construing it in view of chapter 59, § 11, and chapter 64, § 10.—*Id.*

§ 397 (Pa.) Bills and accounts receivable of a foreign corporation do not necessarily indicate capital employed wholly within the state, and cannot be made basis for settlement of a bonus

on increase of capital under Act May 8, 1901 (P. L. 150).—*Commonwealth v. G. W. Ellis Co.*, 85 A. 414.

(G) Review, Correction, or Setting Aside of Assessment.

§ 452 (N.H.) Pub. St. 1901, c. 64, § 10, permitting any railroad corporation aggrieved by a tax to appeal to the Supreme Court for relief which shall make such orders as justice may require, was enacted to put railroad companies on the same basis as to taxation as other taxpayers.—*Boston & M. R. R. v. State*, 85 A. 616.

§ 485 (N.H.) In view of Laws 1878, c. 61, § 7, requiring the board of equalization to determine whether the personalty of the several towns has been uniformly estimated according to the best information from any source, and Pub. St. 1901, c. 63, § 4, requiring the board to correct the assessor's returns, the board, in determining the value of other property for assessing railroad property with reference thereto, pursuant to chapter 64, § 1, as amended by Laws 1909, c. 66, is not confined to the returns of the local assessors.—*Boston & M. R. R. v. State*, 85 A. 616.

§ 493 (N.H.) Under Pub. St. 1901, c. 64, § 10, where a railroad company, aggrieved by a tax, appeals to the Supreme Court, the Supreme Court cannot revise the rulings of the board of equalization at the hearing in a proceeding before it to abate a tax.—*Boston & M. R. R. v. State*, 85 A. 616.

While in absence of an agreement for judgment on a direct appeal to the Supreme Court after exceptions to the admission of evidence, as on petition for an abatement of a tax on real property, it does not usually consider questions of law, it may do so at any stage of the proceedings if it will hasten the disposition of the controversy.—*Id.*

An appeal to the Supreme Court for the abatement of a tax on railroad property pursuant to Pub. St. 1901, c. 64, § 10, is a judicial proceeding to which the usual rules of evidence apply, so that the company may show facts going to a reduction of its tax only by legal evidence, though the same latitude is not allowable in producing evidence as in ordinary judicial proceedings.—*Id.*

VI. LIEN AND PRIORITY.

§ 509 (N.J.Sup.) The Legislature has power to make taxes a lien paramount to prior claims.—*Mayor and Aldermen of Jersey City v. Montville Tp.*, 85 A. 838.

§ 511 (N.J.Sup.) Purchaser of property after October 1st and before tax previously assessed has become a lien takes it subject to the lien when created without notice, especially in view of Tax Act, §§ 57 and 59.—*Mayor and Aldermen of Jersey City v. Montville Tp.*, 85 A. 838.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(A) Collectors and Proceedings for Collection in General.

§ 557 (Pa.) Final settlement by borough auditors showing liability of a borough to a tax collector in the settlement of his accounts is conclusive against the borough if it fails to appeal within the prescribed time.—*Jones v. Sharon Borough*, 85 A. 989.

§ 561 (Pa.) Where reports of borough auditors fix a liability on a borough tax collector for uncollected tax duplicates, the borough council may, under Act June 25, 1885 (P. L. 187), for proper reasons, exonerate him.—*Jones v. Sharon Borough*, 85 A. 989.

Where a tax collector is exonerated from liability for uncollected tax duplicates under Act June 25, 1885 (P. L. 187), such exoneration has the same effect on his liability as if the parties had paid the taxes assessed against them.—*Id.*

XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

§ 868 (N.J.Sup.) Under Transfer Tax Act 1909, § 12, providing that property located in the state shall be subject to a transfer tax bearing the same ratio to the entire tax which decedent's estate would have been subject to if he had been a resident of the state as such property in the state bears to the entire estate, it is error to include in the valuation real estate in New York in fixing transfer tax on stocks of New Jersey corporations belonging to such non-resident decedent.—*Beers v. Edwards*, 85 A. 1022.

§ 879 (Pa.) Where a transfer is intended to take effect, either in possession or enjoyment after the grantor's death, the property is subject to the collateral inheritance tax imposed by Act May 6, 1887 (P. L. 79).—*In re Todd's Estate*, 85 A. 845.

Where testatrix bequeathed legacies, the principal of which she conveyed during her lifetime, taking obligations to pay interest thereon during her life, the legacies were subject to inheritance tax on testatrix's death.—*Id.*

XIV. DISPOSITION OF TAXES COLLECTED, AND FAILURE OF LOCAL AUTHORITIES TO COLLECT.

§ 911 (Me.) Priv. & Sp. Laws 1911, c. 227, § 5, incorporating Bayville Village Corporation providing for the apportionment of taxes collected on property and estates within such village corporation, held a proper exercise of legislative power for the conservation of public welfare.—*Inhabitants of Bayville Village Corporation v. Inhabitants of Boothbay Harbor*, 85 A. 300.

TELEGRAPHS AND TELEPHONES.

II. REGULATION AND OPERATION.

§ 42 (N.J.Sup.) The addressee of a telegram who was dealing in differences could not recover damages for delay in the delivery of a telegram relating to the condition of the market by reason of which he did not buy until the next day, since such dealing is against public policy.—*Schnitzer v. Western Union Telegraph Co.*, 85 A. 1021.

TENANCY IN COMMON.

See Executors and Administrators, § 52; Joint Tenancy; Trial, § 251.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

§ 34 (Del.Ch.) Where tenants in common made a deed in trust for sale, the proceeds to be applied to the payment of liens of record, one of the grantors, who claimed to be the equitable assignee of another, a judgment against whom had been paid by the claimant, waived any right as equitable assignee by the trust deed.—*Curllett v. Emmons*, 85 A. 1079.

III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

§ 43 (Vt.) A tenant in common is not bound to examine the records to see whether his cotenant has given a deed of timber, which could not be effective against his rights, even as color of title; and one relying upon such a deed cannot claim that his acts, in cutting timber from the premises, charged such tenant with the general duty of inquiry.—*Lee v. Follensby*, 85 A. 915.

§ 55 (Vt.) A deed to timber rights by one of four cotenants, being inoperative as against the other three, was not such a color of title as to connect the grantee with the title, so as to prevent, in an action by one of the three for trespass against the grantee, his recovery for the

other as well as himself.—*Lee v. Follensty*, 85 A. 915.

An invalid deed to timber rights by a cotenant of plaintiff does not operate as a license by the plaintiff, unless it is because of some authority back of the deed, which the one claiming the license has the burden of showing, and evidence that plaintiff left such cotenant in possession, with authority to license, did not shift it.—*Id.*

TENDER.

See Attorney and Client, § 98; Sales, § 196; Specific Performance, §§ 105, 126.

§ 14 (Pa.) That a tender is coupled with a condition on which the debtor has a right to insist and to which the creditor cannot reasonably object does not invalidate it.—*Schaeffer v. Herman*, 85 A. 94.

§ 15 (Pa.) If no objection is made to a tender of a certificate of deposit or certified check on the ground that it is not lawful money, such tender is sufficient.—*Schaeffer v. Coldren*, 85 A. 98.

§ 16 (Pa.) Acts insufficient to make a complete tender may be proof of readiness to perform so as to protect the rights of the party where a proper tender is made impossible by circumstances not due to the fault of the tenderer.—*Schaeffer v. Coldren*, 85 A. 98.

TESTAMENT.

See Wills.

TESTAMENTARY CAPACITY.

See Wills, §§ 21-55.

THEATERS AND SHOWS.

See Agriculture; Damages, § 94.

§ 2 (Md.) Acts 1912, c. 132, providing for the regulation and licensing of horse racing in H. county, *held* a proper exercise of police power.—*Clark v. Harford Agricultural & Breeders' Ass'n*, 85 A. 503.

§ 3 (N.J.Sup.) An ordinance declaring that any person who shall publicly, for price or reward, dance without first having obtained a license, applies to an individual performer who may be hired to help make up an exhibition.—*Treasurer of City of Elizabeth v. Lytton*, 85 A. 341.

TICKETS.

See Carriers, § 356.

TIME.

See Abatement and Revival; Covenants; Elections, § 278; Eminent Domain, § 182; Exceptions, Bill of, § 40; Pleading, §§ 58, 199; Principal and Surety, § 108; Recognizances, § 2; Schools and School Districts, § 80; Wills, § 21.

TITLE.

See Adverse Possession; Bankruptcy, § 150; Corporations, §§ 151, 182; Ejectment, §§ 6, 9, 10, 90; Eminent Domain, § 317; Equity, § 47; Fraudulent Conveyances, §§ 139, 147; Partition, § 17; Quietting Title; Sales, § 234; Statutes, §§ 107-121, 137, 138; Trespass, § 46.

TORTS.

See Action on the Case; Arrest; Assault and Battery; Death; False Imprisonment; Fraud; Landlord and Tenant, §§ 162-169; Libel and Slander; Malicious Prosecution; Master and Servant, §§ 88-332; Municipal Corporations, §§ 705, 706, 756-816; Negligence; Nuisance; Physicians and Surgeons, §§ 14-18; Release, § 29; Trespass; Trover and Conversion.

TOWNS.

See Account; Certiorari, §§ 31, 64; Counties; Highways, § 157; Libel and Slander, § 50; Statutes, § 120.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

§ 36 (Me.) Town *held* not entitled to sue water company for specific performance of agreement to convey on payment of cost of construction, with interest less net income, until it lawfully voted to purchase, and lawfully provided means of payment.—*Inhabitants of Strong v. Strong Water Company*, 85 A. 1062.

§ 39 (R.I.) Where a town was authorized to bid for and construct a state road and to obtain road machinery therefor, *held* that, having used the machinery, it was liable in assumpsit, though the contract therefor was made by an officer who was not authorized to enter into it.—*Pocasset Ice Co. v. Burton*, 85 A. 277.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 46 (Me.) The raising of money by a town to buy a waterworks by temporary loans, followed by the formation of a water district to take over the property and issue bonds to pay such loans, the tax provided for their payment to be then abated, would violate Const. art. 22, limiting indebtedness which towns may create.—*Inhabitants of Strong v. Strong Water Company*, 85 A. 1062.

Vote of town to purchase waterworks and issue promissory note for the amount necessary to provide the purchase price, which would exceed the debt limit, *held* unauthorized and invalid under Const. art. 22.—*Id.*

§ 46 (N.J.) Where a township committee borrows money under Township Law 1899, § 81, in anticipation of collection of sums voted, the resolution of the committee need not state that the money is borrowed to anticipate collections voted for township purposes.—*Farmers' & Mechanics' Nat. Bank of Woodbury v. Franklin Tp.*, in Gloucester County, 85 A. 320.

§ 59 (N.J.) The township records show how much money comes into a tax collector's hands, and, while the moneys illegally disbursed may be unknown, he does not cease to owe them to the township, and the proper remedies against him are at law.—*Township of Franklin v. Crane*, 85 A. 408; *Same v. Trammell*, *Id.* 411.

TRADE FIXTURES.

See Fixtures, §§ 15, 31-33.

TRANSFER TAX.

See Taxation, §§ 868, 879.

TRESPASS.

See Action on the Case; Adverse Possession, § 114; Depositions, § 101; Judgment, §§ 707, 743; Tenancy in Common, § 55; Trial, § 140.

II. ACTIONS.

(A) Right of Action and Defenses.

§ 20 (Me.) The gist of trespass *quare clausum* is injury to the possessory right, and the action will not lie unless plaintiff is in possession at the time of the alleged trespass.—*Linn Woolen Co. v. Brown*, 85 A. 404.

A tenant may not maintain trespass *quare clausum* against one in possession under a sublease from him.—*Id.*

A notice to a tenant to quit does not of itself change possession, and trespass may not be maintained against the tenant before his right of possession is actually disturbed.—*Id.*

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

§ 43 (Vt.) In trespass for cutting timber, where the defendant pleaded that he had a license, the plaintiff could recover for timber cut after the alleged license expired, under a denial in his replication that there was any license, without claiming that defendants had exceeded the license.—*Lee v. Follensby*, 85 A. 915.

(C) Evidence.

§ 46 (Pa.) Plaintiffs *held* to have failed to establish title and hence to be not entitled to damages for timber cut.—*Reed v. Broad Top Lumber Co.*, 85 A. 17.

TRIAL.

See Accord and Satisfaction, § 37; Agriculture; Appeal and Error, §§ 171-275, 694, 856, 882, 996-984, 1053, 1064-1068, 1071; Bills and Notes, § 537; Boundaries, § 40; Brokers, § 88; Carriers, §§ 18, 106, 320, 383; Continuance; Contracts, § 352; Corporations, §§ 308, 521; Costs; Criminal Law, §§ 670-834, 1043, 1060, 1158; Damages, §§ 87, 208, 216; Electricity, § 19; Estoppel, § 119; Evidence, § 258; False Pretenses; Fraud, § 65; Highways, § 213; Homicide, §§ 282-308, 340; Husband and Wife, § 335; Insurance, § 668; Landlord and Tenant, § 169, 285; Master and Servant, §§ 286-293, 332; Mechanics' Liens, § 288; Municipal Corporations, § 706; Negligence, §§ 136-139; New Trial; Physicians and Surgeons, § 18; Railroads, § 350; Sales, § 88; Street Railroads, §§ 90, 117; Trover and Conversion, § 68; Wills, §§ 309-316; Work and Labor, § 30.

II. DOCKETS, LISTS, AND CALENDARS.

§ 9 (N.H.) The issuance of a scire facias to revive an action is not the institution of a new action; and hence is not subject to the rule forbidding the entry of the action on the docket until the writ or petition is filed.—*Shea v. Starr*, 85 A. 788.

IV. RECEPTION OF EVIDENCE.**(A) Introduction, Offer, and Admission of Evidence in General.**

§ 45 (Md.) In an action on a note, an objection to a question whether a third party had loaned the defendants any money, and, if so, when, was properly sustained, where there was no offer to show the materiality of such inquiry.—*Herrman v. Combs*, 85 A. 1044.

§ 45 (Vt.) The question asked of defendant by his counsel, immediately after plaintiff, for the purpose of laying a foundation for admission of a letter, showed it to defendant, and he identified it and admitted that he wrote it, not being cross-examination, and the expected answer not being obviously disclosed, an offer of proof was necessary to make erroneous the exclusion, on objection, of the question.—*Livingstone Mfg. Co. v. Rizzi Bros.*, 85 A. 912.

§ 48 (Pa.) Where admissible evidence is included in the same offer with inadmissible evidence, the whole offer may be rejected.—*Ickes v. Ickes*, 85 A. 885.

(B) Order of Proof, Rebuttal, and Reopening Case.

§ 59 (Conn.) Order of proof on a trifling matter is within the discretion of the trial court.—*Holcomb Co. v. Clark*, 85 A. 376.

§ 60 (Conn.) Evidence that the horse, which witness testified was vicious, was the one which kicked plaintiff, and was defendant's horse, is sufficient foundation as to identity for admission of the testimony as to viciousness though the question of the identity was still for the jury.—*Hope v. Valente*, 85 A. 541.

§ 60 (Vt.) The exclusion of the question asked of defendant by his counsel, while defendant

was being questioned by plaintiff in laying foundation to introduce a letter written by defendant, was not error; its effect being only to defer the question till defendant had the case.—*Livingstone Mfg. Co. v. Rizzi Bros.*, 85 A. 912.

§ 62 (Md.) It was error to permit plaintiff to testify in rebuttal, after defendants had closed their case, concerning new matter upon which defendants were denied the right to introduce evidence.—*Herrman v. Combs*, 85 A. 1044.

§ 64 (Md.) It was error to refuse to permit defendants in surrebuttal to introduce evidence on new matter introduced by plaintiff in rebuttal.—*Herrman v. Combs*, 85 A. 1044.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 85 (Pa.) Where offers of evidence supported plaintiff's cause of action, and are objected to on the ground that as a whole they are immaterial, the court commits reversible error if it rejects the offers, though they may have contained irrelevant matter.—*Bausbach v. Reiff*, 85 A. 762.

§ 89 (Md.) Where, in an action on a note, defendant claimed that the note was to be destroyed if a release given of the original debt should be found, it was improper to strike out her testimony that she and her husband, on being requested to give a new note, replied that they found the release and could not give a new note.—*Herrman v. Combs*, 85 A. 1044.

§ 105 (Vt.) It is not error for the court to make use of evidence which comes into the case without objection.—*Boville v. Dalton Paper Mills*, 85 A. 623.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 114 (Pa.) Remarks of counsel, in an action for personal injuries, urging the jury to consider the question of amount of recovery as a warning in fixing the damages, are improper and ground for reversal.—*Brown v. Central Pennsylvania Traction Co.*, 85 A. 362.

§ 133 (Conn.) In a tenant's action for the death of his wife resulting from a defective stair railing, *held*, that reference to defendant's wealth made in plaintiff's argument was not reversible error, where the jury were cautioned to disregard it.—*Koskoff v. Goldman*, 85 A. 588.

VI. TAKING CASE OR QUESTION FROM JURY.**(A) Questions of Law or of Fact in General.**

§ 136 (Md.) In determining the legal effect of written instruments, it is the duty of the court to discover and declare the intention of the parties, and what they have written is to be read in the light of the surrounding circumstances.—*Bond v. Humbird*, 85 A. 943.

§ 139 (Conn.) The court should not substitute its own estimate of the weight and value of the evidence for the estimate of the jury fairly made without disregarding any rules of law.—*Raughtigan v. Norwich Nickel & Brass Co.*, 85 A. 517.

It is the exclusive province of the jury to weigh the evidence.—*Id.*

§ 139 (Conn.) The court may direct a verdict where the jury, as reasonable men, informed as to the law, could not reach any other conclusion than that embodied in the verdict directed.—*Swayne v. Connecticut Co.*, 85 A. 634, 737.

§ 140 (Conn.) The credibility of witnesses is a question for the jury.—*Stern v. Max Rippa Co.*, 85 A. 543.

§ 140 (Pa.) In an action for death of plaintiff's son under the lawful age of employment, the question of fraud in procuring employment *held* for the jury.—*Brennan v. Kingston Coal Co.*, 85 A. 30.

§ 140 (Vt.) In trespass for cutting timber under a license, after receiving a notice to quit on September 6th, the defendant having testified on the stand, after looking at a memorandum, that he cut timber after that time, but when later put on the stand said that he had not cut any after such date, the court was justified in submitting the question to the jury.—*Lee v. Follensby*, 85 A. 915.

§ 142 (Conn.) Inferences to be drawn from circumstances is a question for the jury.—*Stern v. Max Ripps Co.*, 85 A. 543.

§ 143 (Del.) Where plaintiff's evidence alone showed that the accident was due to defendant's negligence, while the deceased was exercising due care, the court properly refused to direct a verdict, though defendant's evidence conflicted therewith and was of a more positive character.—*Philadelphia, B. & W. R. Co. v. Gatta*, 85 A. 721.

The court should direct a verdict when the evidence is not controverted, and the law applied thereto produces but one result; but when there is an issue of fact, on which the evidence conflicts and is sufficient to support a verdict for either party, such issue is for the jury.—*Id.*

The rule that positive testimony outweighs negative testimony does not conflict with the rule that the weight of conflicting testimony shall be left to the jury, but is merely a rule of measurement for use by the jury.—*Id.*

§ 143 (Md.) Where evidence is contradicted, the case must be submitted to the jury, however slight the contradictory evidence may be.—*State v. Crisfield Ice Mfg. Co.*, 85 A. 615.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

§ 186 (Conn.) Instructions commenting on the evidence *held* not ground for reversal, where the judge did not withdraw such questions from consideration of jury or indicate that it was not wholly with them to decide such questions.—*Temple v. Gilbert*, 85 A. 380.

§ 191 (N.J.) To justify a charge deciding a question of law against a plaintiff, the proofs must be such that no inference on which the legal question depends can be legitimately drawn in his favor.—*McCoy v. Millville Traction Co.*, 85 A. 358.

§ 191 (N.J.Sup.) In an action for materials sold, it is error to instruct as a matter of law that the materials were delivered to defendant, when they were not installed in the plant for which they were intended, where defendant's evidence tended to show that before they were delivered he notified plaintiff not to deliver, as they were not needed, and plaintiff said, "All right."—*Jaehnig & Peoples v. Fried*, 85 A. 321.

§ 191 (Vt.) Where plaintiff suing for services in cutting timber claimed the contract was terminated by defendant and sought a recovery on a quantum meruit, an instruction assuming that the contract was still in force was properly denied.—*Stalleto v. Plumley & Sargent*, 85 A. 975.

§ 192 (Conn.) An instruction *held* not erroneous in assuming a state of facts about which there was no controversy.—*Temple v. Gilbert*, 85 A. 380.

§ 193 (Conn.) Instructions indicating judge's opinion on controverted questions *held* not ground for reversal, where he did not withdraw such questions from consideration of jury or indicate that it was not wholly with them to decide such questions.—*Temple v. Gilbert*, 85 A. 380.

§ 194 (Conn.) The court may properly direct the attention of the jury to evidence on a subject, and comment on its weight.—*McLaughlin v. Thomas*, 85 A. 370.

§ 194 (Conn.) Requested instructions which asked the court to pass upon contested questions of fact were properly refused.—*Temple v. Gilbert*, 85 A. 380.

Instruction that plaintiff claimed the explosion was caused by the negligence of the defendant locomotive engineer *held* not objectionable as an instruction that defendant caused the explosion.—*Id.*

(B) Necessity and Subject-Matter.

§ 203 (Md.) Where the evidence in an action for personal injuries and for injuries to plaintiff's horse and wagon from a defective highway was conflicting on all material questions of fact, refusal of defendant's requested prayers covering his theory of the case was error.—*Board of Com'rs of Howard County v. Pindell*, 85 A. 1041.

§ 207 (N.J.) The refusal of the court to instruct as to the probative effect of a fact in evidence is within its discretion.—*Battschinger v. Robinson*, 85 A. 317.

(C) Form, Requisites, and Sufficiency.

§ 232 (N.J.) In an action for attorney's fees, the court's statement of a contention of counsel in the charge, without approval or disapproval, *held* not to constitute ground for reversal.—*Wescott v. Baker*, 85 A. 315.

§ 234 (Vt.) In an action, where a deposition taken by plaintiff was not offered by him nor allowed to be introduced by the defendant, an instruction that the jury could not presume anything as to its contents, nor use the assertions of counsel as to it, but that counsel could comment on the fact that the plaintiff did not use the deposition, and that the only thing that could be presumed is that it would not, on the whole, be favorable to him, was proper.—*Lee v. Follensby*, 85 A. 915.

§ 236 (Me.) Where defendant testified as to transactions with plaintiff's decedent after waiver of the statutory privilege, it was error to instruct that defendant was thereby made a competent witness, and the fact that his interests were adverse to plaintiff should not detract from the weight of his testimony.—*Williams v. Williams*, 85 A. 43.

(D) Applicability to Pleadings and Evidence.

§ 250 (Vt.) Defendant's requested charge that plaintiff could not recover unless he established a written contract signed by defendant is properly refused; plaintiff's pleading authorizing a recovery on the ground of an express or implied contract, and his evidence not being confined to one only of the grounds.—*Boville v. Dalton Paper Mills*, 85 A. 623.

§ 251 (Conn.) In an action for injuries claimed to have been caused by a negligent blast, an instruction on the defense of independent contract *held* sufficient under the issues raised.—*Alexander v. R. A. Sherman's Sons Co.*, 85 A. 514.

In an action for injuries from a blast alleged to have been negligently discharged without proper notice and sufficient covering, plaintiff was not entitled to instructions and bases liability on the theory that defendant is liable regardless of negligence because his blast caused rock to be thrown on the land of another.—*Id.*

§ 251 (Vt.) Where the pleas set up the plaintiff as a tenant in common, the defendant cannot object to an instruction that defendant admitted that plaintiff was a tenant in common.—*Lee v. Follensby*, 85 A. 915.

§ 252 (Conn.) Requested instructions which contained hypothetical propositions unsupported by the evidence were properly refused.—*Temple v. Gilbert*, 85 A. 380.

§ 252 (Md.) An instruction not supported by evidence is properly refused.—Doyle v. Gibson, 85 A. 961.

§ 252 (Pa.) In an action by a woman against a street railway for personal injuries, it is not error for the judge to suggest to the jury that plaintiff's failure to complain to the conductor might have been due to her suffering, though she gave no such explanation in her testimony, where her testimony suggested that reason.—Wingrove v. Central Pennsylvania Traction Co., 85 A. 850.

§ 252 (R.I.) Instruction authorizing deductions from recovery, not warranted by the evidence, are properly refused.—Ralph v. Taylor, 85 A. 941.

(E) Requests or Prayers.

§ 256 (Pa.) The inadequacy of instructions as to the measure of damages is not ground for reversal, where fuller and plainer instructions were not asked for.—Powell v. S. Morgan Smith Co., 85 A. 416.

§ 260 (Conn.) Refusal to instruct *held* not error, where the same matter was covered in instructions given.—Temple v. Gilbert, 85 A. 380.

§ 260 (Conn.) Requested instructions covered so far as applicable by adequate and appropriate instructions are properly refused.—Koskoff v. Goldman, 85 A. 588.

§ 260 (Md.) It is not error to refuse requests to charge which so far as correct are covered by an instruction given.—Knecht v. Mooney, 85 A. 775.

§ 260 (Md.) An instruction substantially covered by one given is properly refused.—Doyle v. Gibson, 85 A. 961.

§ 260 (Md.) The rejection of a prayer which is substantially the same as one already given is not reversible error.—Board of Com'rs of Howard County v. Pindell, 85 A. 1041.

§ 260 (N.H.) An instruction that the absence of a light was not a contributing cause of the accident to a servant *held* properly refused because covered by an instruction already given.—Marcotte v. Maynard Shoe Co., 85 A. 284.

§ 260 (R.I.) Instructions covered by those given are properly refused.—Ralph v. Taylor, 85 A. 941.

§ 260 (Vt.) Where the instructions of the court were that, if plaintiff knew of a sale of timber rights, before or after the sale by a cotenant, and permitted defendants to proceed under it, his silence would prevent a recovery, it was not necessary to give a requested instruction as to an express approval of the sale.—Lee v. Follensby, 85 A. 915.

§ 261 (Md.) Requests to charge, containing much foreign and immaterial matter calculated to confuse and mislead the jury, are properly refused, though they contain correct propositions of law.—Knecht v. Mooney, 85 A. 775.

§ 267 (Conn.) The court need not instruct the jury in the language of requests, but performs its full duty where it gives instructions correct in law adapted to the issues and sufficient for the jury's guidance in determining them upon the evidence.—Koskoff v. Goldman, 85 A. 588.

§ 267 (N.H.) Defendant *held* not entitled to object to the refusal of an instruction, which was given so far as it was applicable to conclusions of fact which might be drawn from the evidence.—Marcotte v. Maynard Shoe Co., 85 A. 284.

Where a request is given in substance, it is not material that the language is changed.—Id.

(F) Objections and Exceptions.

§ 280 (Vt.) In an action for services, where plaintiff's reasons for abandoning the contract as stated in his direct and cross examination conflicted, exception taken by defendant *held* to have sufficiently raised the question whether the charge was erroneous in not calling the

jury's attention to what he said on cross-examination.—Stalleto v. Plumley & Sargent, 85 A. 975.

(G) Construction and Operation.

§ 295 (Conn.) Where, from the instructions as a whole the jury could not have been misled, the giving of an instruction that the defendant was responsible, assuming him to have been negligent, was not erroneous.—Temple v. Gilbert, 85 A. 380.

§ 295 (Pa.) Though standing alone an instruction might bear a construction which would render it erroneous, the charge must be read and considered as a whole.—Powell v. S. Morgan Smith Co., 85 A. 416.

§ 296 (Pa.) An instruction as to negligence of a foreman in directing plaintiff to work, and directing a crane to be moved in his direction, *held* not erroneous in view of further instructions given.—Powell v. S. Morgan Smith Co., 85 A. 416.

§ 296 (Pa.) A judgment will not be reversed for an inaccurate instruction, where the court subsequently gave ample and proper instructions, so that the jury could not have been misled.—Call v. Hallam Const. Co., 85 A. 1126.

§ 296 (Vt.) Where the court instructed that the defendant had not introduced any evidence that a certain person had authority to sell defendant certain timber, to which the defendant excepted and claimed that a certain witness so testified, the error, if there was any such evidence, was cured by a supplemental charge calling the attention of the jury to defendant's claim, and leaving it to them to recall the testimony and determine just what it was.—Lee v. Follensby, 85 A. 915.

IX. VERDICT.

(A) General Verdict.

§ 330 (Conn.) Where both counts for obstruction of easement alleged plaintiff's ownership, the first alleging obstruction by a building, the second by a fence, and the court directed verdict for defendant on the first, findings in the verdict of "the issues in favor of defendant on the first count and in favor of plaintiff on the second count" were not inconsistent.—Raughtigan v. Norwich Nickel & Brass Co., 85 A. 517.

§ 343 (Conn.) A verdict in the form of a finding of the ultimate sum due does not show the jury did not, as was its duty, pass on each and every claim of the parties and adjudicate thereon.—Holcomb Co. v. Clark, 85 A. 376.

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

§ 386 (N.J.Sup.) Requests to apply certain rules of law, submitted to the court sitting without a jury, are properly refused, when they are unsound or inapplicable to the evidence.—Machlin v. Pennsylvania R. Co., 85 A. 340.

(B) Findings of Fact and Conclusions of Law.

§ 392 (Pa.) Where a court of equity replies to requests for findings of fact or conclusions of law with an answer that they are "refused to the extent that they are inconsistent with" the findings of fact and conclusions of law filed by the court of its own motion, it is reversible error, under equity rule No. 62.—Reid v. Reid, 85 A. 84.

§ 396 (Conn.) In an action for breach of a contract for participation in profits from the purchase, improvement, renting, and sale of real property, a variance, in that the finding for plaintiff recited the manner in which the profits were to be derived, while the complaint was silent on the subject, was immaterial within Court Rules, § 149.—Maguire v. Kiesel, 85 A. 689.

§ 404 (Conn.) A statement in the memorandum of decisions made a part of the finding that

a creditor never intended to apply payments to the earliest items of the account is but an expression of a legal conclusion rather than a finding of fact, where it conflicts with a carefully prepared finding of fact.—*American Woolen Co. v. Maaget*, 85 A. 583.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

§ 420 (Md.) Any error in denial of a motion to withdraw the case from the jury at the conclusion of plaintiff's testimony is waived by defendant subsequently offering evidence in support of his defense.—*Knecht v. Mooney*, 85 A. 775.

§ 420 (Md.) Defendant waived right to rely upon refusal to direct a verdict in his favor by proceeding with the trial after refusal of that prayer.—*Doyle v. Gibson*, 85 A. 961.

§ 420 (Md.) An exception to the overruling of a prayer at the close of plaintiff's testimony, that there was no evidence entitling plaintiff to recover was waived where the prayer was renewed at the close of the case after defendants had proceeded with testimony in their own behalf.—*Herrman v. Combs*, 85 A. 1044.

TROVER AND CONVERSION.

See Carriers, § 91; Embezzlement, § 39; Release, § 29; Sales, § 202.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

§ 9 (Vt.) Where defendant had used plaintiff's lumber placing it out of his power to restore it, a demand for its return was not essential to establish a conversion.—*Allen Lumber Co. v. Higuera*, 85 A. 979.

II. ACTIONS.

(D) Damages.

§ 47 (Conn.) The proper measure of damages for conversion of household goods is not the market value of the furniture converted, but rather the fair compensation of the owner for his pecuniary loss, disregarding any sentimental value.—*Mathews v. Livingston*, 85 A. 529.

(E) Trial, Judgment, and Review.

§ 68 (Vt.) In action for conversion of lumber sold, to be paid for on delivery, finding held not substantially insufficient as to the length of time elapsing between the various conversations between the seller and buyer relative to payment.—*Allen Lumber Co. v. Higuera*, 85 A. 979.

In an action for conversion for lumber sold, finding that plaintiff refused credit, and that the buyer agreed to pay cash on delivery, held not insufficient because of the failure to find as to the seller's understanding as to when payment would be made.—*Id.*

TRUST DEEDS.

See Mortgages.

TRUSTEES.

See Bankruptcy, §§ 139-150, 268, 285, 290;

TRUSTS.

See Corporations, §§ 95, 109; Equity, § 29; Executors and Administrators, §§ 41, 288; Religious Societies, § 20; Wills, §§ 673, 684.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

§ 44 (Conn.) Evidence in an action by trustees held to support a finding that plaintiffs had accepted the trust, although no action by the

probate court had been taken to give effect to such acceptance.—*Goodsell v. McElroy Bros. Co.*, 85 A. 509.

Evidence of plaintiffs' acts in relation to trust property held competent on the issue of whether they had accepted the trust.—*Id.*

Evidence held to support a finding that plaintiffs had undertaken the execution of the trust and the management of the trust estate in the capacity of trustees.—*Id.*

(B) Resulting Trusts.

§ 72 (Conn.) In an action for damages for fraudulently inducing plaintiffs to enter in a purchase of land jointly with defendant, the fact that defendant took title in his name did not deprive the others of their interest, a presumptive trust arising; and a finding that there was no consideration for money given to defendant to invest in the land was incorrect.—*Lowe v. Hendrick*, 85 A. 795.

II. CONSTRUCTION AND OPERATION.

(B) Estate or Interest of Trustee and of *Cestui Que Trust*.

§ 135 (Pa.) A trust to support testator's sisters from interest, and principal if necessary, is an active one, and did not fail because of failure of the remainder.—*In re Gourley's Estate*, 85 A. 999.

Wherever it is necessary, in order to accomplish any object of the creator of a trust, that the legal estate should remain in the trustee, the trust is a special active one.—*Id.*

§ 136 (Pa.) A deed of trust by a husband and wife of realty belonging to the husband to a trustee for the wife and children, under which the trustee has no active duties, creates a dry and passive trust.—*McCormick v. Sypher*, 85 A. 1096.

§ 140 (Pa.) In a deed of trust by a husband and wife to a trustee for the wife and children of the wife begotten by her husband, the word "children" is a word of purchase, and not of limitation, and the children, including those born after the date of the deed of trust, take a fee simple after the death of the wife.—*McCormick v. Sypher*, 85 A. 1096.

III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

§ 156 (Conn.) Executors and trustees held to be holding property as trustees, although there had been no formal transfer as executors to themselves as trustees.—*Goodsell v. McElroy Bros. Co.*, 85 A. 509.

§ 169 (Md.) Trusts of real estate on the death of the trustee devolve on his heir at law, while trusts of personalty devolve on the executor or administrator until a new trustee is appointed, and he is a proper party in proceedings for the appointment of a trustee.—*Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 85 A. 949.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 178 (Me.) Equity has jurisdiction to instruct trustees who fail to properly exercise their discretion, either because of bad faith, or because of a misunderstanding of their duties.—*Woodward v. Dain*, 85 A. 660.

§ 193½ (Del.Ch.) Under Rev. Code 1852, amended to 1893, p. 721 (20 Del. Laws, c. 115, § 4) § 2, the chancellor may direct a sale of trust property to apply the proceeds to the same purpose, if there be no express prohibition of sale in the instrument creating the trust, though it directs that the trust property be used only for a certain purpose.—*Trustees for Baptist Church of Borough of Wilmington v. Laird*, 85 A. 1082.

§ 194 (Pa.) A surety on a bond to secure proper application of the purchase money by a trustee making a sale under order of court is not liable, where such trustee was also testamentary trustee of the lands so sold, and received the sum that as trustee to make the sale he had received from such sale.—Commonwealth v. Messenger, 85 A. 26.

Surety on a bond of a trustee selling land under an order by the court is not liable, where after such sale the beneficiaries under the will, of which the trustee making the sale was testamentary trustee, received from him interest on the moneys derived from the sale of the realty.—Id.

§ 219 (Del.Ch.) Where testamentary trustee's refusal to give executor release was by direction of the cestui que trust, he was not chargeable with interest in excess of that paid by the trust company, with which the executor deposited the fund, instead of paying it to the trustee.—Ford v. Wilson, 85 A. 1073.

§ 219 (Pa.) Where a trust company mingles funds held by it in trust for certain uses with its general deposits, it should pay the same interest thereon as it would pay to a third party carrying a deposit of like character.—Reid v. Reid, 85 A. 85.

§ 225 (Del.Ch.) Where real estate was conveyed by tenants in common in trust for sale, the proceeds to be applied to the payment of liens of record, and the lien of a judgment against one of the grantors expired after the deed but before sale, and the trustee induced the creditor to forbear to collect until after the sale, the trustee should be allowed as a credit the amount paid by him to discharge the judgment.—Curlett v. Emmons, 85 A. 1079.

§ 249 (Conn.) Trustees held entitled to sue on notes without a formal indorsement as executors to themselves as trustees under Gen. St. 1902, § 4219.—Goodsell v. McElroy Bros. Co., 85 A. 509.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(C) Actions.

§ 365 (Md.) Where plaintiff allows one, who had charge of her property, to buy it in at tax sale and mortgage it to secure his own debts, and, on his refusal to account, to wait 17 years without bringing an action, and then not until his death, she was guilty of gross laches, and could not recover in equity.—Love v. Rogers, 85 A. 771.

TUNNELS.

See Ejectment, § 6; Equity, § 47.

ULTRA VIRES.

See Municipal Corporations, § 173.

UNDUE INFLUENCE.

See Wills, §§ 155-166.

UNITED STATES.

See Courts, § 489.

I. GOVERNMENT AND OFFICERS.

§ 11 (N.J.) The several states can change the qualifications for electors of Representatives in Congress by changing the qualifications for electors of the most numerous branch of the state Legislature.—Carpenter v. Cornish, 85 A. 240.

UNLOADING.

See Commerce, § 27.

USAGES.

See Customs and Usages.

VACANCY.

See Municipal Corporations, § 149.

VACATION.

See Judgment, §§ 143-173, 340, 386.

VALUE.

See Evidence, §§ 543, 553.

VARIANCE.

See Pleading, § 388.

VENDOR AND PURCHASER.

See Appeal and Error, § 1050; Deeds; Fixtures, § 21; Frauds, Statute of, § 56; Mortgages, §§ 357-373; Religious Societies, § 20; Sales; Specific Performance, § 101; Taxation, § 511.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 33 (N.J.) A representation by the vendor of vacant lots that they intended to build a railway station and cement walks, if false, was ground for rescission of the contract.—Roberts v. James, 85 A. 244.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(B) Rescission by Vendor.

§ 89 (Me.) A contract for the conveyance of real estate and an "assignment" of two mortgages thereon, the first of which was owned by a third person, construed, and held, that the vendor, unable to obtain a voluntary assignment, could rescind and tender a return of the partial price received, though he could have obtained an equitable assignment by paying such first mortgage.—Allen v. Alden, 85 A. 3.

IV. PERFORMANCE OF CONTRACT.

(D) Payment of Purchase Money.

§ 180 (Pa.) A vendee held not entitled to claim that he was only required to execute a mortgage under the contract, and not a bond.—Bohlen v. Black, 85 A. 470.

VI. REMEDIES OF VENDOR.

(B) Actions for Purchase Money.

§ 303 (Pa.) In assumption for the purchase money of land, the plaintiff must be ready and willing to convey to defendant the land purchased.—Kelly v. Saunders, 85 A. 9.

§ 306 (N.J.) Where there is a written contract for the sale of land wholly executory on the part of the vendor, and the vendee rescinds by defending a suit on the contract, the vendor is sufficiently protected against future claims by the record of the suit, and hence the vendee may defend an action for the price by reason of the fraud.—Roberts v. James, 85 A. 244.

VII. REMEDIES OF PURCHASER.

(B) Actions for Breach of Contract.

§ 349 (Vt.) Declaration for breach of contract to pay assessment upon land purchased by plaintiff, alleging that defendant agreed to pay the assessment, held to aver a sufficient promise.—Thorworth v. Blanchard, 85 A. 6.

In such action, an allegation as to the time when the assessment was payable by defendant is traversable, and such time should be stated with certainty.—Id.

In such action it was not necessary to allege that defendant had notice that the assessment had been sustained by the court, since he could find that out as well as the plaintiff.—Id.

VERDICT.

See Appeal and Error, §§ 1001-1005; Trial, §§ 330, 343.

VERIFICATION.

See Evidence, § 382.

VESTED REMAINDERS.

See Wills, §§ 630, 634.

VESTED RIGHTS.

See Constitutional Law, § 111.

VINDICTIVE DAMAGES.

See Damages, §§ 87, 94.

VOTERS.

See Elections, § 63.

WAGES.

See Exemptions.

WAIVER.

See Appearance; Bankruptcy, § 363; Carriers, § 94; Covenants; Estoppel, § 68; Infants, § 84; Landlord and Tenant, § 112; Receivers, § 196; Sales, § 202; Specific Performance, § 101; Tenancy in Common, § 34; Trial, § 420; Witnesses, § 219.

WARDS.

See Guardian and Ward.

WARNING.

See Evidence, § 586; Master and Servant, §§ 150-158; Railroads, § 275.

WARRANTY.

See Bankruptcy, § 268; Insurance, § 291.

WATERS AND WATER COURSES.

See Appeal and Error, § 855; Corporations, § 406; Eminent Domain, §§ 47, 84, 126, 182, 191, 196, 241, 262; Injunction, § 59; Judgment, § 713; Navigable Waters; Towns, §§ 36, 46.

II. NATURAL WATER COURSES.**(C) Pollution.**

§ 67 (Pa.) Where mine water is diverted from its natural course by one operating a coal mine on his own land, and is discharged into a stream of pure water, which, by reason of its higher elevation, does not form the natural drainage of the mine, the landowner is liable in damages.—McCune v. Pittsburgh & Baltimore Coal Co., 85 A. 1102.

§ 75 (Pa.) Pollution of a stream of pure water by drainage from a mine will be enjoined, unless it is impracticable to drain the mine in any other way.—McCune v. Pittsburgh & Baltimore Coal Co., 85 A. 1102.

§ 76 (N.J.Ch.) In an action for damages to suburban real property caused by the pollution of a stream, the damages must be assessed on the value of farming property, even though complainant's experts testified as to its problematic value for city purposes.—Doremus v. City of Paterson, 85 A. 606.

Measure of damages for depreciation in present sale value stated.—Id.

Where the bed and banks of the stream have been permanently polluted, property owners are entitled to damages therefor, even though the emptying of the sewerage has been stopped.—Id.

The amount of damages to which landowners may be entitled for the pollution of a stream at

the end of a given period will not be computed, where defendant claims that after that time it will no longer pollute the stream, and it does not appear in what condition the stream will be left.—Id.

VII. CONVEYANCES AND CON-TRACTS.

§ 154 (Md.) Any right in defendants to drain water into an alley from a building on an adjoining lot *held* abandoned.—Stewart v. May, 85 A. 957.

§ 156 (R.I.) Under a father's deeds to his children of tracts of his farm, including the right to take water from a nearby spring, and "to pass and repass to and from the shore" bordering his lands, the right to take water is not limited by the quoted phrase.—Cram v. Chase, 85 A. 642.

A deed with a privilege to "take water" from a spring *held* to permit a taking by pipe and pump for use in a summer hotel.—Id.

Under a deed including the right to take water from the grantor's nearby spring, his successor cannot complain because the grantee's pumping plant is maintained on a tract other than that covered by the deed, unless water is used on such other tract.—Id.

Under a deed to the grantee, "her heirs and assigns, forever," granting the privilege of taking water from a nearby spring, the privilege passes to the grantee's heirs and assigns.—Id.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

§ 160 (Me.) The "effective height" of a mill-dam is the height at which the dam in good condition will flow land, unaffected by changes in the seasons or occasional leakage in the dam.—Carr v. Piscataquis Woolen Co., 85 A. 497.

Millowners having a prescriptive right to maintain a dam at a certain height had a right to make necessary repairs.—Id.

§ 176 (N.H.) At common law an upper riparian owner had an action for damages for wrongful appropriation of his water power by flowing back the water, and could recover the fair rental of the value of the power so taken.—Swain v. Pemigewasset Power Co., 85 A. 288.

§ 179 (Me.) Evidence on a complaint for flowage due to the raising of a milldam merely that during a spring freshet of unusual severity the water reached a height unusual before the change in the dam did not authorize a finding that a radical and unauthorized raising of the dam had occurred.—Carr v. Piscataquis Woolen Co., 85 A. 497.

IX. PUBLIC WATER SUPPLY.**(A) Domestic and Municipal Purposes.**

§ 201 (Conn.) A water company engaged in supplying the public owes a duty to provide such an adequate supply that a scarcity cannot be reasonably apprehended, considering all contingencies and the purposes for which the water is or may be needed.—In re New Haven Water Co., 85 A. 636.

§ 201 (N.J.Sup.) Contracts between a private water company and municipalities pursuant to statute create a public duty to supply consumers.—Plainfield-Union Water Co. v. Inhabitants of City of Plainfield, 85 A. 321.

§ 206 (N.J.) A water company having a contract with a city for a supply of water is not liable to an inhabitant for loss through failure to supply sufficient water to extinguish a fire in a building owned by such inhabitant.—Hall v. Passaic Water Co., 85 A. 349.

§ 209 (Me.) Evidence *held* not to warrant a finding that water entering plaintiff's cellar came from water pipes of a water company.—Littlefield v. Newport Water Co., 85 A. 432.

WAYS.

See Easements, §§ 50, 69.

WEIGHTS AND MEASURES.

§ 8 (N.J.Sup.) The superintendent of weights and measures of the county of Morris is subject to peremptory removal from his office by the board of chosen freeholders without charges or hearing unless he belongs to a class protected by statute from such removal.—*Bowlby v. Board of Chosen Freeholders of Morris County*, 85 A. 229.

WIDOWS.

See Descent and Distribution, § 53.

WILLS.

See Appeal and Error, § 1022; Descent and Distribution; Evidence, § 501; Executors and Administrators; Infants, § 84; Prohibition, §§ 6, 10, 11; Taxation, §§ 868, 879; Witnesses, §§ 131, 202.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

§ 19 (N.J.Ch.) Testators have wide power and discretion in laying down rules to be followed to find out who are to be the takers of their bounty upon the happening at a remote time of various more or less remote contingencies.—*Woolsey v. Woolsey*, 85 A. 595.

II. TESTAMENTARY CAPACITY.

§ 21 (N.J.) The point of time at which the testamentary capacity is tested is that of the execution of the will.—*In re Buckman's Will*, 85 A. 246.

§ 31 (Del.Super.) The question is whether at the time of making the will testator was of sound and disposing mind and memory; the degree of mind or memory, or the wisdom of the dispositions, not counting.—*In re Miller's Will*, 85 A. 803.

§ 37 (Del.Super.) A "lucid interval" is not merely a cessation of the violent symptoms of an insane disorder, but a restoration of the mind sufficiently to have a sound and disposing mind.—*In re Miller's Will*, 85 A. 803.

§ 38 (Del.Super.) Delusions will not invalidate a will, unless the will was a direct offspring therefrom.—*In re Miller's Will*, 85 A. 803.

§ 52 (Del.Super.) The burden of showing an unsound mind in a testator rests on the contestant, and the testimony must relate to the time of its execution; but, if insanity is once clearly established, the burden shifts.—*In re Miller's Will*, 85 A. 803.

Neither from attempted suicide before the making of a will, nor the completed act afterward, does the law draw any inference of insanity; it being but a fact, among others, to be considered by the jury.—*Id.*

§ 55 (Del.Super.) The evidence to show lucid intervals should be as strong as that to show insanity.—*In re Miller's Will*, 85 A. 803.

§ 55 (N.J.) Evidence on application for probate of a will of a man 94 years of age held to show testamentary capacity in testator.—*In re Buckman's Will*, 85 A. 246.

The fact that a will is natural and reasonable corroborates the correctness of the opinions of the subscribing witnesses that the testator possessed testamentary capacity.—*Id.*

§ 55 (N.J.) Evidence held to show testamentary capacity.—*In re Johnson's Will*, 85 A. 254.

IV. REQUISITES AND VALIDITY.**(C) Execution.**

§ 108 (Me.) The act of a husband in placing a deposit in a savings bank so as to make it run

in the name of himself and his wife, with a statement that the money "may be drawn by either in any event" if intended as a gift to take effect after his death, was void under the statute of wills.—*Staples v. Berry*, 85 A. 303.

§ 114 (N.J.) Where an attesting witness was informed that he was wanted to witness a paper, and the execution of the will was forthwith proceeded with, and the will was published in his presence, and he and the other attesting witness saw testator sign, and both attesting witnesses immediately signed in his presence and in the presence of each other, the will was sufficiently executed.—*In re Johnson's Will*, 85 A. 254.

(F) Mistake, Undue Influence, and Fraud.

§ 155 (N.J.) The influence which is undue and will vitiate a will must amount to moral and physical coercion which destroys free agency and constrains its subject to do that which, but for it, he would not have done.—*In re Buckman's Will*, 85 A. 246.

§ 155 (N.J.) The "undue influence" which vitiates a will is such influence as is sufficient to destroy free agency.—*In re Johnson's Will*, 85 A. 254.

§ 163 (N.J.) The party alleging that a will was procured by undue influence has the burden of proving it.—*In re Johnson's Will*, 85 A. 254.

§ 166 (N.J.) Evidence on application for probate of the will of a feeble man, 94 years old, held not to show that the will was the result of undue influence.—*In re Buckman's Will*, 85 A. 246.

§ 166 (N.J.) Evidence held to show that a will was not procured by undue influence.—*In re Johnson's Will*, 85 A. 254.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.**(E) Jurisdiction, Limitations, and Laches.**

§ 249 (N.J.) Neither the prerogative court, nor any of the surrogates, have general jurisdiction to admit to probate the will of a non-resident having a domicile at his death in another state, though he left property in this state, except as ancillary to probate at his domicile.—*In re Chadwick's Will*, 85 A. 266.

(F) Parties and Process or Notice.

§ 269 (Del. Super.) Under Rev. Code 1832, amended to 1893, p. 668, c. 89, § 1, providing that as to parties not within the state the register of wills may order such service of notice of probate "as he may deem proper," it is sufficient if the register personally notify the interested party of the time of probate.—*In re Duncan's Will*, 85 A. 735.

(H) Evidence.

§ 302 (N.J.) Evidence held to show that a will duly executed consisted of the same four sheets presented for probate.—*In re Johnson's Will*, 85 A. 254.

(I) Hearing or Trial.

§ 309 (Conn.) The probate court has jurisdiction, on application to admit a will to probate, to entertain a claim that the testatrix died a resident of another state and to make a decision thereon.—*Whitehead v. Roberts*, 85 A. 538.

§ 316 (Pa.) An issue devisavit vel non on the ground of testamentary capacity held properly refused.—*In re Long's Estate*, 85 A. 90.

§ 316 (Pa.) Under Act March 15, 1832 (P. L. 146) § 41, an issue devisavit vel non is a matter of right where there is a substantial dispute on a material question of fact.—*In re Timmes' Estate*, 85 A. 136.

An issue devisavit vel non should be granted, where testator was enfeebled in mind and body, and the evidence was doubtful as to whether when he adopted the writing as his will he was in possession of his faculties.—*Id.*

(K) Review.

§ 365 (Ma.) Motion to dismiss a petition to be allowed to appeal from a decree admitting a will to probate, based on the petition not making certain allegations, is equivalent to a demurrer to the petition.—In re Carter, 85 A. 39.

Under Rev. St. c. 65, § 30, allowing appeals from a probate decree, where not seasonably taken, a petition for leave to appeal must allege accident, mistake or defect of notice, and want of fault on petitioner's part; and do not include the fact that justice requires a revision.—Id.

The petition for leave to appeal from a probate decree, because of petitioner, through accident, mistake or defect of notice, without fault on his part, having omitted to seasonably prosecute his appeal, need not state with technical precision matters of proof of such excuses.—Id.

§ 365 (R.I.) In an application for leave to appeal from a decree admitting a will to probate, evidence held to show that petitioner failed to appeal in time because she was sick and unable to attend to business, and that her uncle, who was executor, deceived her as to the contents of the will, and falsely represented that he was looking after her interest, entitling her to an appeal.—Eddy v. Angell, 85 A. 936.

(M) Operation and Effect.

§ 433 (N.J.) Under Orphans' Court Act, § 20, a transcript of a will and showing that the statutory requirements have been complied with is prima facie proof of its due execution; and in ejectment, where the subscribing witnesses testify to facts inconsistent with the attestation clause and their testimony in probate proceedings the question is for the jury.—McDevitt v. Deacon, 85 A. 186.

VI. CONSTRUCTION.

(A) General Rules.

§ 456 (Del.Ch.) As between a rule which supports the natural meaning of the words and one which imports an artificial meaning, the former should be chosen.—In re Cochran's Estate, 85 A. 1070.

§ 470 (Del.Ch.) The intention of testator to be gathered from the whole will is to control.—In re Cochran's Estate, 85 A. 1070.

(C) Survivorship, Representation, and Substitution.

§ 538 (N.J.) Where there is a bequest to one and on his death to another, the gift over takes effect only in the event of the death of the first legatee before the period of distribution.—Dranow v. Sherry, 85 A. 189.

§ 545 (N.J.Ch.) Where a testator leaves his estate in trust for a grandson and provides that, in case such grandson dies before majority and without issue, the estate should be divided as though testator died intestate on the date of the will, on the death of such grandson before majority the next of kin of the grandson should receive the estate as against the next of kin of testator, taking by the will and not by intestacy.—Woolsey v. Woolsey, 85 A. 595.

§ 545 (Pa.) Will construed, and held to vest in testator's daughter H. a life estate in one-third of the residue, which, on her death without issue, reverted to testator's estate; and that H.'s husband took no interest therein.—In re Thompson's Estate, 85 A. 104.

§ 554 (Del.Ch.) Under a devise for life and over to such of testator's children as might survive him and the issue of such as may have died in his lifetime by representation, the issue of such deceased children take a substantive and original gift, and not by way of substitution for their parent.—In re Cochran's Estate, 85 A. 1070.

§ 555 (N.J.Ch.) Under a bequest of a certain amount to 11 "cousins, their heirs, executors," etc., to be equally divided, and that, if "any do not survive me, their shares shall go to the others, and, if they all die before me, the heirs of the one last surviving shall take what the survivor would have taken," where part of them died before the testatrix, the survivors would receive the whole.—Aikman v. Armstrong, 85 A. 819.

§ 557 (Del.Ch.) Under provisions of a will, held that, as a son of testator dying before his will and codicil could never have been an original devisee, his children did not take by substitution.—In re Cochran's Estate, 85 A. 1070.

(D) Description of Property.

§ 567 (Pa.) Will and codicil construed, and held that testatrix's grandnephew was entitled to receive from the executor the full sum of \$20,000.—In re Todd's Estate, 85 A. 843.

§ 587 (Conn.) Where a will specifically devised realty not including that in controversy which was south of a lane, and the third clause devised all of the rest and residue of the realty, namely, that on the north side of such lane, such land south of the lane was devised by the seventh clause devising to plaintiff "all of the rest and residue of my estate."—Raughtigan v. Norwich Nickel & Brass Co., 85 A. 517.

§ 587 (Pa.) A general residuary bequest, contingent in terms, carries the intermediate income which is not disposed of, and, if the will is silent on the subject, the law will allow an accumulation within the statutory period.—In re Leisenring's Estate, 85 A. 80.

(E) Nature of Estates and Interests Created.

§ 600 (N.J.Ch.) A devise of an estate generally, with a power of disposition absolutely and without limitation, creates an estate in fee, and any devise over is void.—Komp v. Thomas, 85 A. 815.

§ 610 (Pa.) The rule that a bequest of personality with power to consume is presumed to be an absolute gift is not a rule of law, but one of construction only, in aid of discovery of the testator's intention.—In re Gourley's Estate, 85 A. 999.

§ 616 (N.J.) A will devising the estate to testator's wife, her heirs and assigns if she be living at his death, but if otherwise, directing the estate be divided among testator's children and authorizing her to dispose of it by will, but if she die intestate, giving it to testator's children, only gave the wife a life estate with the right to dispose of it by will.—Kellers v. Kellers, 85 A. 340.

§ 616 (N.J.Ch.) Will construed, and held, that the first taker had a life estate in the real and personal property with the right to use what might be deemed necessary for her comfortable support and maintenance.—Komp v. Thomas, 85 A. 815.

(F) Vested or Contingent Estates and Interests.

§ 630 (Pa.) Where a contingency is annexed to the time of payment of a legacy only, and the legacy has been made by a previous request, it is vested; but, if annexed to the legacy, it does not vest till the contingency happens.—In re Grothe's Estate, 85 A. 141.

Legacies to the children of testator's son living at testator's death of \$1,000, each as they become 25 years of age, are contingent on the grandchildren reaching that age.—Id.

§ 634 (N.J.) Under a devise to pay the income to testator's wife till their youngest child should reach the age of 21, and on her death to the children or their direct descendants, or when the youngest child became 21 to pay one-third of the income to his wife and two-thirds to the children or their direct descendants, the

children took a vested interest in the income subject to the trusts, and on the widow's death the children or direct descendants of those deceased would take the trust fund absolutely.—*Frelinghuysen v. Frelinghuysen*, 85 A. 171.

(H) Estates in Trust and Powers.

§ 673 (Me.) Direction of a will that executors should pay out of the residuary estate such sums as might be actually necessary for the support of testator's sister *held* to create a trust therein for her actual necessary support, superior to the interest of the life tenant therein.—*Woodward v. Dain*, 85 A. 660.

§ 684 (Pa.) A will leaving a fund in trust for the support of testator's sisters *held* not to authorize the payment of the fund to them immediately, on failure of a remainder left to a charity, because of the testator's death within 30 days from the execution of the will.—*In re Gourley's Estate*, 85 A. 999.

A trust to support testator's sisters from interest, and principal if necessary, was an active trust, and failure of the remainder did not advance time for distribution.—*Id.*

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

§ 728 (Pa.) Under a will providing for annuities and the division of surplus income between children of M., if any, a child of M. took both a part of the fund accruing after his birth and a part accruing before it.—*In re Leisenring's Estate*, 85 A. 80.

§ 729 (Pa.) Where a will directs payment to one of testatrix's sons of \$8,000 per annum and to a second son the same sum per annum if the income is sufficient, the first son is entitled to arrearages out of the subsequent income in excess of \$8,000 before the second son receives anything.—*In re Reed's Estate*, 85 A. 15.

On the failure of income from which an annuity is to be paid in any year or years, the arrearages are to be paid out of the subsequent accumulations unless there is a plain intent in the will to the contrary.—*Id.*

§ 733 (Pa.) A testamentary gift of surplus income *held* immediate, though the testatrix knew of the nonexistence of beneficiaries when she wrote the will.—*In re Leisenring's Estate*, 85 A. 80.

§ 734 (Pa.) A granddaughter of testatrix entitled to an estate in remainder of a legacy, the income of which was bequeathed to testatrix's grandson, not being destitute nor in need of an allowance for maintenance, *held* not entitled to interest on the legacy during the year from testatrix's death.—*In re Todd's Estate*, 85 A. 845.

(D) Election.

§ 792 (Del.Ch.) Where a testator owning land made a general devise of all his property to his wife, and she survived him 12 years and possessed the land, and by will gave all her property generally to her daughter, there was a sufficient manifestation of intention to accept the provisions of the will in lieu of dower; the former being more advantageous.—*Wright v. Cella*, 85 A. 1078.

(H) Void, Lapsed, and Forfeited Devises and Bequests, and Property and Interests Undisposed of.

§ 850 (N.J.Ch.) Wills Act, § 34, providing for the prevention of lapses, does not apply to legatees, who are cousins to the testator.—*Aikman v. Armstrong*, 85 A. 819.

§ 865 (Del.Ch.) Property bequeathed in trust for daughter, principal upon her death to be paid to children and grandchildren, *held* to be disposed of as in case of intestacy, where she left no children or grandchildren; a gift of a remainder over to the children of the testatrix

then living not being implied.—*Ford v. Wilson*, 85 A. 1078.

Where testatrix gave property in trust for daughter during life, with remainder to her children or grandchildren, testatrix's children, as her distributees, *held* to take vested remainders, subject to be divested upon the daughter leaving children or grandchildren; and hence, where she left none, the property would be divided among the children of the testatrix then living, and the personal representative of those who had died.—*Id.*

WITNESSES.

See Appeal and Error, § 1008; Arrest; Constitutional Law, § 55; Criminal Law, §§ 533, 1170½; Depositions; Evidence; Judgment, § 676; Trial, §§ 140, 236; Wills, § 114.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

§ 5 (Del.Super.) Plaintiff's counsel participating in the actual trial of the case was privileged from being called by the defendant as a witness.—*Lupton v. Underwood*, 85 A. 966.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

§ 37 (N.J.) A witness ignorant of the reputation of accused in the community in which he resides is not competent to testify to his good reputation.—*State v. Thome*, 85 A. 452.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

§ 131 (N.J.) Evidence Act, § 4, relating to testimony as to transactions with deceased, is inapplicable to probate proceedings since they are not civil actions, but a judicial inquiry to ascertain whether the instrument is the last will of deceased.—*In re Veazey's Will*, 85 A. 176.

(D) Confidential Relations and Privileged Communications.

§ 188 (Vt.) In a prosecution for adultery, the wife of accused may testify as to his marriage, under P. S. 1592.—*State v. Neiburg*, 85 A. 769.

§ 196 (N.J.Sup.) Where a grand jury was investigating a libel published by a newspaper, the reporter who wrote the libel was not privileged, by virtue of his position, to refuse to disclose the source of his information.—*In re Grunow*, 85 A. 1011.

§ 199 (Del.Super.) Attorneys with whom complainant consulted *held* disqualified to testify to communications between them, though they declined to represent her.—*Lupton v. Underwood*, 85 A. 965.

In an action for alienation of affections, defendant's former attorney *held* not entitled to testify that in a conversation with the husband the husband denied that he ever had any affection for his wife.—*Id.*

§ 202 (N.J.) One who acts as attorney of a testator in the execution of a will may testify with reference thereto in a proceeding for its probate.—*In re Veazey's Will*, 85 A. 176.

§ 219 (Me.) The right of privileged communication may be waived, and where waived cannot be again asserted with effect upon a subsequent trial or appeal of the same case.—*In re Whiting*, 85 A. 791.

III. EXAMINATION.

(A) Taking Testimony in General.

§ 236 (R.I.) In an action for death by being struck by a street car, which decedent was waiting to board, questions whether the headlight was of greater candle power than the lights of

the "cars used around the city," and was brighter than the headlights on other cars, were properly excluded as indefinite.—*Canham v. Rhode Island Co.*, 85 A. 1050.

§ 240 (Del.Super.) A question asked of defendant, in an action for alienation of affections, as to whether she wrote certain letters with the intention to induce plaintiff's husband to leave her, *held* objectionable as leading.—*Lupton v. Underwood*, 85 A. 965.

§ 248 (R.I.) An answer to a question, in an action for decedent's death by being struck by a street car, as to what was done as to signaling the approaching car, that decedent stepped down to the track to cross it was not responsive.—*Canham v. Rhode Island Co.*, 85 A. 1050.

§ 248 (Vt.) That a witness in an adultery case, in response to question of defendant's counsel, told of objectionable conduct of third parties on a certain occasion, and then added, "How would you like that?" did not present error.—*State v. Snyder*, 85 A. 984.

§ 251 (Vt.) A witness who testifies to an occurrence may testify that the occurrence was at the time the subject of a conversation between himself and a third person to strengthen his recollection.—*Miller v. Pearce*, 85 A. 620.

§ 255 (N.J.) A witness may refresh his memory on the witness stand, but also out of court, by reading a memorandum by himself concerning the subject of the testimony.—*State v. Kwiatkowski*, 85 A. 209.

§ 256 (Vt.) Where a plaintiff was permitted to refresh his memory from a letter he had written his counsel, and defendant's counsel asked to see the letter, the court properly limited his inspection to the signature and the portion the plaintiff said that he used in refreshing his memory, where the plaintiff's counsel suggested the inclusion of confidential communications.—*Lee v. Follensby*, 85 A. 915.

§ 260 (N.J.) Examination of a witness by the prosecutor of the pleas as to his testimony on a former trial, not to impeach, but to revive his recollection, was admissible on the theory that the prosecutor was surprised, subject to the discretion of the trial court.—*State v. Kwiatkowski*, 85 A. 209.

(B) Cross-Examination and Re-Examination.

§ 267 (Vt.) The extent of cross-examination is largely within the discretion of the trial court.—*Miller v. Pearce*, 85 A. 620.

In a suit by a wife for the alienation of the affections of her husband, a cross-examination of the husband testifying for defendant *held* within the discretion of the court.—*Id.*

§ 268 (Pa.) Where a witness testified to certain measurements, it was error for defendant's counsel, on cross-examination, to ask him if he would accompany a person designated by the court to the premises to verify the same.—*O'Brien v. Pennsylvania Coal Co.*, 85 A. 130.

§ 268 (Vt.) A question asked by defendant of plaintiff's witness being on the erroneous theory of there being evidence that he was plaintiff's agent, exclusion of it, as not being proper cross-examination, with the effect of deferring it till defendant had the case, was proper.—*Livingstone Mfg. Co. v. Rizzi Bros.*, 85 A. 912.

§ 288 (Vt.) The subject of the relation to plaintiff of G., claimed by defendant to be plaintiff's selling agent, having first been touched on cross-examination of plaintiff's witness, he could testify thereon on redirect.—*Livingstone Mfg. Co. v. Rizzi Bros.*, 85 A. 912.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

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§ 321 (Vt.) One is not concluded by the testimony of his witness, but may show by other

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§ 331½ (Pa.) Where, at the first trial, two physicians testified that plaintiff's rib had been fractured, and on the second trial they are not called, and plaintiff offers no proof of fracture, the testimony of the physicians at the first trial is not admissible to impeach the credibility of plaintiff.—*Wingrove v. Central Pennsylvania Traction Co.*, 85 A. 850.

(B) Character and Conduct of Witness.

§ 350 (Conn.) Cross-examination of plaintiff in slander suit as to her previous arrest for damaging defendant's property and settlement for same, not showing a contradiction of her former statements, is not proper to affect her credibility.—*Hayward v. Maroney*, 85 A. 879.

§ 359 (Pa.) On the second trial of an action by a husband and wife for injuries to the wife, the conviction of the husband and another, between the two trials, of conspiracy to fabricate evidence cannot be proven by the record of the court of quarter sessions.—*Wingrove v. Central Pennsylvania Traction Co.*, 85 A. 850.

(C) Interest and Bias of Witness.

§ 372 (Conn.) Cross-examination of plaintiff in slander suit as to her previous arrest for damaging defendant's property and settlement for same is not proper as tending to show bias.—*Hayward v. Maroney*, 85 A. 379.

(D) Inconsistent Statements by Witness.

§ 387 (Del.Super.) Defendant in cross-examining the witness was not entitled to embody parts of letters which she had identified as in her handwriting, and which had not been introduced in evidence in questions calling for whether she had written the matter contained in the question, to affect her credibility.—*Lupton v. Underwood*, 85 A. 965.

§ 388 (Vt.) Where the foundation for the impeachment of a witness by contradictory statement had not been made, permitting the impeaching witness to testify and thereafter permitting the parties to call the impeached witness for examination as to what was said, were within the court's discretion.—*Miller v. Pearce*, 85 A. 620.

§ 391 (Del.Super.) In an action for alienation of affections, defendant's former attorney *held* competent to testify that at defendant's suggestion he talked with plaintiff's husband about the case to contradict the latter, who denied any such conversation.—*Lupton v. Underwood*, 85 A. 965.

(E) Contradiction and Corroboration of Witness.

§ 405 (Conn.) In an action for death from a defective stairway, where the plaintiff's witness testified to an examination of the construction of the stair on a certain day before it was repaired by defendant after the accident, and defendant's evidence was that on that day it had already been repaired, plaintiff's evidence to establish such time did not conflict with the rule forbidding contradiction of a witness as to an irrelevant fact.—*Koskoff v. Goldman*, 85 A. 588.

§ 406 (Vt.) Where a witness claims to have been an eyewitness to the crime, the defense may introduce evidence to show that he could not have seen what he testified to.—*State v. Snyder*, 85 A. 984.

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§ 28 (Vt.) Though plaintiff, in an action for work, did not in terms testify he was compelled by defendant's failure to pay as agreed to abandon his contract, *held* the evidence was sufficient to show it.—Boville v. Dalton Paper Mills, 85 A. 623.

§ 30 (Vt.) Where plaintiff suing for value of work in cutting timber testified that he was told by defendant to stop cutting, a directed verdict for defendant on the ground that plaintiff had shown no reason for abandoning the contract was properly denied.—Stallato v. Plumley & Sargent, 85 A. 975.

In an action for cutting timber, where the trial proceeded until the argument to the jury on the theory that timber cut on the lot of an adjoining owner was to be taken into account, an instruction that plaintiff could not recover therefor was properly denied.—*Id.*

Where plaintiff, suing for services in cutting timber, testified that the cutting of timber on another's land was due to defendant's fault, an instruction that defendants were entitled to retain a reasonable sum of money for their own protection on account of such cutting was properly denied.—*Id.*

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